Entered

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff,	)	
vs.	)	No. 86-C-505-C
RAY M. McCORMICK and JANE McCORMICK, Defendants.	)	

J U D G M E N T

This matter came on for consideration of the plaintiff's motion for summary judgment. The issues having been duly presented and a decision having been duly rendered in accordance with the Order filed simultaneously herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered on behalf of plaintiff and against the defendants Ray M. McCormick and Jane McCormick.

IT IS SO ORDERED this 19th day of February, 1987.

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

16

Entered

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff,	)	
vs.	)	No. 86-C-505-C
RAY M. McCORMICK and JANE McCORMICK, Defendants.	)	

O R D E R

Now before the Court for its consideration is the motion of the plaintiff for summary judgment. The defendants have responded with a motion seeking the certification of certain questions of state law to the Supreme Court of Oklahoma, pursuant to 20 O.S. §1602.

This action was brought by the plaintiff, pursuant to 28 U.S.C. §2201, seeking a declaratory judgment. The parties have stipulated to the material facts. On June 3, 1985, the defendant Ray McCormick was involved in an automobile accident with a Charles Huber. The accident occurred in Creek County, Oklahoma. The plaintiff had issued an insurance policy to the defendants which covered the motorcycle being driven by Ray McCormick on the date of the accident. The plaintiff had also issued to the defendants three other insurance policies covering three other vehicles owned by the defendants. All four insurance policies

15

were in full force and effect on the date of the accident. The defendants were California residents on the date of the issuance of the policies, on the date of the accident, and remain so today. Ray McCormick was only temporarily in Oklahoma at the time of the accident. Also, the defendants' covered vehicles were principally garaged in California. The four insurance policies were issued out of the plaintiff's California office, and were negotiated, purchased and made in California. All four policies provide uninsured motorist coverage. None of the policies include underinsured motorist coverage, although such coverage was an option available to the defendants.

The policy in question defines "uninsured motor vehicle" as one having no liability insurance coverage, or one having liability insurance coverage with a limit less than required by the financial responsibility act of the state where the car is mainly garaged. Mr. Huber, who had the accident with Mr. McCormick, had liability limits of $100,000 per person and $300,000 per accident. Therefore, Mr. Huber was not operating an "uninsured motor vehicle" within the terms of the policy.

California law distinguishes between "uninsured motorist" coverage and "underinsured motorist" coverage. The latter becomes operational when the vehicle with which the insured has an accident itself is insured but for an amount less than the uninsured motorist limits carried on the insured's vehicle. In other words, if the uninsured motorist limits of the insured's policy are greater than the liability limits of the other party's policy, the other party is "underinsured" for purposes of

coverage. Moreover, under California law at the time the policies were issued, "underinsured" coverage was an option distinct from "uninsured" coverage. This differs from Oklahoma law, in which the concept of "underinsured" coverage is contained within the mandatory "uninsured" coverage if the liability limits of the other party's vehicle are less than the insured's claim. See 36 O.S. §3636(c).

The damages suffered by Ray McCormick exceeded the uninsured motorist coverage contained in the policy covering the motorcycle, and the defendants have made an insurance claim against the plaintiff under the other policies. The plaintiff filed the present action, seeking a declaratory judgment that "there are no amounts due or capable of being due and owing under said policies of insurance as there is no coverage for the accident in question." The grounds for the plaintiff's position are (1) that the subject insurance policies do not contain underinsured motorist coverage, and (2) that under California law, which the plaintiff argues is controlling, no "stacking" of insurance policies is permitted. The defendants have responded that Oklahoma law should be applied to the insurance policies, and that relevant state court decisions reflect a public policy in Oklahoma to protect all motorists on Oklahoma highways, provide underinsured motorist coverage, and "stacking" of various underinsured motorist coverages.

In its motion for summary judgment, the plaintiff asserts that the issue of applicable state law has been decided in Rhody v. State Farm Mutual Ins. Co., 771 F.2d 1416 (10th Cir. 1985).

In that case, the Tenth Circuit Court of Appeals ruled that Oklahoma applied the doctrine of lex loci contractus, and that absent any specific manifestation of intent to be bound by the laws of a particular jurisdiction, "the law of the place where the contract was made governs interpretation of the contract". Id at 1420. The plaintiff argues that because all four insurance policies were made in California, Rhody requires this Court to apply California law, which does not permit "stacking" of insurance policies. Further, the plaintiff notes that, unlike Oklahoma, California does not require "underinsured" coverage to be a part of uninsured motorist coverage, and that consequently the defendants have no claim against the plaintiff on that basis either.

In response, the defendants have asked this Court to certify three questions to the Supreme Court of Oklahoma: (1) whether Oklahoma has a public policy affording the broadest degree of protection to all who use its highways against uninsured motorists; (2) whether Oklahoma would use "interest analysis" as opposed to lex loci contractus; (3) whether 15 O.S. §162 restricts the place of performance of a contract to cases in which the place of performance is specifically indicated in the contract. This Court notes that all three proposed questions were addressed to some extent in Rhody. The Tenth Circuit Court of Appeals stated that "stacking" uninsured motorist coverage did not have "sufficient prominence to establish it as public policy in Oklahoma." 771 F.2d at 1421. As already discussed, the Court in Rhody also stated that "we find no indication of a trend

toward the adoption of the most significant relationship test in Oklahoma law". Id at 1417. Rather, the appellate court affirmed the district court's application of lex loci contractus. Finally, the appellate court explicitly interpreted 15 O.S. §162 as requiring application of the law of the place where the contract was made, unless the contract specifically indicated a place of performance. Id at 1420. The defendants have described the Rhody decision as "curious" and argue that the Tenth Circuit Court of Appeals incorrectly interpreted relevant precedents and statutory law.

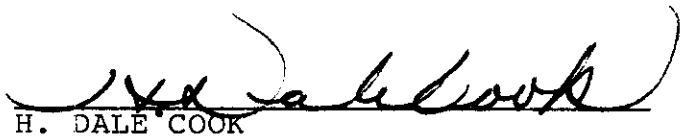
In view of the fact that no Oklahoma appellate court has yet spoken on these precise issues, the defendants' arguments would have greater force if presented to a state court in Oklahoma. However, it is axiomatic that "[t]he doctrine of stare decisis requires this Court to give precedential effect to prior decisions of the United States Supreme Court and the Court of Appeals for the Tenth Circuit." Cherokee Nation v. Muskogee City-County Port Auth., 555 F.Supp. 1015, 1017 (E.D.Okla. 1983). After the Tenth Circuit Court of Appeals had interpreted a Kansas statute, a federal district court in Kansas ruled that "that question is not open for reconsideration by this court." Covill v. Phillips, 455 F.Supp. 485, 487 (D.Kan. 1978). This Court does not believe that, as a federal district court sitting in Oklahoma, it would be proper to, in effect, ignore the Rhody decision by certifying questions which the Tenth Circuit Court of Appeals has answered. Moreover, as the plaintiff has pointed out, 20 O.S. §1602 provides that a Court of Appeals as well as a

district court may certify questions to the Supreme Court of Oklahoma. Under the circumstances, the Court believes that the issue of certification is more properly addressed to the Tenth Circuit Court of Appeals. Therefore, this Court makes its decision in accordance with Rhody, and rules that California law applies to the insurance policies in question. Under California statutes, specifically §11580.2 of the Insurance Code as it existed at the time the insurance policies were made and at the time the accident occurred, "uninsured motorist coverage" strictly referred to coverage activated when a covered vehicle had an accident with another vehicle having no liability coverage or coverage less than required by the state financial responsibility act. Such is not the situation in the case at bar. Further, the defendants have not disputed the plaintiff's citation of California decisions and a California statutory provision that disallows "stacking" of uninsured motorist benefits. See Rudder v. Farmers Ins. Exchange, 165 Cal.Rptr. 562 (Cal.App. 1980), and Section 11580.2 of the California Insurance Code. Clearly, under California law the defendants may not recover against the plaintiff, in that there was no underinsured motorist coverage under the policies in question; therefore, no coverage was applicable to the accident in question, and no amounts are due and owing thereunder.

Accordingly, it is the Order of the Court that the defendants' motion to certify questions of law to the Supreme Court of the State of Oklahoma should be and hereby is denied. It is the

further Order of the Court that the plaintiff's motion for summary judgment should be and hereby is sustained.

IT IS SO ORDERED this 19th day of February, 1987.



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

Entered

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

ALAN T. DAVIS, Plaintiff, vs. LOTUS CARS LIMITED, a British corporation; LOTUS PERFORMANCE CARS, L.P., a New Jersey limited partnership; and JOHN HOKE & CO., LTD., an Oklahoma corporation, Defendants.	)	No. 86-C-528-C

O R D E R

Now before the Court for its consideration are the motions to dismiss filed on June 13, 1986 by defendant John Hoke & Co., and on June 23, 1986 by defendants Lotus Cars Limited and Lotus Performance Cars L.P. These motions were converted to motions for summary judgment on December 22, 1986 and August 27, 1986, respectively. In addition, the Court has for its consideration the motion of plaintiff Alan T. Davis for partial summary judgment filed on October 21, 1986. All parties having responded, the issues are now ready for this Court's determination. Because the Court finds that the issue of jurisdictional amount is dispositive, the other issues raised will not be addressed.

This case involves the purchase of a Lotus automobile by plaintiff Alan T. Davis from defendant John Hoke & Co. (Hoke).

Plaintiff Davis alleges that the new car was purchased in October of 1984 for a purchase price of forty-four thousand dollars ($44,000). In February of 1985, the car was returned for warranty work for several operational and appearance defects. The plaintiff further alleges that defendant Hoke kept the car for some 140 days and then pronounced it repaired. However, plaintiff asserts, he discovered when he picked up the car that the it was still in substantial noncompliance with the warranty. Plaintiff alleges that shortly thereafter the car developed substantial oil leaks which necessitated a complete shut-down and loss of use of the vehicle. Plaintiff therefore returned the vehicle to Hoke seeking to rescind the contract and receive a return of the purchase price. The plaintiff obtained no relief from these actions.

The vehicle remained with Hoke until July of 1986 when plaintiff again took possession of the vehicle upon learning the automobile was allegedly not being garaged or protected and that, as a result, damage to said vehicle had occurred.

The plaintiff seeks to invoke the jurisdiction of this Court pursuant to the Magnuson-Moss Federal Warranty Act, 15 U.S.C. §2301 et seq. The plaintiff claims the defendants failed to fulfill their Warranty obligations, and further that the defendants' conduct amounted to an independent tort, thereby justifying recovery of punitive damages. Plaintiff also seeks attorney fees and damages for the loss of use of the vehicle.

The defendants respond, in their motions for summary judgment, that the plaintiff has failed to meet the requisite amount

in controversy as required by 15 U.S.C. §2310(d), which is fifty thousand dollars ($50,000). Count IV of the Complaint, which invokes the Magnuson-Moss Act, alleges actual damages of forty-four thousand dollars ($44,000). Thus, it is argued, this Court lacks subject matter jurisdiction since the only independent basis for federal jurisdiction is found within the Magnuson-Moss Act, giving rise to federal question jurisdiction under 28 U.S.C. §1331. Therefore, this Court must determine whether the plaintiff has sufficiently pled the jurisdictional amount as contemplated by the Magnuson-Moss Act.

The plaintiff alleges he is entitled to punitive damages as a result of the defendants' conduct. Specifically, he alleges false and fraudulent misrepresentations on the part of the defendants in connection with the sales of the automobile and its accompanying product warranty. However, the Magnuson-Moss Act and its legislative history are silent upon the question of whether punitive damages may be aggregated with actual damages in order to meet the requisite amount in controversy.

In making its determination, the Court bears in mind that "when there is an issue as to the sufficiency of the jurisdictional amount, the burden of proving jurisdiction is on the party asserting it. Furthermore, statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." F & S Construction Co. v. Jensen, 337 F.2d 160, 161 (10th Cir. 1964) (citations omitted). Claims for punitive damages proffered for the purpose of achieving the jurisdictional amount should be carefully examined. Saval v. BL

Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983). Punitive damages are generally unavailable in such contract-based schemes as the Magnuson-Moss Act. Walsh v. Ford Motor Co., 627 F.Supp. 1519, 1524 (D.D.C. 1986).

In absence of explicit congressional mandate, initial inquiry requires examination of the governing state law to determine whether punitive damages are recoverable for breach of warranty. Novosel v. Northway Motor Car Corp., 460 F.Supp. 541 (D.C.N.Y. 1978); Schafer v. Chrysler Corp., 544 F.Supp. 182 (N.D.Ind. 1982).

In Oklahoma, punitive damages may not be awarded in an action arising from a contract. 23 O.S. §9. See also Phillips Machinery Co. v. Leblond, Inc., 494 F.Supp. 318 (N.D.Okla. 1980). However, punitive damages may be awarded when the breach of a contractual obligation amounts to an independent willful tort. Woods Petroleum Corp. v. Delhi Gas Pipeline Corp., 700 P.2d 1023 (Okla.App. 1983).

The determinative issue, therefore, is whether Oklahoma law views a recovery of punitive damages as a part of a breach of contract action, or as a part of a separate and distinct tort action. Such a fine distinction need not ordinarily be made in a state court proceeding, with both actions subject to the court's jurisdiction. However, federal jurisdiction under the Magnuson-Moss Act is invoked solely upon an action for breach of warranty. If federal jurisdiction is present, a tort claim may serve as a pendent state claim.

Upon review, the Court concludes that under Oklahoma law, the contract action and the tort action are viewed distinctly. The Oklahoma Supreme Court has stated:

> As a general rule, damages for breach of contract are limited to the pecuniary loss sustained, and exemplary or punitive damages are not recoverable. This rule is not applicable, however, in those exceptional instances where the breach amounts to an independent, willful tort.

Z. D. Howard Co. v. Cartwright, 537 P.2d 345, 347 (Okla. 1975) (emphasis added)

In Burton v. Juzwik, 524 P.2d 16 (Okla. 1974), the Oklahoma Supreme Court affirmed the trial court's striking of a plaintiff's allegations regarding punitive damages in an action for breach of an alleged oral contract. The Oklahoma Supreme Court stated that the trial court's action was proper because the gravamen of the plaintiff's action was based upon breach of contract. The distinction is also maintained in Hall Jones Oil Corp. v. Claro, 459 P.2d 858 (Okla. 1969). The court stated:

> Conduct that is merely a breach of contract is, of course, not a tort. Nevertheless, a tort may arise in the course of the performance under a contract so that a breach of the contract may not be the gravamen of the action, but an intentional wrong may be. The contract in such case is the mere incident creating the relation furnishing the occasion for the tort and giving rise to an action ex delicto, especially where the acts constituting the breach are willful, designed, intentional, or malicious.

Id at 861.

The court went on to note that Oklahoma law provides that if a contract is breached tortiously, the injured party has an election to waive the breach and sue for tort. Id at 861-62.

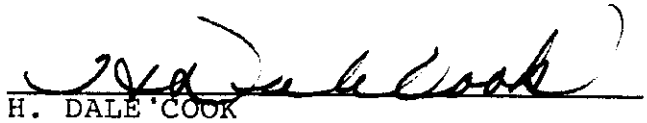
See also Norman's Heritage Real Est. v. Aetna Cas. & Sur., 727 F.2d 911, 916 (10th Cir. 1984). The concept of waiver indicates that Oklahoma law maintains a distinction between the two causes of action. Therefore, the Tenth Circuit Court of Appeals concluded that "proof of the fact of a breach of contract, standing alone, cannot support an award of punitive damages. Punitive damages cannot stand without at least a nominal compensatory award under a tort cause of action." Id. The Magnuson- Moss Act permits federal jurisdiction solely over a breach of warranty claim; Oklahoma law provides punitive damages solely for an independent tort, even if the tort arises out of a contractual relationship. The Court must conclude that the plaintiff may not use his proffered claim for punitive damages to satisfy the jurisdictional amount required under the Magnuson-Moss Act. See generally Boelens v. Redman Homes, Inc., 748 F.2d 1058, 1069-71 (5th Cir. 1984). (Texas law awards punitive damage for the accompanying tort, not for the breach of warranty itself; therefore, federal jurisdiction denied.) Maintaining the tort/contract distinction also comports with the language of Section 355 of the Restatement (Second) of Contracts (1979), and its accompanying comments and illustrations.

The plaintiff further seeks the aggregation of attorney fees and actual damages in the determination of the amount in controversy. However, courts have determined that attorney fees are included in the word "costs" as defined in 15 U.S.C. §2310(d), and therefore may not be considered in the jurisdictional amount.

Saval, supra, at 1032; Gates v. Collier, 616 F.2d 1268, 1278 (5th Cir. 1980).

Accordingly, it is the Order of the Court that the plaintiff's motion for partial summary judgment is hereby denied. It is the further Order of the Court that the motions of defendant John Hoke & Co. and defendants Lotus Cars Limited and Lotus Performance L.P. are hereby granted.

IT IS SO ORDERED this 19th day of February, 1987.



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

Entered

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

ALAN T. DAVIS, Plaintiff, vs. LOTUS CARS LIMITED, a British corporation; LOTUS PERFORMANCE CARS, L.P., a New Jersey limited partnership; and JOHN HOKE & CO., LTD., an Oklahoma corporation, Defendants.	)	No. 86-C-528-C

J U D G M E N T

This matter came on for consideration of the defendants' motions for summary judgment and the plaintiff's cross-motion for partial summary judgment. The issues having been duly presented and a decision having been duly rendered in accordance with the Order filed simultaneously herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered on behalf of the defendants John Hoke & Co., Lotus Cars Limited and Lotus Performance Cars L.P. and against the plaintiff.

IT IS SO ORDERED this 19th day of February, 1987.

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

42

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

KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-389-B
KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, Tulsa County and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-563-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County, and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-565-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County Jail and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-567-B

FILED
FEB 19 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KIP W. L. SYLVESTER, Petitioner, v. TULSA POLICE DEPARTMENT and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondent.	)	No. 86-C-569-B

ORDER

This matter involves five applications for writs of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was allowed to file each application without prepayment of costs or fees. Upon filing, such applications were consolidated for review purposes.

28 U.S.C. §2254 provides in pertinent part:

> [a] ....[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

An application for federal habeas corpus relief will not be granted unless the applicant has exhausted the remedies available in the state courts. A habeas petitioner is not deemed to have exhausted his state remedies if there is any available state procedure by which he has the right to bring his claim before a state court. 28 U.S.C. §§2254(b) and (c).

Rule 4 of the Rules Governing Section 2254 Cases requires the district court judge to make an initial examination of the petition and if it plainly appears from the face of the petition and any exhibits attached to it that the petitioner is not

entitled to relief in the district court, the judge shall order its summary dismissal.

The applications filed in Case Nos. 86-C-389, 86-C-563, 86-C-565, and 86-C-567 appear to be attacks on petitioner's conviction in Tulsa County Case No. CRF-86-537. Petitioner contends that the state trial judge committed him to Eastern State Hospital without being first afforded a hearing. Considering the serious nature of this allegation and the number of federal cases filed by the pro se litigant, the court, in an effort to expedite the just disposition of this matter, has examined the state court files in petitioner's criminal cases, CRF-85-503, CRF-85-3385 and CRF-86-537. From the face of the petitions (86-C-389-B and 86-C-563-B) and the state record, it is clear that Sylvester is not entitled to relief in federal district court.

Insofar as petitioner alleges denial of due process in his being sent to Eastern State Hospital, the record reveals that petitioner was charged in CRF-86-537 with carrying drugs into a place where prisoners are kept. Upon petitioner's application, the case came on for hearing on March 5, 1986, on the issue of petitioner's competency to stand trial. The court ordered that Mr. Sylvester be examined in the Tulsa County Jail by the Tulsa County Mental Health Council, Inc.. Following this examination the Mental Health Council physicians recommended that petitioner be committed to Eastern State Hospital, under 22 O.S.A. §1175.6(2). A subsequent competency hearing was held on March 7, 1986. Petitioner was present and represented by counsel. The

trial judge ordered petitioner to be committed to Eastern State Hospital in accordance with 22 O.S.A. §1175.7.

Petitioner remained at Eastern State Hospital for care and observation by Dr. Garcia, the chief psychiatrist, for approximately one month, when he was released from the hospital upon Dr. Garcia's recommendation and returned to court.

The court finds nothing in the record which supports petitioner's claim that he was committed without being afforded due process of law.

As for petitioner's claims that he was treated improperly while held at Eastern State Hospital, such claims do not challenge the constitutionality of any state court judgment against him and therefore are not cognizable under §2254.[1]

Petitioner additionally argues that the state denied him his right to a speedy trial. Petitioner claims that he was arrested on February 13, 1986, for charges under CRF-86-537 and was not arraigned until May 19, 1986. Absent exigent circumstances, a federal court will not consider a claim made under §2254 unless the petitioner has exhausted his available state remedies thereon. In this situation, petitioner has not brought his speedy trial claim before the state courts. Therefore, federal review is not available. However, even a cursory review of the record clearly indicates that petitioner's right to a speedy trial was not violated in CRF-86-537.

---

1 Petitioner has pending several §1983 civil rights claims addressing these same issues. A determination of the merits of such claims will be made in those cases (86-C-564-B, 86-C-566-B, 86-C-568-B, and 86-C-570-B).

In judging a claim of denial of speedy trial, the Supreme Court has indicated four factors which should be considered: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The Court held that unless the length of delay is such that prejudice can be presumed, there is no need to consider the remaining factors. 407 U.S. at 530. Petitioner has not set forth facts showing any delay in the processing of his case. The only delay resulted from his assertion of incompetency. The court quickly and fairly assessed petitioner's competency. Under Barker v. Wingo, supra, petitioner's claim would fail.

Insofar as petitioner seeks relief on the ground of "Legality of bringing marijuana into a place where prisoners are kept," the court finds this ground to be frivolous and without any basis in law. While pleadings of pro se litigants are held to a lesser standard than those drafted by attorneys, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), the court finds nothing in petitioner's assertion which would give rise to a claim for habeas corpus relief.

As for petitioner's assertion that he was questioned by police officers in violation of Sylvester's Miranda rights, the court finds that relief on this ground is not available. Petitioner has not exhausted his state court remedies as to this issue. Additionally, and more importantly, the state file in this matter reflects that petitioner, represented by counsel, plead guilty to the charge of Carrying Drugs Into a Place Where

Prisoners are Kept. Where a state criminal defendant, on advice of counsel, pleads guilty, he cannot in a federal habeas corpus action raise independent claims relating to the alleged deprivation of constitutional rights which occurred prior to the guilty plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973).

Petitioner's allegations of civil rights violations by the Tulsa County Jail officials are not cognizable in federal habeas review. Likewise, his third claim, involving denial of access to the courts, is not within the scope of inquiry in a §2254 action, but should instead be brought under Title 42 U.S.C. §1983.

In Case No. 86-C-569-B, petitioner attempts to challenge the constitutionality of Tulsa County District Court Case No. CRF-85-3385. The record shows that the trial judge dismissed this action and imposed costs on the state. Because petitioner was not convicted on this charge and is not in custody pursuant to a conviction in CRF-85-3385, habeas corpus relief will not lie as to that case.

In conclusion, the court finds from the face of petitioner's applications and the trial records that petitioner is not entitled to relief in this court. It is therefore ordered that these applications be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

It is so Ordered this 19th day of February, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-389-B
KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, Tulsa County and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-563-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County, and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-565-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County Jail and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-567-B

FILED
FEB 19 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KIP W. L. SYLVESTER, Petitioner, v. TULSA POLICE DEPARTMENT and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondent.	)	No. 86-C-569-B

ORDER

This matter involves five applications for writs of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was allowed to file each application without prepayment of costs or fees. Upon filing, such applications were consolidated for review purposes.

28 U.S.C. §2254 provides in pertinent part:

> [a] ....[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

An application for federal habeas corpus relief will not be granted unless the applicant has exhausted the remedies available in the state courts. A habeas petitioner is not deemed to have exhausted his state remedies if there is any available state procedure by which he has the right to bring his claim before a state court. 28 U.S.C. §§2254(b) and (c).

Rule 4 of the Rules Governing Section 2254 Cases requires the district court judge to make an initial examination of the petition and if it plainly appears from the face of the petition and any exhibits attached to it that the petitioner is not

entitled to relief in the district court, the judge shall order its summary dismissal.

The applications filed in Case Nos. 86-C-389, 86-C-563, 86-C-565, and 86-C-567 appear to be attacks on petitioner's conviction in Tulsa County Case No. CRF-86-537. Petitioner contends that the state trial judge committed him to Eastern State Hospital without being first afforded a hearing. Considering the serious nature of this allegation and the number of federal cases filed by the pro se litigant, the court, in an effort to expedite the just disposition of this matter, has examined the state court files in petitioner's criminal cases, CRF-85-503, CRF-85-3385 and CRF-86-537. From the face of the petitions (86-C-389-B and 86-C-563-B) and the state record, it is clear that Sylvester is not entitled to relief in federal district court.

Insofar as petitioner alleges denial of due process in his being sent to Eastern State Hospital, the record reveals that petitioner was charged in CRF-86-537 with carrying drugs into a place where prisoners are kept. Upon petitioner's application, the case came on for hearing on March 5, 1986, on the issue of petitioner's competency to stand trial. The court ordered that Mr. Sylvester be examined in the Tulsa County Jail by the Tulsa County Mental Health Council, Inc.. Following this examination the Mental Health Council physicians recommended that petitioner be committed to Eastern State Hospital, under 22 O.S.A. §1175.6(2). A subsequent competency hearing was held on March 7, 1986. Petitioner was present and represented by counsel. The

trial judge ordered petitioner to be committed to Eastern State Hospital in accordance with 22 O.S.A. §1175.7.

Petitioner remained at Eastern State Hospital for care and observation by Dr. Garcia, the chief psychiatrist, for approximately one month, when he was released from the hospital upon Dr. Garcia's recommendation and returned to court.

The court finds nothing in the record which supports petitioner's claim that he was committed without being afforded due process of law.

As for petitioner's claims that he was treated improperly while held at Eastern State Hospital, such claims do not challenge the constitutionality of any state court judgment against him and therefore are not cognizable under §2254.[1]

Petitioner additionally argues that the state denied him his right to a speedy trial. Petitioner claims that he was arrested on February 13, 1986, for charges under CRF-86-537 and was not arraigned until May 19, 1986. Absent exigent circumstances, a federal court will not consider a claim made under §2254 unless the petitioner has exhausted his available state remedies thereon. In this situation, petitioner has not brought his speedy trial claim before the state courts. Therefore, federal review is not available. However, even a cursory review of the record clearly indicates that petitioner's right to a speedy trial was not violated in CRF-86-537.

---

1 Petitioner has pending several §1983 civil rights claims addressing these same issues. A determination of the merits of such claims will be made in those cases (86-C-564-B, 86-C-566-B, 86-C-568-B, and 86-C-570-B).

In judging a claim of denial of speedy trial, the Supreme Court has indicated four factors which should be considered: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The Court held that unless the length of delay is such that prejudice can be presumed, there is no need to consider the remaining factors. 407 U.S. at 530. Petitioner has not set forth facts showing any delay in the processing of his case. The only delay resulted from his assertion of incompetency. The court quickly and fairly assessed petitioner's competency. Under Barker v. Wingo, supra, petitioner's claim would fail.

Insofar as petitioner seeks relief on the ground of "Legality of bringing marijuana into a place where prisoners are kept," the court finds this ground to be frivolous and without any basis in law. While pleadings of pro se litigants are held to a lesser standard than those drafted by attorneys, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), the court finds nothing in petitioner's assertion which would give rise to a claim for habeas corpus relief.

As for petitioner's assertion that he was questioned by police officers in violation of Sylvester's Miranda rights, the court finds that relief on this ground is not available. Petitioner has not exhausted his state court remedies as to this issue. Additionally, and more importantly, the state file in this matter reflects that petitioner, represented by counsel, plead guilty to the charge of Carrying Drugs Into a Place Where

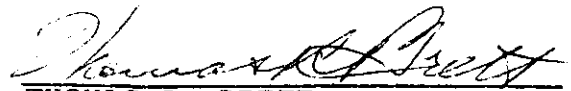
Prisoners are Kept. Where a state criminal defendant, on advice of counsel, pleads guilty, he cannot in a federal habeas corpus action raise independent claims relating to the alleged deprivation of constitutional rights which occurred prior to the guilty plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973).

Petitioner's allegations of civil rights violations by the Tulsa County Jail officials are not cognizable in federal habeas review. Likewise, his third claim, involving denial of access to the courts, is not within the scope of inquiry in a §2254 action, but should instead be brought under Title 42 U.S.C. §1983.

In Case No. 86-C-569-B, petitioner attempts to challenge the constitutionality of Tulsa County District Court Case No. CRF-85-3385. The record shows that the trial judge dismissed this action and imposed costs on the state. Because petitioner was not convicted on this charge and is not in custody pursuant to a conviction in CRF-85-3385, habeas corpus relief will not lie as to that case.

In conclusion, the court finds from the face of petitioner's applications and the trial records that petitioner is not entitled to relief in this court. It is therefore ordered that these applications be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

It is so Ordered this 19th day of February, 1987.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

O.B.A.# 10554

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

LUTHER GOWER and MARY GOWER, individually, and as husband and wife,	)	
Plaintiff,	)	Case No. 86-C-1160B
FOREMOST INSURANCE COMPANY, a foreign insurance corporation,	)	
Defendant.	)	

Notice of DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiffs, Luther and Mary Gower, individually and as husband and wife, by and through their attorneys of record, Howard & Widdows, P.C., and dismiss the present action before this Court Without Prejudice.

Respectfully Submitted,

HOWARD & WIDDOWS, P.C.

By: _____

Joseph F. Bufogle
O.B.A. # 10554
2021 South Lewis
Suite 570
Tulsa, Oklahoma 74104
(918) 744-7440

FILE COPY

mailed 2/18/87 to Pat Albrotto
Client

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

KIP W. L. SYLVESTER, Plaintiff,	)	
v.	)	86-C-566-B
CAPTAIN MATNEY, Defendant.	)	

FILED

FEB 19 1987

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

ORDER

Plaintiff brings this action under Title 42 U.S.C. §1983 alleging that his civil rights were violated while he was incarcerated in Tulsa City-County Jail.

Plaintiff's complaint contains three separate counts: (1) that he was denied his right to a speedy trial, (2) "legality of bringing marijuana into a place where prisoners are kept," and, (3) that he was committed to Eastern State Hospital without any proper hearing in front of a judge.

These same precise issues were addressed on the merits and rejected by court order in plaintiff's consolidated habeas corpus applications. A copy of such order is attached hereto. Having found plaintiff's allegations insufficient for the purposes of habeas corpus under 28 U.S.C. §2254, the court finds them no more convincing under 42 U.S.C. §1983. Plaintiff has wholly failed to show that defendant, while acting under color of state law, deprived him of any federally protected right. Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

It is therefore Ordered that plaintiff's complaint in this matter be and is hereby dismissed.

It is so Ordered this 19th day of February, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-389-B
KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, Tulsa County and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-563-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County, and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-565-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County Jail and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-567-B

KIP W. L. SYLVESTER, Petitioner, v. TULSA POLICE DEPARTMENT and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondent.	)	No. 86-C-569-B

ORDER

This matter involves five applications for writs of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was allowed to file each application without prepayment of costs or fees. Upon filing, such applications were consolidated for review purposes.

28 U.S.C. §2254 provides in pertinent part:

> [a] ....[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

An application for federal habeas corpus relief will not be granted unless the applicant has exhausted the remedies available in the state courts. A habeas petitioner is not deemed to have exhausted his state remedies if there is any available state procedure by which he has the right to bring his claim before a state court. 28 U.S.C. §§2254(b) and (c).

Rule 4 of the Rules Governing Section 2254 Cases requires the district court judge to make an initial examination of the petition and if it plainly appears from the face of the petition and any exhibits attached to it that the petitioner is not

entitled to relief in the district court, the judge shall order its summary dismissal.

The applications filed in Case Nos. 86-C-389, 86-C-563, 86-C-565, and 86-C-567 appear to be attacks on petitioner's conviction in Tulsa County Case No. CRF-86-537. Petitioner contends that the state trial judge committed him to Eastern State Hospital without being first afforded a hearing. Considering the serious nature of this allegation and the number of federal cases filed by the pro se litigant, the court, in an effort to expedite the just disposition of this matter, has examined the state court files in petitioner's criminal cases, CRF-85-503, CRF-85-3385 and CRF-86-537. From the face of the petitions (86-C-389-B and 86-C-563-B) and the state record, it is clear that Sylvester is not entitled to relief in federal district court.

Insofar as petitioner alleges denial of due process in his being sent to Eastern State Hospital, the record reveals that petitioner was charged in CRF-86-537 with carrying drugs into a place where prisoners are kept. Upon petitioner's application, the case came on for hearing on March 5, 1986, on the issue of petitioner's competency to stand trial. The court ordered that Mr. Sylvester be examined in the Tulsa County Jail by the Tulsa County Mental Health Council, Inc.. Following this examination the Mental Health Council physicians recommended that petitioner be committed to Eastern State Hospital, under 22 O.S.A. §1175.6(2). A subsequent competency hearing was held on March 7, 1986. Petitioner was present and represented by counsel. The

trial judge ordered petitioner to be committed to Eastern State Hospital in accordance with 22 O.S.A. §1175.7.

Petitioner remained at Eastern State Hospital for care and observation by Dr. Garcia, the chief psychiatrist, for approximately one month, when he was released from the hospital upon Dr. Garcia's recommendation and returned to court.

The court finds nothing in the record which supports petitioner's claim that he was committed without being afforded due process of law.

As for petitioner's claims that he was treated improperly while held at Eastern State Hospital, such claims do not challenge the constitutionality of any state court judgment against him and therefore are not cognizable under §2254.[1]

Petitioner additionally argues that the state denied him his right to a speedy trial. Petitioner claims that he was arrested on February 13, 1986, for charges under CRF-86-537 and was not arraigned until May 19, 1986. Absent exigent circumstances, a federal court will not consider a claim made under §2254 unless the petitioner has exhausted his available state remedies thereon. In this situation, petitioner has not brought his speedy trial claim before the state courts. Therefore, federal review is not available. However, even a cursory review of the record clearly indicates that petitioner's right to a speedy trial was not violated in CRF-86-537.

---

1 Petitioner has pending several §1983 civil rights claims addressing these same issues. A determination of the merits of such claims will be made in those cases (86-C-564-B, 86-C-566-B, 86-C-568-B, and 86-C-570-B).

In judging a claim of denial of speedy trial, the Supreme Court has indicated four factors which should be considered: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The Court held that unless the length of delay is such that prejudice can be presumed, there is no need to consider the remaining factors. 407 U.S. at 530. Petitioner has not set forth facts showing any delay in the processing of his case. The only delay resulted from his assertion of incompetency. The court quickly and fairly assessed petitioner's competency. Under Barker v. Wingo, supra, petitioner's claim would fail.

Insofar as petitioner seeks relief on the ground of "Legality of bringing marijuana into a place where prisoners are kept," the court finds this ground to be frivolous and without any basis in law. While pleadings of pro se litigants are held to a lesser standard than those drafted by attorneys, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), the court finds nothing in petitioner's assertion which would give rise to a claim for habeas corpus relief.

As for petitioner's assertion that he was questioned by police officers in violation of Sylvester's Miranda rights, the court finds that relief on this ground is not available. Petitioner has not exhausted his state court remedies as to this issue. Additionally, and more importantly, the state file in this matter reflects that petitioner, represented by counsel, plead guilty to the charge of Carrying Drugs Into a Place Where

Prisoners are Kept. Where a state criminal defendant, on advice of counsel, pleads guilty, he cannot in a federal habeas corpus action raise independent claims relating to the alleged deprivation of constitutional rights which occurred prior to the guilty plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973).

Petitioner's allegations of civil rights violations by the Tulsa County Jail officials are not cognizable in federal habeas review. Likewise, his third claim, involving denial of access to the courts, is not within the scope of inquiry in a §2254 action, but should instead be brought under Title 42 U.S.C. §1983.

In Case No. 86-C-569-B, petitioner attempts to challenge the constitutionality of Tulsa County District Court Case No. CRF-85-3385. The record shows that the trial judge dismissed this action and imposed costs on the state. Because petitioner was not convicted on this charge and is not in custody pursuant to a conviction in CRF-85-3385, habeas corpus relief will not lie as to that case.

In conclusion, the court finds from the face of petitioner's applications and the trial records that petitioner is not entitled to relief in this court. It is therefore ordered that these applications be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

It is so Ordered this _____ day of February, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

KIP W. L. SYLVESTER, Plaintiff,	)	
v.	)	86-C-564-B
DR. GARCIA, et al, Defendants.	)	

FILED
FEB 19 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff brings this action under Title 42 U.S.C. §1983 alleging that he was given an inadequate diagnosis by the medical personnel at Eastern State Hospital, and that the defendant Dr. Garcia refused to speak with him personally.

In response to the complaint the defendants filed a motion to dismiss on the grounds that plaintiff has failed to state a cause of action upon which relief can be granted and that such complaint is frivolous. Having reviewed the complaint and the motion and brief in support thereof, the court finds that for the following reasons defendants' motion should be granted.

The Supreme Court of the United States has declared that insufficiency of medical treatment will not amount to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution unless there has been "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Negligence or malpractice will not suffice to sustain a claim under 42 U.S.C. §1983. Smart v. Villar, 547 F.2d 112 (10th Cir. 1976). Additionally, a difference of medical opinion as to course of

treatment does not state a cause of action under Estelle v. Gamble. Id. The plaintiff must allege and prove exceptional circumstances and conduct so grossly incompetent, inadequate or excessive so as to shock the conscience or to be intolerable to basic fairness. Dewell v. Lawson, 489 F.2d 877, 882 (10th Cir. 1974). The complaint in this case clearly indicates that plaintiff has failed to allege a deliberate indifference to his serious medical needs. At best, he asserts a difference of opinion as to his diagnosis and treatment. Such is not enough to state a claim under §1983.

It is therefore ordered that defendants' motion be granted and that plaintiff's complaint be and is hereby dismissed.

It is so Ordered this 19th day of February, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

FEB 19 1987

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

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

BYRON OSCAR AYERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SCOTT E. HOCKETT, and	)	
FARMERS INSURANCE COMPANY, INC.,	)	
	)	
Defendants.	)	No: 86-C-489-B

O R D E R

NOW on this 19th day of February, 1987, plaintiff's Application to Dismiss with Prejudice came on for hearing. The Court being fully advised in the premises finds that said Application should be sustained and the defendants, should be dismissed from the above entitled action with prejudice.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that plaintiff's Application to Dismiss With Prejudice be sustained and the above captioned action be dismissed with prejudice as to defendants.

Thomas R. Brett

HONORABLE THOMAS R. BRETT,
Judge of the United States
District Court for the Northern
District

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

KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	No. 86-C-389-B
KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, Tulsa County and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	No. 86-C-563-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County, and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	No. 86-C-565-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County Jail and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	No. 86-C-567-B

FILED
FEB 19 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KIP W. L. SYLVESTER, Petitioner, v. TULSA POLICE DEPARTMENT and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondent.	)	No. 86-C-569-B

ORDER

This matter involves five applications for writs of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was allowed to file each application without prepayment of costs or fees. Upon filing, such applications were consolidated for review purposes.

28 U.S.C. §2254 provides in pertinent part:

> [a] ....[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

An application for federal habeas corpus relief will not be granted unless the applicant has exhausted the remedies available in the state courts. A habeas petitioner is not deemed to have exhausted his state remedies if there is any available state procedure by which he has the right to bring his claim before a state court. 28 U.S.C. §§2254(b) and (c).

Rule 4 of the Rules Governing Section 2254 Cases requires the district court judge to make an initial examination of the petition and if it plainly appears from the face of the petition and any exhibits attached to it that the petitioner is not

entitled to relief in the district court, the judge shall order its summary dismissal.

The applications filed in Case Nos. 86-C-389, 86-C-563, 86-C-565, and 86-C-567 appear to be attacks on petitioner's conviction in Tulsa County Case No. CRF-86-537. Petitioner contends that the state trial judge committed him to Eastern State Hospital without being first afforded a hearing. Considering the serious nature of this allegation and the number of federal cases filed by the pro se litigant, the court, in an effort to expedite the just disposition of this matter, has examined the state court files in petitioner's criminal cases, CRF-85-503, CRF-85-3385 and CRF-86-537. From the face of the petitions (86-C-389-B and 86-C-563-B) and the state record, it is clear that Sylvester is not entitled to relief in federal district court.

Insofar as petitioner alleges denial of due process in his being sent to Eastern State Hospital, the record reveals that petitioner was charged in CRF-86-537 with carrying drugs into a place where prisoners are kept. Upon petitioner's application, the case came on for hearing on March 5, 1986, on the issue of petitioner's competency to stand trial. The court ordered that Mr. Sylvester be examined in the Tulsa County Jail by the Tulsa County Mental Health Council, Inc.. Following this examination the Mental Health Council physicians recommended that petitioner be committed to Eastern State Hospital, under 22 O.S.A. §1175.6(2). A subsequent competency hearing was held on March 7, 1986. Petitioner was present and represented by counsel. The

trial judge ordered petitioner to be committed to Eastern State Hospital in accordance with 22 O.S.A. §1175.7.

Petitioner remained at Eastern State Hospital for care and observation by Dr. Garcia, the chief psychiatrist, for approximately one month, when he was released from the hospital upon Dr. Garcia's recommendation and returned to court.

The court finds nothing in the record which supports petitioner's claim that he was committed without being afforded due process of law.

As for petitioner's claims that he was treated improperly while held at Eastern State Hospital, such claims do not challenge the constitutionality of any state court judgment against him and therefore are not cognizable under §2254.[1]

Petitioner additionally argues that the state denied him his right to a speedy trial. Petitioner claims that he was arrested on February 13, 1986, for charges under CRF-86-537 and was not arraigned until May 19, 1986. Absent exigent circumstances, a federal court will not consider a claim made under §2254 unless the petitioner has exhausted his available state remedies thereon. In this situation, petitioner has not brought his speedy trial claim before the state courts. Therefore, federal review is not available. However, even a cursory review of the record clearly indicates that petitioner's right to a speedy trial was not violated in CRF-86-537.

---

1 Petitioner has pending several §1983 civil rights claims addressing these same issues. A determination of the merits of such claims will be made in those cases (86-C-564-B, 86-C-566-B, 86-C-568-B, and 86-C-570-B).

In judging a claim of denial of speedy trial, the Supreme Court has indicated four factors which should be considered: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The Court held that unless the length of delay is such that prejudice can be presumed, there is no need to consider the remaining factors. 407 U.S. at 530. Petitioner has not set forth facts showing any delay in the processing of his case. The only delay resulted from his assertion of incompetency. The court quickly and fairly assessed petitioner's competency. Under Barker v. Wingo, supra, petitioner's claim would fail.

Insofar as petitioner seeks relief on the ground of "Legality of bringing marijuana into a place where prisoners are kept," the court finds this ground to be frivolous and without any basis in law. While pleadings of pro se litigants are held to a lesser standard than those drafted by attorneys, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), the court finds nothing in petitioner's assertion which would give rise to a claim for habeas corpus relief.

As for petitioner's assertion that he was questioned by police officers in violation of Sylvester's Miranda rights, the court finds that relief on this ground is not available. Petitioner has not exhausted his state court remedies as to this issue. Additionally, and more importantly, the state file in this matter reflects that petitioner, represented by counsel, plead guilty to the charge of Carrying Drugs Into a Place Where

Prisoners are Kept. Where a state criminal defendant, on advice of counsel, pleads guilty, he cannot in a federal habeas corpus action raise independent claims relating to the alleged deprivation of constitutional rights which occurred prior to the guilty plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973).

Petitioner's allegations of civil rights violations by the Tulsa County Jail officials are not cognizable in federal habeas review. Likewise, his third claim, involving denial of access to the courts, is not within the scope of inquiry in a §2254 action, but should instead be brought under Title 42 U.S.C. §1983.

In Case No. 86-C-569-B, petitioner attempts to challenge the constitutionality of Tulsa County District Court Case No. CRF-85-3385. The record shows that the trial judge dismissed this action and imposed costs on the state. Because petitioner was not convicted on this charge and is not in custody pursuant to a conviction in CRF-85-3385, habeas corpus relief will not lie as to that case.

In conclusion, the court finds from the face of petitioner's applications and the trial records that petitioner is not entitled to relief in this court. It is therefore ordered that these applications be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

It is so Ordered this 19th day of February, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LEE A. ROBINSON,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-1151B

NOTICE OF DISMISSAL

COMES NOW the United States of America by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, 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 19th day of February, 1987.

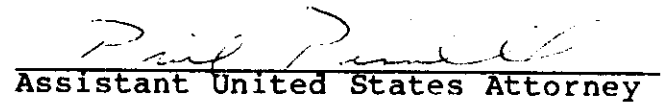
UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

PHIL PINNELL
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of February, 1987, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Lee A. Robinson, 818 North Union Place, Tulsa, Oklahoma 74127-5444.



Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 19 1987

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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
WANDA F. OWENS,	)	
Defendant.	)	CIVIL ACTION NO. 86-C-889-E.

ORDER OF DISMISSAL

Now on this 19th day of February, 1987, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve him have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, Wanda F. Owens, be and is dismissed without prejudice.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-389-B
KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, Tulsa County and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-563-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County, and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-565-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County Jail and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-567-B

FILED
FEB 19 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KIP W. L. SYLVESTER, Petitioner, v. TULSA POLICE DEPARTMENT and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondent.	)	No. 86-C-569-B

ORDER

This matter involves five applications for writs of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was allowed to file each application without prepayment of costs or fees. Upon filing, such applications were consolidated for review purposes.

28 U.S.C. §2254 provides in pertinent part:

> [a] ....[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

An application for federal habeas corpus relief will not be granted unless the applicant has exhausted the remedies available in the state courts. A habeas petitioner is not deemed to have exhausted his state remedies if there is any available state procedure by which he has the right to bring his claim before a state court. 28 U.S.C. §§2254(b) and (c).

Rule 4 of the Rules Governing Section 2254 Cases requires the district court judge to make an initial examination of the petition and if it plainly appears from the face of the petition and any exhibits attached to it that the petitioner is not

entitled to relief in the district court, the judge shall order its summary dismissal.

The applications filed in Case Nos. 86-C-389, 86-C-563, 86-C-565, and 86-C-567 appear to be attacks on petitioner's conviction in Tulsa County Case No. CRF-86-537. Petitioner contends that the state trial judge committed him to Eastern State Hospital without being first afforded a hearing. Considering the serious nature of this allegation and the number of federal cases filed by the pro se litigant, the court, in an effort to expedite the just disposition of this matter, has examined the state court files in petitioner's criminal cases, CRF-85-503, CRF-85-3385 and CRF-86-537. From the face of the petitions (86-C-389-B and 86-C-563-B) and the state record, it is clear that Sylvester is not entitled to relief in federal district court.

Insofar as petitioner alleges denial of due process in his being sent to Eastern State Hospital, the record reveals that petitioner was charged in CRF-86-537 with carrying drugs into a place where prisoners are kept. Upon petitioner's application, the case came on for hearing on March 5, 1986, on the issue of petitioner's competency to stand trial. The court ordered that Mr. Sylvester be examined in the Tulsa County Jail by the Tulsa County Mental Health Council, Inc.. Following this examination the Mental Health Council physicians recommended that petitioner be committed to Eastern State Hospital, under 22 O.S.A. §1175.6(2). A subsequent competency hearing was held on March 7, 1986. Petitioner was present and represented by counsel. The

trial judge ordered petitioner to be committed to Eastern State Hospital in accordance with 22 O.S.A. §1175.7.

Petitioner remained at Eastern State Hospital for care and observation by Dr. Garcia, the chief psychiatrist, for approximately one month, when he was released from the hospital upon Dr. Garcia's recommendation and returned to court.

The court finds nothing in the record which supports petitioner's claim that he was committed without being afforded due process of law.

As for petitioner's claims that he was treated improperly while held at Eastern State Hospital, such claims do not challenge the constitutionality of any state court judgment against him and therefore are not cognizable under §2254.[1]

Petitioner additionally argues that the state denied him his right to a speedy trial. Petitioner claims that he was arrested on February 13, 1986, for charges under CRF-86-537 and was not arraigned until May 19, 1986. Absent exigent circumstances, a federal court will not consider a claim made under §2254 unless the petitioner has exhausted his available state remedies thereon. In this situation, petitioner has not brought his speedy trial claim before the state courts. Therefore, federal review is not available. However, even a cursory review of the record clearly indicates that petitioner's right to a speedy trial was not violated in CRF-86-537.

---

1 Petitioner has pending several §1983 civil rights claims addressing these same issues. A determination of the merits of such claims will be made in those cases (86-C-564-B, 86-C-566-B, 86-C-568-B, and 86-C-570-B).

In judging a claim of denial of speedy trial, the Supreme Court has indicated four factors which should be considered: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The Court held that unless the length of delay is such that prejudice can be presumed, there is no need to consider the remaining factors. 407 U.S. at 530. Petitioner has not set forth facts showing any delay in the processing of his case. The only delay resulted from his assertion of incompetency. The court quickly and fairly assessed petitioner's competency. Under Barker v. Wingo, supra, petitioner's claim would fail.

Insofar as petitioner seeks relief on the ground of "Legality of bringing marijuana into a place where prisoners are kept," the court finds this ground to be frivolous and without any basis in law. While pleadings of pro se litigants are held to a lesser standard than those drafted by attorneys, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), the court finds nothing in petitioner's assertion which would give rise to a claim for habeas corpus relief.

As for petitioner's assertion that he was questioned by police officers in violation of Sylvester's Miranda rights, the court finds that relief on this ground is not available. Petitioner has not exhausted his state court remedies as to this issue. Additionally, and more importantly, the state file in this matter reflects that petitioner, represented by counsel, plead guilty to the charge of Carrying Drugs Into a Place Where

Prisoners are Kept. Where a state criminal defendant, on advice of counsel, pleads guilty, he cannot in a federal habeas corpus action raise independent claims relating to the alleged deprivation of constitutional rights which occurred prior to the guilty plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973).

Petitioner's allegations of civil rights violations by the Tulsa County Jail officials are not cognizable in federal habeas review. Likewise, his third claim, involving denial of access to the courts, is not within the scope of inquiry in a §2254 action, but should instead be brought under Title 42 U.S.C. §1983.

In Case No. 86-C-569-B, petitioner attempts to challenge the constitutionality of Tulsa County District Court Case No. CRF-85-3385. The record shows that the trial judge dismissed this action and imposed costs on the state. Because petitioner was not convicted on this charge and is not in custody pursuant to a conviction in CRF-85-3385, habeas corpus relief will not lie as to that case.

In conclusion, the court finds from the face of petitioner's applications and the trial records that petitioner is not entitled to relief in this court. It is therefore ordered that these applications be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

It is so Ordered this 19th day of February, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-389-B
KIP W. L. SYLVESTER, Petitioner, v. Dr. GARCIA, Tulsa County and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-563-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County, and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-565-B
KIP W. L. SYLVESTER, Petitioner, v. CARL MATNEY, Tulsa County Jail and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	No. 86-C-567-B

FILED
FEB 19 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KIP W. L. SYLVESTER, Petitioner, v. TULSA POLICE DEPARTMENT and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondent.	)	No. 86-C-569-B

ORDER

This matter involves five applications for writs of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was allowed to file each application without prepayment of costs or fees. Upon filing, such applications were consolidated for review purposes.

28 U.S.C. §2254 provides in pertinent part:

> [a] ....[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

An application for federal habeas corpus relief will not be granted unless the applicant has exhausted the remedies available in the state courts. A habeas petitioner is not deemed to have exhausted his state remedies if there is any available state procedure by which he has the right to bring his claim before a state court. 28 U.S.C. §§2254(b) and (c).

Rule 4 of the Rules Governing Section 2254 Cases requires the district court judge to make an initial examination of the petition and if it plainly appears from the face of the petition and any exhibits attached to it that the petitioner is not

entitled to relief in the district court, the judge shall order its summary dismissal.

The applications filed in Case Nos. 86-C-389, 86-C-563, 86-C-565, and 86-C-567 appear to be attacks on petitioner's conviction in Tulsa County Case No. CRF-86-537. Petitioner contends that the state trial judge committed him to Eastern State Hospital without being first afforded a hearing. Considering the serious nature of this allegation and the number of federal cases filed by the pro se litigant, the court, in an effort to expedite the just disposition of this matter, has examined the state court files in petitioner's criminal cases, CRF-85-503, CRF-85-3385 and CRF-86-537. From the face of the petitions (86-C-389-B and 86-C-563-B) and the state record, it is clear that Sylvester is not entitled to relief in federal district court.

Insofar as petitioner alleges denial of due process in his being sent to Eastern State Hospital, the record reveals that petitioner was charged in CRF-86-537 with carrying drugs into a place where prisoners are kept. Upon petitioner's application, the case came on for hearing on March 5, 1986, on the issue of petitioner's competency to stand trial. The court ordered that Mr. Sylvester be examined in the Tulsa County Jail by the Tulsa County Mental Health Council, Inc.. Following this examination the Mental Health Council physicians recommended that petitioner be committed to Eastern State Hospital, under 22 O.S.A. §1175.6(2). A subsequent competency hearing was held on March 7, 1986. Petitioner was present and represented by counsel. The

trial judge ordered petitioner to be committed to Eastern State Hospital in accordance with 22 O.S.A. §1175.7.

Petitioner remained at Eastern State Hospital for care and observation by Dr. Garcia, the chief psychiatrist, for approximately one month, when he was released from the hospital upon Dr. Garcia's recommendation and returned to court.

The court finds nothing in the record which supports petitioner's claim that he was committed without being afforded due process of law.

As for petitioner's claims that he was treated improperly while held at Eastern State Hospital, such claims do not challenge the constitutionality of any state court judgment against him and therefore are not cognizable under §2254.[1]

Petitioner additionally argues that the state denied him his right to a speedy trial. Petitioner claims that he was arrested on February 13, 1986, for charges under CRF-86-537 and was not arraigned until May 19, 1986. Absent exigent circumstances, a federal court will not consider a claim made under §2254 unless the petitioner has exhausted his available state remedies thereon. In this situation, petitioner has not brought his speedy trial claim before the state courts. Therefore, federal review is not available. However, even a cursory review of the record clearly indicates that petitioner's right to a speedy trial was not violated in CRF-86-537.

---

1 Petitioner has pending several §1983 civil rights claims addressing these same issues. A determination of the merits of such claims will be made in those cases (86-C-564-B, 86-C-566-B, 86-C-568-B, and 86-C-570-B).

In judging a claim of denial of speedy trial, the Supreme Court has indicated four factors which should be considered: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The Court held that unless the length of delay is such that prejudice can be presumed, there is no need to consider the remaining factors. 407 U.S. at 530. Petitioner has not set forth facts showing any delay in the processing of his case. The only delay resulted from his assertion of incompetency. The court quickly and fairly assessed petitioner's competency. Under Barker v. Wingo, supra, petitioner's claim would fail.

Insofar as petitioner seeks relief on the ground of "Legality of bringing marijuana into a place where prisoners are kept," the court finds this ground to be frivolous and without any basis in law. While pleadings of pro se litigants are held to a lesser standard than those drafted by attorneys, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), the court finds nothing in petitioner's assertion which would give rise to a claim for habeas corpus relief.

As for petitioner's assertion that he was questioned by police officers in violation of Sylvester's Miranda rights, the court finds that relief on this ground is not available. Petitioner has not exhausted his state court remedies as to this issue. Additionally, and more importantly, the state file in this matter reflects that petitioner, represented by counsel, plead guilty to the charge of Carrying Drugs Into a Place Where

Prisoners are Kept. Where a state criminal defendant, on advice of counsel, pleads guilty, he cannot in a federal habeas corpus action raise independent claims relating to the alleged deprivation of constitutional rights which occurred prior to the guilty plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973).

Petitioner's allegations of civil rights violations by the Tulsa County Jail officials are not cognizable in federal habeas review. Likewise, his third claim, involving denial of access to the courts, is not within the scope of inquiry in a §2254 action, but should instead be brought under Title 42 U.S.C. §1983.

In Case No. 86-C-569-B, petitioner attempts to challenge the constitutionality of Tulsa County District Court Case No. CRF-85-3385. The record shows that the trial judge dismissed this action and imposed costs on the state. Because petitioner was not convicted on this charge and is not in custody pursuant to a conviction in CRF-85-3385, habeas corpus relief will not lie as to that case.

In conclusion, the court finds from the face of petitioner's applications and the trial records that petitioner is not entitled to relief in this court. It is therefore ordered that these applications be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

It is so Ordered this 19th day of February, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

C-25
5/85

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

FILED
FEB 19 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

Jonathan Elmore, et al Plaintiff(s),	)	
vs.	)	No. 86-C-229-E
Eldon Dewayne Elmore, et al Defendant(s).	)	

ORDER

Rule 36(a) of the Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

> (a) In any case in which no action has been taken by the parties for six (6) months, it shall be the duty of the Clerk to mail notice thereof to counsel of record or to the parties, if their post office addresses are known. If such notice has been given and no action has been taken in the case within thirty (30) days of the date of the notice, an order of dismissal may in the Court's discretion be entered.

In the action herein, notice pursuant to Rule 36(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on December 10, 1986. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 19th day of February, 1987.

James O. Ellison
UNITED STATES DISTRICT JUDGE

5

FILED
FEB 19 1987
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

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

SUSAN BENTLY and JAMES E. SIMS, Plaintiffs,	)	
v.	)	No. 86-C-1080 E
DOSS OFFICE SYSTEMS, INC., DOSS DISTRIBUTION, INC., and HENRY DOSS, Defendants,	)	

NOTICE OF DISMISSAL

COMES NOW the Plaintiffs, Susan Bently and James E. Sims and gives this Notice that they dismiss their action against Defendants Doss Office Systems, Inc., Doss Distribution, Inc., and Henry Doss.

Respectfully Submitted,

LARRY L. OLIVER & ASSOCIATES, P.C.

Larry L. Oliver
OBA No. 6769
2211 East Skelly Drive
Tulsa, Oklahoma 74105-5913
918 745-6084

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of _____, 1987, I mailed a true, correct and exact copy of the within and foregoing instrument to:

Mr. Danny P. Richey
Mr. Kenneth J. Treece
700 Sinclair Building
Six East Fifth Street
Tulsa, OK 74103

with proper postage thereon fully prepaid.

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

FILED

FEB 19 1987

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

CITIZENS INSURANCE COMPANY OF AMERICA AND DOUBLE SEAL GLASS COMPANY, a Michigan company d/b/a Gateway Industries,	)	
Plaintiffs,	)	
vs.	)	No. 84-C-896-E
TRANSPORT INSURANCE COMPANY, an Iowa corporation, and SAUNDERS LEASING SYSTEM, INC.,	)	
Defendants.	)	

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiffs, Citizens Insurance Company of America and Double Seal Glass Company d/b/a Gateway Industries, recover judgment against the Defendant, Saunders Leasing System, Inc. in the amount of $37,500.00, and their costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, Transport Insurance Company recover judgment against the Plaintiffs, Citizens Insurance Company of America and Double Seal Glass Company d/b/a Gateway Industries and that Defendant Transport Insurance Company be awarded its costs of action against the Plaintiffs.

DATED at Tulsa, Oklahoma this 18TH day of February, 1987.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

26

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

FILED

FEB 18 1987

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

WILLIAM RICHARD WHITSON, SR. AND SHERYLE WHITSON, individually and as next of kin of William Richard Whitson, Jr.,	)	
Plaintiffs,	)	
vs.	)	No. 85-C-409-E
ST. FRANCIS HOSPITAL, PAUL BISCHOFF, M.D., JAMES DANIEL LARSON, M.D., and WILLIAM NEEL BURNS, M.D.,	)	
Defendants.	)	

JUDGMENT

This action came on for jury trial before the Court, Honorable James O. Ellison, District Judge, presiding, the Court having granted the Motion to Dismiss of Defendant St. Francis Hospital at the conclusion of the Plaintiffs' evidence, and the remaining issues having been duly tried and the jury having rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiffs William Richard Whitson, Sr. and Sheryle Whitson take nothing from the Defendants St. Francis Hospital, Paul Bischoff, M.D., James Daniel Larson, M.D. and William Neel Burns, M.D., that the action be dismissed on the merits, and that the Defendants St. Francis Hospital, Paul Bischoff, M.D., James Daniel Larson, M.D. and William Neel Burns, M.D. recover of the Plaintiffs their costs of action.

1416

DATED at Tulsa, Oklahoma this 17th day of February, 1987.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
FEB 18 1987
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

WILEY ELECTRIC, INC., Plaintiff,	)	
v.	)	No. 86-C-1132-B
JOHN MONTGOMERY and CORA LEE MONTGOMERY, et al., Defendants,	)	
v.	)	
AMERICAN GENERAL FIRE & CASUALTY COMPANY, Intervenor.	)	

O R D E R

This matter comes before the Court on the Defendants' Objection to Intervenor's Petition for Removal and Motion to Remand. For the reasons set forth below, the Motion to Remand is sustained in part and denied in part.

The original action herein was filed in the District Court for Okmulgee County, Oklahoma. Wiley Electric, Inc. v. John Montgomery and Cora Lee Montgomery, et al., Case No. C-83-110. Wiley sought payment for labor and material used in the construction of the Hit-N-Run Grocery in Beggs, Oklahoma. The Defendants' counterclaimed seeking damages arising out of a fire allegedly caused by Wiley's negligence. Thereafter, American General Fire & Casualty Company ("American") intervened in the Okmulgee County action on the ground that it had paid Defendants $579,563.11 under a fire insurance policy and was entitled to

subrogation. On November 24, 1986, the Defendants herein filed a cross-petition against Intervenor American claiming bad faith and fraud in American's handling of the Defendants' insurance claim. The Defendants claimed $692,000.00 actual damages and $1.5 million punitive damages. On December 10, 1986, American dismissed with prejudice its intervention action against Wiley Electric for subrogation. On December 19, 1986, American removed the Okmulgee County action to this court pursuant to 28 U.S.C. §1441 on the basis of diversity of citizenship between the Defendants and American. Defendants object to removal of this action and move for remand on the ground that there is not complete diversity herein because both Wiley Electric and the Montgomerys are citizens of Oklahoma.

The general rule appears to be that the citizenship of the original parties to a lawsuit is the basis for determining whether there is diversity jurisdiction under 28 U.S.C. §1332, and, therefore, "removal cannot be supported solely on the basis of diversity of third party litigants." Hyde v. Carder, 310 F.Supp. 1340, 1341 (W.D.Ky. 1970). The mere existence of diversity of citizenship between an original defendant and a third party defendant does not authorize removal under §1441. 29 Fed.Proc., L.Ed. §69:31 (1984). See, Lowe's of Montgomery, Inc. v. Smith, 432 F.Supp. 1008, 1010-13 (M.D.Ala. 1977). Two theories underlie this general rule. Some courts have held that a third party defendant is not a defendant for purposes of 28 U.S.C. §1441(a). See, 8 ALR Fed. 708 §5[a]. Other courts have

held that third party claims usually do not satisfy the requirement of §1441(c) of a "separate and independent claim." Id. §6[a]. In the instant case, however, American claims removal is proper under §1441(c) because the claim by Defendants against American is separate and independent from the underlying claim, there is diversity of citizenship between the Defendants and American and the amount of the Defendants' cross-claim exceeds $10,000.00.

If American's action against Wiley were the underlying claim upon which removal were based, this court would have no problem deciding that this claim was not "separate and independent" from the Plaintiff's claim against the Defendants, and holding that removal is improper. However, in this instance it is the Defendants' cross-claim against the Intervenor upon which removal is based. This is a claim for bad faith and fraud in American's handling of the Defendants' insurance claim. This claim is distinct from Wiley's claim against the Defendants. The alleged liabilities of the Defendants to the Plaintiff and of the Third Party Defendant to the Third Party Plaintiff are not of the same source or nature. Under such circumstances, the Court concludes that the Defendants' claim against American is separate and independent for purposes of §1441(c). In addition, a previous action by the Montgomerys against American was dismissed in this court with prejudice against the filing of any future actions. John and Cora Lee Montgomery v. American General Fire & Casualty Company, Case No. 83-C-830-E (N.D.Okla. February 12, 1985).

American contends that the Defendants' cross-claim herein is barred by the previous order of dismissal.[1] For these reasons, the Court concludes that removal of this action under §1441(c) is proper.

Section 1441(c) provides:

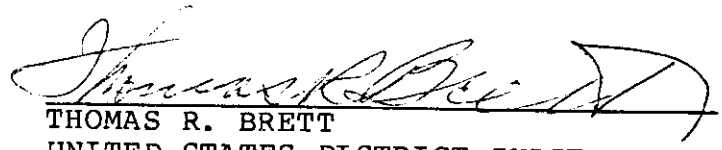
> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion may remand all matters not otherwise within its original jurisdiction."

It is clear that the underlying claim herein asserted by Plaintiff Wiley Electric against the Defendants is not within this Court's original jurisdiction since Wiley is an Oklahoma company and the Defendants are Oklahoma citizens. The facts surrounding the Plaintiff's claim and the Defendants' counter-claim have no connection to the facts surrounding the Defendants' cross-claim against American alleging bad faith and fraud in handling and settling a previous insurance claim arising out of the 1983 fire. The Court must decide therefore whether to retain jurisdiction over all of the claims asserted herein or whether to exercise its discretion and remand the Plaintiff's claim and the Defendants' counterclaim to the District Court for Okmulgee County. Removal under §1441(c) is to be strictly construed. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 10 (1951). In deciding removal cases such as this one, courts must consider

1 This issue would be the proper subject of an appropriate motion by American.

fairness to the Plaintiff in honoring his initial choice of forum, as well as the interests of judicial economy. Wright & Miller, Federal Practice and Procedure: §3724, p. 394 (1985). Here, the claims of the parties are sufficiently separate and independent of each other that the Court concludes that the original claims of the Plaintiff and counterclaims of the Defendants should be remanded to the Okmulgee District Court. This Court will retain jurisdiction over the cross-claim alleged by the Defendants against Intervenor American.

IT IS SO ORDERED, this 18th day of February, 1987.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 83-0311-Civ-ARONOVITZ

ROGER WHEELER, JR., and
E.H.P. CORPORATION, et al.,

Plaintiffs,

vs.

DAVID GREEN, et al.,

Defendants.

In the United States District Court for the Northern District of Oklahoma, File No. 86-C-706 E

FILED

FEB 18 1987

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

ORDER

This cause having come before the Court on Plaintiffs' Motion for Dismissal of Miscellaneous File and the Court having reviewed the motion and being otherwise informed in the premises it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion for Dismissal of Miscellaneous File is hereby granted and this cause is hereby dismissed.

DONE AND ORDERED in Chambers this 17th day of February, 1987.

District Court Judge

Copies furnished to
all counsel of record.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 18 1987

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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
BONNIE L. GORDON,	)	
Defendant.	)	CIVIL ACTION NO. 86-C-270-E

AGREED JUDGMENT

This matter comes on for consideration this 17th of January, 1987, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Bonnie L. Gordon, appearing pro se.

The Court, being fully advised and having examined the file herein, finds that the Defendant, Bonnie L. Gordon, has agreed that she is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against her in the amount of $574.00, plus interest at the rate of 15.05 percent per annum and administrative costs of $.68 per month from October 4, 1984, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Bonnie L. Gordon, in the amount of $574.00, plus interest at the rate of 15.05 percent per annum and administrative costs of $.68 per month from October 4, 1984, until judgment, plus interest thereafter at the current legal rate of 6.09 percent until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

Phil Pinnell
PHIL PINNELL
Assistant U.S. Attorney

Bonnie Gordon
BONNIE L. GORDON

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

TRANSWESTERN MINING COMPANY, Plaintiff,	)	
vs.	)	Case No. 86-C-477-B
VANNOY HILDEBRAND, et al., Defendants.	)	

FILED
FEB 18 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes on before the Court upon the joint motion for dismissal with prejudice of claims between Plaintiff and Defendants James A. Durham, Scott R. Tuthill, Jane Potter, and Wallace & Owens, Inc. only. The Court finds that there is good cause shown for granting the relief requested in this motion, and it is, therefore,

ORDERED, ADJUDGED AND DECREED that all of the claims of Plaintiff Transwestern Mining Company and Defendants James A. Durham, Scott R. Tuthill, Jane Potter, and Wallace & Owens, Inc. against each other are hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants James A. Durham, Scott R. Tuthill, Jane Potter, and Wallace & Owens, Inc. have no right, title or interest in and to the funds which are the subject of Plaintiff's interpleader claims in this action.

DATED this 17 day of February, 1987.

S/ THOMAS R. BRETT

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 18 1987

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

CONTINENTAL CASUALTY COMPANY, an Illinois Insurance Company, Plaintiff,	)	
vs.	)	Case No. C-86-91B
INVESTMENT CONSTRUCTION CORPORATION, an Oklahoma corporation, NOBLE A MILLER, DELORES MILLER, JANET D. SNODDY, PHILLIP E. SNODDY, and KENT R. TAYLOR, individuals, Defendants.	)	

AGREED JOURNAL ENTRY OF JUDGMENT

Pursuant to an agreement entered into between the Plaintiff, Continental Casualty Company, and Defendants, Phillip E. Snoddy, Janet D. Snoddy, and Kent R. Taylor, the following judgment is entered. That Continental Casualty Company, Plaintiff herein, recover from the following Defendants, Phillip E. Snoddy, Janet D. Snoddy and Kent R. Taylor the sum of $833,000.00, plus interest at the legal rate, and its costs of this action. IT IS SO ORDERED.

Dated at Tulsa, Oklahoma this 17 day of Feb, 1987.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

LARRY S. KAPLAN
1500 RepublicBank Tower
Dallas, Texas 75201
(214) 922-9393

ATTORNEY FOR CONTINENTAL CASUALTY COMPANY

GREG THOMAS
P. O. Box 1373
Muskogee, Oklahoma 74402
(918) 683-2861

ATTORNEY FOR DEFENDANTS
JANET D. SNODDY,
PHILLIP E. SNODDY AND KENT R. TAYLOR

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. 19/25 gm. packages, more or less, of an article of drug, labeled in part: "Packaged for Tulsa Intertrade, Inc. Contents Minoxidil, USP Quantity 25 Gm Lot No. 0025 For Prescription Compounding Tulsa, OK 74104", and 5/5 gm. bottles, more or less, of an article of drug, labeled in part: "Packaged for Tulsa Intertrade, Inc. Contents Minoxidil, USP Quantity 5 Gm Lot No. 0025" or "0028" "For Prescription Compounding Tulsa, OK 74104", Defendants.	FILED FEB 18 1987 Jack C. Silver, Clerk U.S. DISTRICT COURT CIVIL ACTION NO. 86-C-957-B

DEFAULT DECREE OF CONDEMNATION AND DESTRUCTION

On October 20, 1986, a Complaint for Forfeiture against the above-described articles was filed in this Court on behalf of the United States of America by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Catherine J. Hardin, Assistant United States Attorney.

The Complaint alleges that the articles proceeded against are drugs which are misbranded while held for sale after

6

shipment in interstate commerce, within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §352(f)(1), as follows:

The labeling of the articles fails to bear adequate direction for use and the articles are not exempt from such requirement since the articles are used in compounding an unapproved new drug.

Pursuant to Warrant for Arrest of Property issued by this Court, the United States Marshal for this district seized said articles.

It appearing that process was duly issued herein and returned according to law; that notice of the seizure of the above-described articles was given according to law; and it further appearing that no persons have interposed a claim before the return date of said process:

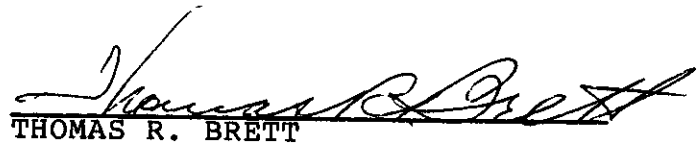
NOW THEREFORE, on motion of the United States for a default decree to condemnation and destruction, the Court being fully advised in the premises, it is hereby

ORDERED, ADJUDGED, and DECREED that the default of all persons having any right, title or interest in the articles seized be and the same is entered herein; and it is further

ORDERED, ADJUDGED, AND DECREED that the seized articles are drugs which are misbranded as alleged in the Complaint, and are therefore, hereby condemned and forfeited to the United States of America pursuant to 21 U.S.C. §334; and it is further

ORDERED, ADJUDGED, AND DECREED that pursuant to 21 U.S.C. §334(d) the United States Marshal for this district shall forthwith destroy the condemned articles and make due return to this Court.

Dated at Tulsa, Ok, this 17 day of February, 1987.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

CAROLE SCOTT, Executrix of the Estate of Charles M. Kelly, Deceased, Plaintiff,	)	
vs.	)	No. 86-C-848-B
AETNA LIFE & CASUALTY COMPANY, Defendant.	)	

FILED

FEB 18 1987

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

ORDER OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant having compromised and settled all issues in the action and having stipulated that the Petition and the action may be dismissed with prejudice,

IT IS THEREFORE ORDERED that the Petition and this cause of action are, by the Court, dismissed with prejudice to the bringing of another action upon the same cause or causes of action.

Entered this 17 day of February, 1987.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED
FEB 18 1987
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

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

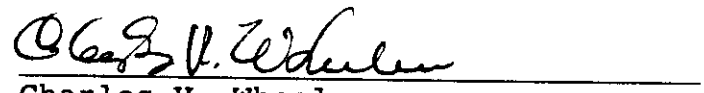
UTICA NATIONAL BANK & TRUST CO., a national banking association,	)	
Plaintiff,	)	No. 85-C-512-E
vs.	)	
ROBERT G. HEERS, et al.,	)	
Defendants.	)	

STIPULATION OF DISMISSAL

PURSUANT to the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto agree that Plaintiff's claims against Frank P. Fabro, Jr., asserted herein are hereby dismissed with prejudice, each party to bear its/their own costs incurred herein.

This dismissal shall have no effect on any other claims made against any other Defendant herein.

DATED this 19 day of January, 1987.



Charles V. Wheeler
GABLE & GOTWALS
2000 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEYS FOR PLAINTIFF
UTICA NATIONAL BANK & TRUST CO.

Katie J. Colopy

Katie J. Colopy
CONNER & WINTERS
2400 First National Bank Tower
Tulsa, Oklahoma 74103
(918) 586-5711

ATTORNEYS FOR DEFENDANT
Frank P. Fabro, Jr.

EXHIBIT "B"

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

FILED
FEB 18 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

RITA A. ROBERTS, Plaintiff, vs. PAWHUSKA HOSPITAL, INC., an Oklahoma corporation; SAM GROOM; STANLEE ANN MATTINGLY; CATHY FRAZIER; and ROBERT L. HENDERSON, Defendants.	)	No. 86-C-620-E

ORDER OF DISMISSAL

NOW on this _____ day of _____, 1987, having reviewed the Joint Application for Dismissal Without Prejudice to dismiss certain defendants, this Court finds that said dismissal is proper.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Stanlee Ann Mattingly, Cathy Frazier and Robert L. Henderson be dismissed from this case without prejudice, and that each party shall be responsible for his or her own costs and attorney's fees.

S/ JAMES O. ELLISON
United States District Judge

APPROVED:

HOLLOWAY, DOBSON, HUDSON & BACHMAN

By A. Scott Johnson
A. Scott Johnson
211 N. Robinson, Suite 900
Oklahoma City, OK 73102
(405) 235-8593
Attorneys for Defendants

Greg Bledsoe
D. Gregory Bledsoe
1515 South Denver
Tulsa, OK 74119
(918) 599-8118
and
James W. Dunham, Jr.
7666 East 61st, Suite 240
Tulsa, Oklahoma 74133
(918) 254-0626
Attorneys for Plaintiff

C-22
5/84

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

JET-LUBE, INC. Plaintiff(s), vs. FRANKLIN SUPPLY COMPANY Defendant(s).	)	No. 86-C-441-B

FILED
FEB 17 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The plaintiff/ JET-LUBE, INC. having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation, as to Plaintiff's motion for Attorney Fees.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 17 day of FEBRUARY, 19 87.

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

14

Entered

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

FILED
FEB 17 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

AMERICAN INTERINSURANCE EXCHANGE,	)	
Plaintiff,	)	
vs.	)	No. 86-C-148-B
JOHN G. CLARY, et al.,	)	
Defendants.	)	

ORDER NUNC PRO TUNC
DISMISSING PETITION IN INTERVENTION

This matter came on for hearing before the undersigned Judge of the United States District Court in and for the Northern District of Oklahoma on January 9, 1987, upon the stipulation for Order of Dismissal of the Intervenor, Dairyland Insurance Company, and Defendants, C.B.S. Insurance Agency, Inc., an Oklahoma corporation, Fred Roseborough, individually and d/b/a Fred Roseborough Agency, and H.R. Eveland. Those parties stipulated that the Petition in Intervention could be dismissed with prejudice; the Court's Order to that effect was filed January 15, 1987. It was not the intention of the parties or the Court to dismiss any remaining claims of Plaintiff. Questions having arisen about the effect of that Order on the claims of Plaintiff, American Interinsurance Exchange. The Court hereby enters its Order Nunc Pro Tunc to be substituted in the place and instead of its Order of January ~~9~~ 15, 1987. The

Court, having examined the pleadings and being well and fully advised in the premises, is of the opinion that the Petition in Intervention should be dismissed.

IT IS THEREFORE, ORDERED ADJUDGED AND DECREED by the Court that the Petition in Intervention of Dairyland Insurance Company be, and the same is hereby dismissed with prejudice.

DATED this 17 day of February, 1987.

S/ THOMAS R. BRETT

JUDGE OF THE U.S. DISTRICT COURT

APPROVED AS TO FORM:

STURM, KESSLER & BRAWNER
301 N.W. 63rd Street,
Suite 340
Oklahoma City, OK 73116
(405) 840-3290

PAUL J. KESSLER
Attorneys for Intervenor,
Dairyland Insurance Company

STEWART & ELDER
1329 Classen Drive
P.O. Box 2056
Oklahoma City, OK 73101
(405) 272-9351

WILLIAM G. BERGNER
Attorneys for Defendants,
C.B.S. Insurance Agency,
Inc., Fred Roseborough,
individually and d/b/a
Fred Roseborough Agency,
and H.R. Eveland

HOUSTON AND KLEIN, INC.
320 S. Boston, Suite 700
P.O. Box 2967
Tulsa, OK 74101
(918) 583-2131

TODD MAXWELL HENSHAW
Attorneys for Plaintiff,
American Interinsurance Exchange

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

DALE E. STUCKEY, Plaintiff, vs. JANNA MOLLOY, DWAYNE FLYNN, and KAREN HORTON, individually and in their official capacities as members of the Board of Education of Dependent School District No. D-35 of Creek County, Oklahoma, and DEPENDENT SCHOOL DISTRICT NO. D-35 of CREEK COUNTY, OKLAHOMA, a/k/a ALLEN BOWDEN PUBLIC SCHOOLS, Defendants.	)	Case No. 86-C-101-C

ORDER OF DISMISSAL

The Court has reviewed the Stipulations for Dismissal which has been signed by all the parties and, for good cause shown . . .

IT IS ORDERED that the captioned cause is dismissed with prejudice.

/S/ H. Dale Cook
Judge H. Dale Cook

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

FILED
FEB 17 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, a national banking association,	)	
Plaintiff,	)	
vs.	)	Case No. 86-C-895B
HOGAN SYSTEMS, INC., a California corporation, and HOGAN SYSTEMS, INC., a Delaware corporation,	)	
Defendants.	)	

FILED
FEB 17 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER APPROVING JOINT STIPULATION OF
DISMISSAL WITHOUT PREJUDICE OF
PLAINTIFF'S CLAIMS AGAINST DEFENDANT
HOGAN SYSTEMS, INC., A CALIFORNIA CORPORATION

Upon the Joint Stipulation Of Dismissal Without Prejudice Of Plaintiff's Claims Against Defendant Hogan Systems, Inc., A California Corporation, filed January 28th, 1987, (the "Stipulation"), and for good cause shown, it is ordered that:

1. The Stipulation is approved.

2. Plaintiff's claims against Defendant Hogan Systems, Inc., a California corporation, are hereby dismissed without prejudice.

3. Plaintiff and Defendant Hogan Systems, Inc., a California corporation, shall bear their own costs, expenses and attorneys' fees incurred solely in connection with the dismissal of Hogan-California from this action.

Dated this 17 day of ~~January~~ February, 1987.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

Submitted by:

Douglas L. Inhofe
CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for the Plaintiff
FIRST NATIONAL BANK AND
TRUST COMPANY OF TULSA

Approved by:

James R. Miller
MOYERS, MARTIN, SANTEE, IMEL
& TETRICK
320 South Boston, Suite 920
Tulsa, Oklahoma 74103
(918) 582-5281

Attorneys for Defendants
HOGAN SYSTEMS, INC., a
Delaware Corporation, and
HOGAN SYSTEMS, INC., a
California Corporation

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

IN RE:	)	
AMERICAN SOLAR, INC.,	)	
Debtor,	)	
and	)	Bankruptcy Case No. 86-00596
FAFCO, INC.,	)	Adversary Proceeding No. 86-0417
Appellant,	)	District Court No. 86-C-1156B
vs.	)	
JAMES R. ADELMAN, TRUSTEE,	)	
Appellee.	)	

FILED

FEB 17 1987

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

ORDER DISMISSING APPEAL

Upon the Withdrawal of Application for Leave to Appeal Interlocutory Order of the Appellant, Fafco, Inc., the Court hereby orders that Appellant's appeal is dismissed as having been rendered moot.

DATED this 17 day of February, 1987.

S/ THOMAS R. BRETT

THE HONORABLE THOMAS BRETT
UNITED STATES DISTRICT COURT JUDGE

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

BILLY L. EVANS, JR., and PATRICIA EVANS, and AMERICAN INSURANCE COMPANY, an Illinois corporation,	)	
Plaintiffs,	)	
v.	)	No. 86-C-49-B
THE BLACK CLAWSON COMPANY, an Ohio corporation,	)	
Defendant,	)	
and	)	
FARREL COMPANY, MIDVALE-HEPPENSTALL COMPANY, FOXBORO COMPANY, and GENERAL ELECTRIC COMPANY,	)	
Third-Party Defendants.	)	

FILED
FEB 17 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER FOR DISMISSAL WITHOUT PREJUDICE

The Court, having reviewed the Stipulation Of Dismissal filed by the party litigants herein, finds that the Third-Party Defendant, Foxboro Company, should be and is hereby dismissed from the above-styled and numbered cause of action without prejudice pursuant to Rule 41(a)(1)(ii)(c) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that counsel for Foxboro Company shall transmit a copy of this Order For Dismissal Without Prejudice to all counsel of record herein.

Thomas R. Brett
United States District Judge

52

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

FILED
FEB 17 1987
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

SOUTHLAND ENERGY CORP.,	)	
	)	No. 85-C-382-B
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

O R D E R

This matter comes before the Court on Plaintiff's Application to Withdraw Motion to Reopen. The Motion is granted.

On October 9, 1985, this court entered an Administrative Closing Order in this case pending final resolution of related matters in the U.S. Tax Court in Deutsche Corporation and Subsidiaries v. Commissioner, Docket Nos. 26000-82 and 12708-83. In November 1986, the U.S. Tax Court entered its orders and decisions in the Deutsche cases. On December 22, 1986, Plaintiff herein filed its Motion to Reopen this case. On January 7, 1987, at Scheduling Conference, Plaintiff agreed to withdraw its Motion to Reopen. Plaintiff has advised the Court it hereby withdraws its Motion to Reopen and agrees to a dismissal of this action with prejudice.

Accordingly, the Plaintiff's Application to Withdraw Motion to Reopen is granted and this matter is dismissed with prejudice.

IT IS SO ORDERED, this 17 day of Feb., 1987.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 17 1987

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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
TEENA E. TAYLOR,	)	
Defendant.	)	CIVIL ACTION NO. 86-C-791-B

ORDER OF DISMISSAL

NOW on this 17th day ~~January,~~ February 1987, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve her have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, Teena E. Taylor, be and is dismissed without prejudice.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FROM AND CONTENT:

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

PETER BERNHARDT
Assistant United States Attorney

C-22
5/84

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

KYLE ROBIN Plaintiff~~(s)~~,	)	
vs.	)	No. 86-C-697-B
DEE WILLIAMS and OSCAR WILLIAMS d/b/a DEE'S TYPING SERVICE	)	
Defendant(s).	)	

FILED
FEB 17 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The defendants/DEE WILLIAMS & OSCAR WILLIAMS d/b/a DEE'S TYPING SERVIC having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 17 day of FEBRUARY, 1987.

UNITED STATES DISTRICT JUDGE

18.

C-25
5/85

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

Kristina L. Krutal McArthur Plaintiff(s),	)	
vs.	)	No. 86-C-214-E
New Jersey Mfg. Insur. Co. Defendant(s).	)	

FILED
FEB 17 1987
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

Rule 36(a) of the Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

> (a) In any case in which no action has been taken by the parties for six (6) months, it shall be the duty of the Clerk to mail notice thereof to counsel of record or to the parties, if their post office addresses are known. If such notice has been given and no action has been taken in the case within thirty (30) days of the date of the notice, an order of dismissal may in the Court's discretion be entered.

In the action herein, notice pursuant to Rule 36(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on December 9, 1986. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 17 day of February, 1987.

UNITED STATES DISTRICT JUDGE

12

Entered

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

FILED

FEB 17 1987

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

MAVIS COMPTON, Plaintiff, v. RED DEVIL, INC., a New Jersey Corporation, Defendant.	)	No. 86-C-671-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 sustained in part and denied in part.

This is an action arising out of the termination of Plaintiff after some nine years employment with the Defendant. Plaintiff alleges three causes of action herein: 1) Breach of Contract; 2) Tortious Bad Faith Breach of Contract; and 3) Negligent or Intentional Infliction of Emotional Distress. These claims are addressed separately below.

Summary judgment must be denied if a genuine issue of material fact is presented to the trial court. Exnicious v. United States, 563 F.2d 418, 425 (10th Cir. 1977). In making this determination, the court must view the evidence in the light most favorable to the party against whom judgment is sought. National Aviation Underwriters, Inc. v. Altus Flying Service, Inc., 555 F.2d 778, 784 (10th Cir. 1977). Factual inferences tending to show triable issues must be resolved in favor of the existence of those issues. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980). The party moving for summary judgment has the

12

cps Hand delivered to counsel h

burden of showing that there is no genuine issue of fact regarding the legal dispute, but the party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials contained in his pleading. The non-movant must set forth specific facts with supporting material showing that there is a genuine issue for trial. Celotex Corporation v. Catrett, 477 U.S.--, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S.--, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corp., 805 F.2d 342 (10th cir. 1986).

I. BREACH OF CONTRACT

Plaintiff claims that she was employed by Defendant under a contract which consisted, in part, of an employee handbook containing the terms of employment. Plaintiff contends that the Defendant breached this contract by refusing to enforce employment evaluation procedures, by resorting to the termination clause in bad faith and by issuing no verbal or written warnings of unsatisfactory performance before terminating her. Plaintiff claims, under the theory of Hall v. Farmers Ins. Exchange, 713 P.2d 1027 (Okl. 1985), that Defendant breached the covenant of good faith which is implied in all employment contracts in Oklahoma. Plaintiff alleges that Defendant terminated her for excessive absences after 9 years 4 months employment because Plaintiff would have had a vested interest in the company profit sharing plan and thrift plan after 10 years employment. Defendant contends that the Employee Handbook specifically provides that an employee may be discharged for chronic absence, that Plaintiff was absent from work 61 out of

215 work days between January 1, 1985, and November 25, 1985, and, therefore, Plaintiff was not terminated in bad faith. In Grayson v. American Airlines, Inc., 803 F.2d 1097, 1099 (10th Cir. 1986), the Court of Appeals stated that if a trial court, on a motion for summary judgment, finds that there was good cause for an employee's termination, that does not end the inquiry into whether an employer breached its implied covenant of good faith dealing. Under the facts as presented, the court concludes that there is a genuine issue of material fact as to whether Defendant, although acting with cause, terminated Plaintiff in bad faith in order that her profit sharing and other rights under the Employment Handbook would not vest. For this reason, the court concludes that granting the motion for summary judgment with respect to Plaintiff's Breach of Contract claim is inappropriate at this time. The issue will be re-examined at trial.

II. TORTIOUS BAD FAITH
BREACH OF CONTRACT

In her second cause of action, Plaintiff claims that by terminating her under the circumstances outlined above, Defendant committed a tort of bad faith breach of contract. Hall, supra, does not establish a tort cause of action for bad faith breach of contract. In Solberg v. Reading & Bates Corporation, No. 85-C-158-B (N.D. Okla. November 18, 1985)(order overruling a motion to dismiss in part and sustaining it in part), this court dismissed a wrongful discharge tort claim asserted under Hall. The court noted:

> "The plaintiff is Hall did not pursue a cause of action sounding in tort. Further, the Oklahoma Supreme Court's recognition of the implied covenant of good faith between the parties to every contract does not create tort damages for breach thereof."

Thus, plaintiff has no tort claim for bad faith breach under Hall. However, under Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977), and its progeny, a tort cause of action exists for breach of the implied duty to act in good faith and deal fairly. However, Christian dealt with the specific obligation of an insurer to its insured. The plaintiff contends that reading Christian in conjunction with Hall, particularly in light of the Oklahoma Court of Appeals' decision in Hinson v. Cameron, 57 O.B.J. 1229 (May 15, 1986), establishes that Oklahoma now recognizes a tort cause of action for breach of the duty to deal fairly and in good faith with reference to employment termination. However, the Hinson decision has not yet been approved for publication in the official reporter, and, under 20 O.S. 1981 §30.5, it is not binding precedent at this time. Hinson does not cite Hall as authority for a tort cause of action. Consequently, this court is not required to follow the principle of law announced in Hinson and declines to extend the tort cause of action recognized in Christian beyond the facts of that case. For this reason, Defendant's Motion for Summary Judgment is sustained with respect to Plaintiff's tort claim for Bad Faith Breach of Contract.

III. INFLICTION OF EMOTIONAL DISTRESS

Plaintiff's final claim is for Negligent or Intentional Infliction of Emotional Distress. Whether Plaintiff's claim is based on negligent or intentional conduct by Defendant, the court must determine whether that conduct may reasonably be regarded as so outrageous and extreme as to permit recovery. Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978); Taylor v.

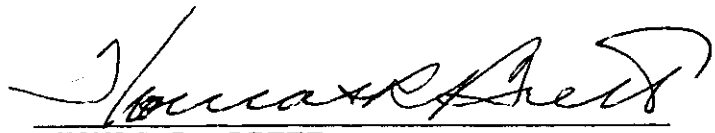
Gilmartin, 686 F.2d 1346 (10th Cir.), cert. denied, sub nom Taylor v. Howard, 459 U.S. 1147 (1983). The conduct necessary to incur liability for infliction of emotional distress is extreme. The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Breeden, supra, at 1378. In addition, the distress suffered by the victim must be "severe emotional distress." Id. at 1377 (emphasis in original).

The evidence submitted to the court establishes that Plaintiff's claim for infliction of emotional distress is based on the contention that Mrs. Compton found it very stressful to be repeatedly turned down for jobs when she told prospective employers that she was fired by Defendant for excessive absence. (Deposition of Mavis J. Compton p. 23). There are several fatal flaws with this claim. First, the emotional distress complained of was not caused by Defendant, but by the prospective employers who did not hire Plaintiff, apparently on the basis of her excessive absence when employed by Red Devil. Second, the only conduct by Defendant which could be the basis of this claim - i.e. terminating Plaintiff - was not to outragrous or extreme as to go beyond all bounds of decency "and be regarded as atrocious and utterly intolerable in a civilized community." Breeden, supra. Finally, although Plaintiff has stated she found the result of her termination and rejection by prospective employers "stressful," this hardly approaches the level of severe emotional distress necessary to support this claim. For these reasons, the court concludes, as a matter of law, that Plaintiff's claim for infliction of emotional distress is fatally

flawed. Therefore, Defendant's motion for summary judgment is sustained with respect to this cause of action.

In summary, the Court hereby grants the Defendant's Motion for Summary Judgment with respect to Counts II and III of Plaintiff's Complaint and denies the motion with respect to Count I. Since Count I, breach of contract, will not support a claim for punitive damages, any such claim is necessarily stricken.

IT IS SO ORDERED, this 17th day of Feb., 1987.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE