



2. The defendant, Tech Center Group, Inc. ("Tech"), is a corporation incorporated under the laws of the State of Oklahoma, having its principal place of business in the State of Oklahoma.

3. All individual defendants are citizens of the State of Oklahoma.

4. The matter in controversy exceeds exclusive of interest and costs the sum of \$10,000.00.

5. This Court has jurisdiction of the subject matter of this dispute and all causes of action asserted herein, pursuant to and in accordance with the provisions of 28 U.S.C. Section 1332.

6. Venue as to Tech is proper in this judicial district pursuant to 28 U.S.C. Section 1391(c).

7. Venue as to Roy Farrow and Nettie Farrow is proper in this judicial district pursuant to the provisions of 28 U.S.C. Section 1392(a).

8. The defendants, Tech, Roy Farrow and Nettie farrow, have failed to answer the allegations contained in the Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment and Affidavit filed by the plaintiff on the 15th day of January, 1988.

9. The allegations contained in the Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment and Affidavit shall be deemed confessed and taken

as true pursuant to Rule 14(a), Rules of the United States District Court for the Northern District of Oklahoma.

10. That plaintiff is entitled to judgment in its favor, for the relief prayed for.

11. The defendants, Tech, Roy Farrow and Nettie Farrow, were at the time of the filing of this action indebted to the plaintiff in the principal amount of \$13,424.74, which has been reduced to \$1,424.74 pursuant to a certain settlement agreement entered into by the plaintiff with Larry Sand, Linda Sand, Jim Hunzeker, Mary Sue Hunzeker and Geraldine Weatherford, plus repossession and storage expenses in the amount of \$1,015.03, together with interest thereon in the amount of \$3,424.74 as of February 9, 1987, and accruing at the rate of \$9.37 per day thereafter, until paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the plaintiff, ITT Commercial Finance Corporation, recover of the defendants, Tech Center Group, Inc., Roy Farrow and Nettie Farrow, judgment in the sum of \$1,424.74, plus repossession and storage expenses in the amount of \$1,015.03, plus interest in the amount of \$3,424.74 as of February 9, 1987, and accruing at the rate of \$9.37 per day thereafter, until paid, and all costs of the action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff shall make separate application to this Court for an award of attorney fees *pursuant to local rule.*

  
\_\_\_\_\_  
JUDGE OF THE UNITED STATES  
DISTRICT COURT

404-1-1/ls

UNITED STATES DISTRICT COURT,  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 15 1986  
JACK C. MEYER, CLERK  
U.S. DISTRICT COURT

BORG-WARNER ACCEPTANCE )  
CORPORATION, a Delaware )  
Corporation, )  
 )  
Plaintiff, )  
 )  
vs. ) Case No. 86-C-882-B  
 )  
CHARLES J. BAZARIAN, )  
ROBERT BYERS, PAMELA BYERS, )  
JAMES D. PAYNE and JUDY PAYNE, )  
and JIM PAYNE OLDS-PONTIAC, )  
INC., an Oklahoma Corporation, )  
 )  
Defendants. )  
\_\_\_\_\_ )

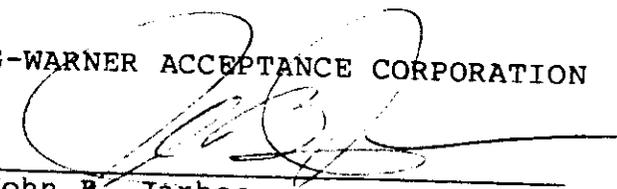
NOTICE OF DISMISSAL

COMES NOW the Plaintiff, Borg-Warner Acceptance Corporation, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and gives notice of its dismissal of the captioned matter as to the Defendants Robert Byers and Pamela Byers only, said parties not having filed or served an Answer or Motion for Summary Judgment herein.

Plaintiff shows the Court that it has not previously dismissed this action against said Defendants in any Court of the United States or of any state, nor has any action based on or including the claims set forth herein been previously so dismissed.

WHEREFORE, Plaintiff's action is hereby dismissed as against the Defendants Robert Byers and Pamela Byers only.

BORG-WARNER ACCEPTANCE CORPORATION

By: 

John B. Jarboe  
JARBOE & STOERMER  
1810 Mid Continent Tower  
Tulsa, Oklahoma 74103  
(918) 582-6131

CERTIFICATE OF SERVICE

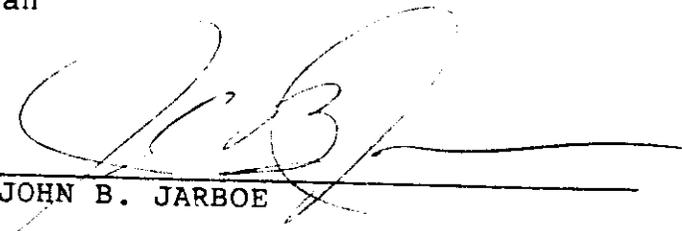
I hereby certify that I mailed a true and correct copy of the above and foregoing Notice of Dismissal by depositing the same in the U.S. Mail, Tulsa, Oklahoma, with proper postage fully prepaid and affixed thereto, this 11 day of March, 1988, and addressed to:

Richard F. Garren, Esq.  
P.O. Box 52400  
Tulsa, OK 74152  
Attorney for James D. Payne,  
Judy Payne and Jim Payne  
Olds-Pontiac, Inc.

Robert and Pamela Byers  
c/o Donald E. DeSpain, Esq.  
201 W. Park Avenue  
Oklahoma City, OK 73102

Kurt Rupert, Esq. and  
J. T. Hardin, Esq.  
1800 Union Plaza  
3030 N.W. Expressway  
Oklahoma City, OK 73112  
Attorneys for Charles J. Bazarian

Thomas J. Kenan, Esq.  
511 Couch Drive  
Oklahoma City, OK 73112  
Trustee in Bankruptcy for  
Charles J. Bazarian

  
\_\_\_\_\_  
JOHN B. JARBOE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ROSHELL C. WHITE, )  
 )  
 Defendant. )

MAR 15 1988

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

CIVIL ACTION NO. 88-C-77-E

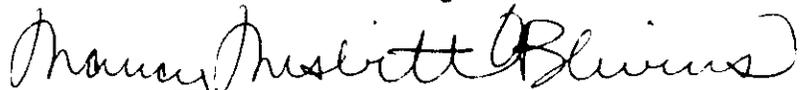
NOTICE OF DISMISSAL

COMES NOW the United States of America by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Nancy Nesbitt Blevins, 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 14<sup>th</sup> day of March, 1988.

UNITED STATES OF AMERICA

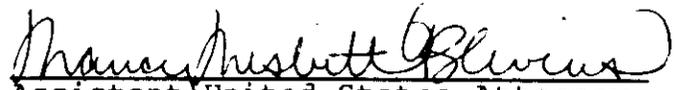
TONY M. GRAHAM  
United States Attorney



NANCY NESBITT BLEVINS  
Assistant United States Attorney  
3600 United States Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

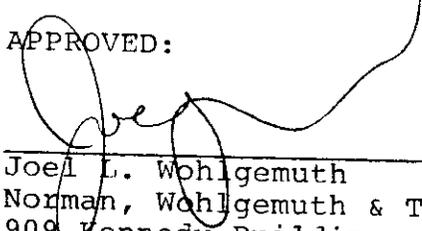
CERTIFICATE OF SERVICE

This is to certify that on the 14<sup>th</sup> day of March, 1988, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Rosshell C. White, 428 South Cherokee, Claremore, Oklahoma 74017.

  
Assistant United States Attorney



APPROVED:



---

Joel L. Wohlgemuth  
Norman, Wohlgemuth & Thompson  
909 Kennedy Building  
Tulsa, OK 74103  
(918) 583-7571

Attorneys for Plaintiffs



---

Mark K. Blongewicz  
Hall, Estill, Hardwick, Gable,  
Golden & Nelson  
4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, OK 74172

Attorneys for Defendants

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

THE LAW COMPANY, INC., )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 COMMERCIAL GLAZING OF )  
 TEXAS, INC., and INDIANA )  
 LUMBERMENS MUTUAL )  
 INSURANCE COMPANY, )  
 )  
 Defendants.)

No. 87-C-181-B

**FILED**

MAR 15 1988

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

ORDER OF DISMISSAL

Upon stipulation of the Plaintiff and Defendant, INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, and by reason of settlement, the within styled and numbered cause is hereby dismissed with prejudice.

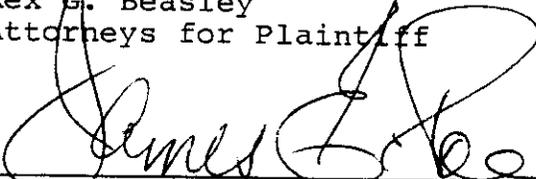
Dated the 15<sup>th</sup> day of March, 1988.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE

  
For David H. Sanders, Sr. and  
Rex G. Beasley  
Attorneys for Plaintiff

  
JAMES E. POE, Attorney for  
Defendant, Indiana Lumbermens Mutual  
Insurance Company

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

INA GILBERT and )  
JAMES GILBERT, )  
Plaintiffs, ) Case No. 87-C-470-E  
v. )  
KIMBERLY-CLARK CORP., )  
Defendant. )

STIPULATION OF DISMISSAL

The parties hereto, JAMES GILBERT and INA GILBERT, husband and wife, plaintiffs, and KIMBERLY-CLARK CORPORATION, defendant, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, do hereby stipulate that the plaintiffs may and do hereby dismiss without prejudice all their causes of action against only the Defendants John Does 1-50. Parties similarly stipulate that plaintiffs' Fifth Cause of Action for relief, namely that JAMES GILBERT has suffered loss of services, society, companionship and consortium of his wife, is dismissed without prejudice against KIMBERLY-CLARK CORPORATION.

CHARLES L. STUTTE  
CHARLES E. DAVIS  
BRUCE MILLER TOWNSEND

By:   
BRUCE MILLER TOWNSEND  
Attorneys for Plaintiffs  
201 West Fifth-Suite 333  
Tulsa, OK 74103-4212  
918-582-9220 OBA #9072

FELDMAN, HALL, FRANZEN, WOODARD & FARRIS

By:   
JOHN R. WOODARD III  
Attorneys for Defendant  
Park Centre - Suite 1400  
525 South Main  
Tulsa, OK 74103-4409  
918-582-7129

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

THOMAS ROY TRUMPETER; SHIRLEY  
LEE TRUMPETER; BRIERCROFT  
SERVICE CORPORATION; CREDIT  
BUREAU OF BARTLESVILLE; COUNTY  
TREASURER, Washington County,  
Oklahoma; and BOARD OF COUNTY  
COMMISSIONERS, Washington  
County, Oklahoma,

Defendants.

**FILED**

MAR 14 1988

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

CIVIL ACTION NO. 87-C-846-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day  
of March, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Phil Pinnell, Assistant United States Attorney;  
the Defendants, Thomas Roy Trumpeter; Shirley Lee Trumpeter;  
Briercroft Service Corporation; Credit Bureau of Bartlesville;  
County Treasurer, Washington County, Oklahoma, and Board of  
County Commissioners, Washington County, Oklahoma, appear not,  
but make default.

The Court being fully advised and having examined the  
file herein finds that the Defendant, Briercroft Service  
Corporation, acknowledged receipt of Summons and Complaint on  
October 23, 1987; that the Defendant, Credit Bureau of  
Bartlesville, acknowledged receipt of Summons and Complaint on  
October 26, 1987; that Defendant, County Treasurer, Washington

County, Oklahoma, acknowledged receipt of Summons and Complaint on December 8, 1987; and that Defendant, Board of County Commissioners, Washington County, Oklahoma, acknowledged receipt of Summons and Complaint on October 20, 1987.

The Court further finds that the Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter, were served by publishing notice of this action in the Bartlesville Examiner-Enterprise, a newspaper of general circulation in Washington County, Oklahoma, once a week for six (6) consecutive weeks beginning January 7, 1988, and continuing to February 11, 1988, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America,

acting on behalf of the Administrator of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this court to enter the relief sought by the Plaintiff, both as the subject matter and the Defendants served by publication.

It appears that the Defendants, Thomas Roy Trumpeter; Shirley Lee Trumpeter; Briercroft Service Corporation; Credit Bureau of Bartlesville; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Five (5), Block One (1), BELLE MEAD ADDITION to Bartlesville, Washington County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on October 4, 1983, the Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter,

executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$28,000.00, payable in monthly installments, with interest thereon at the rate of thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated October 4, 1983, covering the above-described property. Said mortgage was recorded on October 10, 1983, in Book 806, Page 44, in the records of Washington County, Oklahoma.

The Court further finds that the Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter, are indebted to the Plaintiff in the principal sum of \$28,006.20, plus interest at the rate of 13 percent per annum from March 1, 1987 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, Briercroft Service Corporation; Credit Bureau of Bartlesville; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, Oklahoma, are in default and have no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Thomas Roy Trumpeter and Shirley Lee Trumpeter, in the principal sum of \$28,006.20, plus interest at the rate of 13 percent per annum from March 1, 1987 until judgment, plus interest thereafter at the current legal rate of \_\_\_\_\_ percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Briercroft Service Corporation; Credit Bureau of Bartlesville; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

---

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney



---

PHIL PINNELL  
Assistant United States Attorney

PP/css

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

FILED  
MAR 14 1988  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

MARY LOU BROWN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GREAT PLAINS COCA-COLA )  
 BOTTLING COMPANY, formerly )  
 NORTHEASTERN OKLAHOMA )  
 BOTTLING COMPANY, )  
 )  
 Defendant. )

Case No. 87-C-812 B

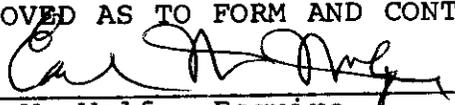
ORDER OF DISMISSAL

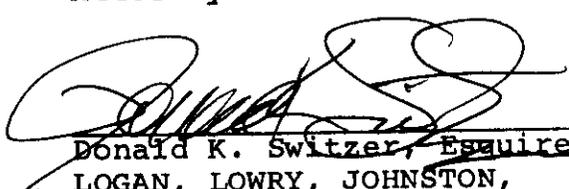
Pursuant to the Joint Stipulation of the parties and for good cause shown it is hereby ORDERED, that this action is dismissed with prejudice by and pursuant to Rule 41(a)(1), F.R.C.P.

S/ THOMAS R. BRETT

Thomas R. Brett  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

  
Earl W. Wolfe, Esquire  
Hartford Building, Suite 123  
110 South Hartford  
Tulsa, Oklahoma 74120-1834  
Attorneys for Plaintiff

  
Donald K. Switzer, Esquire  
LOGAN, LOWRY, JOHNSTON,  
SWITZER, WEST & McGEADY  
P. O. Box 558  
Vinita, Oklahoma 74301  
(918) 256-7511  
Attorneys for Defendant

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

JAMES H. ANDERSON,

Plaintiff,

v.

LARRY LIST OLDSMOBILE-CADILLAC GMC TRUCKS,  
INC.,

Defendant.

No. 87-C-794-B

FILED

MAR 14 1988

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

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 14 day of March, 1988, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

THOMAS R. BRETT

United States District Judge

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

**FILED**

MAR 14 1988

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

CASH ADELBLUE and  
PROTECTION and  
ADVOCACY AGENCY,

Plaintiffs,

v.

OKLAHOMA DEPARTMENT  
OF MENTAL HEALTH and  
EASTERN STATE HOSPITAL,

Defendants.

No. 87-C-779-B

ORDER OF DISMISSAL

NOW on this 14 day of March, 1988, upon the written application of the plaintiffs, Cash Adelblue and Protection and Advocacy Agency, and the defendants, Oklahoma Department of Mental Health and Eastern State Hospital, for a dismissal with prejudice as to the above-encaptioned Complaint, as to said defendants, and all causes of action therein, and the Court having examined said application, finds that said parties have entered into a compromise settlement covering claims involved in the Complaint against said defendants and have requested the court to dismiss said complaint with prejudice, as against said defendants. The Court being fully advised in the premises, finds said settlement is to the best interest of said plaintiffs.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the Complaint and all causes of action of the plaintiffs Cash Adelblue and the Protection and Advocacy Agency, against the defendants, Oklahoma Department of Mental Health and Eastern State Hospital, be and the same are hereby dismissed with prejudice to any further action.

IT IS, FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the parties  
aforementioned shall each bear their own separate attorney fees and court  
costs in the above-captioned matter.

S/ THOMAS R. BRETT

Thomas R. Brett, Judge of the  
United States District Court,  
Northern District of Oklahoma

Approvals:

Renee L. Waisner  
Renee L. Waisner, Attorney for Plaintiffs

Sue Wycoff  
Sue Wycoff, Attorney for Defendants

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

WILBURN RALLO, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 TED WALMAN, )  
 )  
 Defendant. )

87-776-B **FILED**

MAR 14 1988

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

ORDER

Now before the Court for consideration is the Petition for a Writ of Habeas Corpus of Wilburn Rallo Mansfield. Petitioner was convicted in Tulsa County District Court, Case Nos. 20626 and 20627, on September 8, 1964. Mansfield was found guilty of Attempted Robbery with Firearms, A.F.C.F., and Attempted Robbery by Force, A.F.C.F. and sentenced to fifteen (15) years and five (5) years to run consecutively. Mansfield seeks federal habeas relief asserting: (1) his guilty pleas were not voluntarily or intelligently offered; (2) his attorney's representation was ineffective; (3) the trial court failed to investigate his mental state before accepting the guilty pleas; and (4) the trial court failed to advise him that the guilty pleas would allow the State to use the convictions in future proceedings as enhancement for punishment.

The Respondent argues that Mansfield's delayed Petition should be dismissed pursuant to Rule 9(a) of the Rules Governing §2254 Cases in the United States District Courts.

Rule 9(a) provides:

Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond

to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Respondent has shown that the passage of twenty-four (24) years has prejudiced his ability to respond. The critical evidence of what transpired when Mansfield entered his guilty pleas, is no longer available. No transcript is available and the court reporter present at the hearing is now deceased. The testimony from the prosecutor, the defense counsel, and the judge would be based on recollections of events taking place twenty-four (24) years ago. Thus, the burden shifts to Mansfield to show that his habeas petition is based on grounds which he could not <sup>have</sup> known, even by the exercise of reasonable diligence, prior to the court reporter's death. Bowen v. Murphy, 698 F.2d 381 (10th Cir. 1983). As in Bowen, Mansfield has been given the opportunity to rebut the showing of prejudice and explain his delay as required by Rule 9(a).

Mansfield failed to rebut the showing of prejudice. As to the reason for his twenty-four (24) year delay, Mansfield explains that until his conviction for Robbery with Firearms in 1984, he had no idea that the 1964 convictions would be used against him for enhancement of future sentences.

Mansfield's explanation for delay does not rely on a change of law or the discovery of new evidence. Rather, it rests on a basic understanding of law of which Mansfield could have had knowledge by the exercise of reasonable diligence. Having failed

to meet the standard of reasonable diligence, the petition may be dismissed. Bowen v. Murphy, 698 F.2d at 383.

Therefore, it is the ORDER of this Court that Mansfield's Petition for a Writ of Habeas Corpus be dismissed.

Dated this 14 day of March, 1988.

  
THOMAS R. BRET  
UNITED STATES DISTRICT JUDGE

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

**FILED**

IRENE STEEN DARBY, as personal )  
representative of the Estate of )  
Michael Joe Darby, Deceased, and )  
individually, as guardian and )  
next friend of Jennifer Lee Darby, )

Plaintiff, )

v. )

ED DIETLIN, d/b/a DIETLIN AIRCRAFT )  
ENGINES, )

Defendant. )

MAR 14 1988

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

No. 87-C-590-B

O R D E R

This matter came before the Court for a status conference on February 11, 1988. At the status conference the Court informed the parties that the above-captioned case would be dismissed for failure to prosecute as no action has been taken in this case since August 21, 1987. The parties informed that an identical action is now pending in Ohio. The Court therefore directed that if the Plaintiff paid the Defendant's attorney fees this case would be dismissed without prejudice or if Plaintiff did not pay the fees the case would be dismissed with prejudice to refileing. The Court further directed the parties to file any pleadings in this regard by February 25, 1988. The Court has reviewed the case file and notes that neither party has filed any pleadings by the February 25, 1988 deadline. Therefore, the instant action is dismissed with prejudice to refileing in the Northern District of Oklahoma pursuant to Fed.R.Civ.P. 41(b) for failure to prosecute

and failure to abide by the Court's rules and orders. The dismissal of this case will have no effect on the pending Ohio action.

IT IS THEREFORE ORDERED this case is dismissed with prejudice to refiling same in this district.

DATED this 14<sup>th</sup> day of March, 1988.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

HOME SAVINGS & LOAN )  
ASSOCIATION, F. A., a )  
savings and loan association, )

Plaintiff, )

vs. )

No. 87-C-276-B

SOUTHWOOD PARTNERSHIP, an )  
Oklahoma General Partnership, )  
consisting of General Partners )  
of COOPER BROS., INC., )  
an Oklahoma corporation, )  
DAN COOPER, DAVID C. COOPER, )  
and RICHARD L. COOPER, )  
and )  
DAN COOPER, DAVID C. COOPER )  
and RICHARD L. COOPER, )  
individuals, )

Defendants and )  
Third-Party Plaintiffs, )

vs. )

HOME SAVINGS & LOAN )  
ASSOCIATION, F.A., a )  
savings and loan association; )  
FIRST FEDERAL SAVINGS BANK, )  
WATERLOO, IOWA, a savings and )  
loan association; FIRST FEDERAL )  
SAVINGS & LOAN ASSOCIATION OF )  
COUNCIL BLUFFS, COUNCIL BLUFFS, )  
IOWA, a savings and loan )  
association; MISSISSIPPI VALLEY )  
SAVINGS & LOAN ASSOCIATION, )  
BURLINGTON, IOWA, a savings and )  
loan association; FIRST FEDERAL )  
SAVINGS & LOAN OF DAVENPORT, )  
DAVENPORT, IOWA, a savings and )  
loan association; and )  
DUBUQUE SAVINGS & LOAN )  
ASSOCIATION, DUBUQUE, IOWA, )

Third-Party Defendants. )

**FILED**

MAR 14 1988

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

-  
JUDGMENT

NOW on this the 17<sup>th</sup> day of March, 1988, this matter comes on for hearing pursuant to the stipulation of the parties. The Plaintiff appears by J. Schaad Titus of Boone, Smith, Davis & Hurst; the Defendants, Southwood Partnership, Cooper Bros., Inc., Dan Cooper, David C. Cooper and Richard L. Cooper, appear by Ron Ripley of Linn & Helms; and the Third Party Defendants, First Federal Savings Bank, Waterloo, Iowa, First Federal Savings & Loan Association of Council Bluffs, Council Bluffs, Iowa, Mississippi Valley Savings & Loan Association, Burlington, Iowa, First Federal Savings & Loan of Davenport, Davenport, Iowa, and Dubuque Savings & loan Association, Dubuque, Iowa, appear by John B. Heatly of Fellers, Snider, Blankenship, Bailey & Tippens. The Court having examined the files and hearing based upon the stipulation of the parties as evidenced by their signatures approving this Judgment, finds as follows:

1. Judgment should be rendered against the Defendant, Southwood Partnership, *in rem* on the note sued on in the First Cause of Action for the principal sum of \$6,210,903.32 together with interest from and after December 15, 1985, at the rate of eighteen per cent per annum, until paid, plus a reasonable attorneys fee for collection of the sums due and all costs incurred.

2. The - Defendant, Southwood Partnership, made, executed and delivered to the Plaintiff a good and valid first mortgage on the following described real property situated in Tulsa County, State of Oklahoma, to-wit:

A Tract of Land, that is part of the Northwest Quarter of the Northeast Quarter (NW/4 NE/4) of Section Seventeen, Township Eighteen North, Range Thirteen East (17-18N-13E), Tulsa County, Oklahoma, said Tract of Land being described as follows, to-wit:

Starting at the Northwest Corner of the NE/4; thence S 0°24' 38"W along the westerly line of said NE/4 for 330.31' to the "POINT OF BEGINNING" of said tract of land, said point being the Northwest Corner of the S/2 of the N/2 of the NW/4 of the NE/4; thence S 89° 48' 50"E along the Northerly line of the S/2 of the N/2 of the NW/4 of the NE/4 for 755.68'; thence S 0° 23' 01"W for 990.49' to a point on the Southerly line of the NW/4 of the NE/4; thence N 89°50'52"W along said Southerly line for 756.15' to the Southwest Corner of the NW/4 of the NE/4; thence N 0° 24'38"E along the Westerly line of the NW/4 of the NE/4 for 990.94' to the "POINT OF BEGINNING" of said tract of land (hereinafter "Real Property").

with the required mortgage tax paid thereon by Plaintiff as shown on the endorsement of such mortgage.

3. Judgment should be rendered in favor of the Plaintiff and against the Defendant, Southwood Partnership, for the foreclosure of such mortgage upon the above described Real Property to secure the Judgment on the note sued upon in the First Cause of Action.

4. The mortgage in favor of the Plaintiff as described above constitutes the first lien upon the Real Property and the premises described above and any and all right, title and interest of the Defendants in the Real Property or the premises described above and any and all other right, title and interest of other defendants in and to this cause, or any of the them have, or claim to have, in and to such Real Property, is subsequent, junior and inferior to the mortgage and lien of the Plaintiff to secure the sums identified above.

5. The mortgage specifically provides that the appraisal of the premises is expressly waived or not waived at the sole option of the Plaintiff, that the Plaintiff hereby determines to exercise the option and seek appraisal and sale of the Real Property.

6. The Defendant's Counterclaim and Third Party Petition against the Third Party Defendants is and should be dismissed with prejudice.

7. The Plaintiffs' claims for a judgment *in personam* against the Defendants, Cooper Bros., Inc., Dan Cooper, David C. Cooper and Richard L. Cooper, should be dismissed with prejudice.

Based upon the stipulation of the parties, it is therefore ORDERED, ADJUDGED AND DECREED that:

1. The -Plaintiff, Home Savings & Loan Association, F.A., have and recover judgment *in rem* against the Defendant, Southwood Partnership, on its First Cause of Action in the sum of \$6,210,903.32, together with interest thereon from and after December 15, 1985, at the interest rate of eighteen per cent per annum, plus a reasonable attorneys fee to be set by the Court, the costs of abstracting, the fees of the receiver and all other costs incurred.

2. The Plaintiff, Home Savings & Loan Association, F.A., have and recover judgment *in rem* against the Real Property for the foreclosure of its mortgage and lien, to-wit:

A Tract of Land, that is part of the Northwest Quarter of the Northeast Quarter (NW/4 NE/4) of Section Seventeen, Township Eighteen North, Range Thirteen East (17-18N-13E), Tulsa County, Oklahoma, said Tract of Land being described as follows, to-wit:

Starting at the Northwest Corner of the NE/4; thence S 0°24' 38"W along the westerly line of said NE/4 for 330.31' to the "POINT OF BEGINNING" of said tract of land, said point being the Northwest Corner of the S/2 of the N/2 of the NW/4 of the NE/4; thence S 89° 48' 50"E along the Northerly line of the S/2 of the N/2 of the NW/4 of the NE/4 for 755.68'; thence S 0° 23' 01"W for 990.49' to a point on the Southerly line of the NW/4 of the NE/4; thence N 89°50'52"W along said Southerly line for 756.15' to the Southwest Corner of the NW/4 of the NE/4; thence N 0° 24'38"E along the Westerly line of the NW/4 of the NE/4 for 990.94' to the "POINT OF BEGINNING" of said tract of land.

to the extent of the judgment *in rem* for principal, interest, attorneys fees and costs granted herein.

3. The Plaintiff has a first lien upon the subject Real Property to the extent of its judgment granted herein which runs against the Real Property; that the same be foreclosed as provided by law and that an order of sale issue in this cause commanding the Sheriff of Tulsa County to sell the above described Real Property with appraisalment.

4. An order of sale be issued, directing and commanding the advertisement and sale according to law on execution with appraisalment of the subject Real Property, free and clear, and discharged of, and from all interest, claims, liens and rights of redemption, of the Defendants and any and all persons claiming by, through or under the above named persons since the filing of the action; that such Real Property be sold according to the laws of the State of Oklahoma, and accordingly that the proceeds of such sale be immediately transmitted to the Clerk of the United States District Court for the Northern District of Oklahoma, and the Clerk be and is hereby ordered and directed to pay from the proceeds of the sale of such Real Property: first, the costs of this action of the sale; second: the judgment of the Plaintiff; and finally: the balance, if any, to be retained by the Court Clerk to abide further order of the Court; and that from and after the sale of the Real Property, the

parties to this action and any and all persons claiming under them since the filing of this action be, and are hereby barred, restrained and enjoined from having or asserting any right, title, interest or lien in, to or against the Real Property.

5. Upon confirmation of the sale of the subject Real Property, the proper party to do so shall deliver good and sufficient sheriff's deed to the purchaser of the Real Property, which deed shall convey all right, title, interest, estate and equity of redemption of any parties herein and each of them and all parties claiming under them since the filing of this action.

6. The counterclaims and third party claims of the Defendants, Southwood Partnership, an Oklahoma general partnership, and Cooper Bros., Inc., Dan Cooper, David C. Cooper, Richard L. Cooper, are and hereby dismissed with prejudice, and the Plaintiff's claims against the Cooper Bros., Inc., Dan Cooper, David C. Cooper and Richard L. Cooper, are hereby dismissed with prejudice.

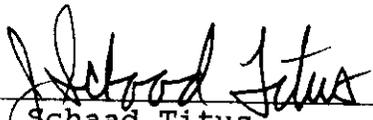
IT IS SO ORDERED.

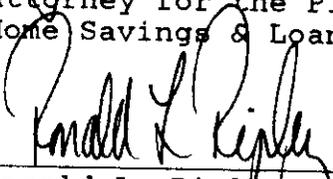
S/ THOMAS R. BRETT

---

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM, CONTENT AND  
STIPULATIONS:

  
\_\_\_\_\_  
J. Schaad Titus  
Attorney for the Plaintiff,  
Home Savings & Loan Association, F.A.

  
\_\_\_\_\_  
Ronald L. Ripley  
Attorney for the Defendants,  
Southwood Partnership, Cooper Bros., Inc.,  
Dan Cooper, David C. Cooper and Richard L. Cooper

  
\_\_\_\_\_  
John B. Heatly  
Attorney for the Third Party Defendants,  
First Federal Savings Bank, Waterloo, Iowa,  
First Federal Savings & Loan Association of  
Council Bluffs, Council Bluffs, Iowa,  
Mississippi Valley Savings & Loan Association,  
Burlington, Iowa, First Federal Savings & Loan  
of Davenport, Davenport, Iowa, and Dubuque  
Savings & Loan Association, Dubuque, Iowa

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GERALD E. BAIN; GWENDOLYN M. )  
JEFFERSON; AVCO FINANCIAL )  
SERVICES, INC.; STATE OF )  
OKLAHOMA ex rel. DEPARTMENT )  
OF HUMAN SERVICES; THE FOURTH )  
NATIONAL BANK OF TULSA; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; and BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
)  
Defendants. )

**FILED**

MAR 14 1988

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

CIVIL ACTION NO. 87-C-217-B

DEFICIENCY JUDGMENT

Now on this 14 day of March, 1988, there came on for hearing the Motion of the Plaintiff United States of America for leave to enter a Deficiency Judgment herein, said Motion being filed on the 19th day of February, 1988, and a copy of said Motion being mailed to Robert A. Todd, Esq., 2519 East 21st Street, Tulsa, Oklahoma 74114, Attorney for Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, and all other counsel of record. The Plaintiff, United States of America, acting on behalf of the Administrator of Veterans Affairs, appeared by Tony M. Graham, United States Attorney for the Northern District of Oklahoma through Phil Pinnell, Assistant United States Attorney, and the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, appeared neither in person nor by counsel.

The Court upon consideration of said Motion finds that the amount of the Judgment rendered herein on September 10, 1987, in favor of the Plaintiff United States of America, and against the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, with interest and costs to date of sale is \$36,365.56.

The Court further finds that the appraised value of the real property at the time of sale was \$30,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered September 10, 1987, for the sum of \$27,221.00 which is less than the market value.

The Court further finds that the said Marshal's sale was confirmed pursuant to the Order of this Court on the 8th day of March, 1988.

The Court further finds that the Plaintiff, United States of America on behalf of the Administrator of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, as follows:

Principal Balance as of 11/23/87	\$30,198.81
Interest	5,170.84
Late Charges to Date of Judgment	179.40
Appraisal by Agency	230.00
Management Broker Fees to Date of Sale	240.00
Abstracting	204.00
Publication Fees of Notice of Sale	<u>142.51</u>
TOTAL	\$36,365.56
Less Credit of Appraised Value	- <u>30,500.00</u>
DEFICIENCY	\$ 5,865.56

plus interest on said deficiency judgment at the legal rate of \_\_\_\_\_ percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Administrator of Veterans Affairs have and recover from Defendants, Gerald E. Bain and Gwendolyn M. Jefferson, a deficiency judgment in the amount of \$5,865.56, plus interest at the legal rate of 6.71 percent per annum on said deficiency judgment from date of judgment until paid.

ST. THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

PP/css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 ) BILLY R. SMITH; SHIRLEY J. )  
 ) SMITH; STATE OF OKLAHOMA ex rel. )  
 ) OKLAHOMA TAX COMMISSION; )  
 ) COUNTY TREASURER, Creek County, )  
 ) Oklahoma; and BOARD OF COUNTY )  
 ) COMMISSIONERS, Creek County, )  
 ) Oklahoma, )  
 )  
 ) Defendants. )

**FILED**

MAR 14 1988

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

CIVIL ACTION NO. 87-C-796-B

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day  
of March, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, Assistant United States  
Attorney; the Defendants, County Treasurer, Creek County,  
Oklahoma, and Board of County Commissioners, Creek County,  
Oklahoma, appear by Wesley R. Thompson, Assistant District  
Attorney, Creek County, Oklahoma; the Defendant, State of  
Oklahoma ex rel. Oklahoma Tax Commission, appears by its attorney  
Robert B. Struble; and the Defendants, Billy R. Smith and  
Shirley J. Smith, appear not, but make default.

The Court being fully advised and having examined the  
file herein finds that the Defendants, Billy R. Smith and  
Shirley J. Smith, acknowledged receipt of Summons and Complaint  
on October 6, 1987; that Defendant, State of Oklahoma ex rel.  
Oklahoma Tax Commission, acknowledged receipt of Summons and

Complaint on September 30, 1987; that Defendant, County Treasurer, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on September 30, 1987; and that Defendant, Board of County Commissioners, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on September 30, 1987.

It appears that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, filed their Answer herein on October 9, 1987; that Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer and Cross-Petition herein on October 14, 1987; and that the Defendants, Billy R. Smith and Shirley J. Smith, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

All that part of the Southeast Quarter of the Southeast Quarter of the Southwest Quarter (SE/4 SE/4 SW/4) of Section Seventeen (17), Township Nineteen (19) North, Range Nine (9) East of the Indian Base and Meridian, Creek County, State of Oklahoma, according to the U.S. Government Survey thereof, being more particularly described as follows, to-wit: BEGINNING at a point Twenty-five (25) feet North of the Southwest corner of the said Southeast Quarter of the Southeast Quarter of the Southwest Quarter (SE/4 SE/4 SW/4); thence North 0°04'30" West a distance of Three Hundred Forty-two and fifty/hundredths (342.50) feet; thence South 78°52'38" East a

distance of One Hundred Ninety-eight and sixty-one/hundredths (198.61) feet; thence South 8°55'00" West a distance of Three Hundred Seven and ninety-one/hundredths (307.91) feet; thence due West and Twenty-five (25) feet from the South line of said Section Seventeen (17) a distance of One Hundred Forty-six and seventy/hundredths (146.70) feet to the point of beginning, and reserving a twenty-five (25) foot easement for roadway and utility purposes along the West boundary line of said property.

The Court further finds that on May 4, 1982, the Defendants, Billy R. Smith and Shirley J. Smith, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$40,375.00, payable in monthly installments, with interest thereon at the rate of fifteen and one-half percent (15.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Billy R. Smith and Shirley J. Smith, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated May 4, 1982, covering the above-described property. Said mortgage was recorded on May 5, 1982, in Book 117, Page 1806, in the records of Creek County, Oklahoma.

The Court further finds that the Defendants, Billy R. Smith and Shirley J. Smith, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Billy R. Smith and Shirley J. Smith, are indebted to the Plaintiff in the

principal sum of \$40,378.32, plus interest at the rate of fifteen and one-half percent (15.5%) per annum from February 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, Billy R. Smith and Shirley J. Smith, were discharged in bankruptcy on December 15, 1986, Case No. 8601790 WC, United States Bankruptcy Court, Southern District of Mississippi.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, claims no right, title, or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$26.74, plus penalties and interest, for the year of 1986. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Billy R. Smith and Shirley J. Smith, in the principal sum of \$40,378.32, plus interest at the rate of fifteen and one-half percent (15.5%) per annum from February 1, 1986 until judgment, plus interest thereafter at the current legal rate of 6-7 1/2 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff

for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have and recover judgment in rem in the amount of \$26.74, plus penalties and interest, for personal property taxes for the year of 1986, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, in the amount of \$26.74, plus penalties and interest, for personal property taxes which are presently due and owing on said real property.

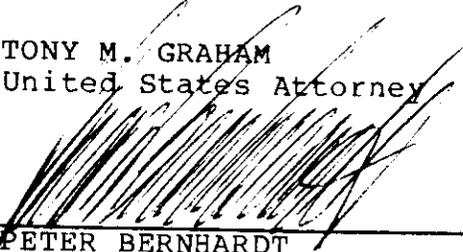
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney

  
PETER BERNHARDT  
Assistant United States Attorney

  
ROBERT B. STRUBLE  
Attorney for Defendant,  
State of Oklahoma ex rel.  
Oklahoma Tax Commission

  
WESLEY R. THOMPSON  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Creek County, Oklahoma

PB/css

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

FRANK RAPHEAL BROWN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) 87-601-B  
 THOMAS WHITE, et al, )  
 )  
 Defendant. )

FILED

MAR 14 1988

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

ORDER

Now before the Court is Respondent's Motion to Dismiss Pursuant to Rule 9(b) of the Rules Governing §2254 Cases in the United States District Courts (#6). Petitioner seeks federal habeas relief from a thirty (30) year sentence imposed upon his conviction of Shooting With Intent to Kill in Case No. CRF-81-3172. Petitioner now raises as grounds for habeas relief:

- (1) Denial of effective assistance of counsel in the failure to subpoena and call certain witnesses at petitioner's request;
- (2) Denial of effective assistance of counsel in stipulating to certain facts regarding a medical report without petitioner's consent;
- (3) Denial of effective assistance of counsel in failing to call the bailiff or jurors in support of petitioner's motion for new trial;

Petitioner has once before sought habeas relief from his conviction in Case No. CRF-81-3172. In the case of Brown v. State of Oklahoma, Case No. 84-C-204-E (N.D. Okla. 1984), the Honorable James O. Ellison denied Petitioner's habeas request. That decision was affirmed on appeal before the Tenth Circuit Court of Appeals.

In his earlier habeas petition, Petitioner initially raised the following rounds in his Petition for Writ of Habeas Corpus.

- (1) denial of effective assistance of counsel in failing to call certain witnesses in behalf of the Petitioner;
- (2) denial of effective assistance of counsel in stipulating to certain facts regarding a medical report;
- (3) denial of effective assistance of counsel in failing to call Petitioner to testify in his own defense;
- (4) denial of properly constituted jury; and
- (5) denial of fair trial by prejudicial remarks of the prosecutor.

Facing dismissal under Rose v. Lundy, 455 U.S. 509 (1982), of his "mixed" petition, Petitioner elected to strike his unexhausted claims and proceed upon the remaining grounds. In so doing, Petitioner abandoned his petition for federal habeas relief on grounds (1), (2) and (3). The abandoned Grounds (1) and (2) are identical to grounds (1) and (2) now before this Court for consideration.

Rule 9(b) of the Rules Governing §2254 Cases provides that a second federal habeas petition may be dismissed if the judge finds that Petitioner's failure to assert the present grounds, in his prior petition, constitutes Petitioner's abuse of the writ.

The burden is on the government to plead abuse of the writ. Sanders v. U.S., 373 U.S. 1 (1963). The respondent has so pled. Once the government has met its burden, the Petitioner has the burden of proving he has not abused the writ. Price v. Johnston, 334 U.S. 266 (1948). Although Petitioner has had two opportunities to do so, he has failed to convince the Court that he is not abusing the writ. There is no indication that new

facts have been discovered which would better support the previously abandoned first two claims. There is no assertion that Petitioner was earlier unaware of the facts supporting his new third claim. Petitioner has pointed to no retroactive change of law which would excuse his failure to raise these claims in the earlier petition.

"Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Rose v. Lundy, 455 U.S. at 520-21.

"Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation." Sanders v. U.S., 373 U.S. at 18. The Court finds that Petitioner's present habeas grounds could have been raised at the same time Petitioner first sought habeas relief from the Court, and Respondent's Motion to Dismiss should be granted pursuant to Rule 9(b). U.S. v. Talk, 597 F.2d 249 (10th Cir. 1979).

It is, therefore, the ORDER of the Court that Respondent's Motion to Dismiss is hereby granted and Petitioner's Petition for Writ of Habeas Corpus is hereby dismissed.

Dated this 14<sup>th</sup> day of March, 1988.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 14 1988

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

TERRY DEWAYNE BLANKENSHIP, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 TED WALLMAN, Warden )  
 )  
 Defendant. )

87-C-867-B

ORDER

Now before the Court for consideration is the Petition for a Writ of Habeas Corpus of Terry Dewayne Blankenship. Mr. Blankenship was convicted of First Degree Manslaughter and sentenced to thirty (30) years imprisonment in Nowata County District Court, Case No. CRF-83-7. Mr. Blankenship's conviction was affirmed on direct appeal to the Oklahoma Court of Criminal Appeals in No. F-83-729. Thereafter, Mr. Blankenship applied for post-conviction relief from the trial court, which was denied, said denial affirmed on appeal in Case No. PC 87-668.

Blankenship now seeks federal habeas relief asserting three grounds, considered as follows.

I. Trial Counsel's Failure to Communicate Plea Negotiations

As his first ground for relief, Blankenship asserts that his trial counsel, Jim Conatser, failed to communicate a plea offer from the District Attorney of twenty (20) years imprisonment, and that the failure violated his due process rights.

This ground was raised before the Oklahoma trial court in Blankenship's application for post-conviction relief. The trial court held an evidentiary hearing to determine the factual issues. The prosecuting attorney, the defense attorney, a former

sheriff, the Defendant's mother, and Blankenship testified at the hearing. The trial court judge thereafter filed findings of fact and conclusions of law, in which the following finding was made:

This Court specifically finds that the petitioner was advised by his trial counsel, Jim Conatser, of the plea bargain offer of twenty years to First Degree Manslaughter prior to the beginning of his jury trial. (State of Oklahoma v. Blankenship, Case No. CRF-83-7 (August 11, 1987)).

Title 28 U.S.C. §2243(d) requires a federal court to presume state court findings of fact are correct. Sumner v. Mata, 455 U.S. 591, 71 L.Ed.2d 480, 483 (1982). After reviewing the evidentiary hearing transcript in full, this Court finds that the state court's factual determination is supported by the record, and none of the seven factors specified in §2254(d) are present. Sumner, supra. Therefore, the trial court's finding will be presumed correct and Blankenship's first argument is without merit.

## II. Trial Court's Failure to Instruct on Defense of Others

Blankenship urges as his second ground for habeas relief the failure of the trial court to instruct the jury on the defense of others. In order to obtain federal habeas relief based on a challenged jury instruction, a prisoner must show that the instruction "so infected the entire trial that the resulting conviction violates due process." Untied States v. Frady, 454 U.S. 152, 164, 71 L.Ed.2d 816 (1982) (citing Henderson v. Kibbe, 431 U.S. 145, 52 L.Ed.2d 203 (1977)). The challenged instruction must be not only erroneous but violative of "some right which was

guaranteed to the Defendant by the Fourteenth Amendment." Cupp v. Naughtner, 414 U.S. 141, 146, 38 L.Ed.2d 368 (1973).

Blankenship asserts that the record shows he went "to the aid of another person when asked for help." The Oklahoma Court of Criminal Appeals considered the issue during Blankenship's direct appeal. The Appeals Court reviewed the trial record and made the following findings:

... [t]here was no objection to the instructions given, nor did the Appellant submit a requested instruction on defense of another ... Appellant was not entitled to an instruction on defense of another, as his companion was not within the category of persons one is entitled to protect by deadly force. See 21 O.S. 1981, §733. Nor was the appellant entitled to an instruction on prevention of a public offense, see 22 O.S. 1981, §§31-33, as the decedent's attack upon the driver of the truck had ended prior to the fight with the appellant." (Blankenship v. State, No. F-83-729, (May 27, 1987)(footnotes omitted).

The findings of fact of the State Court will be presumed to be correct. Ball v. Ricketts, 779 F.2d 578, 580 (10th Cir. 1985). This Court must, however, independently apply constitutional standards to the factual findings of the State court. Ball v. ricketts, 779 F.2d at 580. Since Blankenship did not request such an instruction, and the evidence at trial would not have supported such a defense, this Court concludes that the trial court's omission of an instruction on defense of another did not so infect the trial with error that Blankenship's conviction violates due process. U.S. v. Frady, 454 U.S. at 164. Blankenship's second argument is without merit.

### III. Trial Counsel's Failure to Render Effective Legal Assistance

As his third ground for relief Blankenship identifies eight instances of ineffective assistance of counsel at trial, denominated I through VIII. Only issue II was raised on appeal and considered by the Oklahoma Court of Criminal Appeals. Issues I, and III through VIII, were raised for the first time in Blankenship's application for post-conviction relief. Citing Coleman v. State, 693 P.2d 4 (Okla. Crim.App. 1984), the Oklahoma Court did not consider these issues. (State v. Blankenship, CRF 83-7, Findings of Fact and Conclusions of Law (August 11, 1987)).

The Court's action, in declining review of issues I, and III through VIII, is, properly, a recognition of Blankenship's procedural default.

Coleman summarizes Oklahoma's procedural default rule (22 O.S. §1086) as follows: "[T]he doctrine of res judicata bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal." Coleman, 693 P.2d at 5; See also, Jones v. State, 704 P.2d 1138, 1139-40 (Okla. Crim. App. 1985). In Reed v. Ross, 468 U.S. 1, 11, 82 L.Ed.2d 1 (1984), the Supreme Court directs, "When a procedural default bars litigation of a constitutional claim in state court, a state prisoner may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice'". A defense attorney may not ignore a state's procedural rules in the expectation that constitutional claims can be raised at a later date in federal court. Reed, 468 U.S. at 14. "Procedural

defaults of this nature are, therefore, 'inexcusable'. Reed, 468 U.S. at 14.

Here, Blankenship has not demonstrated sufficient "cause" for bypassing Oklahoma procedures. Smith v. Murray, \_\_\_ U.S. \_\_\_, 91 L.Ed.2d 434 (1986).<sup>1</sup> Therefore, in order to advance important principles of comity and finality, this Court will not review issues I, and III through VIII except to note that applying the cause and prejudice test here does not result in a fundamental miscarriage of justice. Murray v. Carrier, \_\_\_ U.S. \_\_\_, 91 L.Ed.2d 397, 426-31 (1986).

As to issue II of Ground Three, Blankenship contends that his trial attorney's failure to develop a theory constitutes ineffective assistance of counsel. Blankenship contends that counsel should have developed testimony which would show the fatal stab wounds were inflicted by a co-defendant.

In Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the benchmark for judging a claim of ineffective assistance of counsel. To afford habeas relief two factors must be shown: (1) counsel's performance was so deficient as to be outside the "range of competence demanded of attorneys in criminal cases"; and (2) counsel's errors were so serious as to deprive the Defendant of a fair trial with a reliable result. Strickland, 466 U.S. at 687.

---

<sup>1</sup> "Cause" has been held to include novelty of constitutional claims, and ineffective assistance by appellate counsel.

In considering the question of performance, this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Here, Blankenship's attorney advanced and developed a trial strategy of acting in self-defense. (Vol V., Tr. 853-56, Opening Statement of Defense Counsel; Vol V, Tr. 1114-39, Closing Statement of Defense Counsel.) Such a strategy is reasonable in light of Blankenship's admissions of stabbing the victim. Furthermore, in closing argument, counsel argued to the jury that Blankenship was not responsible for all four stab wounds suffered by the victim. (Vol. V, Tr. 1119-23). To succeed on the issue of performance, Blankenship must overcome the presumption that, under the circumstances, his lawyer's focus on the self-defense strategy might be considered sound trial strategy.

As the Supreme Court notes in Strickland, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (At 689)(citation omitted). This Court finds that trial counsel's choice of trial strategy is well within "the wide range of professionally competent assistance." Strickland, at 690. Therefore, the third ground for habeas relief is also without merit.

IV Conclusion

Therefore, it is the ORDER of this Court that Blankenship's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 is hereby denied.

Dated this 14 day of March, 1988.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



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

MAR 14 1988

DEPT. OF CLERK  
U.S. DISTRICT COURT

ERVIN ELECTRIC, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 87-1023-B  
 )  
 MIDWEST ENERGY MANAGEMENT, )  
 INC., SEARS, ROEBUCK AND )  
 COMPANY, and PEPPER SOUTHERN, )  
 INC., )  
 )  
 Defendant. )

O R D E R

Before the Court for disposition are the following motions: Sears, Roebuck and Company's motion to transfer, Defendant Pepper Southern, Inc.'s motion to dismiss and alternative motion to transfer, Defendant Midwest Energy Management, Inc.'s motion to dismiss. For the reasons set forth below, the motions are granted in part and denied in part.

This action arises from the Plaintiff's participation as a subcontractor in an Orlando, Florida construction project. Plaintiff contracted with the Defendant Midwest Energy Management, Inc. to provide certain electrical construction on a Sears store. Defendant Midwest Energy Management, Inc. ("Midwest") was a subcontractor for Defendant Pepper Southern, Inc. ("Pepper"), who in turn was hired by the Defendant, Sears, Roebuck and Company ("Sears"). The Plaintiff alleges that under the terms of its written contract with Defendant Midwest it was to be paid \$20,895.00. Plaintiff alleges that it has performed

the obligation under the contract but has not been paid \$4,910.32 of the contract price. In addition, the Plaintiff alleges that in the course of construction Defendant Sears and Defendant Pepper contacted the Plaintiff and requested that certain extra work be performed in addition to that contracted for which the Plaintiff would be compensated \$15,428.74. Plaintiff seeks recovery of both the remaining contract sum and the amount due for the extra work performed.

Counts I and II of the Plaintiff's complaint seek judgment against Defendant Sears on theories of unjust enrichment and detrimental reliance. Likewise, the Plaintiff seeks recovery on Counts III and IV against Defendant Pepper for unjust enrichment and/or detrimental reliance. Counts V and VI seek judgment against Defendant Midwest under the written contract in the amount of \$4,910.32, and under an oral contract in the amount of \$15,428.74.

MOTION TO DISMISS AND ALTERNATIVE MOTION  
TO TRANSFER OF PEPPER SOUTHERN, INC.

Defendant Pepper asks the Court to dismiss this action for lack of in personam jurisdiction asserting that it has not availed itself of the privilege of doing business within the State of Oklahoma. In support, the Defendant asserts it has not qualified to do business in Oklahoma, has no service agent in the state and has no employees or agents who reside here. The Plaintiff asserts that Pepper has subjected itself to the jurisdiction of this Oklahoma court by virtue of a telephone call from Mr. Robert Shannon, a representative of Pepper Southern,

Inc. in March 1986. The said telephone call involved negotiations for the Plaintiff to do certain extra work for the construction project on behalf of the Defendants Sears and Pepper. This work was in addition to work already performed by the Plaintiff pursuant to a written contract with Defendant Midwest executed October 11, 1985.

12 Okl.St. Ann. §2004(F) provides:

"A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States."

The United States Supreme Court held that before jurisdiction can be exercised, the Due Process Clause of the Fourteenth Amendment requires minimum contacts between the state exercising personal jurisdiction and the defendant. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

It is critical to due process that "defendant's conduct in connection with the forum state are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

A minimum contacts inquiry must focus on the totality of the relationship between the defendant and the forum state. Colwell Realty Investments v. Triple T Inns, 785 F.2d 1330 (5th Cir. 1986); All American Car Wash v. National Pride Equipment, Inc., 550 F.Supp. 166 (W.D.Okla. 1981). Plaintiff urges that jurisdiction is proper here under the "active purchaser" test pronounced by the Oklahoma Supreme Court in Yankee Metal Products

Co. v. District Court, 528 P.2d 311 (Okla. 1974), for the reasons that the Defendant Pepper initiated a telephone call to the Plaintiff and discussed specifications and the possibility of hiring Plaintiff to perform the extra work. The Plaintiff urges that this active participation and negotiations in planning are sufficient contacts for this Court to exercise personal jurisdiction over the nonresident Defendant Pepper. The Court finds the Yankee Metal rationale unpersuasive in the instant case for the reasons that the Defendant Pepper's contacts with the Oklahoma Plaintiff were not a result of the Defendant's unilateral actions but rather the consequence of the written contract between the Plaintiff and Defendant Midwest. Further, it is clear that the telephone conversation between the Plaintiff and Pepper occurred after its contract with Midwest and was not the impetus for the Plaintiff's activities in the Florida construction site.

The Court is also unpersuaded by the Plaintiff's authority to the effect that a telephone call in and of itself will satisfy the minimum contact standard. Brown v. Flowers Ind. Inc., 688 F.2d 328 (5th Cir. 1982) cert. denied, 103 S.Ct. 1275 (1983). The Court finds that the isolated telephone communication is too tenuous a contact to invoke the Court's in personam jurisdiction over the Defendant Pepper. While the telephone communication should be considered in examining the totality of the contacts, the Court cannot say that the telephone conversation standing alone was an act by which the Defendant Pepper purposely availed

itself of the privilege of conducting activities within the State of Oklahoma. The Court concludes that the assertion of personal jurisdiction by this Court over Defendant Pepper would offend traditional notions of fair play and substantial justice. Therefore, the Defendant Pepper's motion to dismiss is granted.

MOTION TO DISMISS OF MIDWEST  
ENERGY MANAGEMENT

Defendant Midwest also seeks dismissal based on in personam jurisdiction grounds. Defendant Midwest's motion and brief in support adopts Defendant Pepper's brief in support of its motion to dismiss for lack of personal jurisdiction and provides no independent research or facts in support of its motion. In light of the written contract between the Plaintiff and Defendant Midwest, attached as Exhibit A to the Plaintiff's complaint, the Court finds the Defendant Midwest's posture considerably different than that of Defendant Pepper. In addition to the written contract, the Plaintiff has detailed certain other facts such as the numerous telephone calls initiated by Midwest to the Plaintiff's offices in Tulsa for both the original contract and the later request for extra work on the project. The Court finds that based upon the affidavit of Ron Wilson which chronicles the Defendant Midwest's contacts with the State of Oklahoma by various telephone conversations in the solicitation of a bid and negotiations for a contract and the ultimate written contract accepted by the Plaintiff in Tulsa, the Plaintiff has satisfied the burden of proving the existence of jurisdiction over Defendant Midwest. See, Wilshire Oil Co. v. Riffe, 409 F.2d 1277

(10th Cir. 1969). The Defendant Midwest's motion to dismiss for lack of in personam jurisdiction is overruled.

MOTION TO TRANSFER OF SEARS, ROEBUCK & CO.

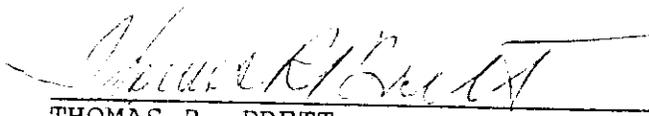
Also before the Court is the motion of Defendant Sears to transfer this action to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. §1404(a), which provides that:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The burden is on the party moving for transfer to establish that the suit should be transferred. Unless the balance of convenience is strongly in favor of the moving party, the Plaintiff's choice of forum should not be disturbed. Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 508 (1947). A showing of inconvenience to Defendant is not enough for granting a change of venue where the transfer would merely shift the inconvenience to the other party. Hoster v. Monongahela Steel Corp., 492 F.Supp. 1249, 1254 (W.D.Okla. 1980). Additional consideration is properly given when the Plaintiff has chosen the forum in which he resides. Ammon v. Kaplow, 468 F.Supp. 1304, 1313 (D.Kan. 1979). Plaintiff herein resides in the Northern District of Oklahoma. The Defendant has not satisfied the Court that the balance of convenience exists in its favor to merit a transfer. For the foregoing reasons, the Court concludes Defendant Sears' motion to transfer pursuant to 28 U.S.C. §1404(a) should be overruled.

Defendant Midwest Energy Management, Inc. should secure local counsel as required by Rule 4(h) of the Rules of the United States District Court for the Northern District of Oklahoma. The parties are directed to adhere to the scheduling deadlines set at the February 8, 1988 status conference.

IT IS SO ORDERED, this 15<sup>th</sup> day of March, 1988.

  
\_\_\_\_\_  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

**MAR 11 1988**

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

THE TELEX CORPORATION, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 87-C-873-E  
 )  
ASHER B. EDELMAN, et al., )  
 )  
Defendants. )

ORDER OF DISMISSAL

NOW ON THIS 10<sup>th</sup> day of March, 1988, the Court has for its consideration the Stipulation for Dismissal jointly filed in the above-styled and numbered cause by plaintiff and defendants. Based upon the representations and requests of the parties, as set forth in the foregoing Stipulation, it is

ORDERED that plaintiff's Complaint, Amended Complaint and claims for relief against the defendants be and the same are hereby dismissed with prejudice. It is further

ORDERED that defendants' Counterclaims and claims for relief against the plaintiff be and the same are hereby dismissed with prejudice. It is further

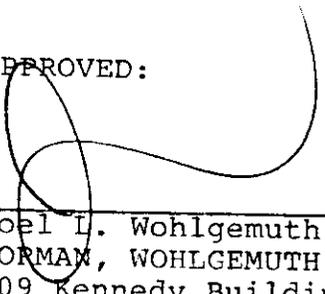
ORDERED that each party shall bear its own costs.

Dated this 10<sup>th</sup> day of March, 1988.

**S/ JAMES O. ELLISON**

\_\_\_\_\_  
JAMES O. ELLISON,  
UNITED STATES DISTRICT JUDGE

APPROVED:

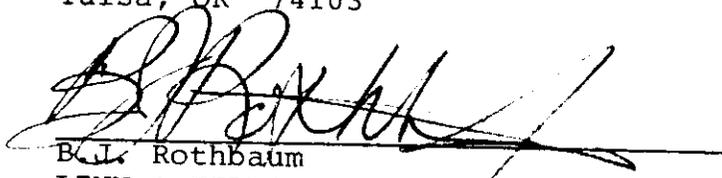
  
\_\_\_\_\_  
Joel D. Wohlgemuth  
NORMAN, WOHLGEMUTH & THOMPSON  
909 Kennedy Building  
Tulsa, Oklahoma 74103  
(918) 583-7571

Attorneys for Plaintiff,  
Telex Corporation

OF COUNSEL:

Raymond L. Falls, Jr.  
Allen S. Joslyn  
P. Kevin Castel  
Seth Goodchild  
CAHILL GORDON & REINDEL  
a partnership including  
professional corporations)  
80 Pine Street  
New York, New York 10005  
(212) 701-3000

Roy C. Breedlove  
JONES, GIVENS, GOTCHER,  
BOGAN & HILBORNE  
3800 First National Tower  
Tulsa, OK 74103

  
\_\_\_\_\_  
B.J. Rothbaum  
LINN & HELMS  
1200 Fidelity Plaza  
Oklahoma City, OK 73102

Attorneys for all Defendants

OF COUNSEL:

Rodman Ward, Jr.  
Stuart L. Shapiro  
Vaughn C. Williams  
Edward P. Welch  
Anthony W. Clark  
Constance S. Huttner  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM  
919 Third Avenue  
New York, NY 10022

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

**FILED**

MAR 11 1988

ALBERT BIGPOND and )  
DOROTHY DEAN BIGPOND, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
FIBREBOARD CORPORATION, ET AL.)  
 )  
Defendants. )

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

No. 87-C-123-E

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Stipulated Application for Dismissal of certain parties in the above entitled action, and the Court noting that the matter has been fully settled and compromised between those parties, and based upon the stipulation,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above entitled action be, and it is hereby dismissed, without cost to either party, and with prejudice to the Plaintiffs as to the Defendants Fibreboard Corporation, Owens-Corning Fibreglas Corporation, Eagle-Picher Industries, Inc., Pittsburgh-Corning Corporation, The Celotex Corporation, GAF Corporation, Keene Corporation, Owens-Illinois, Inc., H. K. Porter Company, Armstrong Cork Company, Flexitallic Gasket Company, Inc., and The Flintkote Company.

S/ JAMES O. ELISON

UNITED STATES DISTRICT JUDGE

entered

FILED

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

MAR 10 1988

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

SHEARSON LEHMAN MORTGAGE CORPORATION, a Delaware corporation,  
 Plaintiff,  
 vs.  
 VEREX ASSURANCE, INC., a Wisconsin corporation,  
 Defendant.

No. 87-C-48-C

O R D E R

Now before the Court for its consideration is the motion of the defendant for partial summary judgment.

This action is brought on two claims. In the first, plaintiff asserts that defendant breached the implied covenant of good faith and fair dealing arising out of defendant's failure to pay twenty-seven insured loans in which defendant insured plaintiff against loss on a deficiency. The second claim is based upon the twenty-seven private insurance certificates for the loans themselves. Defendant now moves for partial summary judgment, seeking judgment as to the first claim.

"[T]he issue of bad faith will most often be a question for the jury." Duckett v. Allstate Ins. Co., 606 F.Supp. 728, 731 (W.D.Okla. 1985). In the two cases cited by defendant in which summary judgment was granted against a bad faith claim, Duckett,

supra, and Harris v. Farmers Ins. Co., 607 F.Supp. 92 (W.D.Okla. 1985), the insurance company was faced with questions of Oklahoma law which could reasonably have been interpreted in more than one way. Under such circumstances, the court determined that it was clear that the insurance company did not act in bad faith. The situation in the case at bar is at a remove from Duckett and Harris. The issues involved here are not merely whether, based on the information the defendant had, it was a reasonable interpretation of Oklahoma law to decline payment. This is analogous to Duckett and Harris. At issue in this case is also whether the investigation conducted by defendant was reasonable or adequate, i.e., whether the defendant properly gathered sufficient factual information on which to base its legal decision. Disputes raised between the parties include (a) whether an adequate investigation requires examination of all twenty-seven loans and (b) whether certain information was conveyed in a "serious" or "jocular" tone. It seems clear that, implicitly, the defendant is asking the Court to weigh evidence. This is the jury's function.

It is the Order of the Court that the motion of the defendant for partial summary judgment is hereby DENIED.

IT IS SO ORDERED this 9<sup>th</sup> day of March, 1988.

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

FILED  
MAR 10 1988

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

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

ENERGY ASSOCIATES OPERATING )  
COMPANY, a sole proprietorship )  
of Riley Barnard, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WIDE WEST ENERGY, INC., and )  
FIRST MANAGEMENT SERVICE, INC., )  
 )  
Defendants. )

No. 87-C-430-C

JOURNAL ENTRY

This matter came on for hearing by telephone conference call before the United States Magistrate on September 10, 1987. Plaintiff appeared by Bruce W. Gambill. Defendants appeared not; however, Alva Wesley-Thomas, the defendants' previous attorney, advised the Magistrate that she had been allowed to withdraw, but nevertheless participated in the hearing.

Based upon that hearing, the Court determines and orders:

1. That this matter concerns a Motion to Vacate a judgment granted by Osage County, Oklahoma District Court Case No. C-86-56, on the 17th day of April, 1986 in which Energy Associates Operating Company, a sole proprietorship of Riley Barnard was plaintiff and was awarded the sum of \$13,214. and interest thereon and attorney fees

of \$3,303. and costs against Wide West Energy, Inc. and First Management Service, Inc.

2. The defendant Wide West Energy, Inc. has filed bankruptcy and their case number 86-0030H2-11 in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, and that said Court transferred this matter as adversary case number 86-0596 to this Court on the 25th day of May, 1987.
3. That this action is to vacate a valid and existing judgment of the Osage County, Oklahoma District Court.
4. That the action to vacate such judgment is hereby dismissed for failure to prosecute and that the Osage County judgment is final and unappealed from.
5. That this case determination be filed in said Bankruptcy Case as determining issues therein.

IT IS SO ORDERED this 9<sup>th</sup> day of March, 1988.

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

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

RIC OCASEK, et al.,  
Plaintiffs,

vs.

BEST SHOT, INC., BRUCE  
KIRALY, and ARTHUR UNDERWOOD,  
Defendants.

No. 87-C-609-C

**FILED**

**MAR 10 1988**

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

ORDER

This matter comes on for consideration on the Application of the plaintiffs, Ric Ocasek, et al., for an Order of Dismissal of the defendant, Arthur Underwood. The Court having considered the Application and finding that it is by agreement of the parties, finds that Arthur Underwood should be dismissed as a defendant in this action, without prejudice to the refileing thereof.

IT IS SO ORDERED this 9 day of <sup>March</sup> ~~February~~, 1988.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

17081/tlr

DONALD R. PFEIFER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 A.T.&T. INFORMATION SYSTEMS, )  
 INC.; UNIDEN CORPORATION )  
 (OF JAPAN); and UNIDEN )  
 CORPORATION OF AMERICA, )  
 )  
 Defendants. )

No. 87 C-360-C

**F I L E D**

**MAR 10 1988**

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

ORDER OF DISMISSAL OF CROSS-CLAIM WITHOUT PREJUDICE

NOW, on this 10 day of March, 1988, this matter comes on before the undersigned Judge of the District Court, upon Application of the parties for dismissal without prejudice of the Cross-Claim of Defendant, A.T.&T. Information Systems, Inc., against Defendant, Uniden Corporation of America.

Based upon statement of the parties with reference to settlement of the pending action, the Court finds that the parties' Application for Dismissal of Cross-Claim Without Prejudice should be granted.

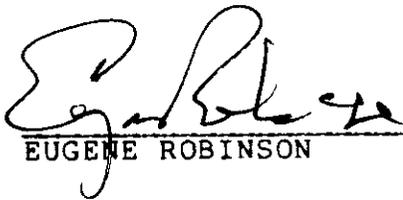
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Cross-Claim of Defendant, A.T.&T. Information Systems, Inc., against Defendant, Uniden Corporation of America, is hereby dismissed without prejudice.

IT IS SO ORDERED.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM & CONTENT:



EUGENE ROBINSON

Attorney for Defendants  
Uniden Corp. (of Japan) and  
Uniden Corp. of America



ELSIE DRAPER

Attorney for Defendant  
A.T.&T. Information Systems, Inc.

FILED

MAR 10 1988

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA JACK C. SILVER, CLERK  
U.S. DISTRICT COURT

MR. J'S AUTO SUPPLY, INC., )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LEON WILLIAMS and IRENE )  
WILLIAMS, husband and wife, )  
 )  
Defendants. )

No. 87-C-501-C

O R D E R

Now before the Court for its consideration is the motion of the defendants to dismiss, said motion filed on October 19, 1987. The Court has no record of a response to this motion from the plaintiff. Rule 14(a) of the Local Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

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

Therefore, since no response has been received to date herein, in accordance with Rule 14(a), the failure to comply constitutes a confession of the motion by the plaintiff.

Accordingly, it is the Order of the Court that the motion of the defendant to dismiss should be and hereby is GRANTED.

IT IS SO ORDERED this 9<sup>th</sup> day of March, 1987.

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

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

*entered*  
**FILED**

**MAR 10 1988**

GUESS ?, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RANDY'S SILK SCREENING INC. )  
OF TULSA, et al., )  
 )  
Defendants. )

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

Case No. 87-C-191-C ✓

PERMANENT INJUNCTION

On the 10<sup>th</sup> day of March, 1988, the above-entitled action came on for consideration pursuant to the settlement agreement of plaintiff, Guess ?, Inc., and defendant The Sportsman Sporting Goods, Inc. ("Defendant"), that a permanent injunction be entered against defendant. Appearing on behalf of plaintiff was legal counsel Gary S. Chilton. Appearing on behalf of defendant was legal counsel J. Thomas Mason.

The Court, being fully advised of the premises, makes the following findings of fact and conclusions of law:

1. In November, 1981, Plaintiff adopted and commenced use of the trademark GUESS ?, along and in combination with a distinctive, red, inverted triangle design (hereinafter "GUESS ? in Design"), in connection with the sale of men's and women's apparel.

2. Since November, 1981, Plaintiff has continuously used the trademarks GUESS ? and GUESS ? in Design in interstate

commerce in the United States in connection with the advertising and sale of its men's and women's apparel. Plaintiff has also used its trademarks in the distinctive "Flying Ace" design attached hereto as Exhibit 1. The above trademarks and Flying Ace design of plaintiff are collectively referred to hereinafter as the "Guess ? Trademarks."

3. The GUESS ? Trademarks have developed a secondary meaning and significance in the minds of the purchasing public and products bearing such marks are identified with Plaintiff.

4. Plaintiff's GUESS ? and GUESS ? in Design trademarks are registered with the United States Patent and Trademark Office under Registration Nos. 1,299,580 and 1,271,896 issued October 9, 1984 and March 27, 1984 respectively. Said registrations are valid and subsisting and are prima facie evidence of Plaintiff's exclusive right to use the marks GUESS ? and GUESS ? in Design.

5. Defendant has allegedly distributed, offered for sale and sold certain sweatshirts bearing a counterfeit GUESS ? Trademark or colorable imitation thereof.

6. Defendant has no objection to Plaintiff's requested permanent injunction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, its agents, servants, employees and all persons in active concert or participation with it, is hereby restrained from in any manner, directly or indirectly, doing the following:

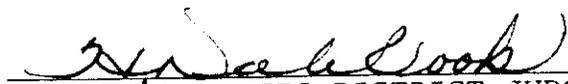
1. Infringing Plaintiff's Guess ? Trademarks, including, inter alia, counterfeiting such trademarks, competing unfairly with Plaintiff, falsely designating the origin of Defendant's goods, engaging in deceptive trade practices, and specifically from:

(a) Using in any manner Plaintiff's Guess ? Trademarks or colorable imitations thereof, or any other names or marks which so resemble Plaintiff's said marks as to be likely to cause confusion, deception or mistake, on or in connection with the manufacture, silk screening, heat transferring, imprinting, advertising, offering for sale or sale of any product not authorized by Plaintiff;

(b) Passing off, inducing or enabling others to sell or pass off any product as products produced or approved by Plaintiff under its GUESS ? Trademarks; and

(c) Committing any acts calculated to cause purchasers to believe that Defendant's products are those sold under the control and supervision of Plaintiff, or are sponsored, approved, connected with, guaranteed or produced under the control and supervision of Plaintiff.

ISSUED this 10<sup>th</sup> day of March, 1988, at 3:20 o'clock P.m.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

*G S Chilton*

---

ROY J. DAVIS, ESQ.  
GARY S. CHILTON, ESQ.  
ANDREWS DAVIS LEGG BIXLER  
MILSTEN & MURRAH  
500 West Main  
Oklahoma City, Oklahoma 73102  
Attorneys for Plaintiff  
GUESS ?, Inc.

*J T Mason*

---

J. THOMAS MASON, ESQ.  
SANDERS AND CARPENTER  
Denver Building  
624 South Denver  
Tulsa, Oklahoma 74119  
Attorneys for Defendant  
The Sportsman Sporting Goods, Inc.

85841.



*Flying*

**GILLESSE**

*ace*

PLAINTIFF'S EXHIBIT  
/

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

*entered*  
**FILED**  
**MAR 10 1988 A**  
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

GUESS ?, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RANDY'S SILK SCREENING INC. )  
OF TULSA, et al., )  
 )  
Defendants. )

Case No. 87-C-191-C ✓

PERMANENT INJUNCTION

On the 10<sup>th</sup> day of March, 1988, the above-entitled action came on for consideration pursuant to the settlement agreement of plaintiff, Guess ?, Inc., and defendant May's Drug Stores, Inc. ("Defendant"), that a permanent injunction be entered against defendant. Appearing on behalf of plaintiff was legal counsel Gary S. Chilton. Appearing on behalf of defendant was legal counsel John M. Imel and John E. Rooney, Jr.

The Court, being fully advised of the premises, makes the following findings of fact and conclusions of law:

1. In November, 1981, Plaintiff adopted and commenced use of the trademark GUESS ?, along and in combination with a distinctive, red, inverted triangle design (hereinafter "GUESS ? in Design"), in connection with the sale of men's and women's apparel.

2. Since November, 1981, Plaintiff has continuously used the trademarks GUESS ? and GUESS ? in Design in interstate commerce in the United States in connection with the advertising and sale of its men's and women's apparel. Plaintiff has also used its trademarks in the distinctive "Flying Ace" design attached hereto as Exhibit 1. The above trademarks and Flying Ace design of plaintiff are collectively referred to hereinafter as the "Guess ? Trademarks."

3. The GUESS ? Trademarks have developed a secondary meaning and significance in the minds of the purchasing public and products bearing such marks are identified with Plaintiff.

4. Plaintiff's GUESS ? and GUESS ? in Design trademarks are registered with the United States Patent and Trademark Office under Registration Nos. 1,299,580 and 1,271,896 issued October 9, 1984 and March 27, 1984 respectively. Said registrations are valid and subsisting and are prima facie evidence of Plaintiff's exclusive right to use the marks GUESS ? and GUESS ? in Design.

5. Defendant has allegedly distributed, offered for sale and sold certain sweatshirts bearing a counterfeit GUESS ? Trademark or colorable imitation thereof.

6. Defendant has no objection to Plaintiff's requested permanent injunction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, his agents, servants, employees and all persons in

active concert or participation with him, is hereby restrained from in any manner, directly or indirectly, doing the following:

1. Infringing Plaintiff's Guess ? Trademarks, including, inter alia, counterfeiting such trademarks, competing unfairly with Plaintiff, falsely designating the origin of Defendant's goods, engaging in deceptive trade practices, and specifically from:

(a) Using in any manner Plaintiff's Guess ? Trademarks or colorable imitations thereof, or any other names or marks which so resemble Plaintiff's said marks as to be likely to cause confusion, deception or mistake, on or in connection with the manufacture, silk screening, heat transferring, imprinting, advertising, offering for sale or sale of any product not authorized by Plaintiff;

(b) Passing off, inducing or enabling others to sell or pass off any product as products produced or approved by Plaintiff under its GUESS ? Trademarks; and

(c) Committing any acts calculated to cause purchasers to believe that Defendant's products are those sold under the control and supervision of Plaintiff, or are sponsored, approved, connected with, guaranteed or produced under the control and supervision of Plaintiff.

ISSUED this 10<sup>th</sup> day of March, 1988, at  
3:20 o'clock p.m.

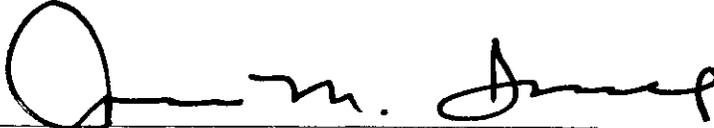
  
UNITED STATES DISTRICT JUDGE

APPROVED:



---

ROY J. DAVIS, ESQ.  
GARY S. CHILTON, ESQ.  
ANDREWS DAVIS LEGG BIXLER  
MILSTEN & MURRAH  
500 West Main  
Oklahoma City, Oklahoma 73102  
Attorneys for Plaintiff  
GUESS ?, Inc.



---

JOHN M. IMEL  
JOHN E. ROONEY, JR.  
MOYERS, MARTIN, SANTEE,  
IMEL AND TETRICK  
320 South Boston Building  
Suite 920  
Tulsa, Oklahoma 74103  
Attorneys for Defendant  
May's Drug Stores, Inc.

8586L



PLAINTIFFS  
EXHIBIT  
/

*Entered*

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

GUESS ?, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 RANDY'S SILK SCREENING INC. )  
 OF TULSA, et al., )  
 )  
 Defendants. )

Case No. 87-C-191-C ✓

**F I L E D**

**MAR 10 1988** ✱

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

PERMANENT INJUNCTION

On the 10<sup>th</sup> day of March, 1988, the above-entitled action came on for consideration pursuant to the settlement agreement of plaintiff, Guess ?, Inc., and defendant Randy's Silk Screening, Inc., ("Defendant"), that a permanent injunction be entered against defendant. Appearing on behalf of plaintiff was legal counsel Gary S. Chilton. Appearing on behalf of defendant was legal counsel J. Thomas Mason.

The Court, being fully advised of the premises, makes the following findings of fact and conclusions of law:

1. In November, 1981, Plaintiff adopted and commenced use of the trademark GUESS ?, along and in combination with a distinctive, red, inverted triangle design (hereinafter "GUESS ? in Design"), in connection with the sale of men's and women's apparel.

2. Since November, 1981, Plaintiff has continuously used the trademarks GUESS ? and GUESS ? in Design in interstate commerce in the United States in connection with the advertising and sale of its men's and women's apparel. Plaintiff has also used its trademarks in the distinctive "Flying Ace" design attached hereto as Exhibit 1. The above trademarks and Flying Ace design of plaintiff are collectively referred to hereinafter as the "Guess ? Trademarks."

3. The GUESS ? Trademarks have developed a secondary meaning and significance in the minds of the purchasing public and products bearing such marks are identified with Plaintiff.

4. Plaintiff's GUESS ? and GUESS ? in Design trademarks are registered with the United States Patent and Trademark Office under Registration Nos. 1,299,580 and 1,271,896 issued October 9, 1984 and March 27, 1984 respectively. Said registrations are valid and subsisting and are prima facie evidence of Plaintiff's exclusive right to use the marks GUESS ? and GUESS ? in Design.

5. Defendant has allegedly distributed, offered for sale and sold certain heat transfers bearing a counterfeit GUESS ? Trademark or colorable imitation thereof.

6. Defendant has no objection to Plaintiff's requested permanent injunction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, his agents, servants, employees and all persons in

active concert or participation with him, is hereby restrained from in any manner, directly or indirectly, doing the following:

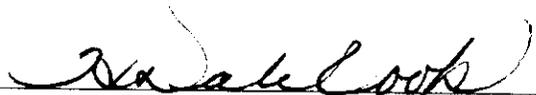
1. Infringing Plaintiff's Guess ? Trademarks, including, inter alia, counterfeiting such trademarks, competing unfairly with Plaintiff, falsely designating the origin of Defendant's goods, engaging in deceptive trade practices, and specifically from:

(a) Using in any manner Plaintiff's Guess ? Trademarks or colorable imitations thereof, or any other names or marks which so resemble Plaintiff's said marks as to be likely to cause confusion, deception or mistake, on or in connection with the manufacture, silk screening, heat transferring, imprinting, advertising, offering for sale or sale of any product not authorized by Plaintiff;

(b) Passing off, inducing or enabling others to sell or pass off any product as products produced or approved by Plaintiff under its GUESS ? Trademarks; and

(c) Committing any acts calculated to cause purchasers to believe that Defendant's products are those sold under the control and supervision of Plaintiff, or are sponsored, approved, connected with, guaranteed or produced under the control and supervision of Plaintiff.

ISSUED this 10<sup>th</sup> day of March, 1988, at 3:20 o'clock p.m.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

*G S Chilton*

---

ROY J. DAVIS, ESQ.  
GARY S. CHILTON, ESQ.  
ANDREWS DAVIS LEGG BIXLER  
MILSTEN & MURRAH  
500 West Main  
Oklahoma City, Oklahoma 73102  
Attorneys for Plaintiff  
GUESS ?, Inc.

*JTM*

---

J. THOMAS MASON, ESQ.  
SANDERS AND CARPENTER  
Denver Building  
624 South Denver  
Tulsa, Oklahoma 74119  
Attorneys for Defendant  
Randy's Silk Screening, Inc.



*Flying*

**GIESS**

*ace*

PLANTIFF'S EXHIBIT  
/

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

HOMEWARD BOUND, INC., BRIDGET  
BECKER, JOHN DOUGLAS BERRY,  
MICHAEL BRASIER, DEMINKYN MARTIN,  
JULIE MARIE PAULSON, SUSAN MARIE  
THOMPSON, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

Case No. 85-C-437-E

THE HISSOM MEMORIAL CENTER,  
REGINALD BARNES, WILLIAM FARHA,  
ALBERT FURR, LEON GILBERT,  
ROBERT GREER, JANE HARTLEY,  
JOHN ORR, DAVID WALTERS, CARL  
WARD, DEPARTMENT OF HUMAN SERVICES  
OF THE STATE OF OKLAHOMA, ROBERT  
FULTON, JEAN COOPER, JAMES WEST  
and JULIA TESKA,

Defendants.

**FILED**

MAR - 9 1988

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

JUDGMENT

In accordance with the Order entered on this 8<sup>th</sup> day of March,  
1988 awarding Plaintiffs' counsel, Bullock and Bullock, interim attorney  
fees pendente lite, the Court hereby enters judgment in  
favor of Plaintiffs' counsel, Bullock and Bullock, in the amount of  
\$406,650.00 for base fees.

Entered this 9<sup>th</sup> day of March, 1988.

  
\_\_\_\_\_  
JAMES O. ELLISON  
United States District Court

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

**FILED**

MAR -9 1988

DAVID R. HICKS, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
CFS PROPERTIES, INC., et al., )  
 )  
Defendants. )

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

No. 88-C-75-E

ADMINISTRATIVE CLOSING ORDER

The Defendant Gary Sheets having filed his 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 thirty (30) 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 8<sup>th</sup> day of March, 1988.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE **14R - 9 1988**  
NORTHERN DISTRICT OF OKLAHOMA

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

LARRY VON CATO, JR., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 RICHARD O'CARROLL, )  
 )  
 Defendants. )

87-E-1087-E ✓

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate filed February 16, 1988 in which the Magistrate recommended that Plaintiff's §1983 Complaint be dismissed as frivolous pursuant to 28 U.S.C. §1915(d). Van Sickle v. Holloway, 791 F.2d 1431, 1434 (10th Cir. 1986).

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby is affirmed.

It is therefore Ordered that Plaintiff's §1983 Complaint is dismissed as frivolous pursuant to 28 U.S.C. §1915(d). Van Sickle v. Holloway, 791 F.2d 1431, 1434 (10th Cir. 1986).

Dated this 8<sup>th</sup> day of March, 1988.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

A

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

ANDREW DRISKEL, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 OKLAHOMA DEPARTMENT OF )  
 CORRECTIONS, Granite )  
 Reformatory in conjunction )  
 with DR. FEATHERTON, )  
 )  
 Defendants. )

87-C-1031-E ✓

**FILED**  
MAR - 9 1988

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

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate filed February 18, 1988 in which the Magistrate recommended that the Plaintiff's Complaint be dismissed as frivolous.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby is affirmed.

It is therefore Ordered that the Plaintiff's Complaint is dismissed as frivolous.

Dated this 8<sup>th</sup> day of March, 1988.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

4

**FILED**

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

MAR - 9 1988

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

JULIUS D. NELSON

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED,

Defendant.

No. 86-C-346-E

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 8<sup>th</sup> day of March, 1988.

---

UNITED STATES DISTRICT JUDGE

3634-0001  
MABW/clh  
LD16

Firm Bar No. 31

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

HAMILTON BANK, a national )  
banking corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WYERWOOD FARMS, INC., a )  
corporation, FRANK C. WYER )  
and HELEN A. WYER, )  
 )  
Defendants. )

No. 84-C-486-C

**FILED**

**MAR 9 1988**

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

ORDER

Now on this 8<sup>th</sup> day of March, 1988, this matter comes on before me the undersigned Judge of the District Court or by agreement of the parties. Plaintiff is present by the signature of its attorneys of record, Allis & Vandivort, Inc., by Madalene A.B. Witterholt and the Defendants are present by their signatures and by that of their attorney, Charles Whitman. Upon reviewing the pleadings by agreement of the parties the Court makes the following findings of fact and conclusions of law:

1. That Plaintiff has a valid security interest in an Arabian horse named Atfa Moniet.
2. That said Atfa Moniet is properly in the custody of Plaintiff.
3. That the Defendants should and do hereby convey to Plaintiff all their right, title and interest in and to Atfa Moniet for the purpose of Plaintiff's selling

said collateral and crediting the proceeds after costs, to the judgment of the Plaintiff.

IT IS SO ORDERED.

Dated: March 8, 1988.

HAMILTON BANK, a National  
Banking Corporation,  
Plaintiff

(Signed) H. Dale Cook

The Honorable H. Dale Cook  
Judge of the District Court

By

Madalene A. B. Witterholt  
Madalene A.B. Witterholt  
Bar No. 10,528  
20th Floor Mid-Continent  
Tower  
401 S. Boston Avenue  
Tulsa, OK 74103  
(918)584-7700

Charles Whitman  
Charles Whitman, Attorney  
for Defendants Wyerwood  
Farms, Frank C. Wyer and  
Helen A. Wyer

Frank C. Wyer  
Frank C. Wyer

Helen A. Wyer  
Helen A. Wyer

*Entered*

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

HEBRON LIMITED PARTNERSHIP, )  
an Arkansas limited partner- )  
ship; ROBERT E. BABCOCK; )  
DAVID McCLINTON; CLARK C. )  
McCLINTON and MARIE McCLINTON, )  
as Trustees for the Clark and )  
Marie McClinton Trust; JAMES )  
E. LINDSEY, Trustee for the )  
Lindsey Family Trust; and JAMES )  
L. GADDY, )  
Plaintiffs, )

-vs-

Case No. 85-C-226-C ✓

GOLDEN EAGLE DEVELOPMENT, )  
INC., an Oklahoma corporation; )  
DAVID L. BUSSETT; E. J. WILSON; )  
and G. LEE JACKSON, )  
Defendants, )

-vs-

PEKO PETROLEUM COMPANY, )  
Garnishee. )

**FILED**

**MAR 9 1988** *A*

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

JOURNAL ENTRY OF JUDGMENT

NOW, on this 9<sup>th</sup> day of March, 1988, this  
cause comes on to be heard in its regular order; Plaintiff  
appears by its Attorneys, Eagleton and Nicholson, and the  
Garnishee, Peko Petroleum Company, having been ordered to make  
answer to said Garnishment by this Court no later than January  
11, 1988, failed to so answer, and makes default.

The Court finds that said Garnishee has been duly  
served with Summons, that the time for filing an Answer or

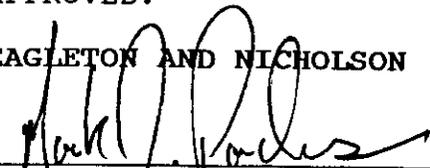
pleading herein has expired and that none has been filed; that it has jurisdiction of the parties and the subject matter of this action. Said Garnishee is adjudged to be in default and the allegations of Plaintiff's Motion for Judgment against Garnishee are ordered taken as true and confessed. Trial by jury is waived in Open Court. The Court, having heard evidence and being fully advised in the premises, and on consideration thereof, finds that all of the allegations of Plaintiff's Motion for Judgment against Garnishee are true and that Plaintiff should have Judgment as prayed for therein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff have and recover Judgment against the Garnishee, Peko Petroleum Company, for the sum of \$175,000.00, with interest thereon at the rate of 15% per annum from December 31, 1987, an Attorney's fee to be determined by the Court, and for all costs of this action, for all of which let Execution issue.

  
JUDGE

APPROVED:

EAGLETON AND NICHOLSON

  
DON R. NICHOLSON II, OBA #6673  
MARK J. PORDOS, OBA #11476  
Fidelity Plaza - Suite 310  
Oklahoma City, Oklahoma 73101  
Telephone: (405) 236-0550  
Attorneys for Plaintiffs  
RFG\HEBRONJE.07

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

CLERK'S OFFICE

UNITED STATES COURT HOUSE

TULSA, OKLAHOMA 74103

March 9, 1988

JACK C. SILVER  
CLERK

(918) 581-7796  
(FTS) 736-7796

TO: Counsel/Parties of Record

RE: Case # 82-C-755-C

White v. American Airlines

This is to advise you that Chief Judge H. Dale Cook entered the following Minute Order this date in the above case:

The motion of the plaintiff to amend judgment, filed on December 4, 1987, is hereby denied, for the reasons stated in this Court's Order of November 19, 1987.

Very truly yours,

JACK C. SILVER, CLERK

By: *Patricia J. Hadden*  
Deputy Clerk

Entered  
FILED

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

MAR -9 1988

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

JOE L. WHITE, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 AMERICAN AIRLINES, INC., )  
 a Delaware corporation, )  
 )  
 Defendant. )

No. 82-C-755-C ✓

O R D E R

Now before the Court for its consideration is the motion of the defendant for partial judgment notwithstanding the verdict or, in the alternative, for new trial or, in the alternative, for an order of remittitur. Following a jury trial on plaintiff's claims for wrongful discharge and defamation, the jury returned its verdict on October 13, 1987. On November 19, 1987, this Court entered judgment in favor of plaintiff in the amount of \$1,516,000 on the wrongful discharge claim and in favor of the defendant on the defamation claim. Defendant has now filed the present motion.

1. JNOV MOTION

A. Wrongful Discharge Claim

The defendant contends that the Court erred in its Order of September 15, 1987 (hereafter September 15 Order) in predicting that the Supreme Court of Oklahoma, faced with the case at bar, would recognize the public policy exception to the terminable at will doctrine. This prediction was based upon Hinson v. Cameron,

742 P.2d 549 (Okla. 1987). It will be useful to discuss separately (1) the power of a federal court to render such predictions, and (2) the proper interpretation of Oklahoma law.

The defendant correctly refers to §4507 of the Wright and Miller treatise as an authoritative source on the issue of a federal court's responsibility in this area, what may be called the "predictive" function. A reading of the section provides support for this Court's ruling. The fountainhead of present doctrine is Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), in which the United States Supreme Court repudiated the doctrine of Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (U.S. 1842), which held that federal courts could disregard certain state court decisions, thus resulting in inconsistent decisions and forum-shopping. Pursuant to the Erie doctrine, under proper circumstances,

the federal court must determine issues of state law as it believes the highest court of the state would determine them, not necessarily (although usually this will be the case) as they have been decided by other state courts in the past. Unless a federal court is allowed this much freedom and flexibility, the Erie doctrine simply would have substituted one kind of forum-shopping for another.

19 Wright, Miller & Cooper, Federal Practice and Procedure, §4507 (1982) at 89-91 (footnote omitted). As this Court explained in its September 15 Order, dicta in the Hinson decision persuaded this Court that the Supreme Court of Oklahoma would recognize the public policy exception under proper facts.

Necessarily, in making such a prediction a federal court must state a principle of law which the highest state court has not yet explicitly stated. While the federal court should be

circumspect in so doing, the power to do so exists. The defendant's reliance upon a statement in Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975), to the effect that federal courts should not "engraft" exceptions on state rules, is misplaced. In context, the United States Supreme Court was clearly holding that a federal court in a diversity case may not "engraft" an exception onto a state's conflicts-of-law rules. The Supreme Court has never held that a federal court is, under all circumstances, rigidly bound to wait until a state's highest court expressly and unambiguously adopts a modification in any area of state law. If it had, the extensive discussion in the Wright and Miller treatise regarding the "predictive" function of a federal court could be considerably more brief. Indeed, if the defendant's position were correct, the established principle that a federal court may consider dicta of the highest state court in making a prediction would be meaningless. The treatise authors discuss two recent appellate decisions as follows:

The Seventh Circuit recently has expressed a strong policy against expanding state law by predicting the trends in state court decisions. In Anderson v. Marathon Petroleum Co., C.A.7th, 1986, 801 F.2d 936, the court stated: "Resident litigants who seek adventurous departures in state common law are advised to sue in state rather than federal court." Id. at 942 (Posner, J.). Similarly, in Shaw v. Republic Drill Corp., C.A.7th, 1987, 810 F.2d 149, the court stated: "we have already indicated our unwillingness to speculate on any trends in state law .... This policy applies with special force to a plaintiff in a diversity case who has chosen to litigate his state law claim in federal court ... our policy will continue to be one that requires plaintiffs desirous of succeeding on novel state law claims to present those claims initially in state court." Id. at 150 (per curiam). To the extent that this policy indicates an unwillingness to

predict how the highest state court actually would decide an issue, it is subject to serious criticisms. It directly encourages forum-shopping, not only between state and federal court, but also between federal courts in the Seventh and other Circuits. Moreover, the Seventh Circuit's policy creates a dilemma. If the court refuses to expand or predict the content of state law irrespective of how the case came into federal court, it will give defendants faced with novel state law claims a strong incentive to remove, directly contrary to the goals of Erie. If, on the other hand, the Seventh Circuit limits its policy to cases in which the plaintiff initially brought his or her claims in federal court, the policy could place undue pressure on plaintiffs who have both state and federal law claims to forego a federal forum. It also is at least arguably inequitable to decide the merits of cases differently based on how they came into federal court, and it remains to be seen whether the Seventh Circuit will deny defendants the right to assert novel state law defenses when they have chosen to remove a case from state court.

Id. (Supp. 1987) at 7. This Court agrees with the discussion above. The position of the defendant herein, a variant of that expressed by the Seventh Circuit, must be rejected. In fact, since the case at bar was originally filed in state court and was removed to federal court by the defendant, even the Seventh Circuit would not use this reasoning to deny a novel state law claim. See Anderson, 801 F.2d at 942 ("(It would be different if [plaintiffs] had filed this suit in state court and [defendant] had removed it to federal court)"). This Court notes that to accept the defendant's argument at its logical extension would be to declare that a federal court in Oklahoma could never predict a change in Oklahoma law; it must wait until the Oklahoma Supreme Court recognizes the change expressly. Such a declaration would promote forum-shopping, which is precisely what the Erie doctrine is designed to prevent.

Regarding the second pertinent issue, i.e., this Court's interpretation of Oklahoma law, the defendant correctly notes that in recognizing new causes of action, the Supreme Court of Oklahoma has addressed the issue of retroactivity. The Oklahoma Supreme Court has consistently concluded that the new cause of action should be applied prospectively, rather than retroactively, and has made what may be called a "statement of prospectivity." For example, in Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300, 306 (Okla. 1986), the Oklahoma Supreme Court stated:

In adopting a new rule of liability which creates a civil cause of action, we specifically hold that the law hereby established will be applied prospectively to all causes of action occurring from and after the date the mandate issues herein.

Defendant has placed emphasis upon Griggs v. State ex rel. Okla. Dept. of Transp., 702 P.2d 1017 (Okla. 1985), in which the Oklahoma Supreme Court adopted the factors articulated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), for determining when a new pronouncement should be applied retroactively. As set forth in Griggs, the factors are as follows:

(1) at the threshold, the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or on an issue of first impression whose decision is not clearly foreshadowed; (2) the court must weigh the merits and demerits of applying the rule retroactively by considering the rule's prior history, its purpose and effect, and whether retroactivity will further or retard its operation; and (3) the court must consider the inequity flowing from retroactive application, including unfairness and hardship to the parties.

Griggs, 702 P.2d at 1020. Defendant argues that this Court should have applied the Chevron factors and ruled that the public policy exception only be applied prospectively.

In discussing this aspect of Oklahoma law, the defendant fails to consider (1) the purpose of the Chevron analysis, and (2) the Oklahoma Supreme Court's rulings as to the parties before it. The Oklahoma Supreme Court renders regularly published opinions which resolve -- or at least provide guidance on -- all manner of state law questions. When the highest court of a state recognizes a new cause of action, its decision is made available for all litigants or potential litigants in Oklahoma courts. Obviously, it is vital for the state supreme court to advise those with pending cases what effect, if any, a recent opinion will have on the pending litigation. Orders of this Court, by contrast, are not regularly published, and this Court's primary concern is with the proper resolution of a pending dispute, not pronouncing rules of law to affect all other litigants. It would serve no purpose for this Court to have discussed the Chevron factors in its September 15 Order, because those factors are primarily concerned with the effect of a decision on litigants other than those before the Court. In a decision recognizing a new cause of action, even after engaging in the Chevron analysis and making this statement of prospectivity, the Oklahoma Supreme Court has consistently applied a new cause of action to the parties before the court.

In the Griggs decision, the court was reviewing a change in Oklahoma law which had already taken place, in Vanderpool v. State, 672 P.2d 1153 (Okla. 1983). Vanderpool modified the doctrine of governmental immunity. The issue in Griggs, as the court stated in its first sentence, was whether Vanderpool should be made applicable to all cases pending on appeal at the time Vanderpool was decided. After applying the Chevron factors, the court in Griggs ruled that such applicability should not be found. In explaining why the plaintiff before the court should not receive the benefit of Vanderpool, the court stated:

The hardship to Griggs consists of the arguable unfairness in treating them differently from the plaintiff in Vanderpool. The latter received the benefit of the abrogation norm. The law generally favors encouraging litigants to go forward with appeals which may lead to salutary changes in jurisprudence.

Griggs, 702 P.2d at 1021 (footnote omitted). Similarly, in Snethen v. Oklahoma State U. of Farmers Ed. & Co-op U., 664 P.2d 377, 382 (Okla. 1983), the court overruled a prior precedent and stated:

Neither fairness nor any principle of public policy dictates that we give a purely prospective application to the change effected by today's decision. The insured should be allowed to reap the benefit of his successful challenge to the insurable interest test we now reject by this opinion. Our pronouncement today shall hence be given effect to this case and, prospectively, to all insurance losses occurring after mandate herein is issued.

(Emphasis added). See also Vanderpool, supra, 672 P.2d at 1157 (new doctrine prospective "[e]xcept as to the case before us"), and Brigance, supra, 725 P.2d 300, 306 (Okla. 1986) (new rule of

liability prospective; however, "[w]e apply the rule of liability adopted herein to the parties in the case before us").

As the Oklahoma Supreme Court indicates in Griggs and Snethen, it is only proper to give a party arguing for an extension of existing law the benefit of that extension if the court so recognizes it. When a new cause of action is recognized, denial of it to the plaintiff results in absolute denial of recovery, while from the defendant's standpoint, recognition is not an absolute finding of liability, but merely places the evidence before the jury. The plaintiff here has asserted the public policy exception at least since his Amended Complaint, filed on August 30, 1982. The argument was not a sudden shift based upon the Hinson decision. This Court's task was to interpret and apply the law of Oklahoma as this Court believes that the Supreme Court of Oklahoma would. Rawson v. Sears, Roebuck & Co., 822 F.2d 908, 910 (10th Cir. 1987). Thus, even as a matter of equity (i.e., the third Chevron factor) this Court followed established precedent in applying the new cause of action to the parties before it. Had the Oklahoma Supreme Court in Hinson expressly recognized the public policy exception, and stated that the new cause of action was only to be applied to cases arising thereafter, this Court would have erred in applying it to the present parties. This Court's September 15 Order was rather a prediction of what the Oklahoma Supreme Court has not yet done, and therefore the defendant's statement that a new cause of action has been improperly applied to the present parties is

incorrect. It would be senseless for a federal court to have the ability to predict changes in state law, coupled with the inability to apply such a prediction to the parties before it.

In Lambert v. Park, 597 F.2d 236 (10th Cir. 1979) the United States Court of Appeals for the Tenth Circuit predicted that Oklahoma would adopt the "informed consent" doctrine in medical malpractice cases. The appellate court applied its ruling to the parties before it. In Scott v. Bradford, 606 P.2d 554 (Okla. 1979) the Oklahoma Supreme Court subsequently fulfilled the prediction of Lambert by formally adopting the informed consent theory. Defendant stresses that the Scott opinion contains a statement of prospectivity. 606 P.2d at 559. In order for that datum to be relevant to the case at bar, the defendant must believe that the statement of prospectivity in Scott somehow renders Lambert erroneous or not binding on the parties who were before the Lambert court. This Court is aware of no authority supporting such a proposition, and rejects it. The defendant's argument that this Court ignored the established at-will employment rule is a circular one. If an exception to a rule were precluded by the rule's existence, no exception would ever be recognized. The Oklahoma Supreme Court has never explicitly recognized or rejected the public policy exception. Therefore, a prediction was necessary.

The defendant's citation of Bimbo v. Burdette Tomlin Memorial Hospital, 644 F.Supp. 1033 (D.N.J. 1986) is inapposite. The court in Bimbo determined not to apply in the action before it a

cause of action already expressly recognized by the New Jersey Supreme Court in a prior decision. This would be analogous to the case at bar if the Hinson court had expressly recognized the public policy exception (in which case the Oklahoma Supreme Court presumably would have included a statement of prospectivity, which statement would have bound this Court). As this Court explained in its September 15 Order, the court in Hinson did not expressly recognize the public policy exception; rather, in this Court's view, it indicated that it would recognize the exception under proper facts. Therefore, this Court engaged in the "predictive" function, as a federal court may and should under proper circumstances. Although not engaging in extensive analysis, the district court in Merkel v. Scovill, Inc., 570 F.Supp. 133, (S.D.Ohio 1983), recognized the public policy exception.

Finally, this Court wishes to briefly refer to McGehee v. Florafax International, Inc., 58 O.B.J. 2609 (Okla.Ct.App. 1987). This decision was rendered by one division of the Oklahoma Court of Appeals at approximately the same time as this Court's September 15 Order, but did not become known to this Court until later. In Florafax, the plaintiff alleged that he was discharged for his refusal to execute false affidavits in connection with account collection. The court in review stated:

At the close of plaintiff's evidence the trial court heard defendants contend that because plaintiff's contract of employment was oral it was terminable "at will," and defendants could fire him for any cause including a refusal to carry out a company policy requiring him to break the law! The trial court's response to plaintiff's stand against wrongdoing was to sustain the defendants' demurrer to his evidence and

dismiss his action--a rather blunt way of telling plaintiff that the just are not always treated justly in some courts of justice.

Id. at 2610. The court then reversed the judgment of dismissal. The Florafax court did not couch its decision in terms of the public policy exception. Indeed, the court did not even mention the Hinson decision, which had been rendered months earlier. This Court merely notes that the Florafax decision is not evidence contrary to the prediction by this Court in its September 15 Order. Decisions of intermediate state courts are among the factors a federal court should consider in such analysis. Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1574-75 (10th Cir. 1984). The Court is not persuaded that it erred in predicting that the Oklahoma Supreme Court will recognize the public policy exception, and declines to grant defendant's motion on that basis.

#### B. Sufficiency of Evidence

Defendant contends that this Court should award it judgment notwithstanding the verdict because there was insufficient evidence to support plaintiff's claim of wrongful discharge. The applicable standard is as follows:

"Judgment n.o.v. is proper only when the evidence so strongly supports an issue that reasonable minds could not differ." ... We must view the evidence in the light most favorable to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. ... A reviewing court is not permitted to consider the credibility of witnesses in reaching its decision ... nor may a court weigh the evidence or determine where the preponderance of the evidence lies. ... Moreover, if there is conflicting or insufficient evidence to warrant a "one-way conclusion", a directed verdict or judgment

n.o.v. is inappropriate. Generally, a directed verdict or a motion for a judgment n.o.v. "should be cautiously and sparingly granted."

Ryder v. City of Topeka, 814 F.2d 1412, 1418 (10th Cir. 1987) (citations omitted). See also Bruno v. Western Elect. Co., 829 F.2d 957, 962-63 (10th Cir. 1987). While it is correct that those American Airlines officials who testified denied any knowledge that plaintiff had been asked to commit perjury, there was sufficient evidence from which the jury could reasonably infer such knowledge on the part of the defendant. Therefore, the Court declines to grant the defendant judgment on this basis.

## 2. NEW TRIAL MOTION

### A. Sufficiency of Evidence

In its motion for new trial, defendant contends that the verdict was against the weight of the evidence. Such a motion is directed to the discretion of the trial court. Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir. 1984). From a review of the evidence presented, the Court concludes that the jury's verdict herein was not against the weight of the evidence. Accordingly, the motion for new trial on this basis is denied.

### B. White-Wheeler Conversation

Defendant argues that testimony regarding the conversation between plaintiff White and California attorney David Wheeler should not have been admitted. The defendant's position is somewhat unclear, and therefore the Court will attempt to respond in as broad a manner as possible.

On April 13, 1987, defendant filed a motion in limine which stated that it sought exclusion of "any testimony by WHITE as to what David Wheeler, attorney for the insurance carrier representing AMERICAN in the DC-10 crash litigation, told WHITE...." (Motion in Limine at 4) (emphasis added). The asserted grounds were (1) irrelevance (2) hearsay and (3) attorney-client privilege. On September 22, 1987, defendant filed a supplemental brief in support of this motion, stating that defendant sought to exclude "the proposed testimony by the plaintiff of what 'David Wheeler' (who is alleged to have been an attorney for the insurance carrier allegedly representing American in earlier litigation) supposedly said to plaintiff." (Supplemental Brief at 1) (emphasis added). Elsewhere defendant refers to Wheeler, "whom plaintiff also evidently contends was defendant's legal counsel in the defense of a pending lawsuit ..." (Supplemental Brief at 8), and "an alleged attorney for AMERICAN...." (Supplemental Brief at 10). These statements demonstrate that (1) defendant sought to bar the testimony of plaintiff White as to the conversation, and (2) defendant did not state that Wheeler was at any time attorney for the defendant.

In this context, the motion in limine came before the Court on September 23, 1987 and was overruled on all three grounds. The assertion of irrelevance is meritless. It is difficult to conceive of evidence more relevant to this cause of action than the request of the plaintiff to commit perjury. Even if, as defendant contends, no evidence was presented proving that

defendant knew of the request and of plaintiff's refusal, this would mean that plaintiff had failed to prove one element of his cause of action. It would not render the Wheeler-White conversation irrelevant. As for hearsay, defendant's elaborate argument in its supplemental brief reflects misunderstanding of the concept. "[T]estimony is not hearsay when it is to prove only that a statement was made and not the truth of the statement." Creaghe v. Iowa Home Mut. Cas. Co., 323 F.2d 981, 984 (10th Cir. 1963). This was precisely the reason given by the Court for overruling that portion of defendant's argument. Finally, regarding the assertion of privilege, the Court has emphasized with previous quotations that the defendant did not state that Wheeler had ever been an attorney who represented American Airlines. It is settled that "[t]he burden of establishing the applicability of a privilege rests on the party seeking to assert it." Matter of Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 279 (10th Cir. 1983). Far from meeting its burden of proof, the defendant continually referred to Wheeler as its "alleged" attorney, as if it denied the allegation. The motion in limine was properly overruled.

In the briefs supporting its new trial motion, the defendant asserts that the Court erred in overruling the motion in limine. Oddly, however, the focus of defendant's argument is that the testimony of Wheeler concerning his conversation with White should not have been admitted, a requested exclusion not contained in the motion in limine.

In contrast to the motion in limine, defendant now freely states that Wheeler did in fact represent American Airlines when he interviewed plaintiff White in 1979. Wheeler so states in his deposition at page 16, LL.15-16. Defendant argues that Wheeler's deposition testimony should have been excluded based upon the attorney-client privilege. (In its Reply Brief supporting its new trial motion, filed on February 22, 1988, defendant shifts ground again, and argues that neither White nor Wheeler should have been permitted to testify as to the conversation.)

The attorney-client privilege protects "confidential communications by a client to an attorney made in order to obtain legal assistance from the attorney in his capacity as a legal advisor." Matter of Grand Jury Subpoena, *supra*, 697 F.2d at 278 (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)). Because the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Fisher, 425 U.S. at 403. See also Matter of Grand Jury Subpoena, 697 F.2d at 278 (privilege is to be narrowly construed). This principle should be kept in mind when considering 12 O.S. §2502, the codification of the attorney-client privilege in Oklahoma. Defendant contends that plaintiff White, in his conversation with Wheeler, is properly defined as a "representative of the client" pursuant to 12 O.S. §2502(A)(4) which states:

A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client; and

The defendant would have the Court construe "advice" in this provision to encompass a request to commit perjury. The Court declines to do so. Defendant also refers to 12 O.S. §2502 (B) which provides in pertinent part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

Again, the critical aspect of the conversation to which plaintiff testified was not a communication "made for the purpose of facilitating the rendition of professional legal services." To hold that it would be to pervert the purpose of the attorney-client privilege.<sup>1</sup> "[T]he privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts...." Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 354 (1985). Cf. 12 O.S. §2502(D)(1). On the privilege issue, the relevant consideration is not the credibility of the witness in his testimony, but whether he is entitled to testify at all. In this instance, the plaintiff was so entitled. For similar reasons, Wheeler's testimony was properly admitted as well. The Order permitting the taking of the deposition, entered on September 22, 1987, while stating that the taking of the deposition will not

---

<sup>1</sup>"Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice." Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348 (1985) (emphasis added).

constitute waiver of the attorney-client privilege, also states that "the deposition will be used only in the case should American's Motion in Limine [be] denied." The motion in limine was denied, and properly so, and the defendant thus waived any objection to the introduction of the deposition. Of course, the defendant could have declined to take Wheeler's deposition (the Order permitting the deposition was granted over plaintiff's objection), but then plaintiff's testimony would have stood uncontradicted. It is difficult to see how such a circumstance would have benefitted the defendant or led to a different result.

Defendant also refers the Court to Upjohn v. United States, 449 U.S. 383 (1981), which broadened the privilege from "only communications between counsel and top management, and decided that, under certain circumstances, communications between counsel and lower-level employees are also covered." Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348 (1985). Defendant contends that the communications at issue in the case at bar are similar to those in Upjohn. On the contrary, the petitioner in Upjohn was conducting its own internal investigation of questionable payments made by one of its foreign subsidiaries. Subsequently, the Internal Revenue Service sought production of the investigation files. The Supreme Court saw fit to broaden the privilege in order to promote the obtaining of information by corporate counsel "to ensure their client's compliance with the law." Upjohn, 449 U.S. at 392. By contrast, the communication as to which plaintiff sought to testify herein

was an instruction that he violate the law. Again, none of the purposes of the privilege, detailed in Upjohn, would be served by barring such testimony. The Upjohn Court was addressing a situation in which a free flow of information was necessary from lower-level employees to corporate counsel in order that the corporation could obtain legal advice. 449 U.S. at 394. This purpose is not served by permitting a corporation to establish a "zone of silence" over communications from counsel to an employee not properly characterized as "legal advice." Cf. id. at 395. In the case at bar, moreover, no outside agency sought compulsion of the information; the employee voluntarily wished to testify. Even if this communication were privileged, at least one decision has concluded that the broadening of the privilege in Upjohn necessarily means that, in certain circumstances, a corporate employee may also wave the privilege. Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 699 (E.D.Va. 1987). The Court need not reach this issue, because it is persuaded that the privilege does not apply to the communication at issue. However, without stating a general rule on the matter, the Court believes that any privilege which hypothetically did attach could be waived by plaintiff as to the conversation to which he was a party and as to the instructions directed solely to him. In sum, the Court is not persuaded that any error was committed in the admission of the White-Wheeler conversation.

### C. Continuance Denial

The defendant contends that it was prejudiced because it was

not permitted to file an answer, no pretrial order was prepared, and defendant's request for continuance was denied, all after the Court's September 15, 1987 Order permitting the plaintiff to bring his wrongful discharge claim.

On September 21, 1987, defendant made an oral application for continuance, referring to its written application filed on September 10, 1987. The oral request focused on the preparation of a pretrial order. By the Court's recollection, no request to file an answer was made. From the evidence presented at trial, it appears that any answer filed would have been a general denial. No prejudice is apparent in this regard.

It is true that the trial was ultimately conducted without a pretrial order. However, defendant does not demonstrate any greater prejudice to it than to plaintiff in such a circumstance. Again, this is an insufficient basis for a new trial.

Defendant contends that a continuance was in order because this Court "without warning" (New Trial Brief at 7), restored the plaintiff's wrongful discharge claim. As the Court has attempted to demonstrate in the discussion in 1(A), supra, no reader of Hinson v. Cameron should have been "without warning" of the interpretation rendered by this Court. In its Reply Brief regarding the new trial motion, filed on February 22, 1988, the defendant asserts that it should have been permitted discovery as to the economic losses asserted by plaintiff. Defendant had deposed plaintiff's expert on April 3, 1987, and does not demonstrate any significant difference between the deposition and

trial testimony. Defendant presented no economic expert of its own, and offers little but speculation as to precisely how it was prejudiced. As the Court stated when denying the application for continuance, the present litigation had been pending since August, 1982, without coming to trial. Considering the time necessary for trial of this case, a continuance might have resulted in delay of still more months. Under the circumstances, the Court is not persuaded that it abused its discretion in this regard.

D. Evidentiary Rulings

The defendant has recited various evidentiary rulings made adverse to defendant, and complains that it was substantially prejudiced thereby. "The determination for the admission and exclusion of evidence is left to the trial court's discretion." United States v. Wright, 826 F.2d 938, 945 (10th Cir. 1987). The Court is not persuaded that it abused its discretion. Defendant also complains of a few statements "blurted out" by witnesses which were not prompted by the Court's evidentiary rulings. The Court does not believe that these few statements, in the context of all the evidence, mandate a new trial.

E. Jury Instructions

The defendant contends that various jury instructions given by the Court were erroneous. These instructions will be discussed in turn.

The Court instructed the jury that the burden of proof was preponderance of the evidence. Defendant argues that the

appropriate burden of proof is clear and convincing evidence. Defendant asserts that, in the concurring opinion in Hinson v. Cameron, 742 P.2d 549 (Okla. 1987), "Justice Kauger stated that any new tort theory should require 'strict' proof because of the seriousness and gravity of the improper conduct which constitutes the predicate for the new claim." (New Trial Brief at 25). Justice Kauger said no such thing. She was addressing situations when a court should find that tort remedies, in addition to contract remedies, are available to a plaintiff in a case of this type. She stated: "Courts should adhere strictly to proof of bad faith, malice, or public policy breach as a threshold breach for potential tort recovery." Id. at 561 (footnote omitted). In other words, Justice Kauger was not addressing burden of proof, but rather was admonishing courts to strictly require some proof of bad faith, malice or public policy breach before permitting tort recovery. In any event, a statement in a concurring opinion joined by two other justices is only of marginal guidance. Defendant also refers to Vigil v. Arzola, 699 P.2d 613 (N.M.App. 1983), rev'd in part on other grounds, 687 P.2d 1038 (N.M. 1984), which adopted the "clear and convincing" standard. The defendant states that this Court cited Vigil with approval in its September 15, 1987 Order. That Order could not be clearer that Vigil was cited solely for the proposition that punitive damages should not be available to a plaintiff in the case in which a new tort action was recognized. The Supreme Court of New Mexico has now declined to overrule the "clear and convincing" standard in Silva

v. Albuquerque Assembly & Distribution Freeport Warehouse Corp., 738 P.2d 513, 515 (N.M. 1987). This Court declines to follow New Mexico in this regard, which appears to be the only jurisdiction to have applied such a standard.

Defendant contends that the Court should have instructed that "(a) AMERICAN requested WHITE to commit perjury, and; (b) that the AMERICAN officer who decided to terminate WHITE actually knew of that request and of WHITE's refusal." (New Trial Brief at 26). The essence of this cause of action -- that plaintiff was discharged because of his refusal to commit perjury -- is contained in the elements given in the jury instructions in this case. The instructions given by the Court require proof of knowledge of the refusal on defendant's part. An instruction focused on an individual corporate officer would render it virtually impossible for a plaintiff to overcome a self-serving denial by that officer with circumstantial evidence, which will necessarily be a plaintiff's proof in most such cases.

Defendant contends that the Court should have instructed the jury that the refusal to commit perjury must be a substantial factor, not merely a cause, in plaintiff's termination. The instruction in question was only given the jury after obtaining approval of counsel for both parties. Under Rule 51 F.R.Cv.P., the defendant has waived objection. In any case, under the evidence presented, the Court has concluded that the instruction was not improper or misleading.

Finally, defendant contends that the jury should have been instructed that an essential element of plaintiff's claim was that it is reasonably certain plaintiff would have continued to be employed with the defendant if he had not been terminated. The Court does not find this to be an established element in cases of this type. While it would have been an effective argument in cross-examination of plaintiff's expert or in closing argument, it need not be included as an element of plaintiff's claim. The jury was instructed that damages awarded should not be speculative. The defendant's request is, to a large extent, redundant. Similarly, defendant's recent argument that the plaintiff has somehow admitted jury confusion (February 22, 1988 Reply Brief in support of New Trial at 20-21) must fail. A verdict will not be upset on the basis of speculation as to the manner in which the jurors arrived at it. Howard D. Jury, Inc. v. R & G Sloane Manuf. Co., 666 F.2d 1348, 1351 (10th Cir. 1981).

F. Expert Testimony

In its brief supporting its motion for new trial, defendant launches an elaborate attack upon the methodology employed by plaintiff's economic expert, who testified as to the financial loss suffered by plaintiff. Such an attack is better staged on cross-examination or through presentation of opposing party's own expert witness, rather than in post-trial briefs. "Expert witness testimony is subject to the same tests of credibility and weight as is any other admissible evidence." Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 930 (10th Cir.),

cert. denied, 469 U.S. 853 (1984). The defendant presented no expert witness of its own, and plaintiff's expert witness was virtually unimpeached. The jury was instructed that it was free to accept or reject the expert testimony. Obviously, the jury found the testimony persuasive and the Court cannot conclude that any manifest injustice resulted therefrom.

G. ERISA Preemption

The defendant contends that the portion of plaintiff's claim for damages involving lost income and benefits from health insurance and contributions to the defendant's employee benefit plans are preempted by the Employment Retirement Income Security Act, 29 U.S.C. §1001 et seq. (ERISA). Defendant relies upon Metropolitan Life Ins. Co. v. Taylor, 107 S.Ct. 1542 (1987) and Pilot Life Ins. Co. v. Dedeaux, 107 S.Ct. 1549 (1987). The Court set forth in Dedeaux its preemption analysis, and in Taylor held that common law causes of action filed in state court preempted by ERISA are removable to federal court.

The defendant did not object to the damages instruction in reference to benefits, and thereby waived the preemption "defense" under Rule 51 F.R.Cv.P. In any event, the Court has concluded that the defendant's argument is not well taken. The Dedeaux court plainly stated that the issue for consideration was whether ERISA "preempts state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan." 107 S.Ct. at 1550-51 (emphasis added). The plaintiff's claim in the case at bar was

not for improper processing of a benefit claim, but for wrongful discharge. A claim that a plaintiff was discharged to prevent him from obtaining benefits would be preempted. See, e.g., Adams v. Catalyst Research, 659 F.Supp. 163, 165 (D.Md. 1987). The claim of plaintiff herein, that he was discharged for his refusal to commit perjury, falls outside the Dedeaux rationale, and is not preempted. The defendant relies in part upon a decision of the Michigan Court of Appeals in Teper v. Park West, 396 N.W.2d 210 (Mich.App. 1986). In Morningstar v. Meijer, inc., 662 F.Supp. 555 (E.D.Mich. 1987), a federal district court in Michigan, in ruling that not all breach of contract actions are preempted, described Teper as "an incorrect interpretation of federal law." Id. at 556. This Court agrees, and rejects the defendant's attempt to ignore the limitation contained in the first sentence of the Dedeaux decision.

#### H. Emotional Distress Damages

Defendant contends that the Court erred by instructing the jury that plaintiff could recover emotional distress damages. Defendant says that "the better reasoned authorities on this point" deny such damages, and then proceeds to cite a single decision, Vigil v. Arzola, 699 P.2d 613 (N.M. Ct.App. 1983). A genuinely better reasoned authority is Cagle v. Burns and Roe, Inc., 726 P.2d 434 (Wash. 1986) (en banc), in which the Supreme Court of Washington held that, as with other intentional torts, a wrongful discharge in violation of public policy carries with it the recoverability of damages for emotional distress. In the

course of its discussion, the Cagle court described Vigil, supra, as the only case to deny such damages. 726 P.2d at 437 n.2. The defendant's other points on this issue are without merit.

I. Remittitur

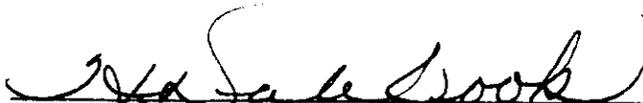
Defendant seeks remittitur as to both plaintiff's pecuniary damages and emotional distress damages, the two types set forth in the jury instructions. The applicable standard is that

absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate.

Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981) (footnote omitted) (en banc) (plurality opinion), cert. denied, 464 U.S. 824 (1983). The Court has reviewed the evidence presented in the case, and has concluded that the jury's verdict should not be disturbed.

It is the Order of the Court that the motion of the defendant for partial judgment notwithstanding the verdict or, in the alternative, for new trial or, in the alternative, for an order of remittitur, is hereby DENIED.

IT IS SO ORDERED this 8<sup>th</sup> day of March, 1988.

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

*Entered*

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**  
NORTHERN DISTRICT OF OKLAHOMA

**MAR 9 1988**

JOE R. PRUETT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TRW, INC. d/b/a REDA PUMP )  
 DIVISION, )  
 )  
 Defendant. )

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

No. 87-C-307-C

O R D E R

Before the Court for its consideration is the motion for summary judgment brought by the defendant TRW, Inc. d/b/a Reda Pump Division. Defendant contends that no material controverted facts exists and that it is entitled to summary judgment as a matter of law.

The following facts are uncontroverted. Defendant is engaged at its Bartlesville, Oklahoma facility in the manufacture and sale of downhole electrical submergible oil well pumping equipment. Beginning in late 1985 and continuing to the present, defendant experienced a significant decline in its business due to falling oil prices which held to a corresponding reduction in the demand for oil pumping equipment. Defendant contends that in order to bring its employee capacity in line with its decline in business, it decided to undertake a major reduction in its workforce. Between November, 1985 and January 31, 1986, 421

15

employees were either laid off or took voluntary separation. Of this number, 113 persons were classified as salaried non-union employees. Oil prices continued to decline, and in March, 1986, defendant laid off 263 additional employees. Of these, 105 were classified as salaried non-union employees.

All reduction-in-work force decisions regarding unionized employees were made in accordance with defendant's collective bargaining agreement with the operating engineers' union. All reduction-in-work force decisions, with respect to exempt and nonexempt employees (as defined under the Fair Labor Standards Act) were made pursuant to the reduction-in-work force policy as established by management. (The term "exempt" means that the classification is exempt from the requirements of the federal wage and hour law.)

Plaintiff was first hired by defendant in July, 1951. In August, 1982, plaintiff was promoted to the exempt salaried classification of lead planner/vendor scheduler in the finished product planning department. The length of plaintiff's employment was not specified by any contract or policy manual.

Prior to plaintiff's lay-off, his supervisor was given a budgetary figure that was to be met in his department. To meet the budget, plaintiff's supervisor decided to lay off five salaried exempt employees, which included plaintiff.

Defendant asserts that following plaintiff's termination, plaintiff's former duties were reassigned to Jerry Savage (age 42 with 14 years of service to defendant) and Henry Waller (age 51

with 35 years of service with defendant). Under defendant's lay-off policy, exempt employees displaced from their jobs do not have the right to displace any other employee remaining within the organization.

In response, plaintiff asserts that he was 52 years old at the time of his termination and had been employed by defendant for 34 years, earning \$2,500 per month. Plaintiff contends that at the time of his termination, Sabrina Rickman was 30 years old and had been employed as a non-exempt employee of defendant for 12 years, earning \$2,000 per month. Plaintiff contends that he and Ms. Rickman were cross-trained to do each other's job, but regardless of his ability to perform her work, he was terminated and she was not. Plaintiff asserts that had exempt employees been allowed to displace non-exempt employees he would have been able to displace Ms. Rickman, due to his seniority, and retain his employment.

Plaintiff brings his first cause of action under the Age Discrimination Employment Act (ADEA), 29 U.S.C. §621 et seq. and a second cause of action for wrongful discharge. In his claim for wrongful discharge, plaintiff asserts defendant has violated the implied covenant of good faith and fair dealings by its termination process. In view of Hall v. Farmers Ins. Exchange, 713 P.2d 1027 (Okla. 1985) and Hinson v. Cameron, 742 P.2d 549 (Okla. 1987), plaintiff limits his contention to the assertion that defendant's lay-off policy is void and unenforceable as a matter of public policy in that the defendant's policy has a disparate impact on persons within the protected age group, and

such impact is unlawful. Plaintiff's assertion is without merit. First, plaintiff's public policy argument does not come within the purview of public policy violations specifically enumerated in Hinson. Second, if defendant's lay-off policy is determined to be void and unenforceable because of its disparate impact on the defined protected age group, the appropriate remedy is found under the ADEA. That specific public policy has been legislated by Congress and an established remedy has been designated. Therefore plaintiff's second cause of action for wrongful discharge is subject to summary dismissal for failure to state a claim.

As to plaintiff's claim under the ADEA, as plead in the complaint, the Court has carefully reviewed relevant case authority. The principles of law applicable are delineated as follows:

1. The ADEA does not require that every plaintiff in a protected age group be allowed a trial simply because he was discharged during a reduction-in-force. The mere termination of a competent employee when an employer is making cut-backs due to economic necessity is insufficient to establish a prima facie case of age discrimination, rather, the plaintiff in a "cut-back" case must provide evidence that age was a factor in the termination. Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985).
2. The mere fact that plaintiff was replaced by a younger employee -- the age differential factor -- itself is insufficient to establish a prima facie case. Holley v. Sanyo Mfg., Inc., supra; Sahadi v. Reynolds Chemicals, 636 F.2d 1116 (6th Cir. 1980).
3. Where an employer reduces his workforce for economic reasons, it incurs no duty to transfer an employee to another position within the company. Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986).

4. An employer is under no duty, when it is reducing its work force for economic reasons, to restructure its enterprise and move more senior employees into lower echelon, poorer paying jobs in order to satisfy the ADEA. Parcinski v. The Outlet Co., 673 F.2d 34 (2nd Cir. 1982), cert. den. 459 U.S. 1103.
5. The ADEA does not require an employer to accord special or preferential treatment to employees over forty years of age. It requires, instead, that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion or discharge. Durham Industries, Inc. v. North River Ins. Co., 673 F.2d 37 (2nd Cir. 1982), cert. den. 459 U.S. 827.

In view of these legal principles, the Court has received no evidence from plaintiff that his discharge was motivated by his age. The Court finds that plaintiff has failed to make a prima facie showing of age discrimination. As stated by the Sixth Circuit:

Generally an ADEA plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons. To meet his ultimate burden of demonstrating that he was a victim of age discrimination, the plaintiff, in addition to proving that he fell within the protected class, that he was terminated and that he was replaced by a younger individual, must come forward with additional direct, circumstantial, or statistical evidence that age was a determining factor in his termination.

Ridenour v. Lawson Co., supra at 57.

In an effort to overcome defendant's motion for summary judgment, plaintiff changed the theory of his case from that originally plead in his complaint by asserting in his responsive brief that defendant's lay-off policy had a disparate impact on members of the protected age group. In his brief, plaintiff contends, without any supporting documentation, that a greater

number of the protected age group employees are within the exempt job classification, with generally a lesser number included within the non-exempt classification, thus allowing defendant's lay-off policy to have a disparate impact on members of the protected age group. Defendant objects to plaintiff's change of theory since discovery has been concluded.

The Court finds that defendant will not be unduly prejudiced by the Court's allowing discovery to be reopened for a period of thirty days from the date of this Order for the limited purpose of plaintiff attempting to acquire some evidence to support his claim of disparate impact. If plaintiff cannot make such a showing, defendant can reassert its motion for summary judgment.

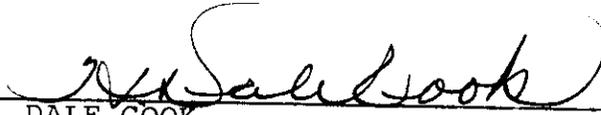
Following the thirty-day period, plaintiff is granted an additional fourteen days to submit his evidence to the Court. Defendant is given seven days thereafter to respond. During the thirty-day discovery period, defendant is directed to supply plaintiff with requested/relevant documentary evidence.

Therefore, it is the Order of the Court that defendant's motion for summary judgment based on plaintiff's claim for disparate treatment under the Age Discrimination Employment Act is hereby GRANTED.

It is the further Order of the Court that plaintiff is granted leave of thirty days from the date of this Order to conduct discovery and provide the Court within fourteen days thereafter proof substantiating his claim of disparate impact. Defendant is granted seven days thereafter to respond.

It is the further Order of the court that defendant's motion for summary judgment as to plaintiff's claim of Wrongful Discharge is hereby GRANTED.

IT IS SO ORDERED this 7<sup>th</sup> day of ~~February~~ <sup>March</sup>, 1988.

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

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

DYCO PETROLEUM CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Case No. 83-C-858-C  
 )  
 FAWNMARK MINERALS, LTD., et al., )  
 )  
 Defendants. )

**FILED**  
MAR 9 1988

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

ORDER DISMISSING ALL DEFENDANTS

Upon the Application of Plaintiff, Dyco Petroleum Corporation, for an Order of Dismissal of all Defendants and for good cause shown, the Court, being fully advised in the premises, finds that said Application should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. All Defendants are dismissed without prejudice from the above-captioned cause; and,
2. No costs are to be charged against either Plaintiff or any of the Defendants.

Date: March 8, 1988

(Signed) H. Dale Cook

The Honorable H. Dale Cook  
United States District Judge

Submitted by:

Paula E. Pyron  
Lance Stockwell  
Paula E. Pyron  
Linda Chindberg Hubble  
BOESCHE, McDERMOTT & ESKRIDGE  
800 Oneok Plaza  
100 West Fifth Street  
Tulsa, OK 74103  
(918) 583-1777

ATTORNEYS FOR PLAINTIFF  
DYCO PETROLEUM CORPORATION

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 RICHARD LEON TEEMAN; MARY LOU )  
 TEEMAN; FEDERAL LAND BANK OF )  
 WICHITA, KANSAS; COUNTY )  
 TREASURER, Osage County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Osage County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**  
**MAR 9 1988**

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

CIVIL ACTION NO. 82-C-705-C

ORDER OF DISMISSAL

Upon the Motion of the United States of America, acting through the Farmers Home Administration, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Nancy Nesbitt Blevins, Assistant United States Attorney, to which no objections have been filed, it is hereby ORDERED that this action is dismissed without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

Dated this 8<sup>th</sup> day of March, 1988.

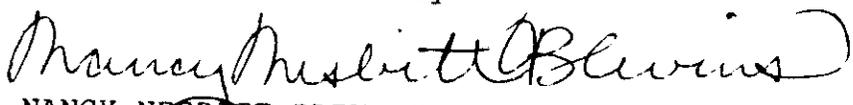
(Signed) H. Dale Cook

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

UNITED STATES OF AMERICA

TONY M. GRAHAM  
United States Attorney



NANCY NESBITT BLEVINS  
Assistant United States Attorney  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

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

THE SERVICMASTER COMPANY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MATTHEW D. HAYES d/b/a )  
 SERVICMASTER OF NORTHEAST )  
 OKLAHOMA, )  
 )  
 Defendant. )

No. 87-C-835-C

**FILED**

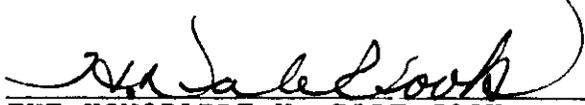
**MAR 9 1988**

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

DEFAULT JUDGMENT

In accordance with the Court's Order of March 1, 1988, Judgment by Default is hereby entered in favor of Plaintiff, The ServiceMaster Company ("ServiceMaster"), and against Defendant, Matthew D. Hayes d/b/a ServiceMaster of Northeast Oklahoma ("Hayes"), on Plaintiff's claim that it is entitled to assignment of a telephone number held by Defendant. Hayes is hereby ordered to assign to ServiceMaster the telephone number, (918) 542-4395.

Entered this 8th day of March, 1988.

  
\_\_\_\_\_  
THE HONORABLE H. DALE COOK

*entered*

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

THE ESTATE OF JAMES )  
LITTLETON DANIEL, JR.; )  
JOHN D. MCCARTNEY and )  
DAVID S. JAMES, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
BOWDEN ATHERTON, et al., )  
 )  
Defendants. )

Case No. 85-C-590-C

**F I L E D**

**MAR 9 1988**

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

O R D E R

Plaintiffs, The Estate of J. Littleton Daniel, Jr. ("Daniel"), John D. McCartney ("McCartney"), and David S. James ("James"), and Defendant, Gill Savings Association ("Gill") have requested that this Court enter an Order dismissing the claims pending between these parties with prejudice. The Court has considered the Joint Motion and finds that it should be granted. It is therefore,

ORDERED ADJUDGED AND DECREED, that all pending claims between Daniel, McCartney, James and Colwell and all claims which have been pending in this case between these parties shall be and hereby are dismissed with prejudice. Costs of Court shall be taxed against the parties that have incurred them and all such costs having been paid, let no execution issue. All relief not specifically granted herein is denied.

Signed this 8<sup>th</sup> day of March, 1988.

  
H. Dale Cook  
United States District Judge

*entered*

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

THE ESTATE OF J. LITTLETON §  
DANIEL, JR., ET AL., §  
§  
Plaintiffs, §  
§  
v. §  
BOWDEN ATHERTON, ET AL., §  
§  
Defendants. §

CIVIL ACTION NO. 85-C-590-C

**FILED**

**MAR 9 1988**

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

ORDER

Plaintiffs, The Estate of J. Littleton Daniel, Jr. ("Daniel"), David S. James (James"), and John D. McCartney ("McCartney"), and defendant, Colwell Financial Corporation ("Colwell") have requested that this Court enter an Order dismissing the claims pending between these parties with prejudice. The Court has considered the joint motion and finds that it should be granted. It is, therefore,

ORDERED, ADJUDGED, AND DECREED that all pending claims between Daniel, James, and McCartney and Colwell and all claims which have been pending in this case between these parties shall be and hereby are dismissed with prejudice. Costs of Court shall be taxed against the parties that have incurred them and all such costs having been paid, let no execution issue. All relief not specifically granted herein is denied.

SIGNED this 8<sup>th</sup> day of March, 1988.

*W. Salebrook*  
JUDGE PRESIDING

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

FILED

MAR -9 1988

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

QUARLES DRILLING CORPORATION, )  
a Oklahoma corporation; )  
INTEGRATED DRILLING AND )  
EXPLORATION, INC., a Oklahoma )  
corporation; INDREX, INC., a )  
Oklahoma corporation and )  
RESOURCE SERVICES CORPORATION, )  
a Oklahoma corporation, )  
)  
Plaintiffs, )  
)  
VS. )  
)  
ALEXANDER & ALEXANDER SERVICES, )  
INC., a Maryland corporation; )  
and ALEXANDER & ALEXANDER, INC., )  
a Louisiana corporation, )  
)  
Defendants. )

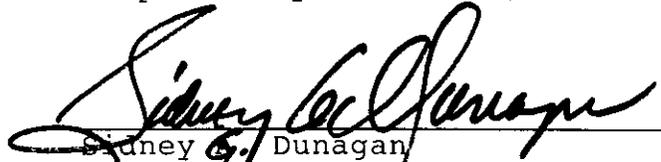
Case No. 87-C-1009 B

NOTICE OF DISMISSAL

The Plaintiffs, Quarles Drilling Corporation, Integrated Drilling and Exploration, Inc., Indrex, Inc., and Resource Services Corporation, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure dismiss without prejudice their Complaint filed in the above-entitled cause. Said dismissal is filed without prejudice since the Defendants have not served an answer to any of the causes of action filed by the Plaintiffs in their Complaint.

Dated: March 8, 1988.

Respectfully submitted,



Sidney G. Dunagan  
Joel R. Hogue  
GABLE & GOTWALS  
2000 Fourth National Bank Building  
Tulsa, Oklahoma 74119-1217  
(918) 582-9201

FILED

MAR -8 1988

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

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

VALLEY FORGE INSURANCE COMPANY, )  
 a foreign corporation, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 OKLAHOMA FARM BUREAU MUTUAL )  
 INSURANCE COMPANY, an Oklahoma )  
 corporation, )  
 )  
 Defendant. )

No. 87-C-270-C ✓

O R D E R

Now before the Court for its consideration is the plaintiff's objection to the Findings and Recommendations of the United States Magistrate, the latter entered on January 26, 1988.

The following facts appear to be uncontested. Defendant issued a policy of automobile insurance to Joseph A. Arko, which was in full force and effect on July 3, 1985. On that date an accident occurred involving the covered vehicle. Joseph Arko, his wife Anna Arko, and Mary Therese Amedio were in the car at the time of the accident. It is disputed who was driving the car at the time of the accident. All three were killed. Subsequently, the estate of Mr. and Mrs. Arko sued the estate of Ms. Amedio in the District Court of Mayes County, State of

Oklahoma. The defendant refused to defend the estate of Ms. Amedio based upon Exclusion B in the policy, which provides:

We do not provide liability coverage: 1. for bodily injury incurred by you or a family member.

Plaintiff filed the present action, seeking a declaratory judgment that Exclusion B is void as against the public policy of Oklahoma. Essentially, plaintiff argues that Oklahoma's compulsory liability insurance provisions require coverage to a person such as Ms. Amedio. Defendant responds that Exclusion B is not void, in that it does not prevent claims against an insured by a third person, but prevents an insured from, in effect, collecting from his own liability coverage when the car is driven by a permissive user and that user causes the insured's injuries.

After a hearing on cross motions for summary judgment, the magistrate recommended that the plaintiff's motion be overruled and the defendant's motion be granted. A similar exclusion was upheld in Looney v. Farmers Ins. Group, 616 P.2d 1138 (Okla. 1980), upon which the Magistrate placed principal reliance. While it is true, as plaintiff notes, that Looney was somewhat modified in Young v. Mid-Continent Cas. Co., 743 P.2d 1084 (Okla. 1987), the factual situation was clearly distinguishable from the case at bar. While the Magistrate did not refer to Young in his Report and Recommendation, it was brought to his attention through the briefs.

It is the Order of the Court that the motion of the plaintiff, Valley Forge Insurance Company, for summary judgment is hereby DENIED.

It is the further Order of the Court that the motion of the defendant, Oklahoma Farm Bureau Mutual Insurance Company, for summary judgment is hereby GRANTED.

IT IS SO ORDERED this 7<sup>th</sup> day of March, 1988.

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

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 NADINE E. STOWERS, )  
 )  
 Defendant. )

MAR - 8 1988  
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

CIVIL ACTION NO. 88-C-101-B

NOTICE OF DISMISSAL

COMES NOW the United States of America by Tony M. Graham, 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 with prejudice.

Dated this 8<sup>th</sup> day of March, 1987.

UNITED STATES OF AMERICA  
TONY M. GRAHAM  
United States Attorney  
*Phil Pinnell*  
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 8<sup>th</sup> day of March, 1988, a true and correct copy of the foregoing was hand delivered to: Nadine E. Stowers, 6565 South Newport #217, Tulsa, Oklahoma 74136.

*Phil Pinnell*  
Assistant United States Attorney

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

FILED

MAR -8 1988

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

CUE HENDERSON, JR., et al., )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 NEWELL MANUFACTURING COMPANY )  
 and MUELLER ENGINEERING, INC., )  
 )  
 Defendants, )  
 vs. )  
 )  
 RIVERSIDE PRODUCTS, et al., )  
 )  
 Third-Party Defendants. )

No. 87-C-313-C ✓

O R D E R

Now before the Court for its consideration is the motion of third-party defendant American Contex Corporation (Contex) to dismiss the Third-Party Complaint of Newell Manufacturing Company (Newell) and the cross-claim of third-party defendant Tulsa Metal Processing Company.

This action arises out of the death of Cue Henderson, Jr. on February 6, 1987. Mr. Henderson was a crane operator for a company which makes use of an automobile shredder, also known as a "hammer-mill shredder", which shreds automobiles into small compacted pieces so that the metal may be recycled. The Complaint alleges that while Mr. Henderson was on the shredder attempting to free jammed pieces of metal, he was dragged into the machine and killed.

Named as one defendant was Newell, which "manufactured, distributed, and sold the electric machinery, parts and power unit which operated the automobile shredder." (Complaint at ¶9).

AM

On November 20, 1987, defendant Newell filed a Third-Party Complaint naming, among others, American Contex Corporation and Tulsa Metal Processing Company as third-party defendants. The basis of liability alleged is that the third-party defendants provided materials, equipment, components and/or designs which were utilized in or incorporated in the automobile shredder.

On December 13, 1987, third-party defendant Tulsa Metal Processing Company filed its answer and cross-claim. The cross-claim names American Contex Corporation, and two other third-party defendants, and alleges that they provided the materials, equipment, components or designs which were utilized in or incorporated in the automobile shredder.

On December 21, 1987, American Contex filed the present motion, seeking to dismiss both the third-party complaint of Newell and the cross-claim of Tulsa Metal Processing. Contex relies upon an affidavit executed by its president which states that Contex was not involved in the design, installation and/or manufacture of electrical components, but rather was exclusively engaged in a business brokerage capacity. Further, the affidavit states that the motor in question was ordered by and shipped to Newell Manufacturing Company in San Antonio, Texas. Contex is a New York corporation and the motor was shipped directly from the manufacturer in Germany. Finally, the affidavit states that Contex had no contacts with any parties or persons in Oklahoma concerning the purchase of the motor, and had no reason to believe that the equipment was going to be utilized in the State of Oklahoma.

In response, Newell focuses on a statement in the affidavit that Contex "does no business whatsoever in the State of Oklahoma, except on occasion receives a telephone order in New York for the delivery of merchandise." Newell contends that these occasional telephone orders constitute sufficient contacts with Oklahoma for this Court to exercise personal jurisdiction.

The question of whether a federal court has in personam jurisdiction over a nonresident defendant in diversity cases is determined by the law of the forum state. Yarbrough v. Elmer Bunker & Associates, 669 F.2d 614 (10th Cir. 1982). The applicable provision of Oklahoma law is 12 O.S. §2004(F), which states the following: "A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States." The applicable precedents recognize a distinction between "general" and "specific" jurisdiction. If the non-resident defendant's activities in the state are "continuous and systematic", or "substantial", the court may assert general jurisdiction over a cause of action, even if it is unrelated to the defendant's forum activities. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984) and Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952). If the defendant's contacts are neither substantial, nor continuous and systematic, but the cause of action arises out of or is related to the defendant's forum activities, "specific" personal jurisdiction exists. See Helicopteros, supra at 414 n.8. Newell has made no showing that Contex's contacts with Oklahoma were "continuous and systematic",

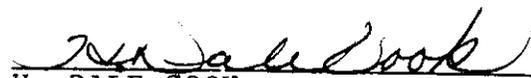
or "substantial". Therefore, general jurisdiction does not exist. The affidavit submitted by Contex demonstrates that the present cause of action neither arises out of nor is related to the defendant's forum activities. The affidavit has not been contradicted; accordingly, specific personal jurisdiction is not present.

Newell essentially asserts jurisdiction over Contex based upon the "fortuitous circumstance" that the motor found its way into Oklahoma. Cf. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980). This is an insufficient basis for personal jurisdiction, and thus the motion should be granted.

Third-party defendant Tulsa Metal Processing has made no response to the motion to dismiss of Contex. Therefore, pursuant to Rule 14(a) of the Local Rules, this motion should also be granted as to Tulsa Metal Processing.

It is the Order of the Court that the Motion of defendant American Contex Corporation to dismiss the Third-Party Complaint of Newell Manufacturing Company and the Cross-Claim of third-party defendant Tulsa Metal Processing Company is hereby GRANTED.

IT IS SO ORDERED this 7<sup>th</sup> day of March, 1988.

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

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA MAR -8 1988

8

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

VALLEY FORGE INSURANCE COMPANY, )  
 a foreign corporation, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 OKLAHOMA FARM BUREAU MUTUAL )  
 INSURANCE COMPANY, an Oklahoma )  
 corporation, )  
 )  
 Defendant. )

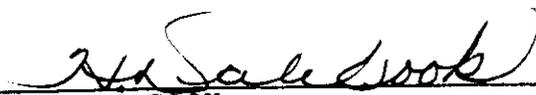
No. 87-C-270-C ✓

J U D G M E N T

This matter came on for consideration of the motion for summary judgment of defendant Oklahoma Farm Bureau Mutual Insurance Company. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Court grants defendant's motion for summary judgment in accordance with the Order filed contemporaneously herewith, that plaintiff take nothing and that the parties bear their own attorney fees and costs of this action.

IT IS SO ORDERED this 7th day of March, 1988.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 vs. )  
 )  
 F. JOHN WALKER; PHYLLIS C. )  
 WALKER; FRONTIER FINANCIAL )  
 SERVICES, INC.; COUNTY )  
 TREASURER, Tulsa County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**

MAR - 8 1988

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

CIVIL ACTION NO. 87-C-1056-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8<sup>th</sup> day  
of March, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, Assistant United States  
Attorney; the Defendants, County Treasurer, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma, appear by Doris L. Fransein, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendants, F. John Walker  
and Phyllis C. Walker, appear by their attorney Steven R.  
Hickman; and the Defendant, Frontier Financial Services, Inc.,  
appears not, having previously filed its Disclaimer.

The Court being fully advised and having examined the  
file herein finds that the Defendant, F. John Walker,  
acknowledged receipt of Summons and Complaint on December 26,  
1987; that Defendant, Phyllis C. Walker, acknowledged receipt of  
Summons and Complaint on January 7, 1988; that the Defendant,

Frontier Financial Services, Inc., acknowledged receipt of Summons and Complaint on December 31, 1987; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on December 21, 1987; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on December 21, 1987.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers herein on January 8, 1988; that the Defendants, F. John Walker and Phyllis C. Walker, filed their Answer herein on January 8, 1988; and that the Defendant, Frontier Financial Services, Inc., filed its Entry of Appearance and Disclaimer herein on January 5, 1988.

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

Unit 903, Building 9, PHASE I, DELAWARE CROSSING CONDOMINIUMS, together with an undivided .01348 percent interest in the common elements appertaining thereto, according to the Declaration Creating Unit Ownership Estates for Delaware Crossing Condominiums, dated December 15, 1981, recorded in Book 4585 at Pages 1445-1527, inclusive of the records of Tulsa County, State of Oklahoma, and by Annexation Notice dated May 21, 1982, recorded in Book 4614 at Pages 1358-1376; and by Annexation Notice dated November 2, 1982, recorded in Book 4648 at Pages 345-362, covering the following described real property, to-wit;

Lot Two (2), Block One (1), DELAWARE CROSSING  
CONDOMINIUMS, an Addition to the City of  
Tulsa, Tulsa County, State of Oklahoma,  
according to the recorded plat thereof.

The Court further finds that on April 22, 1985, the Defendants, F. John Walker and Phyllis C. Walker, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$49,500.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, F. John Walker and Phyllis C. Walker, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated April 22, 1985, covering the above-described property. Said mortgage was recorded on April 24, 1985, in Book 4858, Page 1192, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, F. John Walker and Phyllis C. Walker, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, F. John Walker and Phyllis C. Walker, are indebted to the Plaintiff in the principal sum of \$49,676.85, plus interest at the rate of 12.5 percent per annum from April 1, 1987 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$555.00, plus penalties and interest, for the year of 1987. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of Count Commisssioners, Tulsa County, Oklahoma, does not claim any right, title, or interest in the subject real property.

The Court further finds that the Defendant, Frontier Financial Services, Inc., disclaims any right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, F. John Walker and Phyllis C. Walker, in the principal sum of \$49,676.85, plus interest at the rate of 12.5 percent per annum from April 1, 1987 until judgment, plus interest thereafter at the current legal rate of 6.59 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$555.00, plus penalties and interest, for ad valorem taxes for the year of 1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Frontier Financial Services, Inc., and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$555.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

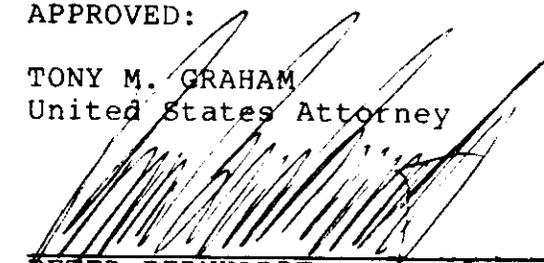
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

*For: Thomas R. Brett, Judge*

APPROVED:

TONY M. GRAHAM  
United States Attorney

  
PETER BERNHARDT  
Assistant United States Attorney

  
STEVEN R. HICKMAN  
Attorney for Defendants,  
F. John Walker and Phyllis C. Walker

  
DORIS L. FRANSEIN  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

PB/css

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

**FILED**

MAR - 8 1988

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

BUFFALO ROYALTY CORPORATION )  
and BUFFALO ROYALTY 1981-1 )  
DRILLING PROGRAMS, )

Appellants, )

vs. )

Case No. 87-C-570-B

THE NORTHWEST EXPLORATION )  
COMPANY CREDITORS TRUST, )

Appellee. )

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Joint Stipulation and Motion To Dismiss Appeal, filed on March 3, 1988 herein by Appellants Buffalo Royalty Corporation and Buffalo Royalty 1981-1 Drilling Programs, and by Appellee The Northwest Exploration Company Creditors Trust, the Court finds that Buffalo Royalty Corporation, Buffalo Royalty 1981-1 Drilling Programs, and The Northwest Exploration Company Creditors Trust have reached a full and amicable settlement of all claims by and between them in this appeal and in the proceedings below, which form the subject of this appeal. The Court further finds that the appellants and appellee herein have requested the dismissal of this appeal, with prejudice, with each party to bear its own attorneys' fees and costs herein.

IT IS THEREFORE ORDERED that this appeal be and is hereby dismissed, with prejudice, as to all claims by and between The Northwest Exploration Company Creditors Trust, Buffalo Royalty Corporation, and Buffalo Royalty 1981-1

Drilling Programs, with each party to bear its own attorneys' fees and costs herein, AND IT IS SO ORDERED.

DATED this 8<sup>th</sup> day of March, 1988.

S/ JAMES O. ELLISON

For: Thomas R. Brett  
UNITED STATES DISTRICT JUDGE

FILED

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

MAR -8 1988

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

HAL FRENCH, an individual, and )  
DAVID K. JOHNSON, an individual, )  
 )  
Plaintiffs, )

vs. )

No. 88-C-127-E

CHARLES KOPP, an individual, )  
NATIONAL INSURANCE SERVICES, INC., )  
an Oklahoma corporation, and )  
NATIONAL INSURANCE SERVICES - )  
MILLER, INC., an Oklahoma corporation, )  
 )  
Defendants. )

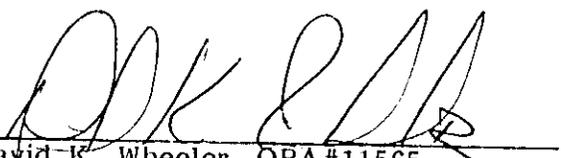
**NOTICE OF DISMISSAL**

Pursuant to Rule 41 of the Fed. R. Civ. P., Plaintiffs, Hal French and David K. Johnson, hereby give notice of the dismissal of this action without prejudice to any future filing.

Dated: Tulsa, Oklahoma  
March 8, 1988

Respectfully submitted,

MACK MURATET BRALY & ASSOCIATES

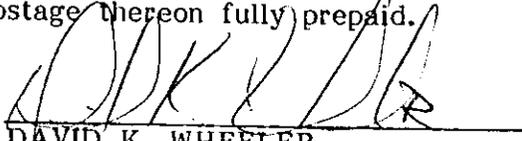
BY:   
David K. Wheeler, OBA #11565

1701 Fourth National Bank Building  
Tulsa, Oklahoma  
(918) 582-2806

ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I, David K. Wheeler, being one of the attorneys for Plaintiffs Hal French and David K. Johnson, do hereby certify that on this 8<sup>th</sup> day of March, 1988, I did serve a true and correct copy of the above and foregoing Notice of Dismissal upon the Defendants by causing a copy thereof to be mailed to their attorney, Maynard I. Ungerman, Ungerman, Conner & Little, 1323 East 71st Street, P.O. Box 701917, Tulsa, Oklahoma 74170-1917, via the United States Mails with proper postage thereon fully prepaid.

  
\_\_\_\_\_  
DAVID K. WHEELER

*entered*

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

**F I L E D**

**MAR -7 1988**

STATE FARM FIRE AND )  
CASUALTY COMPANY, )  
) )  
Plaintiff, )  
vs. )  
) )  
JOHN WESLEY MARTIN, KIMBERLY )  
CARLENE McALVAIN, SANDRA )  
RENE EASTEP, BRANDIE LEE )  
MILLSPAUGH, MELISSA SUE )  
MILLSPAUGH, CINDY JEAN )  
EASTEP and JACKIE MILLSPAUGH, )  
) )  
Defendants. )

No. 87-C-494-C Jack C. Silver, Clerk  
U.S. DISTRICT COURT

J U D G M E N T

This matter came before the Court upon motion of the plaintiff, State Farm Fire and Casualty Company, for summary judgment. The issues having been duly tried and a decision having been duly rendered in accordance with the Order filed simultaneously herein,

It is so Ordered and Adjudged that the plaintiff, State Farm Fire and Casualty Company, is entitled to Judgment over and against the defendants Kimberly Carlene McAlvain, Sandra Rene Eastep, Brandie Lee Millspaugh, Melissa Sue Millspaugh, Cindy Jean Eastep and Jackie Millspaugh on plaintiff's claim for declaratory judgment.

IT IS SO ORDERED this 7<sup>th</sup> day of March, 1988.

*H. Dale Cook*  
H. DALE COOK  
Chief Judge, U. S. District Court

**F I L E D**

**IN THE UNITED STATES DISTRICT COURT FOR THE MAR - 7 1988  
NORTHERN DISTRICT OF OKLAHOMA**

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

FIREMAN'S FUND INSURANCE )  
COMPANY, a California )  
corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GAFFEY, INC., an Oklahoma )  
corporation, )  
 )  
Defendant. )

No. 86-C-485 E

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this \_\_\_\_\_ day of \_\_\_\_\_, 1988, upon joint application of the parties for a dismissal of this action and the counter-action with prejudice and for good cause shown, the Court finds that the same should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the main action and counter-action be and hereby are dismissed with prejudice.

**S/ JAMES O. ELISON**

\_\_\_\_\_  
JUDGE OF THE U.S. DISTRICT COURT  
MCAFEE & TAFT

*Entered*

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE ~~WEST~~ -7 1988  
NORTHERN DISTRICT OF OKLAHOMA

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

STATE FARM FIRE AND )  
CASUALTY COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JOHN WESLEY MARTIN, KIMBERLY )  
CARLENE McALVAIN, SANDRA )  
RENE EASTEP, BRANDIE LEE )  
MILLSPAUGH, MELISSA SUE )  
MILLSPAUGH, CINDY JEAN )  
EASTEP and JACKIE MILLSPAUGH, )  
 )  
Defendants. )

No. 87-C-494-C

O R D E R

Before the Court for its consideration is the motion of plaintiff State Farm Fire and Casualty Company (State Farm), for summary judgment pursuant to Rule 56 F.R.Cv.P.

Defendant John Wesley Martin was convicted on February 5, 1987 in Tulsa County District Court of twenty-one counts of forcing minors to participate in lewd photographs, seven counts of lewd molestation, four counts of indecent exposure and one count of forcible sodomy. He was sentenced to serve six-hundred twenty years in a state penal institution.

Defendant Martin's conviction stems from incidents involving Martin and defendants Kimberly Carlene McAlvain, Sandra Rene Eastep, Brandie Lee Millspaugh, and Melissa Sue Millspaugh. These minor children, by and through their mothers, defendants

Cindy Jean Eastep and Jackie Millspaugh, and their mothers individually, have filed an action against defendant Martin in Tulsa County District Court. They allege that, over the course of several months, defendant Martin performed various sexual acts with the minor children "coercively and by force and did record such acts photographically."

Defendant Martin has coverage under a homeowner's insurance policy with State Farm. State Farm commenced this declaratory judgment action requesting the Court to determine whether the policy of insurance issued by State Farm to Martin provides coverage for the incident at issue and further whether State Farm is under a duty to defend Martin in the state court action.

The homeowner's policy contains the following relevant provisions:

If a claim is made or a suit is brought against an insured for damages because of bodily injury ... to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the insured is legally liable; and
2. provide a defense ...

This coverage applies only:

...  
to a person off the insured location, if the bodily injury ... is caused by the activities of an insured.

Under the exclusions section, coverage does not apply to "bodily injury ... which is expected or intended by an insured."

In a declaratory judgment action it is the Court's function to construe and interpret written instruments -- including insurance policies. The policy in question imposes a duty on State Farm to defend Martin when his activities cause bodily

injuries to others except when the bodily injuries were "expected or intended" by Martin. Whether State Farm has a duty to defend Martin in the pending state court proceeding is determined by the allegations contained on the face of the state court petition.

The petition states:

Defendant's acts are an invasion of the privacy of the individual children heretofore mentioned and constitute willful and negligent infliction of emotional distress on said children and their parents.

The Court finds, from a review of the state court petition that the petition sets forth a claim for invasion of privacy and asserts a legal conclusion that the invasion of privacy resulted in intentional infliction of emotional distress on the children and their parents. In Oklahoma, in order for a plaintiff to prevail on its claim for intentional infliction of emotional distress, the plaintiff must prove that the defendant "intentionally injured" the plaintiff, or realized that plaintiff was likely to suffer the injuries complained of, or acted with willful disregard of the injuries plaintiff could suffer. See generally, Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978) and Bennett v. City National Bank and Trust Co., 549 P.2d 393 (Ct.App.Ok. 1975). Therefore inherent in the cause of action of intentional infliction of emotional distress is the intent to create the injury.

In Lumbermen's Mutual Ins. Co. v. Blackburn, 477 P.2d 62 (Okla. 1970) the Oklahoma Supreme Court held that, to properly construe the "intentional acts" exclusion in homeowners'

policies, the emphasis must be upon the intent to commit injury and not upon the intent to commit an act.

In view of the Lumbermen's decision as applied to the cause of action plead in the state court, clearly the allegations, as plead, are excluded from coverage under the homeowner's policy. The allegations come within the exclusionary clause of the policy.

The Court will note that much attention was given by both parties in their briefs before this Court to the word "negligent" as contained in the state court petition. In their brief, the defendants assert that the petition properly plead a cause of action for the separate and independent tort of negligent infliction of emotional distress, a tort recognized by Oklahoma courts. See e.g. Ellington v. Coca Cola Bottling Co., 717 P.2d 109 (Okla. 1986). However, after construing the state court petition liberally in favor of the defendants herein, as this court must do for summary judgment purposes (see, United Mine Workers v. Ronocco, 314 F.2d 186 (10th Cir. 1963)), the Court must conclude that defendants herein did not properly plead a cause of action for negligent infliction of emotional distress. The word "negligent" is used as an adjective, and does not plead a legally cognizable claim. In order to properly plead the independent tort of negligent infliction of emotional distress, the petition must state that mental anguish caused physical suffering. The appearance of the word "negligent" as shown on the face of the

pleadings, is without any legal effect, results in mere surplusage, and is not properly presented to the Court.

Notwithstanding the above, the Court has carefully reviewed case authority on the subject of this declaratory judgment action. The overwhelming majority of courts which have construed identical or similar insurance provisions have held that insurance coverage does not extend to situations such as this. The prevailing holding is summarized as follows:

For purposes of the intentional act exclusion in a homeowner's insurance policy, intent to cause injury will be inferred as a matter of law from acts of sexual abuse and assault on minors, regardless of the insured's alleged lack of subjective intent to injure.

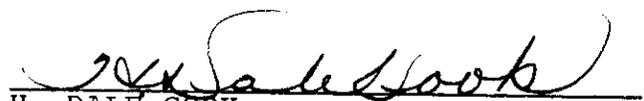
See e.g. State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421 (Minn. 1984), Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Ct.App.Minn. 1986), Rodriguez v. Williams, 729 P.2d 627 (Wash. 1986), Linebaugh v. Berdish, 376 N.W.2d 400 (Mich.App. 1985), CNA Ins. Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984) and Allstate Ins. Co. v. Kim W., 206 Cal.Rptr. 609 (Calif.App. 1984).

Although the cited authority is not binding on this Court, the Court nonetheless finds the language and analysis to be well reasoned as to law and fact.

WHEREFORE, premises considered, it is the Order of the Court that the motion for summary judgment brought by the plaintiff State Farm over and against the defendants Kimberly Carlene McAlvain, Sandra Rene Eastep, Brandie Lee Millspaugh, and Melissa Sue Millspaugh is hereby GRANTED. In so granting, this Court determines as a matter of law that State Farm is under no duty to

defend John Wesley Martin in case No. CJ 87-1841 currently pending in Tulsa County District Court and further that the homeowner's policy issued to John Wesley Martin by State Farm does not provide coverage for the loss asserted in case No. CJ 87-1841, Tulsa County District Court.

IT IS SO ORDERED this 7<sup>th</sup> day of March, 1988.

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

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

FILED

MAR - 7 1988

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

HILLCREST MEDICAL CENTER,  
a corporation,  
  
Plaintiff,  
  
vs.  
  
ANTONIO TORRES; ARKANSAS POULTRY  
FEDERATION INSURANCE TRUST, said Trust  
Consisting of MONTY HENDERSON, VIC  
EVANS, DONALD V. ALLEN, JOHN TYSON,  
and CHARLES ANDERSON as Trustees;  
ARKANSAS POULTRY FEDERATION, INC.,  
a corporation; and FEWELL & ASSOCIATES,  
INC., a corporation,  
  
Defendant(s).

Case no: 88-C0046 C

NOTICE OF DISMISSAL

To: ARKANSAS POULTRY FEDERATION, INC., a corporation and FEWELL &  
ASSOCIATES, INC., a corporation, defendants, and RANDY COLEMAN and LARRY LIPE,  
attorneys for said defendants.

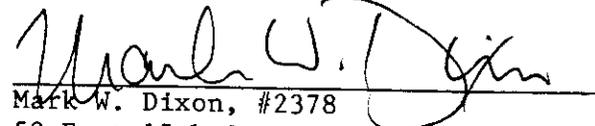
Notice is hereby given that as the above-entitled action was commenced  
on January 19, 1988, and defendants have filed neither an answer nor a motion  
for summary judgment herein, plaintiff dismisses the above-entitled action  
without prejudice as to defendant, ARKANSAS POULTRY FEDERATION, INC., a corpo-  
ration and as to defendant, FEWELL & ASSOCIATES, INC., a corporation, only.

The clerk of the above-entitled court is requested to enter this dismissal in the records of the court.

Dated March 4, 1988.

WORKS, LENTZ & POTTORF, INC.

By

  
Mark W. Dixon, #2378  
50 East 15th Street  
Tulsa, Oklahoma 74119  
(918) 582-3191

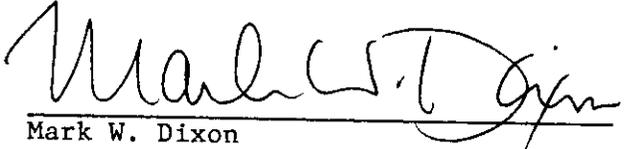
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Mark W. Dixon, hereby certify that on the 7<sup>th</sup> day of March, 1988, I mailed a true and correct copy of the above and foregoing pleading, by depositing same in the United States Mail with proper postage thereon fully prepaid, to:

Randy Coleman  
BARRON & COLEMAN, P.A.  
2478 First Commercial Building  
401 West Capitol  
Little Rock, Arkansas 72201

Larry Lipe  
Comfort, Lipe & Green  
2100 Mid-Continent Tower  
401 South Boston Avenue  
Tulsa, Oklahoma 74103

  
Mark W. Dixon

*Entered*

**FILED**

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

MAR -7 1988

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

HAROLD GLOVER d/b/a	)
HAROLD GLOVER TAX	)
CONSULTANT AND ACCOUNTANT,	)
	)
Plaintiff,	)
	)
vs.	)
	)
UNITED STATES FIRE	)
INSURANCE COMPANY,	)
	)
Defendant and	)
Third Party Plaintiff,	)
	)
vs.	)
	)
REED, SMITH & REED, INC.;	)
BOB REED and ROBERT REED, JR.,	)
individuals as officers, and/or	)
board members of Reed, Smith	)
& Reed, Inc.; and GEORGE SMITH,	)
	)
Third Party Defendants.	)

No. 87-C-281-C

O R D E R

Before the Court for its consideration is the motion for summary judgment brought by third-party defendants Bob Reed and Robert Reed, Jr. against the third-party plaintiff, United States Fire Insurance Company.

Plaintiff Harold Glover d/b/a Harold Glover Tax Consultant and Accountant (Glover) brought this action against United States Fire Insurance Company (U.S. Fire) for breach of contract and bad faith. Plaintiff is seeking proceeds under an insurance policy

issued by U. S. Fire for burglary losses allegedly incurred by plaintiff.

On May 14, 1987 George Smith issued a Business Liability Insurance policy to Glover insuring plaintiff's business, located at 1307 South Main, with defendant U. S. Fire. On the face of the policy is listed "Reed, Smith & Reed, Inc.", as the procuring agent or broker.

Glover asserts that he contacted his agent, George Smith, in July 1985 to notify him that he would be relocating his business, in three months, from 1307 South Main in Tulsa to 1725 North Peoria in Tulsa. On January 11, 1987, Glover's place of business was burglarized. Glover notified U. S. Fire, but defendant refused to pay his claim on the premise that U. S. Fire had not been notified that Glover had moved his business.

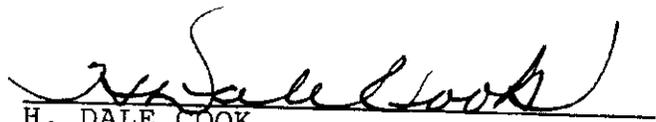
U. S. Fire subsequently brought a third-party complaint against Reed, Smith & Reed, Inc.; Bob Reed; Robert Reed, Jr. and George Smith. U. S. Fire seeks indemnification for all or any part of recovery plaintiff may obtain against U. S. Fire by reason of any negligence by the third-party defendants in failing to notify U. S. Fire of plaintiff's relocation.

Bob Reed and Robert Reed, Jr. (Reeds) seek summary judgment against U. S. Fire asserting that George Smith is not the "Smith" in Reed, Smith & Reed, Inc. and was not an agent of Reed, Smith & Reed, Inc. Reeds assert that George Smith was an independent broker who "occasionally brought business to Reed, Smith & Reed, Inc. who then found an insurance company to underwrite the particular risk."

The Court finds that Reeds' motion for summary judgment is without merit. On its face, the policy lists Reed, Smith & Reed as the agent for U. S. Fire. Under the facts as plead, George Smith represented himself to be an agent of Reed, Smith & Reed, Inc.; and he sold the insurance policy through -- and with approval of -- Reed, Smith & Reed, Inc. U. S. Fire is justified in looking to Reeds as the authorized agent of U. S. Fire, and as the agent listed on the insurance policy, for failure to give notice of any modifications in the policy at issue and can seek indemnification against Reeds for any act of negligence which can be proven to have caused U. S. Fire's breach of contract with its insured.

WHEREFORE, premises considered, it is the Order of the Court that the motion for summary judgment brought by third-party defendants Bob Reed and Robert Reed, Jr. is hereby DENIED.

IT IS SO ORDERED this 7<sup>th</sup> day of <sup>much</sup>~~February~~, 1988.

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

*Entered*

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA MAR -7 1988

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

JOHN ZINK COMPANY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ZINKCO, INC. and	)
JOHN SMITH ZINK,	)
	)
Defendants.	)

No. 85-C-292-C

O R D E R

Before the Court for its consideration are the objections filed by both parties to the Findings and Recommendations of the Magistrate regarding plaintiff's application for attorney fees.

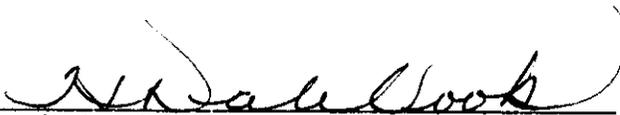
The Court in its Findings of Fact and Conclusions of Law and Judgment dated December 18, 1986, awarded plaintiff John Zink Company its reasonable attorney fees under 15 U.S.C. §1117(a). In accordance, plaintiff filed its application, with supporting documents, on January 5, 1987 requesting \$183,504.83 in fees. Plaintiff supplemented its application on June 1, 1987 requesting an additional \$35,021.00. Plaintiff therefore seeks an aggregate award of \$218,525.83 in attorney fees.

In a comprehensive report filed on October 28, 1987 (as modified November 10, 1987), Magistrate Jeffrey Wolfe recommended to the Court that plaintiff be awarded the sum of \$132,128.38 in attorney fees.

The Court has independently reviewed the parties' pleadings, briefs, exhibits and applicable case authority; and in due consideration of the history of this litigation, the Court concludes that plaintiff, as prevailing party, should be awarded attorney fees in the sum of \$132,128.38 for the reasons set forth in the Magistrate's report dated October 28, 1987 (as modified November 10, 1987). The Court hereby affirms and adopts the Report and Recommendation as the Findings and Conclusions of this Court.

It is therefore Ordered that plaintiff John Zink Company is awarded attorney fees in the sum of \$132,128.38 over and against the defendants Zinkco, Inc. and John Smith Zink.

IT IS SO ORDERED this 7<sup>th</sup> day of March, 1988.

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

*Entered*

**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA MAR -7 1988

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

JACK F. HUBELI, E. R. SWIFT, )  
BETTY F. RIPPEOE, SHIRLEY P. )  
LASTER, JAMES C. O'ROURKE, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
BETHLEHEM STEEL CORPORATION, )  
a Delaware corporation, )  
 )  
Defendant. )

Nos. 87-C-394-C  
87-C-415-C  
87-C-416-C  
87-C-421-C  
87-C-422-C  
(CONSOLIDATED)

O R D E R

Now before the Court for its consideration is the objection of defendant Bethlehem Steel Corporation to the Report and Recommendation of the Magistrate entered on December 16, 1987.

Plaintiffs each brought a separate action against defendant claiming wrongful termination resulting from a pattern and practice of discrimination by the defendant against older employees, breach of the implied covenant of good faith and fair dealing, tortious breach of the implied covenant of good faith and fair dealing, and intentional infliction of severe emotional distress. Defendant, in each of the five lawsuits, filed a motion to dismiss each of the plaintiffs' claims for breach of the implied covenant of good faith and fair dealing, tortious breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress.

The case was referred to Magistrate Wolfe for Report and Recommendation on the issue of consolidation of the cases and on the defendant's motions to dismiss.

The Magistrate recommended consolidation of the five cases as stated in his Report and Recommendation.

The Magistrate further recommended that the defendant's motion to dismiss the plaintiffs' claims for breach of the implied covenant of good faith and fair dealing should be granted in light of Hinson v. Cameron, 742 P.2d 549 (Okla. 1987). In Hinson, the Oklahoma Supreme Court held that "assuming there may be an implied covenant of good faith and fair dealing in every at-will employment relation, that covenant does not operate to forbid employment severance except for good cause." (Id. at 1668) (emphasis added).

The Magistrate also recommended dismissal of plaintiff's claims for tortious breach of the implied covenant of good faith and fair dealing. As stated in Hinson, the tort of wrongful discharge does not exist in Oklahoma where the relationship between the individuals is that of master and servant.

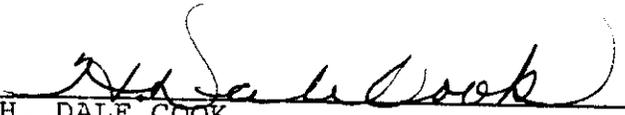
In regard to the plaintiff's claims for intentional infliction of severe emotional distress, the Magistrate recommended that these claims also be dismissed. In Viestenz v. Fleming Co., 681 F.2d 699, 702 (10th Cir. 1982), the Tenth Circuit Court of Appeals has held that a claim for intentional infliction in the context of termination of employment must be supported by allegations and proof addressing the manner in which the employee was

interviewed or discharged rather than from the fact of the discharge itself.

The Court has independently reviewed the pleadings and briefs of the parties and the files of all five cases and finds that the recommendations of the Magistrate are reasonable under the circumstances of this case and consistent with applicable law.

Therefore, premises considered, it is the Order of the Court that the five cases are to be consolidated and that the defendant's motions to dismiss the plaintiff's claims are granted. The Court hereby affirms the Report and Recommendation of the Magistrate entered on December 16, 1987.

IT IS SO ORDERED this 7<sup>th</sup> day of March, 1988.

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

*Entered*

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

FILED  
MAR -7 1988

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

BRUCE BONNETT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 OSTRANDER, SUGG & YORK, INC., )  
 et al., )  
 )  
 Defendants. )

No. 85-C-1055-C

O R D E R

Before the Court is the motion of defendant Ostrander, Sugg & York, Inc. (Ostrander) for attorney fees against plaintiff Bruce Bonnett and for sanction against plaintiff's original attorney Stephen Jones, pursuant to Rule 11 F.R.Cv.P.

Plaintiff filed his amended complaint on March 4, 1986 specifically seeking relief against defendant Ostrander in Count V for alleged violations of §101 of the Oklahoma Securities Act (71 O.S. §1 et seq.) and under Count VI for alleged common law fraud. Both counts against Ostrander arise under Oklahoma law.

On July 16, 1987 Ostrander filed a motion for summary judgment against plaintiff. At the time the motion was filed, the plaintiff had been indicted in the Northern District of Oklahoma on charges of bank fraud, stemming from his involvement with the First National Bank of Sapulpa. The case sub judice also arose from Bonnett's involvement with the Bank. Bonnett

elected not to respond to the merits of Ostrander's summary judgment motion on the premise that he did not want to waive his Fifth Amendment privileges. Summary judgment was granted in favor of defendant Ostrander on December 3, 1987.

Defendant Ostrander, as prevailing party, has cited no Oklahoma statutory authority in support of its request for attorney fees. Ostrander's reliance on the Federal Securities Act for authority is not appropriate under the facts as plead, or the relief sought.

In reviewing the pleadings and case history, the Court finds and concludes that Rule 11 sanctions are not warranted against plaintiff's attorney. Further, this Court has not been presented with any proof by defendant Ostrander which would warrant a legal conclusion that plaintiff or his attorney acted in bad faith in prosecuting this ation which would justify an award of attorney fees under the principles espoused in Sterling Energy, Ltd. v. Friendly Nat. Bank, 744 F.2d 1433 (10th Cir. 1984).

It is therefore Ordered that the motion filed by defendant Ostrander, Sugg & York, Inc. for attorney fees and sanctions is hereby denied.

IT IS SO ORDERED this 7th day of March, 1988.

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

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

**FILED**

MAR - 4 1988

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

MERIDIAN ENGINEERING, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
HMBH ARCHITECTS, )  
 )  
Defendant. )

No. 86-C-990-E ✓

**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

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

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

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

DATED this 24 day of March, 1988.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

*Entered*

**FILED**

FEB 25 1988

CLERK, U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

MDL Docket No. 153

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

IN RE HOME-STAKE PRODUCTION )  
COMPANY SECURITIES LITIGATION )

LELAND L. LEACHMAN, )  
JAMES H. LEACHMAN )  
LESTER J. LEACHMAN, )  
ROBERT H. WEXLER, )  
JERROLD A. WEXLER )

Plaintiffs, )

v. )

HOME-STAKE PRODUCTION )  
COMPANY, HOME-STAKE )  
1970 PROGRAM OPERATING CORPORA- )  
TION, ROBERT S. TRIPPET, )  
and KEPLINGER & ASSOCIATES, INC.)

Defendants. )

Civil Action Nos.  
73-C-344  
73-C-409  
(Consolidated)

**FILED**

MAR 4 1988

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

ORDER

On this 12th day of February, 1988, the following motions came on for hearing in regular order:

1. Plaintiffs' Motion to Amend Complaint Against Defendant Keplinger & Associates.
2. Keplinger's Amended Motion for Summary Judgment (to the extent not previously ruled upon).

Plaintiffs Leland L. Leachman, Lester J. Leachman, James H. Leachman, Robert H. Wexler and Jerrold A. Wexler were represented by Peter Van N. Lockwood, Caplin &

Drysdale, Washington, D.C., and defendant Keplinger & Associates, Inc. ("Keplinger") was represented by Harry A. Woods, Jr., Crowe & Dunlevy, P. C., Oklahoma City, Oklahoma.

At a hearing conducted on November 2, 1987, the Court granted summary judgment in favor of Keplinger on all claims against Keplinger except the gross negligence claim, and the Court reserved ruling on that claim.

The Court had previously heard argument of counsel on the motions, and, on February 12, 1988, inquired as to whether counsel for either side had any additional evidence or argument to submit. Each counsel responded that he had nothing further to submit.

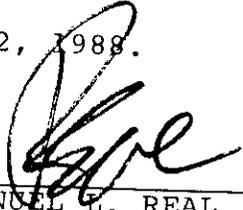
The Court then orally announced its rulings on the pending motions, as follows:

1. It is hereby ORDERED and DIRECTED that plaintiffs' motion to amend complaint to change the gross negligence claim against Keplinger to a negligence claim is granted.
2. It is hereby ORDERED AND DIRECTED that Keplinger's Amended Motion for Summary Judgment is granted as to plaintiffs' negligence claim.

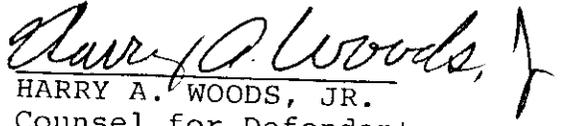
The Court, having previously granted summary judgment to Keplinger as to all other claims, excused counsel

for defendant Keplinger from further attendance at the  
conference conducted on February 12, 1988.

DATED: 2-25, 1988.

  
\_\_\_\_\_  
MANUEL E. REAL  
U. S. District Judge

PREPARED BY:

  
\_\_\_\_\_  
HARRY A. WOODS, JR.  
Counsel for Defendant  
KEPLINGER & ASSOCIATES, INC.

FILED

*Entered*

MAR - 4 1988

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

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

In Re:

HOME-STAKE PRODUCTION  
COMPANY SECURITIES  
LITIGATION.

)  
)  
)  
)  
)

MDL Docket No. 153  
ALL CASES

ORDER GRANTING THE MOTION TO DISMISS  
OF DEFENDANT ROBERT S. TRIPPET

NOW on this 4<sup>th</sup> day of March, 1988, there comes on for review the Motion to Dismiss of Robert S. Trippet. Being fully advised in the premises, the Court finds that good cause exists for the granting of the Motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the claims pending against the Defendant Robert S. Trippet under Section 12(2) and Section 17 of the Securities Act of 1933 be dismissed.

*R*



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

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

*entered*  
**FILED**  
FEB 25 1988  
CLERK, U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

IN RE HOME-STAKE PRODUCTION )  
COMPANY SECURITIES LITIGATION )

MDL Docket No. 153

LELAND L. LEACHMAN, )  
JAMES H. LEACHMAN )  
LESTER J. LEACHMAN, )  
ROBERT H. WEXLER, )  
JERROLD A. WEXLER )

Plaintiffs, )

Civil Action Nos.

v. )

73-C-344

73-C-409

(Consolidated)

HOME-STAKE PRODUCTION )  
COMPANY, HOME-STAKE )  
1970 PROGRAM OPERATING CORPORA- )  
TION, ROBERT S. TRIPPET, )  
and KEPLINGER & ASSOCIATES, INC.)

Defendants. )

**FILED**  
MAR 4 1988  
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

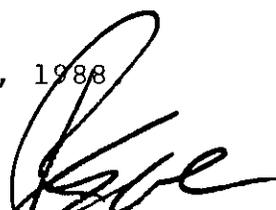
JUDGMENT ON DECISION BY THE COURT

This action came on for hearing on a motion for summary judgment before the Honorable Manuel L. Real, United States District Judge, Central District of California, sitting by designation, presiding, and summary judgment was granted in favor of defendant Keplinger & Associates, Inc. ("Keplinger") as to all claims of plaintiffs against Keplinger. Therefore,

It is ORDERED and ADJUDGED that the plaintiffs take nothing from Keplinger, that the claims against

Keplinger be dismissed on the merits, and that Keplinger recover of the plaintiffs, and each of them, jointly and severally, its costs of this action, and such attorneys fees, if any, which this Court may subsequently award.

DATED: 2-25, 1988

  
~~CLERK OF THE COURT~~

U.S. District Judge

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

**FILED**

**MAR - 4 1988**

MOTOR CARRIER AUDIT & COLLECTION )  
CO., A DIVISION OF DELTA TRAFFIC )  
SERVICE, INC. )

vs. )

CEDAR CREEK WHOLESALE, INC. )

87-C-1024-E

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

ORDER OF DISMISSAL

Be it remembered that on the 2d day of March,  
1988, came on for consideration the Plaintiff's Notice for  
Dismissal and the Court, after considering the Notice and  
pleadings filed therein, is of the opinion that the Plaintiff's  
request for dismissal should be granted. It is, therefore,

ORDERED that the above-styled and numbered cause is  
hereby dismissed with prejudice.

**S/ JAMES O. ELLISON**

UNITED STATES DISTRICT JUDGE

9920A

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

LOUIS ALLEN MILLER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 METROPOLITAN TULSA TRANSIT )  
 AUTHORITY, A Public Trust, )  
 )  
 Defendant. )

No. 87-C-524-B

**FILED**

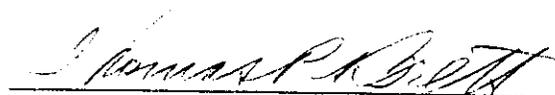
MAR - 4 1988

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

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date herein, IT IS HEREBY ADJUDGED that the Defendant, Metropolitan Tulsa Transit Authority, is to have judgment on the claim of the Plaintiff, Louis Allen Miller, and that the Plaintiff's action is hereby dismissed, with costs assessed against the Plaintiff and the parties are to pay their own respective attorneys' fees.

DATED this 11<sup>th</sup> day of March, 1988.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

TERRY KIRK REE, )  
 )  
 Petitioner, )  
 )  
 v. ) 88-C-177-B  
 )  
 ATTORNEY GENERAL OF STATE )  
 OF OKLAHOMA, )  
 )  
 Respondent. )

**FILED**  
MAR - 3 1988  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

Petitioner Terry Kirk Ree's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is now before the court for initial consideration. Petitioner was convicted in Tulsa County District Court, Case No. CRF-85-411 of two counts of Murder in the First Degree and one count of Assault and Battery with Intent to Kill. Petitioner was sentenced to three life sentences pursuant to an agreement in which he pled guilty. The convictions were not appealed to the Oklahoma Court of Criminal Appeals.

Petitioner filed an application for relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. §1080 et seq. The application was denied by order of the trial court on September 22, 1987. Such denial was affirmed by the Court of Criminal Appeals of the State of Oklahoma in Case No. PC-87-1000 on January 28, 1988.

Petitioner now seeks federal habeas relief, alleging the imposition of three life sentences to run consecutively was in violation of his constitutional rights. The basis of petitioner's assertion is that all his crimes were committed "in

one act, at the same time and place" and therefore the sentences should be concurrent rather than consecutive.

Having reviewed the application and the applicable law, the court finds as follows. "Where a defendant is charged with separate and distinct crimes, as in the present case, it is proper to impose consecutive sentences even though they were committed during a single operation." Carpenter v. State, 668 P.2d 347, 350 (Okla.Crim.App. 1983), citing, United States v. Davis, 573 F.2d 1177 (10th Cir. 1978).

The Davis court also emphasized that:

Our criminal justice system certainly does not envision that a person found guilty of two like or similar offenses shall be entitled to the same penalty. The system has always recognized that a sentencing judge has considerable discretion and leeway in determining, from the totality of the circumstances, the extent of the individual punishment to be meted out for each offense committed.

Id. at 1181.

Title 22 O.S. 1981 §976 provides: "If the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses."

Title 28 U.S.C. §2254 provides that a federal court "shall entertain an application for a writ of habeas corpus on 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."

Pleadings drafted by pro se litigants are held to a less stringent standard than formal pleadings drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). However, construing petitioner's application in a liberal manner, the court finds no allegations which if proved would state a claim cognizable under the federal habeas corpus law.

If a pro se litigant's complaint is found to be frivolous, improper or obviously without merit, the court may promptly dismiss it. Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976). Petitioner's only asserted ground for relief is the imposition of consecutive sentences. Based on the applicable law, the court finds that this assertion is without merit and may therefore be dismissed as frivolous. There is no legal right which petitioner is legitimately seeking to vindicate.

Based on the above, the court finds that petitioner cannot make a rational argument on the facts or law which would entitle him to habeas corpus relief. Phillips v. Carey, 638 F.2d 207 (10th Cir. 1981). It is therefore Ordered that petitioner's application be and is hereby dismissed, pursuant to 28 U.S.C. §1915(d), as frivolous.

Dated this 3<sup>rd</sup> day of March, 1988.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

FILED

MAR -3 1936

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

FEDERAL DEPOSIT INSURANCE CORPORATION,  
in its corporate capacity,

Plaintiff,

vs.

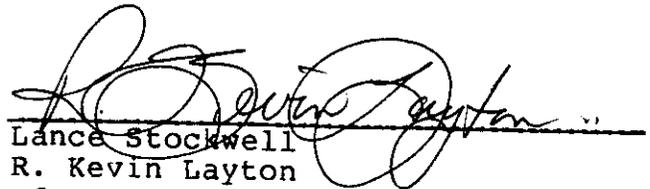
CLAUDE H. ROGERS,

Defendants.

Case No. 87-C-793C

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff and Defendant herein and stipulate to the dismissal of this action with prejudice, with all parties to bear their own costs.



Lance Stockwell  
R. Kevin Layton  
of BOESCHE, McDERMOTT & ESKRIDGE  
800 Oneok Plaza, 100 W. 5th St.  
Tulsa, Oklahoma 74103

ATTORNEYS FOR FEDERAL DEPOSIT  
INSURANCE CORPORATION



Jack Santee  
Moyers, Martin, Santee  
Imel and Tetric  
320 S. Boston, Suite 920  
Tulsa, OK 74103

ATTORNEY FOR CLAUDE ROGERS



**FILED**

MAR - 3 1988

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

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

CONLEY CORPORATION, an	)	
Oklahoma corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 87-C-1059-E
	)	
BAREK-KARPEL INDUSTRIES,	)	
a New York corporation,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

On this 3<sup>rd</sup> day of March, 1988, upon written application of the parties for an order of dismissal with prejudice of the complaint and all causes of action, the Court, having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the complaint and have requested the Court to dismiss the complaint with prejudice to any future action, and the Court, having been fully advised in the premises, finds that said complaint should be dismissed. It is, therefore,

ORDERED, ADJUDGED and DECREED by the Court that the complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same are hereby dismissed with prejudice to any further action.

**5/ JAMES O. ELLISON**

\_\_\_\_\_  
JAMES O. ELLISON, JUDGE  
UNITED STATES DISTRICT COURT





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

FILED  
MAR -3 1988

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

ITT COMMERCIAL FINANCE  
CORPORATION,

Plaintiff,

vs.

Case No. 87-C-707-B

TECH CENTER GROUP, INC.,  
LARRY SAND, LINDA SAND,  
JIM HUNZEKER, MARY SUE  
HUNZEKER, GERALDINE  
WEATHERFORD, ROY FARROW and  
NETTIE FARROW,

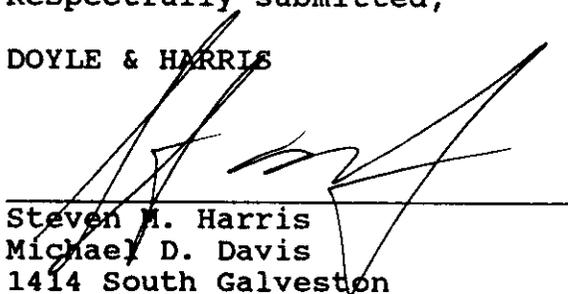
Defendants.

STIPULATION OF DISMISSAL WITH  
PREJUDICE PURSUANT TO RULE 41(a)(1)  
AS TO THE DEFENDANTS, LARRY SAND,  
LINDA SAND, JIM HUNZEKER, MARY SUE  
HUNZEKER, AND GERALDINE WEATHERFORD, ONLY

COMES NOW the plaintiff and the defendants, Larry Sand,  
Linda Sand, Jim Hunzeker, Mary Sue Hunzeker and Geraldine  
Weatherford, and hereby stipulate pursuant to Fed.R.Civ.P.  
41(a)(1) to dismiss the above captioned action with preju-  
dice as to said defendants only.

Respectfully submitted,

DOYLE & HARRIS

  
\_\_\_\_\_  
Steven M. Harris  
Michael D. Davis  
1414 South Galveston  
Tulsa, OK 74127  
(918) 582-0090  
Attorneys for Plaintiff

*Byron D. Todd*

---

Byron D. Todd  
3140 South Winston  
Room 19  
Tulsa, OK 74135  
Attorney for Defendants,  
Larry Sand, Linda Sand,  
Jim Hunzeker, Mary Sue  
Hunzeker, and Geraldine  
Weatherford

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

JOANNE HARRISON and J.R. )  
HARRISON, )  
 )  
Plaintiffs, )  
 )  
v )  
 )  
MARC A. COX, BILL COX and )  
RHONDA COX, )  
 )  
Defendant. )

No. 87-C-953-*JB*

**FILED**  
MAR - 3 1988  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

NOW on this 3rd day of March, 1988,  
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.

S/ THOMAS R. BRETT  
\_\_\_\_\_  
THOMAS R. BRETT, Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAR - 3 1988

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONELL E. DOTSON, )  
 )  
 Defendant. )

CIVIL ACTION NO. 88-C-151-E

ORDER OF DISMISSAL

Now on this 3rd day of March, 1988, 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, Donell E. Dotson, be and is dismissed without prejudice.

*By* DONELL E. DOTSON

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

**MAR - 2 1988**

WILLIAM BUXTON, EXECUTOR OF THE )  
ESTATE OF LINDA M. WILSON, and )  
UTICA NATIONAL BANK & TRUST )  
COMPANY, a corporation, TRUSTEE )  
OF THE ESTATE OF LINDA M. WILSON, )

Plaintiffs, )

v. )

UNITED STATES FIDELITY AND )  
GUARANTY COMPANY, a corporatin, )

Defendant. )

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

No. 87-C-528-B

O R D E R

Before the Court for decision are the motions for summary judgment of Plaintiffs and of Defendant in reference to Plaintiffs' insurance claims for loss resulting from an October-November 1980 burglary and vandalism of approximately \$4,000.00 and a vandalism loss in November 1982 relative to real property damage in the amount of \$33,500.00, at the insured property, 111th and South Sheridan, Tulsa, Oklahoma. The Plaintiffs also joined a claim for alleged bad faith and accompanying punitive damages but now withdraw same conceding the facts do not support such a claim.

The two insurance policies involved are Plaintiffs' 1980 United States Fidelity and Guaranty Company's ("U.S.F.&G") homeowner's policy (1980 loss), and Plaintiff's 1982 U.S.F.&G. homeowner's policy (1982 loss), attached to Defendant's supplementary response brief as Exhibits A and B. The 1980

policy contains the pre-1985 36 Okl.St. Ann. (1957) §4803 one hundred and sixty-five line standard fire policy language. The 1982 homeowner's insurance policy had been reworded to make the policy "more easily readable" by the policyholder and did not contain the specific one hundred and sixty-five line fire policy language of pre-1985 36 Okl.St. Ann. (1957) §4803, but it did provide fire coverage.

The 1980 (Exhibit A) insurance policy concerning the one-year limitation for commencing an action states:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve (12) months next after inception of the loss."

In the subject 1982 "more readable" insurance policy, the one-year limitation for commencing an action provision states:

"SUIT AGAINST US. No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the occurrence causing loss or damage."

The Defendant urges in its motion for summary judgment that no material issue of fact remains because under each insurance policy the one year "statutory" (36 Okl.St. Ann. (1957) §4803(g)) period of limitation had expired before the Plaintiffs initially commenced their action on September 25, 1986. (The action was dismissed without prejudice March 19, 1986, and refiled March 19, 1987, within one year in accordance with 12 Okl.St. Ann. §100.) The Plaintiffs urge in their motion for summary judgment that the one-year period of limitation is inapplicable as to each policy

because the Plaintiffs' claim is for burglary and/or vandalism coverage, implicating Oklahoma's five-year written contract statute of limitations (12 Okl.St. Ann. §95), and not the one-year fire coverage period of limitation.

The following sections of 36 Okl. St. Ann. §4803 are relied upon by the Defendant in support of its motion for summary judgment both as to the 1980 and 1982 policies:

"B. Except as provided in subsection F of this section, no policy or contract of fire insurance shall be made, issued or delivered by an insurer or by any agent or representative thereof, on any property in the state, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy.

\* \* \*

"C. Appropriate forms of additional contracts, riders or endorsements, insuring against indirect or consequential loss or damage or against any one or more perils other than those of fire and lightning, or providing coverage which the insurer issuing the policy is authorized by charter and by the laws of this state to assume or issue, may be issued in connection with the standard fire policy.

Such other perils or coverages may include those excluded in the standard fire insurance policy, and may include any of the perils or coverages permitted to be insured against or issued by property and casualty insurers. Such forms of contracts, riders and endorsements may contain provisions and stipulations inconsistent with such standard fire insurance policy, if said provisions and stipulations are applicable only to such additional coverage or the additional peril or perils insured against.

"D. Provisions to be contained on the first page of the policy may be rewritten, supplemented, or rearranged to facilitate policy issuance and to include matter which may otherwise properly be added by endorsement.

The pages of the standard fire insurance policy may be renumbered and the format rearranged for convenience in the preparation of individual

contracts, and to provide space for the listing of rates and premiums for coverages insured thereunder or under endorsements attached or printed thereon, and such other data as may be conveniently included for duplication on daily reports for office records.

\* \* \*

"F. 1. The State Board for Property and Casualty Rates may approve for use within the state a form of policy which does not correspond to the standard fire insurance policy as provided by this section, if the coverage of said approved policy form with respect to the peril of fire shall not be less than that contained in the standard fire insurance policy as provided in this section."

The above-quoted language of §4803, with the exception of Paragraph F.1. is common to both the §4803 1957 version and the 1985 amendment. Paragraph F.1. quoted above is the 1985 amendment.

The Plaintiff argues that even if the one year limitation period applies that Defendant waived such limitation by its conduct regarding each claim.

Pursuant to Fed.R.Civ.P. 56, if no material issues of fact are presented from a review of the record such motion should be sustained. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty-Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986); and Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). For the reasons hereafter discussed, the Defendant's motion for summary judgment is sustained regarding Plaintiffs' claim under the 1980 policy and alleged loss, but is denied in reference to the 1982 policy

and alleged loss. The Plaintiff's motion for summary judgment is denied concerning each insurance policy claim. The denial of the Defendant's motion for summary judgment in reference to the 1982 subject insurance policy is because it is unclear that approval of such a custom nonconforming policy had been granted by the Oklahoma Insurance Commissioner. If it had not been approved, it could perhaps be argued that the one-year limitation provision therein is "contractual" as opposed to "statutory" relative to the nonfire, that is vandalism or theft coverage and therefore the five-year statute of limitations under 12 Okl.St. Ann. §95 would apply. The Court will not address at this time the limitation period waiver or tolling issue relative to the 1982 loss claim.

In reference to the 1980 homeowner's insurance policy and claim thereunder, the Plaintiffs' position is that the one-year limitation period to commence an action applies to the standard fire policy therein, but not to the burglary (theft) and/or vandalism coverage provided by the policy. Plaintiff argues that the burglary or vandalism coverage is "casualty insurance" in accordance with 36 Okl.St. Ann. §4801(2) and therefore 12 Okl.St. Ann. §216 requires application of the Oklahoma statute of limitation 5-year period for written contracts under 12 Okl.St. Ann. §95.<sup>1</sup>

---

<sup>1</sup> The analysis of Springfield Fire and Marine Insurance Co. v. Biggs, 295 P.2d 790 (Okla. 1956), hereafter pre-empts this contention.

In response to Plaintiff's argument the Defendant urges that 36 Okl.St. Ann. §4803(C) makes the standard fire policy, including the one-year period of limitation, applicable to perils other than fire which are included in Plaintiff's homeowner's policy. Therefore, Plaintiff asserts that since the suit herein was not commenced within twelve months from the date of the loss, nor is there any factual basis established for tolling of the limitation period, Plaintiffs' action is barred.

In the case of Springfield Fire and Marine Insurance Co. v. Biggs, 295 P.2d 790 (Okla. 1956), the Supreme Court of Oklahoma was confronted with an analogous case. Therein the plaintiff made a claim for windstorm and hail damage to his house, claiming that the damage was covered under a standard fire policy with a "windstorm and hail endorsement" attached. The defendant insurer asserted the plaintiff's action was barred by the one-year period of limitation in the standard fire policy, lines 157 through '161 thereof. In Springfield the Supreme Court of Oklahoma held the one-year limitation applied stating in its syllabus:

"1. Title 36 O.S. 1951 §244.1, providing for the use, in connection with a Standard Fire Insurance Policy, of endorsements insuring against other perils, enables the issuance, in connection with such a policy, of an endorsement covering loss or damage by hail, and the incorporation in said endorsement, of said policy's short-term limitation for the commencement of an action on account of such loss or damage."

36 Okl. St. (1951) §244.1(5) contained the following language:

"Appropriate forms of other contracts or endorsements, whereby the interest in the property described in such policy shall be insured against one or more of the perils which the insurer is empowered to assume and their use in common with the Standard Fire Insurance Policy may be authorized by the State Insurance Board. \* \* \*"

In Springfield Fire and Marine Insurance Co. v. Biggs, supra, the plaintiff urged that Connecticut Fire Ins. Co. v. Horne, 201 Okl. 643, 207 P.2d 931 (1949), established that the one-year period of limitation in the standard fire policy did not apply to other types of insurance. The court held that the Connecticut Fire Ins. Co. case was not applicable because:

"The cited case arose previous to the 1945 enactment, supra, now in effect. At that time the standard form fire insurance policy was prescribed by Tit. 36 O.S. 1941 §244 (as indicated by the opinion in that case) originally a part of Art. II, Chapter 21, S.L. 1909, enacted several years before fire insurance companies, licensed to transact business in this State, were authorized, by Legislative Act of 1917, 'to cover the hazards of \* \* \* hail.' Upon consideration of this fact, and the further fact that the standard policy law at that time contained no language whatsoever indicating that the Legislature intended it to apply to policies covering losses by hail, the court there held that one-year limitation inapplicable. Here, the situation is entirely different. As will be observed, the present standard policy law was enacted many years after fire insurance companies were authorized by the above-cited Act 'to cover the hazard of \* \* \* hail'; and we think the language of Section 244.1(5), supra, shows that the Legislature, by therein enabling insurance against other authorized perils by the use of endorsements '\* \* \* in connection with the Standard Fire Insurance Policy \* \* \*' strongly indicated its intention that provisions of the standard fire insurance policy, such as the one prescribing the 12-month period of limitation, could be (as is properly done by the endorsement involved here) made applicable to losses from hail. In fact, we think that such use is clearly within the purview of said section."

In the case of Birmingham Fire Insurance Company v. Bond, 301 P.2d 361 (Okla. 1956), the court applied similar reasoning to hold that the one-year period of limitation contained in the standard fire policy applied to other coverages endorsed. The vandalism and theft coverage claimed under the 1980 insurance policy herein is pursuant to the HO-3 RS form and endorsement (Exhibit A).

Plaintiffs cite Merchants and Manufacturers' Insurance Company of New York v. Burns, 205 Okl. 31, 234 P.2d 409 (1951), to support their position that the one-year period of limitation applies only to claims under the fire insurance coverage. Merchants is distinguishable, however, because it involved a suit brought under a Jewelry-Fur Floater Insurance Policy for theft and the policy did not contain a statutory form fire insurance policy.

Plaintiffs' cited cases of Seay v. Commercial Union Assur. Co., 140 P. 1164 (Okla. 1914), and Utilities Ins. Co. v. Smith, 129 F.2d 798 (10th Cir. 1942), involve "contractual" limitations rather than "statutory" limitations, thereby implicating 15 Okl. St. Ann. §216, which prevents a reduction of the limitation period set forth in 12 Okl. St. Ann. §95.

The language of 36 Okl. St. (1951) §244.1(5) is substantially the same as that quoted above in the first paragraph of 36 Okl. St. (1957) §4803(C), so the rationale of Springfield Fire and Marine Ins. Co. v. Biggs, 295 P.2d 790 (Okla. 1956), is applicable herein, i.e., the one-year period of limitation set

forth in the 1980 homeowner's policy is enforceable in reference to the Plaintiffs' vandalism and/or theft claim herein.

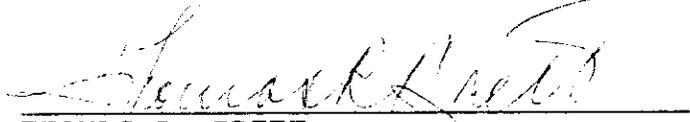
Relative to Plaintiffs' claim of waiver by the Defendant or conduct on the part of the Defendant that would constitute a tolling of the one-year limitation period, the record supports the following: Plaintiffs' first alleged loss under the 1980 homeowner's insurance policy occurred some time in October or early November 1980. The affidavit of U.S.F.&G. adjuster Dick Rogers acknowledges that he wrote William Buxton on April 21, 1981, requesting a written repair estimate for the damages sustained in the vandalism. Rogers had no communication with the insured until he received the repair estimate from the insured on December 16, 1981, which was after the expiration of the one-year limitation period in November 1981. Before there could be a waiver or tolling of the limitation period, the conduct giving rise to same must occur within the year of the limitation period. Prudential Fire Insurance Co. v. Trave-Taylor Co., 194 Okla. 394, 152 P.2d 273 (1944); Agricultural Insurance Co. of Watertown, N.Y. v. Iglehart, 386 P.2d 145 (Okla. 1963); and Metz v. Buckeye Union Fire Ins. Co., 147 N.E.2d 119 (Ohio 1957). The record herein indicates that the only conduct of the Defendant that could perhaps be construed as a waiver, thereby tolling the one-year period of limitation, occurred after the one-year limitation period had expired.

The Defendant's motion for summary judgment relative to the alleged first loss under the 1980 insurance policy is hereby

sustained, and the Defendant's motion for summary judgment relative to the alleged second loss under the 1982 insurance policy is hereby overruled for the reasons stated above.

The case is set for further status conference on the 17<sup>th</sup> day of March, 1988, at 3:00 o'clock P.M.

IT IS SO ORDERED, this 17<sup>th</sup> day of March, 1988.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

FILED

MAR -2 1988

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

LINEAR FILMS, INC. )  
 )  
Plaintiff, )  
 )  
vs. )  
 ) Civil No. 88-C-141B  
ATLANTIS GROUP, INC., )  
LF ACQUISITION CORP., )  
EARL W. POWELL, AND )  
PHILLIP T. GEORGE, )  
 )  
Defendants. )

STIPULATION OF DISMISSAL

Plaintiff, Linear Films, Inc., and Defendants, Atlantis Group, Inc., LF Acquisition Corp., Earl W. Powell, and Phillip T. George, pursuant to Rule 41(a) (1) (ii) of the Federal Rules of Civil Procedure, hereby agree to this Stipulation of Dismissal dismissing with prejudice all claims of Plaintiff in the captioned case against the Defendants. Each party shall bear its own costs, expenses and attorneys' fees.



---

John S. Athens  
P. David Newsome, Jr.

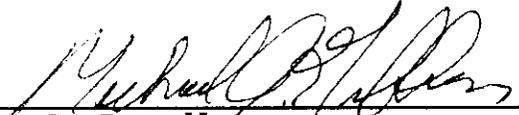
CONNER & WINTERS  
2400 First National Tower  
Tulsa, Oklahoma 74103

Attorneys for Plaintiff,  
Linear Films, Inc.

Of Counsel:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON  
1285 Avenue of the Americas  
New York, New York 10019

STEIN, ZAUDERER, ELLENHORN, FRISCHER & SHARP  
45 Rockefeller Plaza  
New York, New York 10111

  
\_\_\_\_\_  
Roy C. Breedlove  
Michael J. Gibbens

JONES, GIVENS, GOTCHER, BOGAN  
& HILBORNE  
3800 First National Tower  
Tulsa, Oklahoma 74103

Attorneys for Defendants,  
Atlantis Group, Inc.,  
LF Acquisition Corp.,  
Earl W. Powell, and  
Phillip T. George

Of Counsel:

LINN & HELMS  
1200 Fidelity Plaza  
Oklahoma City, Oklahoma 73102

**F I L E D**

**MAR - 2 1988**

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

WILMA LAIDLEY, )  
CINDY THULIN, )  
BETTYE REDDING, and )  
RENEE' WAISNER. )  
Plaintiffs, )

vs. )

No. 87- C- 418- E

LANTZ McCLAIN; individually and in )  
his official capacity as District )  
Attorney of Creek County, State of )  
Oklahoma; )  
TED RITTER; individually and in his )  
official capacity as Director of )  
the District Attorney's Training )  
Coordination Council; )  
BOARD OF COMMISSIONERS, COUNTY OF )  
CREEK, State of Oklahoma; and )  
WESLEY RUCKER, )  
Defendants. )

ORDER OF DISMISSAL OF DEFENDANT WESLEY RUCKER

The Court, after considering the Stipulation of Dismissal of Defendant Wesley Rucker executed by all of the parties in the above-styled case, hereby orders the above-styled case dismissed against defendant WESLEY RUCKER, only, without prejudice.

Ordered this 2<sup>nd</sup> day of March, 1988.

*By* James Ellison

District Court Judge Ellison

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

T. J. EDWARD WILSON, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BOARD OF COUNTY COMMISSIONERS )  
 OF TULSA COUNTY, et al., )  
 )  
 Defendants. )

No. 86-C-1148-B

**FILED**

**MAR - 2 1988**

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

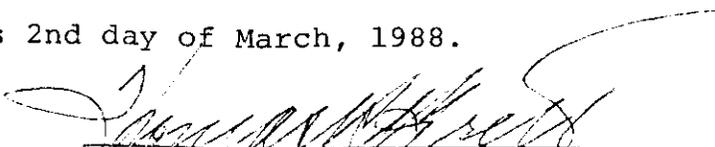
ORDER AND JUDGMENT

In accordance with the jury verdict entered March 1, 1988, the Court hereby enters judgment in favor of Defendants, Sergeant Ray Hannon, Deputy A. E. Martin and Deputy S. Woodruff, and against Plaintiff, T. J. Edward Wilson.

Further, in accordance with the Court's ruling sustaining the Defendant Tulsa County Commissioners, Louis Harris, John Selph and Melvin C. Rice motions for summary judgment on February 29, 1988, and the Court sustaining the motion for directed verdict of the Defendants Tulsa County and Sheriff Frank Thurman on March 1, 1988, judgment is hereby granted for each of said Defendants against the Plaintiff, T.J. Edward Wilson.

Defendants are awarded costs against Plaintiff. Each party is to bear their own attorney fees.

IT IS SO ORDERED this 2nd day of March, 1988.

  
\_\_\_\_\_  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR - 1 1988

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

LINDA J. SMITH,

Plaintiff,

v.

LONG JOHN SILVERS, INC.,

Defendant.

No. 87-C-843-B

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 29<sup>th</sup> day of Feb., 1988, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

*[Signature]*

United States District Judge

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

**F I L E D**

**MAR -1 1988**

THE STATE INSURANCE FUND OF THE )  
STATE OF OKLAHOMA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ASARCO INCORPORATED d/b/a )  
FEDERATED METALS CORPORATION, )  
 )  
Defendant. )

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

No. 85-C-1133-E

**ADMINISTRATIVE CLOSING ORDER**

James Waller having filed his claim in Worker's Compensation Court 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 forty-five days of a final adjudication of the Worker's Compensation Court 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 29<sup>th</sup> day of February, 1988.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

MAR 1 1988

PROFESSIONAL INVESTORS LIFE )  
INSURANCE COMPANY AND )  
BONNEVILLE LIFE INSURANCE )  
COMPANY, )

Plaintiffs, )

vs. )

GERALD M. SIMON AND )  
CYNTHIA R. SIMON, )

Defendants. )

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

No. 86-C-768-E

ADMINISTRATIVE CLOSING ORDER

The Defendants having filed their 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 thirty (30) 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 29<sup>th</sup> day of February, 1988.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR -1 1988

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

TAYLORBANC SAVINGS ASSOCIATION OF TAYLOR,  
TEXAS

Plaintiff(s),

vs.

DR. TOM VANDERPOOL

Defendant(s).

No. 87-C-410-E

ADMINISTRATIVE CLOSING ORDER

The DEFENDANT 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 45 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 29<sup>th</sup> day of February, 1988.

UNITED STATES DISTRICT JUDGE

**F I L E D**

IN THE UNITED STATES DISTRICT COURT FOR THE **MAR -1 1988**  
NORTHERN DISTRICT OF OKLAHOMA

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

KELLY D. LAMB, an individual, )  
 )  
Plaintiff, )  
 )  
vs. ) Case No. 85-C-927-E  
 )  
ROCKWELL GRAPHIC SYSTEMS, )  
INC., formerly Miehler, Goss, )  
Dexter, Inc., a Delaware )  
corporation, )  
 )  
Defendants. )

ORDER OF DISMISSAL WITH PREJUDICE

NOW, on this 29<sup>th</sup> day of February, 1988, the above styled and captioned matter comes on for hearing pursuant to the Stipulation for Dismissal With Prejudice heretofore filed by counsel for the parties, and the Court, after reviewing said Stipulation for Dismissal With Prejudice, finds that same should be sustained.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that pursuant to the stipulations and agreements reached by the parties, all information concerning the Defendant's financial condition produced to Plaintiff in connection with this litigation shall be held by the parties strictly confidential and shall either be returned to Defendant's counsel or destroyed and shall not be disclosed

to any individual not a party to this action and further that the Protective Order entered by this Court on or about December 8, 1987 shall be and is hereby continued in effect relevant to such financial information.

**S/ JAMES O. ELISON**

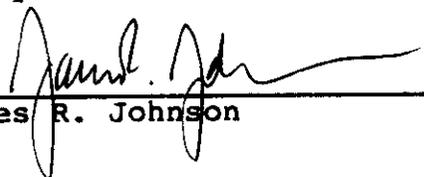
Judge of the United States  
District Court for the Northern  
District of Oklahoma

APPROVED:

GARRISON, BROWN, CARLSON  
& BUCHANAN  
Attorneys for Plaintiff

By   
Alan R. Carlson

BREWER, WORTEN, ROBINETT,  
JOHNSON, WORTEN & KING  
Attorneys for Defendant

By   
James R. Johnson

**FILED**

**MAR -1 1988**

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

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

U.S. TESTING COMPANY, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNIVERSAL POWER CONCEPTS, )  
 INC., et al., )  
 )  
 Defendants. )

No. 87-C-386-E

**ADMINISTRATIVE CLOSING ORDER**

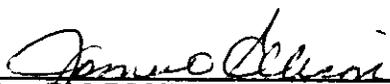
NOW on this 29<sup>th</sup> day of February, 1988 comes on for hearing the above styled case and the Court, being fully advised in the premises finds:

The Plaintiff having been designated as the official depository of the Court for the purpose of holding the Papp Plasma Fusion Engine and having been relieved of further liability or responsibility in connection with this action save and except for its obligation to maintain the engine in storage pending further order of this Court and this Court being unaware of the need for additional proceedings in this matter in the immediate future, 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 six (6) months of this date 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 29<sup>th</sup> day of February, 1988.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE



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

BENNIE BOYD, JR.,  
  
Petitioner,  
  
v.  
  
THOMAS WHITE, et al,  
  
Respondents.

**FILED**

MAR - 1 1988

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

87-C-834-B

ORDER

Now before the Court for consideration is the Petition of Bennie Boyd, Jr., for a Writ of Habeas Corpus. Pursuant to a plea bargain, Petitioner entered a plea of guilty to the charge of Attempted Larceny of an Automobile After Former Conviction of a Felony. He was sentenced to some fifteen (15) years in prison.

Petitioner did not perfect a direct appeal but did file an application for post-conviction relief. However, in his federal habeas petition, Petitioner raises two grounds for relief not previously presented to the courts of the State of Oklahoma.

As Ground One of his petition before this court, Boyd raises the claim (1) that he was denied a full and fair evidentiary hearing in the trial court; and (2) that the factual determination was not fully supported by the record as a whole. As Ground Three of his petition before this court, Boyd raises, inter alia, the claim that he was denied effective assistance of counsel when his lawyer did not advise him that an appeal could be taken, and appellate counsel provided, at public expense. None of these claims have been previously raised before the Oklahoma courts.

Petitioner also raises the following claims, heretofore raised before the Oklahoma Courts: (1) Denial of due process as a result of the failure of the trial court to impose sentence without first requiring the State to introduce into evidence a certified copy of Boyd's prior judgment and sentence, showing he was represented by counsel at said judgment and sentence; and (2) Denial of effective assistance of counsel, as a result of his lawyer's failure to object to enhancement of his punishment, in violation of Oklahoma state laws.

In Rose v. Lundy, 455 U.S. 509, 71 L.Ed.2d 379 (1982), the United States Supreme Court addressed the question of how federal habeas petitions should be treated where they contain both exhausted and unexhausted claims for relief. Because it would be unseemly to upset a state court conviction without granting State courts an opportunity to correct constitutional violators (Rose, 455 at 518-519) the Court held that a "total exhaustion rule" would better promote the interests of comity without unreasonably impairing a prisoner's right to relief. Rose, 455 at 522. Thus, the Supreme Court has decided "that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Rose, 455 at 522 (footnote omitted).

Therefore, it is the Order of this Court that Petitioner's habeas petition be dismissed. In accordance with Rose v. Lundy, (455 U.S. at 520), Boyd may either resubmit a petition with only exhausted claims or exhaust the remainder of his claims.

It is so ORDERED this 1<sup>ST</sup> day of March, 1988.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MARC A. ROBERTS; DOROTHY A. )  
 ROBERTS; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )  
 BENEFICIAL OKLAHOMA, INC., )  
 )  
 Defendants. )

**FILED**

MAR - 1 1988

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

CIVIL ACTION NO. 87-C-823-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29<sup>th</sup> day  
of February, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Nancy Nesbitt Blevins, Assistant United States  
Attorney; the Defendants, County Treasurer, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma, appear by Doris L. Fransein, Assistant District  
Attorney, Tulsa County, Oklahoma; and the Defendants, Marc A.  
Roberts, Dorothy A. Roberts, and Beneficial Oklahoma, Inc.,  
appear not, but make default.

The Court being fully advised and having examined the  
file herein finds that the Defendants, Marc A. Roberts and  
Dorothy A. Roberts, acknowledged receipt of Summons and Complaint  
on October 22, 1987; that Defendant, County Treasurer, Tulsa  
County, Oklahoma, acknowledged receipt of Summons and Complaint  
on October 8, 1987; that Defendant, Board of County

Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on October 7, 1987; and that Defendant, Beneficial Oklahoma, Inc., acknowledged receipt of Summons and Amended Complaint on December 10, 1987.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers herein on October 26, 1987 and their Answers to Amended Petition herein on December 14, 1987; and that the Defendants, Marc A. Roberts, Dorothy A. Roberts, and Beneficial Oklahoma, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Four (4), Block E, JOE SUBDIVISION of Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on June 25, 1985, Marc A. Roberts and Dorothy A. Roberts, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$22,000.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Marc A. Roberts and

Dorothy A. Roberts, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated June 25, 1985, covering the above-described property. Said mortgage was recorded on June 26, 1985, in Book 4872, Page 1537, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Marc A. Roberts and Dorothy A. Roberts, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Marc A. Roberts and Dorothy A. Roberts, are indebted to the Plaintiff in the principal sum of \$21,971.46, plus interest at the rate of 11.5 percent per annum from September 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title, or interest in the subject real property.

The Court further finds that the Defendant, Beneficial Oklahoma, Inc., is in default and has no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Marc A. Roberts and Dorothy A. Roberts, in the principal sum of \$21,971.46, plus interest at the rate of 11.5 percent per annum

from September 1, 1986 until judgment, plus interest thereafter at the current legal rate of 6.59 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, and Beneficial Oklahoma, Inc., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Marc A. Roberts and Dorothy A. Roberts, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney

  
NANCY NESSITT BLEVINS  
Assistant United States Attorney

  
DORIS L. FRANSEIN  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

NNB/css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 vs. )  
 )  
 ) GEORGE G. RANDOLPH; LYNDA K. )  
 ) RANDOLPH; RONALD E. BERRY; )  
 ) LAKE AREA VETERINARY CLINIC, )  
 ) INC.; ALAN K. POTTER; SHARON )  
 ) PAGE; COUNTY TREASURER, Osage )  
 ) County, Oklahoma; BOARD OF )  
 ) COUNTY COMMISSIONERS, Osage )  
 ) Oklahoma, and FIRST NATIONAL )  
 ) BANK OF HOMINY, OKLAHOMA, )  
 )  
 ) Defendants. )

**FILED**

MAR - 1 1988

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

CIVIL ACTION NO. 87-C-633-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29<sup>th</sup> day of January, 1988. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; the Defendant, Ronald E. Berry, appears pro se; the Defendant, First National Bank of Hominy, Oklahoma, appears by Gene Ware, Assistant Vice President; and the Defendants, George G. Randolph, Lynda K. Randolph, Lake Area Veterinary Clinic, Inc., Alan K. Potter, and Sharon Page, appear not, but make default.

The Court being fully advised and having examined the file herein finds that the Defendant, George G. Randolph,

acknowledged receipt of Summons and Complaint on August 23, 1987; that Defendant, Lynda K. Randolph, acknowledged receipt of Summons and Complaint on August 31, 1987; that Defendant, Ronald E. Berry, acknowledged receipt of Summons and Complaint on August 17, 1987; that Defendant, Lake Area Veterinary Clinic, acknowledged receipt of Summons and Complaint on November 16, 1987; that Defendant, Alan K. Potter, acknowledged receipt of Summons and Complaint on November 16, 1987; that Defendant, Sharon Page, acknowledged receipt of Summons, Complaint, and Amendment to Complaint on November 24, 1987; that Defendant, First National Bank of Hominy, Oklahoma, acknowledged receipt of Summons, Complaint, and Amendment to Complaint on September 23, 1987; that Defendant, County Treasurer, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on August 6, 1987; and that Defendant, Board of County Commissioners, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on August 11, 1987.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer herein on August 14, 1987; that the Defendant, Ronald E. Berry, filed his Answer to Complaint herein on August 21, 1987; that the Defendant, First National Bank of Hominy, Oklahoma, while not having filed an Answer but did correspond with Plaintiff United States of America, a copy of which is attached hereto as Exhibit "A" and incorporated; and that the Defendants, George G. Randolph, Lynda K. Randolph, Lake Area Veterinary Clinic, Inc., Alan K.

Potter, and Sharon Page, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lots 1, 2, 3 and 4, in Block 5, in PETTIT ADDITION to Hominy, Osage County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on July 15, 1982, the Defendants, George G. Randolph and Lynda K. Randolph, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$12,200.00, payable in monthly installments, with interest thereon at the rate of fifteen and one-half percent (15.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, George G. Randolph and Lynda K. Randolph, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated July 15, 1982, covering the above-described property. Said mortgage was recorded on July 27, 1982, in Book 620, Page 542, in the records of Osage County, Oklahoma.

The Court further finds that the Defendants, George G. Randolph and Lynda K. Randolph, made default under the terms of the aforesaid note and mortgage by reason of their failure to

make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, George G. Randolph and Lynda K. Randolph, are indebted to the Plaintiff in the principal sum of \$11,910.95, plus interest at the rate of 15.5 percent per annum from June 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$12.15 plus penalties and interest for the year 1986 and \$10.95 plus penalties and interest for the year 1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Ronald E. Berry, has a lien on the property which is the subject matter of this action by virtue of a mortgage in the amount of \$1,500.00, plus interest at the rate of 15 percent per annum from January 1, 1983. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, First National Bank of Hominy, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of two judgments, one in the amount of \$371.12 and the other in the amount of \$285.33. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, George G. Randolph and Lynda K. Randolph, in the principal sum of \$11,910.95, plus interest at the rate of 15.5 percent per annum from June 1, 1986 until judgment, plus interest thereafter at the current legal rate of 6.59 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment in the amount of \$12.15 plus penalties and interest for personal property taxes for the year 1986 and \$10.95 plus penalties and interest for personal property taxes for the year 1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, George G. Randolph and Lynda K. Randolph, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action

accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, Ronald E. Berry, in the amount of \$1,500.00, plus interest at the rate of 15 percent per annum from January 1, 1983;

Fourth:

In payment of the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, in the amount of \$12.15 plus penalties and interest for the year 1986 and \$10.95 plus penalties and interest for the year 1987, personal property taxes which are currently due and owing;

Fifth:

In payment of the Defendant, First National Bank of Hominy, Oklahoma, in the amount of \$656.45.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under

and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT  

---

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney

---

PHIL PINNELL  
Assistant United States Attorney

---

JOHN S. BOGGS JR.  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Osage County, Oklahoma

---

RONALD E. BERRY, pro se

---

GENE WARE  
Assistant Vice President  
First National Bank of Hominy, Oklahoma

PP/css

**1** First  
National  
Bank in Hominy

September 23, 1987

**RECEIVED**

SEP 24 1987

U. S. ATTORNEY  
N. D. OKLAHOMA

P.O. BOX 1  
117 North Price  
Hominy, OK 74035-0001  
(918) 885-2161

Jack C. Silver  
Clerk of the District Court  
Northern District of Oklahoma  
U. S. Courthouse  
333 West Fourth Street  
Tulsa, Ok. 74103

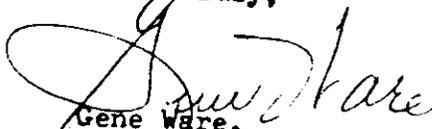
RE: Civil Action File No. 87-C-633-B, USA vs George C Randolph, et al.

Dear Sirs:

We acknowledge receipt of the summons and complaint and amendment to complaint in the above captioned matter. We also acknowledge that the Plaintiff, United States of America, holds a Superior Claim, and that the statements in their Amendment to Complaint that was filed Sept. 22, 1987, are correct as stated.

However, This bank, First National Bank in Hominy, Oklahoma, does hold Journal Entry Judgments againts the Defendants, George G. Randolph for \$371.12, and Lynda K. Randolph for \$285.33. We request that these judgments be considered in their proper sequence against any equity the defendants may have.

Yours truly,

  
Gene Ware,  
Ass't Vice President

**EXHIBIT "A"**

*Since 1906*

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

**F I L E D**

MAR -1 1988

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

JOHN BAKER,

Plaintiff,

v.

CUMMINS SALES & SERVICE,

Defendant.

No. 80-C-159-E

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 29<sup>TH</sup> day of February, 1987, comes on to be heard the Stipulation For Order of Dismissal With Prejudice of the parties herein. The Court, being well advised on the premises, finds that this action should be and hereby is Dismissed With Prejudice.

  
The Honorable James O. Ellison  
United States District Judge

