

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

DYCO PETROLEUM CORPORATION,
a corporation,

Plaintiff,

v.

CABOT PIPELINE CORPORATION,
a corporation, and WESTAR
TRANSMISSION COMPANY,
a division of CRANBERRY
PIPELINE CORPORATION,
a corporation,

Defendants.

CASE NO. 89-C-866-B

FILED

JUN 28 1991

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

ORDER

Upon the Joint motion of all parties, and upon representation that this suit has been settled, it is hereby ordered that this suit is dismissed with prejudice to re-filing. Costs of suit are assessed against the party incurring same.

SIGNED this the 28 day of June, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

individuals residing in Rancho Santa Fe, California.

4. Travelers Insurance Company is a corporation organized under the laws of the State of Connecticut and doing business in the State of Oklahoma.

5. The real property involved in this action is located in Tulsa County, State of Oklahoma.

6. All of the parties were personally served with a Summons and a copy of Plaintiff's Complaint, as evidenced by the verified returns of service filed in this action.

7. Defendants Rittenberry, after being duly served with process in this case, have failed to answer or otherwise appear and are in default.

8. This Court has proper jurisdiction over the parties and matters asserted herein, and venue is proper in this Court.

9. On or about March 22, 1985, for good and valuable consideration, Defendants Rittenberry made, executed, and delivered unto Utica National Bank & Trust Company, Tulsa, Oklahoma (the "Bank") a certain promissory note (the "Note") in the original principal sum of \$1,500,000.00, plus interest accruing thereon at a rate equal to the Bank's base rate as established from time to time plus 1.0%, bearing Note No. 78557 with an original maturity date of March 22, 1988. Three Note Modifications were executed which ultimately extended the maturity date of the Note to March 22, 1990.

10. As security for the repayment of the indebtedness evidenced by the Note, together with all other indebtedness

previously due and owing or thereafter accruing by Defendants Rittenberry, Defendants Rittenberry made, executed, and delivered unto the Bank a certain mortgage (the "Mortgage") covering the following described property, to-wit:

Lots Six (6) and Eleven (11), Block One (1),
TOWN AND COUNTRY ESTATES, an Addition to Tulsa
County, State of Oklahoma, according to the
recorded plat thereof, a/k/a 3801 East 74th
Street, Tulsa, Oklahoma 74136 (the
"Property").

The Mortgage is dated March 22, 1985, and was filed of record March 25, 1985, in Book 4851 at Page 1939 in the Office of the County Clerk of Tulsa County, State of Oklahoma, with all mortgage tax paid thereon.

11. On July 20, 1989, the Office of the Comptroller of the Currency (the "Comptroller") closed Utica and assumed exclusive custody and control of the property and affairs of Utica pursuant to 12 U.S.C. §191.

12. Thereafter, the Comptroller tendered to Federal Deposit Insurance Corporation appointment as Receiver (the "Receiver") of Utica pursuant to 12 U.S.C. §1821. The Receiver thereby became possessed of all assets, business and property of Utica.

13. Pursuant to 12 U.S.C. §1823(d), and agreements approved in the United States District Court for the Northern District of Oklahoma, Case No. 89-C-602-B, certain assets of Utica were sold and transferred by the Receiver to Federal Deposit Insurance Corporation in its corporate capacity ("FDIC") including the Note and the Mortgage. Pursuant thereto, FDIC acquired all right, title and interest of the Bank in and to the Note and Mortgage.

14. Despite demand to Defendants Rittenberry for payment, Defendants Rittenberry have failed and continue to fail to make payments under the terms of the Note and, consequently, are in default thereof. The entire principal amount of the Note has been accelerated and is now due and payable in full.

15. There is due and owing under the terms of the Note the principal sum of \$1,304,950.61, interest accrued thereon through May 6, 1991 in the sum of \$422,122.66 and interest thereafter at the rate of 12.5% per annum until paid, \$19,565.90 for ad valorem taxes, \$875.00 for inspections, and \$7,932.50 for attorney fees, together with all costs of this action.

16. The Mortgage constitutes a first, prior, valid and perfected lien on the Property, prior and superior to the liens and interests of all other parties to this action.

17. The liens claimed by Travelers Insurance Company, a Connecticut corporation and the State of Oklahoma, ex rel. Oklahoma Tax Commission constitute valid and perfected liens on the Property, subordinate to the lien of the Mortgage, but superior to the interests of all other parties to this action, other than FDIC.

18. The Mortgage should be foreclosed, and the Property offered for sale by the Sheriff of Tulsa County in accordance with statutory procedure.

19. FDIC has elected to have the Property sold with appraisalment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court as follows:

A. Federal Deposit Insurance Corporation, in its corporate capacity, has succeeded to all the rights of Utica National Bank & Trust Company, in and to the Note and the Mortgage, and shall have and recover of and from the Defendants, Charles R. Rittenberry and Rayleen S. Rittenberry, husband and wife, jointly and severally, an in personam judgment, in the principal amount of \$1,304,950.61, interest accrued thereon through May 6, 1991 in the sum of \$422,122.66 and interest thereafter at the rate of 12.5% per annum until paid, \$19,565.90 for ad valorem taxes, \$875.00 for inspections, and \$7,932.50 for attorney fees, plus judgment for all other costs of this action accrued and accruing, all to bear interest at the statutory rate from the date of judgment until paid, all of which constitute a lien on the Property until paid.

B. FDIC has a valid, first and prior mortgage on the Property. The mortgage lien of FDIC is adjudged and established to be a good and valid lien upon the Property and FDIC's judgment indebtedness is secured by the lien.

C. Any and all right, title and interest which the Defendants Charles R. Rittenberry and Rayleen S. Rittenberry have or claim in the Property is subsequent, junior, subordinate and inferior to the mortgage lien of FDIC and the liens of Travelers Insurance Company, a Connecticut corporation and State of Oklahoma, ex rel. Oklahoma Tax Commission.

D. Travelers Insurance Company, a Connecticut Corporation and State of Oklahoma, ex rel. Oklahoma Tax Commission have valid liens on the Property, subject only to the lien of FDIC.

E. Upon the failure of the Defendants Charles R. Rittenberry and Rayleen S. Rittenberry to satisfy the liens described above, the Sheriff of Tulsa County shall levy upon the Property, after having the Property appraised as provided by law; shall proceed to advertise and sell the Property according to law; and shall immediately turn over the proceeds of the sale to the Clerk of Court for the United States District for the Northern District of Oklahoma, who shall apply the proceeds arising from the sale as follows:

First: To payment of costs of this action and of the sale, including attorney fees of counsel for FDIC;

Second: To satisfy the judgment of FDIC as set forth in this Journal Entry of Judgment;

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

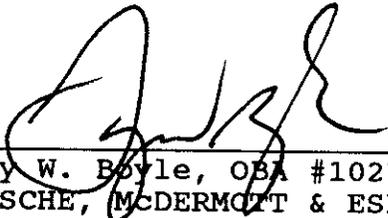
F. From and after the sale of the Property, all the parties to this action, and each of them (other than a party who purchases the Property at such sale), and all persons claiming under them or any of them shall be and are hereby forever barred and foreclosed from any and every lien upon, right, title, estate and equity of redemption, in or to the Property, or any portion thereof.

G. Upon confirmation of the sale ordered, the Sheriff of Tulsa County shall execute and deliver a good and sufficient deed to the Property to the purchaser, which shall convey all the right, title, interest, estate and equity of redemption, of all the

parties and all the persons claiming under them and each of them, since the filing of this action, and upon application of the purchaser, the Court shall issue a writ of assistance to the Sheriff, who shall place the purchaser in full and complete possession and enjoyment of the Property.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

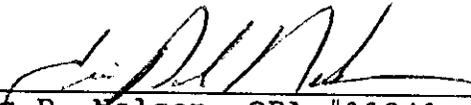


Gary W. Boyle, OBA #1027
BOESCHE, McDERMOTT & ESKRIDGE
800 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103
(918) 583-1777

ATTORNEYS FOR PLAINTIFF,
FEDERAL DEPOSIT INSURANCE CORPORATION

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity, vs. CHARLES R.
RITTENBERRY and RAYLEEN S, RITTENBERRY,
husband and wife, et al.; United States
District Court for the Northern District
of Oklahoma; Case No. 90-C-626-B

APPROVED AS TO FORM:



Eric P. Nelson, OBA #11941
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, Oklahoma 74103
(918) 585-9211

ATTORNEYS FOR DEFENDANT,
TRAVELERS INSURANCE COMPANY

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity, vs. CHARLES R.
RITTENBERRY and RAYLEEN S, RITTENBERRY,
husband and wife, et al.; United States
District Court for the Northern District
of Oklahoma; Case No. 90-C-626-B

APPROVED AS TO FORM:



Lisa Haws, OBA #12695
Assistant General Counsel
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194-0011
(405) 521-3141

ATTORNEY FOR DEFENDANT,
STATE OF OKLAHOMA ex rel. OKLAHOMA
TAX COMMISSION

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

JUN 29 1991

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

THE ESTATE OF WILLIAM E. SEIVERT,)
by KATHLEEN SIEVERT, WIDOW OF)
WILLIAM E. SIEVERT,)

Plaintiff,)

v.)

No. 90-C-730-B

PRUCO LIFE INSURANCE COMPANY,)

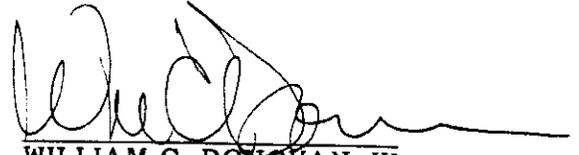
Defendant.)

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff and Defendant hereby state to the Court that they have reached a settlement in this lawsuit and hereby stipulate for dismissal of this cause with prejudice.

The parties have executed a certain General Release and Indemnification Agreement which sets forth the specific covenants of Plaintiff to Defendant, and Defendant to Plaintiff. As part of their agreement, the parties shall bear their own respective attorney's fees and costs. Nothing herein shall be construed as an admission or concession by Defendant of any violation of law, wrong doing or liability concerning any matter in this lawsuit. Such liability being expressly denied.


KATHLEEN SIEVERT, PLAINTIFF



WILLIAM C. DONOVAN, III
111 E. Third St.
Suite 300
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFF



Timothy A. Carney
GABLE & GOTWALS
2000 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEY FOR DEFENDANT

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

FILED

JUN 28 1991

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

DARNIE M. POPE,)
)
 Plaintiff,)
)
 v.)
)
 AMERICAN AIRLINES, INC.,)
)
 Defendant.)

90-C-170-B ✓

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed June 10, 1991 in which the Magistrate Judge recommended that this case be administratively closed until such time as the parties either move to reopen or dismiss. Further, the Magistrate Judge recommended that a Status Conference be held in September, 1991 to ascertain the parties' progress toward settlement, if not resolved by that time.

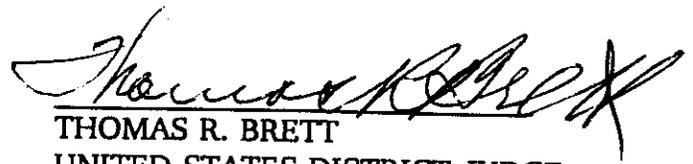
No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is, therefore, Ordered that this case is to be administratively closed until such time as the parties either move to reopen or dismiss; and that a Status Conference is to be held September, 1991 to ascertain the parties' progress toward settlement, if not resolved by that time.

314

Dated this 28 day of June, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 28 1991

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

DOROTHY HINKLE, REPRESENTATIVE)
OF THE ESTATE OF TERESA GREEN,)

Plaintiff,)

vs.)

No. 90-C-579-E

THE SECRETARY OF THE)
DEPARTMENT OF HEALTH AND)
HUMAN SERVICES OF THE UNITED)
STATES, ET AL.,)

Defendants.)

ORDER

This matter is before the court on Defendants' Motion to Dismiss. This claim arose from the alleged medical negligence of certain personnel of the Claremore Indian Hospital. The record shows that the alleged negligence occurred in connection with the delivery of Decedent Green's child. It is undisputed that Plaintiff's administrative claim against the Defendant Secretary was timely filed and that the Secretary denied the claim in the Department's final determination issued on January 4, 1990. This suit was filed on July 5, 1990, naming the Secretary, Dr. McMahon and Dr. Hunt as attending physicians and certain unnamed personnel of the Hospital as party defendants. The record indicates that the Secretary was served on October 15, 1990.

Defendants have argued and Plaintiff concedes that the proper party Defendant in this case is the United States rather than the parties named by Plaintiff in her Complaint. Indeed, Plaintiff concurs with Defendants' position that the individual Defendants should be dismissed. Defendants also argue that the action was not

filed against the proper party in a timely fashion; therefore this Court lacks subject-matter jurisdiction. And, Defendants aver that the jurisdictional defect cannot be cured by Rule 15(c), Fed.R.Civ.P. The Defendants have made a convincing case for dismissal; the Court is persuaded that it does not have jurisdiction. This matter states a claim under the Federal Torts Claims Act which provides in pertinent part that where, as here, an administrative claim was filed as a necessary predicate to suit, the action must be filed against the United States within six months of the agency's final determination of the administrative claim or "be forever barred." 28 U.S.C. §2401(b). Further, notice to the named Defendants cannot be imputed to the United States pursuant to Rule 15(c) unless the named Defendants are properly served within the six-month limitations period. Schiavone v. Fortune, 477 U.S. 21 (1986); Johnson v. United States Postal Service, 861 F.2d 1475 (10th Cir. 1988), cert. denied, 110 S.Ct. 54 (1989). In the instant case, service to the named Defendants occurred in October, well after the six-month period prescribed in §2401(b). The Court finds therefore that Defendants' Motion should be granted.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is granted; this case is dismissed.

ORDERED this 27th day of June, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

Dismiss prays, in the alternative, for an order transferring the case to the District Court for the Western District of Missouri pursuant to 28 U.S.C. §1406(a), the Court will grant Defendant's Motion to Dismiss in part.

IT IS THEREFORE ORDERED that Plaintiff's Motions are denied; Defendant's Motion is grant in part, denied in part. This case is ordered transferred to the District Court for the Western District of Missouri pursuant to 28 U.S.C. §1406(a).

ORDERED this 27th day of June, 1991.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 28 1991

[Handwritten mark]

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

KEITH L. BELKNAP,

Plaintiff,

vs.

AMWAY CORPORATION,

Defendant.

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)
)
)
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)
)
)
)
)
)

87-C-795-B ✓

J U D G M E N T

In accordance with the jury verdict rendered on June 24, 1991, Judgment is hereby entered in favor of Plaintiff Keith L. Belknap and against the Defendant Amway Corporation in the amount of \$150,000.00 plus post-judgment interest from and after the date hereof at the annual rate of 6.09% until paid. Costs are assessed against the Defendant Amway Corporation if timely applied for under Local Rule 6. Attorney fees, if appropriate, may be timely applied for under Local Rule 6.

DATED this 27th day of June, 1991.

[Handwritten signature of Thomas R. Brett]
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

JUN 28 1991

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

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

IN RE:)	
JANET SMITH,)	
)	Case No. 90-02445-W
Debtor.)	(Chapter 7)
JANET SMITH,)	
)	
Plaintiff-)	
Appellee,)	
vs.)	Adv. No. 90-0251-W
RICHARD H. SMITH,)	
)	
Defendant-)	
Appellant.)	Dist. Ct. No. 91-C-0020-E

ORDER DISMISSING APPEAL

Upon the Notice of Disposition Of Adversary Proceeding And Request For Dismissal Of Appeal, for good cause shown it is ORDERED that the above appeal is dismissed as moot.

Done this 27 day of June, 1991.

W/ JAMES O. ELLISON

United States District Judge

APPROVED:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: ORIGINAL SIGNED BY
SAM G. BRATTON II
 Sam G. Bratton II
 Suite 500
 320 S. Boston Avenue
 Tulsa, Oklahoma 74103
 (918) 582-1211
 Attorney for Appellee

BARROW, GADDIS, GRIFFITH & GRIMM

By:

William R. Grimm, Esq.
J. Patrick Mensching, Esq.
610 S. Main, Suite 300
Tulsa, Oklahoma 74119
(918) 584-1600

Attorneys for Appellant

FILED

MAY 31 1991

DOROTHY A. EVANS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

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

IN RE: REPUBLIC FINANCIAL)
CORPORATION, an Oklahoma)
corporation,)
))
Debtor,)
))
R. DOBIE LANGENKAMP,)
Successor Trustee,)
))
Plaintiff,)
))
vs.)
))
R. A. PLANOS and SUE PLANOS,)
))
Defendants.)

Case No. 84-01460-W
(Chapter 11)

FILED

JUN 27 1991

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

Adv. No. 86-0380-C

91-C-34-E

ORDER OF APPROVAL OF SETTLEMENT OF CONTROVERSY
AND DISMISSAL OF ADVERSARY PROCEEDING WITH PREJUDICE

Upon the Joint Application for Approval of Settlement of Controversy and Dismissal of Adversary Proceeding with Prejudice for good cause shown, the Court

FINDS:

1. Notice hereof has been given to all parties required under the provisions of the confirmed Plan of Reorganization of the above debtor, and all such parties having approved the proposed settlement, notice is therefore sufficient and proper and no further notice is required.

2. It would be in the best interests of the Estate and the creditors thereof if this settlement of controversy as proposed in the said Joint Application be approved, and it is therefore

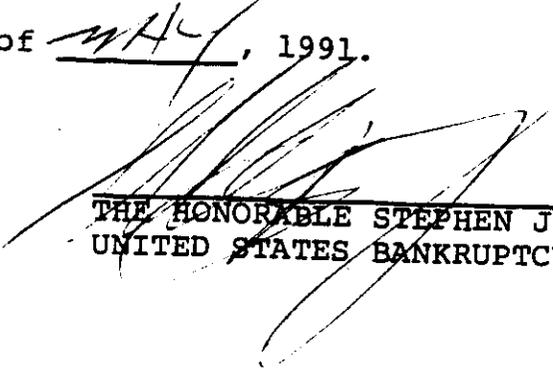
ORDERED that the settlement of the above-styled and numbered adversary proceeding on the terms and conditions set forth in the Joint Application is approved, and it is further

ORDERED that the parties are directed to comply with the terms thereof, and it is further

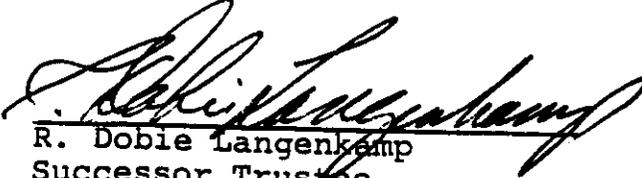
DOCKETED 6-3, 1991
Clerk U.S. Bankruptcy Court
Oklahoma

ORDERED that the above-styled and numbered adversary proceeding be and the same is hereby dismissed, with prejudice.

DONE, the 31 day of MAY, 1991.


THE HONORABLE STEPHEN J. COVEY
UNITED STATES BANKRUPTCY JUDGE

APPROVED:

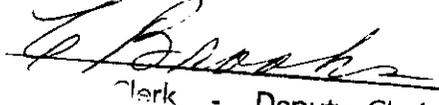

R. Doble Langenkamp
Successor Trustee
400 S. Boston, Suite 1200
Tulsa, OK 74103
583-4514


R. A. Planos


Sue Planos

United States Bankruptcy Court |
Northern District of Oklahoma | ss

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL ON FILE.


Clerk - Deputy Clerk

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

FILED
JUN 27 1991

JACK SILVER, CLERK
U.S. DISTRICT COURT

GAS ENERGY DEVELOPMENT
CORP.,

Plaintiff,

vs.

PACIFIC WESTERN ENERGY
CORP.,

Defendant.

No. 90-C-82 B

ORDER

Before the Court for decision is Defendant's, Pacific Western Energy Corporation, (PWEC), Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(2), asserting that the Court is without *in personam* jurisdiction over PWEC. Also under consideration is Gas Energy Development Corporation's, (GED's), Motion to Enjoin PWEC from prosecuting a similar action filed by PWEC in the Northern District of California, and PWEC's Motion to Transfer this matter to the Northern District of California.

In making a determination under Rule 12, the Court must take as true all allegations of the Complaint and all reasonable inferences from them must be indulged in favor of the Complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

Furthermore, all well-pleaded facts are admitted under Fed.R.Civ.P. 12(b) Motions to Dismiss. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

21

c/m

Pursuant to Okla. Stat. Tit. 12, §2004(F) (Supp. 1990), a due process analysis of the 14th Amendment of the United States Constitution is implemented in Oklahoma when determining *in personam* jurisdiction over a non-resident party. McClelland v. Watling Ladder Co., 729 F.Supp. 1316, 1318-19 (W.D. Okla. 1990).

Plaintiff, an Oklahoma corporation, and PWEC, a California corporation, entered into an oil and gas contractual agreement in the month of October, 1989. In this contractual agreement, PWEC originally agreed to purchase a quantity of 7500 MMBtu's/per day from GED for a term of November 1, 1989 through October 31, 1990. The contracting parties in January of 1990 reduced the quantity of natural gas to 2500 MMBtu's/per day.

For a period in December 1989, GED was unable to deliver the specified quantity of natural gas to PWEC. GED alleges that this failure to provide natural gas to PWEC is excused as a result of a *force majeure* clause in the contract.

PWEC in February of 1990 sent a letter to GED indicating that it would no longer purchase natural gas under its agreement with GED, citing sporadic delivery as a concern. On the 2nd day of February, 1990, GED initiated this lawsuit in this forum. PWEC filed a Complaint against GED regarding this transaction in the Northern District of California.

Prior to determining Plaintiff's Motion to Enjoin Defendant, PWEC, from pursuing the California action, or Motion to Transfer this matter to California, this Court will first determine whether PWEC is subject to *in personam* jurisdiction of this forum.

In a diversity suit, a federal court may exercise *in personam* jurisdiction over a non-resident Defendant when there exists minimum contacts with the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

In determining whether minimum contacts exist, a purposeful availment analysis is implemented. Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988).

Generally, the use of the mails, communication via telephone or other international communications do not suffice for purposeful activity or availment of a forum's protection. Peterson v. Kennedy, 771 F.2d 1244, 1261-62 (9th Cir. 1985).

"The existence of letters or telephone calls to the forum state related to the Plaintiff's action will not necessarily meet due process standards." Rambo, 839 F.2d at 1418, and Kenan v. McBirney, 702 F.Supp. 843, 845 (W.D. Okla. 1989).

Thus, PWEC in maintaining communication with Plaintiff, GED, via telephone and letter correspondence regarding the formation of the oil and gas contract, did not purposefully avail itself of this forum's jurisdiction.

Furthermore, PWEC did not solicit business in Oklahoma, nor did it initiate the disputed transaction between itself and GED. Quite the contrary, GED first contacted representatives of PWEC in October of 1989 in the hopes of increasing its market base in the state of California. In addition, GED representatives traveled to California to solidify contract formation with PWEC. This indicates that PWEC's contacts with this forum are not based on its

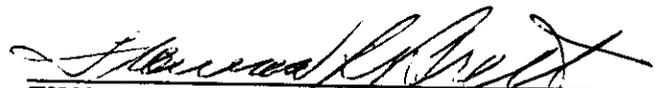
own actions, but the actions of the Plaintiff, GED. Jurisdiction must be based on the Defendant's own purposeful contacts with the forum state. Kulko v. Superior Court, 436 U.S. 84, 93-94 (1978), and Rambo, 839 F.2d at 1420.

Also, the mere fact that a contract has been entered into with an out-of-state party does not automatically establish minimum contacts in the other party's home forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79 (1985).

Other considerations also indicate that an exercising of *in personam* jurisdiction over the Defendant, PWEC, would violate "fair play and substantial justice," International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), these include: PWEC possessing no offices or agents in Oklahoma; the natural gas under contract between the parties was to be delivered outside the state of Oklahoma, and subsequently to California; and no agent or representative of PWEC visited Oklahoma regarding the disputed transaction with GED.

Therefore, Defendant's Motion to Dismiss for lack of personal jurisdiction, alleging lack of minimum contacts with the Northern District of Oklahoma in derogation of substantial due process, should be and the same is hereby SUSTAINED and this matter is DISMISSED, without prejudice. Defendant's Motion to Transfer and GED's Motion to Enjoin is now moot.

IT IS SO ORDERED, this 27th day of June, 1991.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 27 1991

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

Alvin Ray Lady,)

Plaintiff)

vs)

Case No. 89-C-222-B

Louis W. Sullivan, M.D.,)
Secretary of Health and)
Human Services,)

Defendant.)

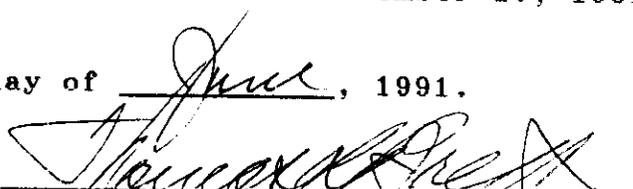
ORDER

Upon review of the Plaintiff's application for final order and judgment, and the pleadings, and the Defendant's non-objection to the United States Magistrate Judge's Findings and Determination, the Court hereby adopts the United States Magistrate Judge's Findings and Determination and,

IT IS ORDERED, ADJUDGED AND DECREED, that the decision of the Secretary, denying Plaintiff's application for a period of disability and disability insurance benefits based on his 1982 application, is reversed and there is no legal cause to remand for additional fact finding, remanded for pyament of benefits.

THEREFORE, the Defendant shall pay the Plaintiff the requisite benefits forthwith, based on his application of March 26, 1982 and his onset date of November 20, 1981.

ENTERED this 27 day of June, 1991.


United States District Judge

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

KENNETH D. CAZZELL,
an individual, and ZELCO
MANUFACTURING, INC., an
Oklahoma corporation,

Plaintiffs,

vs.

PIEDMONT AMERICAN LIFE INSURANCE
COMPANY, a foreign insurance
corporation; AMERICAN INSTITUTE OF
MANAGEMENT SERVICES, INC.,
a/k/a A.I.M.S., a foreign
corporation; EMPLOYEE
BENEFIT ANALYSTS, an Oklahoma
corporation, and DON KENNEDY,
an individual,

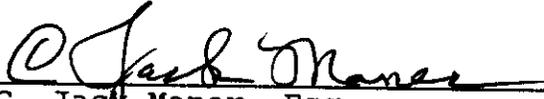
Defendants.

Case No. 90-C-0026-B

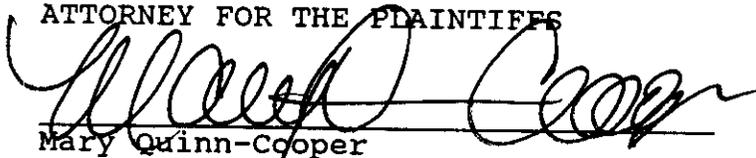
STIPULATION OF VOLUNTARY DISMISSAL

COME NOW all of the parties who have entered an appearance
in the above-referenced action, and stipulate the dismissal of this
action and all claims made therein with prejudice, pursuant to Rule
41(a)(1) of the Federal Rules of Civil Procedure.

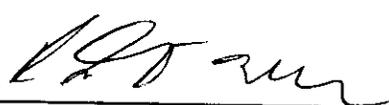
Respectfully submitted,


C. Jack Maner, Esq.
201 W. 5th, Suite 550
Tulsa, OK 74103

ATTORNEY FOR THE PLAINTIFFS


Mary Quinn-Cooper
2800 Fourth National Bank Bldg.
Tulsa, OK 74119

ATTORNEY FOR DON KENNEDY AND
EMPLOYEE BENEFIT ANALYSTS, INC.


R. David Whitaker, OBA No. 10520
of BOESCHE, McDERMOTT & ESKRIDGE
800 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103
(918) 583-1777

ATTORNEY FOR PIEDMONT AMERICAN LIFE
INSURANCE COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of June, 1991, a true and correct copy of the above and foregoing was deposited in the United States Mail in Tulsa, Oklahoma, postage prepaid thereon, addressed to:

C. Jack Maner, Esq.
201 W. 5th, Suite 550
Tulsa, OK 74103

Mary Quinn-Cooper, Esq.
2800 Fourth National Bank Bldg.
Tulsa, OK 74119

R. David Whitaker, Esq.
800 ONEOK Plaza
100 West 5th St.
Tulsa, OK 74103



FILED

JUN 26 1991

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

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

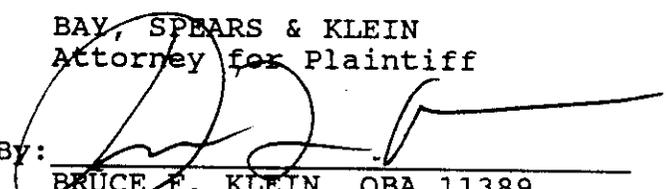
MOUNTAIN STATES FINANCIAL)
RESOURCES, CORP.,)
)
Plaintiff,)
)
vs.)
)
JACK B. SELLERS,)
)
Defendant.)

Case No. 91-C-0093 C

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW, the Parties and pursuant to Federal Rules of Civil Procedure 41(a) and hereby stipulates to the dismissal of the above-styled action without prejudice of refileing and not on the merits as the Plaintiff's claim does not satisfy the jurisdictional amount in controversy of \$50,000.00 as required by 28 U.S.C. §1332(a).

BAY, SPEARS & KLEIN
Attorney for Plaintiff

By: 
BRUCE F. KLEIN, OBA 11389
501 N.W. 13th - P.O. Box 61190
Oklahoma City, OK 73146
405/235-5605


JACK B. SELLERS, OBA 8066
JACK B. SELLERS LAW ASSOC., INC.
P.O. Box 730
Sapulpa, OK 74067-0730
(918) 224-9070

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

FILED

JUN 26 1991

THE FIRST NATIONAL BANK IN)
DOLTON, a national banking)
association,)

Plaintiff,)

vs.)

ST. JOHN MEDICAL CENTER, INC.,)
an Oklahoma corporation,)

Defendant.)

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

Case No. 91-C-168-E

ORDER

Currently before the Court is the parties' Joint Motion to Stay or, In the Alternative, Application for Administrative Closing Order. Upon good cause shown, and there being no objection, the Court finds that the Motion is well taken and should be granted.

IT IS THEREFORE ORDERED that this case be administratively closed and may be reopened upon application of either party.

IT IS FURTHER ORDERED that the June 26, 1991, deadline for Amendment the Pleadings or Adding Parties and the July 8, 1991, Scheduling Conference be stricken.

IT IS SO ORDERED this 25 day of June, 1991.

57 JAMES O. ELLISON

THE HONORABLE JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

VENTURE TECHNICAL SALES &)
SERVICE, INC.,)
)
Plaintiff,)
)
vs.)
)
COTTON HOUSTON, INC., and)
COTTON HOUSTON SERVICES, INC.,)
)
Defendants.)

No. 90-C-659-C

FILED
JUN 26 1991 *AW*

JOURNAL ENTRY OF JUDGMENT

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

NOW on this 26 day of June, 1991, this matter comes on before the undersigned Judge of the United States District Court for the Northern District of Oklahoma. The Court, informed as to the settlement agreement of the parties and being otherwise fully advised in the premises, finds as follows:

That this Court has jurisdiction of the parties and subject matter herein pursuant to 28 U.S.C. §1332.

That Plaintiff, Venture Technical Sales & Service, Inc., should be, and is hereby granted a judgment against Defendant, Cotton Houston Services, Inc., in the sum of Fifty Thousand (\$50,000.00) dollars.

That pursuant to said agreement of the parties, said judgment shall be paid Five Thousand (\$5,000.00) dollars by wire transfer as directed by Plaintiff on or before the 4th day of June, 1991, and a like sum in a like manner on or before the 11th day of June, 1991. The balance of Forty Thousand (\$40,000.00) dollars shall be paid in monthly installments made by wire transfer on or before the 10th day of July, 1991, and a like sum in a like manner each and every month thereafter until paid in

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full. Said judgment shall not bear interest if payments are timely made.

In the event default of payment, either in time or method, the entire balance shall become due and payable, shall be subject to execution, and shall bear interest at the rate of 7.51% from date of default until paid in full.

That Venture Technical Sales & Service, Inc., upon receipt of full payment of the judgment entered herein, shall execute and file a Satisfaction of Judgment and Release of Judgment Lien (if applicable).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this Court has jurisdiction of the parties and subject matter herein pursuant to 28 U.S.C. §1332.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, Venture Technical Sales & Service, Inc., should be, and is hereby granted a judgment against Defendant, Cotton Houston Services, Inc., in the sum of Fifty Thousand (\$50,000.00) dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that pursuant to said agreement of the parties, said judgment shall be paid Five Thousand (\$5,000.00) dollars by wire transfer as directed by Plaintiff on or before the 4th day of June, 1991, and a like sum in a like manner on or before the 11th day of June, 1991. The balance of Forty Thousand (\$40,000.00) dollars shall be paid in monthly installments made by wire transfer on or before the 10th day of July, 1991, and a like sum in a like

manner each and every month thereafter until paid in full. Said judgment shall not bear interest if payments are timely made.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that in the event default of payment, either in time or method, the entire balance shall become due and payable, shall be subject to execution, and shall bear interest at the rate of 7.51% from date of default until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Venture Technical Sales & Service, Inc., upon receipt of full payment of the judgment entered herein, shall execute and file a Satisfaction of Judgment and Release of Judgment Lien (if applicable).


JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:


H. DUANE RIEPE,
Attorney for Plaintiff


THOMAS HARWOOD,
Attorney for Defendant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

CLERK'S OFFICE

UNITED STATES COURT HOUSE

333 West Fourth Street, Room 411

TULSA, OKLAHOMA 74103-3881

JACK C. SILVER
CLERK

(918) 581-7796
(FTS) 745-7796

June 26, 1991

TO: Counsel/Parties of Record

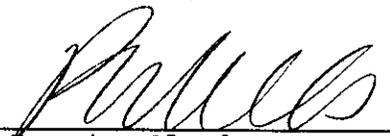
RE: Case No. 90-C-192-C Grant v. Kaiser

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 requesting amendment of order is hereby denied. Any additional alterations were not part of plaintiff's plea agreement and may not be granted by this Court.

Very truly yours,

JACK C. SILVER, CLERK

By: 

Deputy Clerk

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

FILED
JUN 26 1991

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

CRAWFORD ENTERPRISES, INC.,	}	
	}	
Plaintiff,	}	
	}	
vs.	}	No. 83-C-859-C
	}	
DAVID HOWARD et al.,	}	
	}	
Defendants,	}	
	}	
vs.	}	
	}	
ELI MASSO,	}	
	}	
Garnishee.	}	

ORDER

This matter is before the Court on remand from the Tenth Circuit Court of Appeals¹ with instructions for this Court to determine the date on which M & H Gathering, Inc. (M & H) was rendered insolvent as measured under the "equity test."²

The Court held a hearing in this matter on March 28, 1991 and received oral arguments from the parties. The Court has also reviewed the briefs, the original trial transcript and applicable law.³ After careful consideration the Court finds as follows.

¹Crawford v. Howard, No. 89-5177 & 89-5186, Order and Judgment, October 18, 1990.

²This test is described by the Oklahoma Supreme Court as the "inability to pay debts as they become due in the regular course of business." Oklahoma Moline Plow Co. v. Smith, 139 P. 285, 287 (Okla. 1914).

³The factual background of this case is fully set forth in the Order and Judgment of the Tenth Circuit Court of Appeals.

The Court finds that the only income of M & H during the time period here in question was the carriage fee received from Public Service Company. Due to the stock buy out arrangement that David Howard had with Eli Masso, Howard directed as of April 30, 1982 all of M & H's income from the carriage fee to Masso. M & H had no other income either before or during the May 1982 through January 1983 period when Eli Masso was receiving payments from David Howard. Contemporaneously, M & H incurred debts that were not being paid as they became due.

M & H began operating its gas gathering system at approximately the same time that Howard agreed to buy Masso out of the company. Operating the gathering system included use of a compressor leased from Crawford. The two-year lease agreement required Howard to pay Crawford \$11,550.00 monthly for use of the compressor. Howard made the monthly payments under the lease from February to May 1982. M & H had no income prior to February 1982 but incurred monthly operating expenses. Howard characterized these debts as production costs and paid them on behalf of M & H. Neither these payments nor Howard's payments of M & H's other operating costs, which ranged from \$900.00 to \$40,000.00 per month from October 1981 to February 1983, were made out of M & H funds. Instead, all of M & H's costs were paid by Howard, either out of David Howard Energy Resources, Inc. or out of the Lincoln Oil Field Sales and Service accounts.

Howard attempted to sell all the assets of M & H during this period but was unsuccessful. Howard also sought additional

financing for M & H from banks but was not successful. He never borrowed money in the name of M & H.

By August 1982 M & H's operations had more or less ceased. On September 3, 1982 M & H entered into a contract with J-W Operating Co. whereby J-W agreed to provide to M & H a natural gas compressor unit for a term of six months for a minimum monthly rental fee of \$3,193.00. Howard never paid any amount owing under this contract.

In Pemberton v. Longmire, 151 P.2d 410 (Okla. 1944) the court considered the circumstances under which a corporation is legally considered unable to pay its debts as they become due. The Philmor Corporation had debts of \$9,278.43 as of September 10, 1938 and only \$2,165.01 with which to pay those debts. As of October 10, the corporation owed \$11,264.15 and had only \$85.72 to apply on the indebtedness. The court determined that the corporation was insolvent on September 10 and on October 10 because it did not have sufficient income to pay its debts in those months. When a corporations liabilities exceeds its assets it is legally insolvent.

The fact that Howard voluntarily made payments on behalf of M & H does not mean that M & H was able to pay its own debts as they became due. If M & H had any ability to borrow money, that ability was lost when Howard conveyed M & H's entire income to Masso.

The facts before this Court compel the conclusion that M & H was insolvent under the equity test during the entire period that Masso was receiving the carriage fee (from May 1982 to January 1983). Accordingly, judgment is hereby awarded in favor of

Crawford Enterprises, Inc. and against Eli Masso in the sum of \$55,860.71.

Plaintiff's attorney is directed to prepare a judgment for this Court's review within ten days of the date of this order.

IT IS SO ORDERED this 26th day of June, 1991.



H. DALE COOK

Chief Judge, U. S. District Court

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

entered

FILED

JUN 26 1991

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

VIRGIE FAYE HOLMES,
Personal Representative of
Ronald Leon Holmes, Sr.,
deceased)

Plaintiff,)

vs.)

RUSSELL LEE BROWN; YOUNG'S
TRUCKING, INC., a
corporation; and NORTHLAND
INSURANCE COMPANIES)

Defendants.)

and)

No. 90-C-605-C

RUSSELL LEE BROWN,)

Third-Party Plaintiff,)

vs.)

FRONTIER EXPRESS, INC.,
D/B/A D&M TRANSPORTATION
COMPANY, and TRUCK
INSURANCE EXCHANGE,)

Third-Party Defendants.)

ORDER

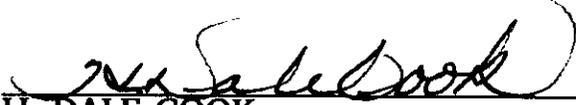
Before the Court is the motion of defendant Young's Trucking, Inc., for summary judgment. The basic facts of this action are set forth in a companion Order. Plaintiff seeks to impose liability on Young's Trucking under a theory of negligent entrustment. This theory is recognized under Oklahoma law as distinct from respondeat superior. See Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155 (Okla. 1980); McQuade v. Arnett, 558 F.Supp. 11

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(W.D.Okla. 1982). In opposing the pending motion, plaintiff has presented some rather thin evidence regarding falsification of log books by Brown. Even if such falsification took place, and Young's knew of it, plaintiff has not made it plain that the alleged falsification related to a matter involving causation (e.g., driver fatigue). Nevertheless, the Court is not persuaded that judgment is appropriate at this time. It is also premature for the Court to render any ruling as to punitive damages.

It is the Order of the Court that the motion of defendant Young's Trucking, Inc., for summary judgment is hereby denied.

IT IS SO ORDERED this 26th day of June, 1991.



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

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

FILED

JUN 26 1991

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

*Closed
3rd Party
Action only*

VIRGIE FAYE HOLMES,)
Personal Representative of)
Ronald Leon Holmes, Sr.,)
deceased)

Plaintiff,)

vs.)

RUSSELL LEE BROWN; YOUNG'S)
TRUCKING, INC., a)
corporation; and NORTHLAND)
INSURANCE COMPANIES)

Defendants.)

and)

RUSSELL LEE BROWN,)

Third-Party Plaintiff,)

vs.)

FRONTIER EXPRESS, INC.,)
D/B/A D&M TRANSPORTATION)
COMPANY, and TRUCK)
INSURANCE EXCHANGE,)

Third-Party Defendants.)

No. 90-C-605-C

J U D G M E N T

This matter came on for consideration of the motion for summary judgment of third-party defendants and counterclaim defendant. The issues having been duly considered and a decision having been duly rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for third-party defendants and counterclaim

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defendant Virgie Faye Holmes and against third-party plaintiff, and that third-party plaintiff take nothing by way of his third-party action and counterclaim.

IT IS SO ORDERED this 26th day of June, 1991.



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

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

FILED

JUN 26 1991

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

VIRGIE FAYE HOLMES,)
Personal Representative of)
Ronald Leon Holmes, Sr.,)
deceased)
)
Plaintiff,)
)
vs.)
)
RUSSELL LEE BROWN; YOUNG'S)
TRUCKING, INC., a)
corporation; and NORTHLAND)
INSURANCE COMPANIES)
)
Defendants.)
)
and)
)
RUSSELL LEE BROWN,)
)
Third-Party Plaintiff,)
)
vs.)
)
FRONTIER EXPRESS, INC.,)
D/B/A D&M TRANSPORTATION)
COMPANY, and TRUCK)
INSURANCE EXCHANGE,)
)
Third-Party Defendants.)

No. 90-C-605-C ✓

ORDER

Before the Court is the motion of defendant Russell Lee Brown for partial summary judgment as to punitive damages. Brown contends that the present record indicates that there is no basis for submission of the issue of punitive damages to the jury.

The Court concludes that it is premature to enter such a ruling. The Court will revisit the issue at the conclusion of plaintiff's trial evidence.

It is the Order of the Court that the motion of defendant Brown for partial summary judgment on the issue of punitive damages is hereby denied.

IT IS SO ORDERED this 26th day of June, 1991.



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

*closed
3rd Party
Action
only*

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

FILED

JUN 26 1991

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

VIRGIE FAYE HOLMES,)
Personal Representative of)
Ronald Leon Holmes, Sr.,)
deceased)

Plaintiff,)

vs.)

RUSSELL LEE BROWN; YOUNG'S)
TRUCKING, INC., a)
corporation; and NORTHLAND)
INSURANCE COMPANIES)

Defendants.)

and)

No. 90-C-605-C

RUSSELL LEE BROWN,)

Third-Party Plaintiff,)

vs.)

FRONTIER EXPRESS, INC.,)
D/B/A D&M TRANSPORTATION)
COMPANY, and TRUCK)
INSURANCE EXCHANGE,)

Third-Party Defendants.)

ORDER

Before the Court is the motion of the third-party defendants and counterclaim defendant for summary judgment against defendant and third-party plaintiff Russell Lee Brown. The facts of the case are largely undisputed. On September 6, 1989, Ronald Leon Holmes, plaintiff's deceased, was operating a semi-tractor trailer rig for his employer, Frontier Express, Inc. He experienced mechanical difficulty and pulled the vehicle onto the shoulder of the roadway.

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Apparently, the last trailer protruded approximately four to five feet into the right-hand traffic lane. Defendant Brown, while operating a rig for his employer, Young's Trucking, Inc., crested a hill and saw Holmes' vehicle from a distance of approximately half a mile. Although slowing somewhat at one point while crossing a bridge, Brown remained in the right-hand lane. Brown testified that he did not attempt to change lanes because he saw headlights in his side mirror, indicating that another vehicle was in the passing lane. Ultimately, Brown's vehicle struck Holmes' vehicle, and Holmes was killed.

Holmes' estate brings this action for negligence against defendant Brown. In response, Brown has filed a third-party Complaint and counterclaim, alleging that the deceased Holmes was negligent and that such negligence was a proximate cause of the accident. The defendants as to those claims now move for summary judgment.

The movants rely upon the cause/condition distinction recognized by Oklahoma law. In Hunt v. Firestone Tire & Rubber Co., 448 P.2d 1018, 1023 (Okla. 1968), the court stated:

The proximate cause of any injury must be the efficient cause which sets in motion the chain of circumstances leading to the injury; if the negligence complained of merely furnished a condition by which the injury was possible and a subsequent independent act caused the injury, the existence of such condition is not the proximate cause of the injury.

The dichotomy has been criticized by commentators as "worse than useless", because it merely represents a conclusion arrived at after applying some form of "foreseeability" test. See 4 F. Harper, F. James & O. Gray, The Law of Torts, §20.6 (2d ed. 1986) at 173-74. Oklahoma has never repudiated the use of the distinction, but has

indicated that foreseeability is the determinative factor. See Long v. Ponca City Hospital, Inc., 593 P.2d 1081, 1086 (Okla. 1979).

Movants cite Thur v. Dunkley, 474 P.2d 403 (Okla. 1970), which involved a car pulling off onto a highway shoulder in order that a flat tire could be fixed. The court made the following broad statement:

We have held that negligent parking creates but a condition that is not actionable when followed by intervening circumstances such as is here presented, and that proximate cause under such circumstances is a matter of law for the court and if submitted to the jury as a question of ultimate fact it is reversible error.

Id. at 406.

Brown notes that in Thur, other vehicles stopped behind defendant's vehicle, and one of these other vehicles was struck by still another vehicle. The vehicle struck careened into the opposite lane of traffic, causing plaintiff's vehicle to leave the highway. The court noted: "There was no contact between the Thur car and any other car and no contact between the plaintiff's tractor-trailer and any other car." Id. at 405. Thus, any causation on defendant's part was much more attenuated than under the present facts. There was also no direct contact between plaintiff and defendant in Transport Indemnity Co. v. Page, 406 P.2d 780 (Okla. 1963).

While not directly ruling on the issue, the Tenth Circuit has cast doubt on any sort of blanket exception for cases such as this. In John Long Trucking, Inc. v. Greear, 421 F.2d 125 (10th Cir. 1970), the court stated:

We have recently applied the Oklahoma "Mere Condition Rule" to rear end collisions with negligently parked vehicles and have sustained the trial court's ruling that as a matter of

law, the act of negligent parking was non-actionable in view of the subsequent superseding act of the rear end collision. See *Beesley v. United States*, 364 F.2d 194 (10th Cir.), and *Haworth v. Mosher*, 395 F.2d 566 (10th Cir.). But this does not mean that everyone who negligently parks his vehicle is relieved of all liability when some other person even negligently collides with his vehicle. The intervening act may or may not supersede the antecedent negligence depending upon a variety of situations which we have no need to explore here, but see Restatement (Second) of Torts, §§440-453 (1965). It is sufficient to the decision in our case to observe that foreseeability is an essential element of proximate cause in Oklahoma and that it is the standard by which the proximate cause, as distinguished from the existence of a mere condition, is to be tested.

Id. at 127 (footnote omitted).

The court held that the issue of causation in a "negligent parking" case was properly submitted to the jury in *Ross v. Gearin*, 291 P. 534 (Okla. 1930).

The Court must also keep in mind various general principles. The record must be construed liberally in favor of the party opposing the summary judgment. *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988). Where there is a question as to whether an intervening act is the proximate cause of an injury to the exclusion of a prior wrongful act alleged to have merely created a condition, the question is ordinarily one of fact for determination by a jury. *Metropolitan Paving Co. v. Puckett*, 389 F.2d 1, 4 (10th Cir. 1968). Finally, where the evidence is conflicting or where reasonable men might draw different conclusions, the question of reasonable foreseeability of an intervening act or agency causing subsequent injury is to be determined by the jury. *Atherton v. Devine*, 602 P.2d 634, 637 (Okla. 1979). Here, however, the evidence is not conflicting. It is undisputed that Brown saw Holmes' vehicle from one-half mile away, but continued at such a speed that he could not properly avoid the collision. Brown has pointed to evidence which perhaps indicates that Holmes improperly

inspected his vehicle, when such an inspection would have led him to discover the mechanical problem which stalled his truck. Brown also contends that Holmes should have placed flares beside his truck. There is evidence that warning reflector "triangles" were placed beside the Holmes vehicle. Again, the Court concludes that Brown's own negligence operates as a superseding cause and that judgment in movants' favor is appropriate.

It is the Order of the Court that the motion of Frontier Express, Inc., d/b/a D & M Transportation Company, Truck Insurance Exchange, and Virgie Holmes for summary judgment against Russell Lee Brown is hereby granted.

IT IS SO ORDERED this 26th day of June, 1991.



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

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

FILED

JUN 26 1991

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

CIMARRON FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

ALBERT E. WHITEHEAD and
LACY E. WHITEHEAD, husband
and wife; MEGHAN COVES
ASSOCIATION, INC.,

}
}
}
}
}
}
}
}
}
}
}
}

No. 90-C-549-C

ORDER

Currently pending before the Court is the motion of plaintiff Cimarron Federal Savings and Loan Association (Cimarron) for the Court to reconsider the order entered on October 18, 1990 overruling Cimarron's motion for summary judgment. For the reasons herein stated, the Court grants Cimarron's motion to reconsider.

The following facts are uncontroverted. Walter C. Gray, a builder/developer, in partnership with Phoenix Federal Savings and Loan and Eastern Oklahoma Service Corporation planned and constructed Meghan Coves, as a lakeside condominium complex on Grand Lake, just south of Grove, Oklahoma. Gray, as partner with Phoenix Federal, solicited the sale of Unit #77 at Meghan Coves to the defendants Albert and Lacy Whitehead. Gray represented to the Whiteheads that the project would consist of 179 separate units to be completed within two years from commencement of the project; that the project would be an exclusive residential community composed of unit owners only; that it would have three tennis

courts, two pools, three whirlpools, one kiddie pool, and that in addition there would be 24-hour security forces, lakeside camera, security monitors for each house, a courtesy vehicle, and a covered boat slip available for each unit up to 40 feet. Defendants offered a "news release" dated May 20, 1983 announcing the ribbon cutting ceremonies for Meghan Coves (while the project was still under construction) and promotional material. These exhibits list, among others, the same features to be included in the Meghan Coves project as were represented to the Whiteheads.

Based on these representations, the Whiteheads assert that on July 17, 1984 they purchased Unit #77 through a down payment and by executing a promissory note and mortgage in favor of Phoenix Federal in the principal sum of \$166,250.00. The note required the Whiteheads to make monthly installment payments beginning September 1, 1984 until August 1, 2014 in the sum of \$1,742.13. On March 1, 1989 defendants stopped making installment payments. Defendants assert that they stopped making the payments because the project was not completed as represented by Gray and Phoenix Federal. Specifically defendants assert Phoenix Federal failed to construct all of the common elements as represented, unreasonably delayed in constructing the elements which have been completed, permitted the accumulation of unsightly building materials during the construction of the project, and failed to build an exclusive residential community comprised of single family units as represented. Defendants assert that plaintiff has converted the project into a time share/lease facility resulting in a hotel/motel resort.

Cimarron, as successor-in-interest to Phoenix Federal, upon default by the Whiteheads elected to accelerate the indebtedness on the note and filed this action seeking payment under the note and foreclosure of the mortgage. The outstanding sum on the note as of the date of default, March 1, 1989, is \$160,092.48 with accruing interest and costs.

The Whiteheads answered and counterclaimed against the plaintiff seeking rescission of the note and mortgage or alternatively, tendering the deed on the property, and seeking an offset on the amount alleged owing asserting claims of fraud, deceit and false misrepresentations allegedly resulting in the diminished value of the property purchased.

Cimarron has moved for summary judgment on its claim and on the Whiteheads' counterclaim.

On August 31, 1988 the Federal Home Loan Bank Board determined that Phoenix Federal was insolvent. Pursuant to 12 U.S.C. §1729(c)(1)(B), the Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Phoenix to conduct an orderly liquidation of Phoenix Federal. By the provisions of 12 U.S.C. §1729(b)(1)(A), the FSLIC in its capacity as receiver for Phoenix Federal acquired title of all Phoenix Federal's assets. The FSLIC then entered into a Purchase and Assumption agreement with Cimarron and as part of that agreement, Cimarron acquired the Note and Mortgage which are the subject of the instant action. The Whiteheads defaulted on their note, on March 1, 1989, and Cimarron instituted the instant action on October 5, 1989.

In FDIC v. Palermo, 815 F.2d 1329 (10th Cir. 1987), the court held that the FDIC as receiver of a failed banking institution takes title to a bank's assets subject to all existing rights and equities. Palermo, 815 F.2d at 1334. Additionally, 12 U.S.C. §1819 (Fourth) has been amended and provides federal courts with jurisdiction to hear counterclaims against the FDIC as receiver. See, FDIC v. Kasal, 913 F.2d 487,493 (8th Cir. 1990).¹ Accordingly, defendants are permitted to assert their counterclaim against the plaintiff, even though the plaintiff acquired these assets from a liquidation proceeding.

In Palermo, the court determined that in bank liquidation cases, absent the need for a federal uniform rule, the court is to look for guidance to the law of the state having the closest connection to the transaction at issue. 815 F.2d at 1335. Thus the laws of Oklahoma will determine whether the Whiteheads have properly asserted a claim for fraud, misrepresentation and deceit against the plaintiff.

Under Oklahoma law the elements of fraud are: (1) a material misrepresentation which was false; (2) with knowledge of the falsity when the representation was made; (3) made with the intention that it be acted upon; (4) actual reliance on the representation; and (5) resulting injury. Testerman v. First Family Life Ins. Co., 808 P.2d 703 (Okla.App.1990). See, also, FDIC v. Palermo, supra. at 1335 (applying Oklahoma law). A misrepresentation may occur when one conveys a false impression by

¹12 U.S.C. §1819 (Fourth) as amended in 1989 provides that the FDIC has corporate powers "to sue and be sued, and complain and defend, in any court of law or equity, State or Federal."

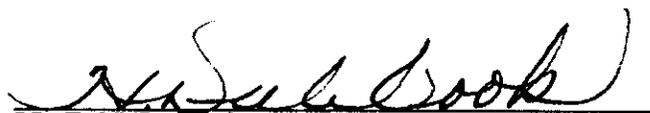
failing to disclose the entire truth. Testerman, 808 P.2d at 706. However, false representations must be regarding existing facts and not to future events. Hall v. Edge, 782 P.2d 122, 128 f.n.7 (Okla.1989) citing Citation Co. Realtors, Inc. v. Lyon, 610 P.2d 788, 790 (Okla. 1980). An exception to this general rule, is if the speaker knows of facts which would or could prevent the representation from materializing in the future. Id. In this case, the Whiteheads have failed to allege any fact which would indicate that Gray or Phoenix Federal made the representations, here in question, regarding the intended development of the project with knowledge that the future development would not or could not occur. Conversely, there is every indication that Gary and Phoenix intended to develop the project as represented. As previously mentioned, the news release and the promotional materials included the same representations as made to the Whiteheads concerning the intended development of the project. Under Rule 9(b) F.R.Cv.P., allegations of fraud must be pleaded with particularity or be subject to dismissal. The Whiteheads have failed to set forth in their counterclaim a cognizable claim for fraud, misrepresentation or deceit. Thus, plaintiff is entitled to summary judgment on the counterclaim.

The Whiteheads have admitted executing the note and mortgage and failure to tender payment on any date after March 1, 1989. The Court has heretofore determined that the Whiteheads have not asserted any viable counterclaim, thus plaintiff is entitled to summary judgment on its principal claim against the defendants

Albert and Lacy Whitehead. This Order renders all other outstanding motions moot.

Plaintiff is directed to prepare a judgment for the Court's review within 10 days of the date of this order.

IT IS SO ORDERED this 26th day of June, 1991.


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

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

FILED

JUN 26 1991

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

UNITED STATES OF AMERICA)

vs.)

HENRY LEE SMITH)

Defendant.)

CIVIL ACTION NO. 91-C-190-E

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$1,000.00, accrued interest in the amount of \$203.89, administrative costs of \$221.06 as of February 15, 1991, plus accrued interest at 3% per annum until judgment, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay

the amount of indebtedness in full and the further representation of the defendant that he will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 25th day of June, 1991, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$50.00, and a like sum on or before the 25th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 3600 U.S. Courthouse, 333 West 4th Street, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

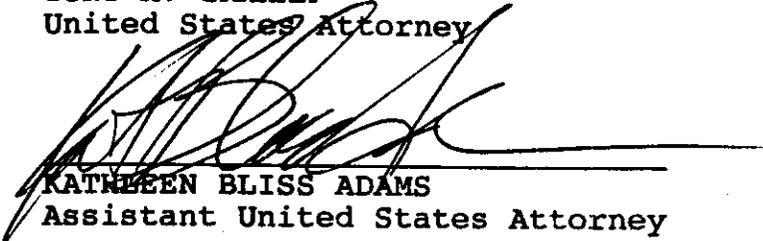
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Henry Lee Smith, in the principal amount of \$1,000.00, accrued interest in the amount of \$203.89, administrative costs of \$221.06 as of February 15, 1991, plus interest at 3% per annum until judgment, plus interest thereafter at the current legal rate of 6.09 percent per annum until paid, plus the costs of this action.

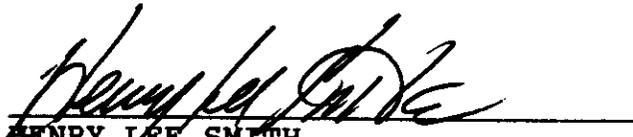
57 JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

TONY M. GRAHAM
United States Attorney


KATHLEEN BLISS ADAMS
Assistant United States Attorney


HENRY LEE SMITH
Defendant

FILED

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

JUN 26 1991

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHRISTOPHER DALE GATES,)
 a/k/a CHRIS DALE GAMMEL,)
)
 Defendant.)

No. ~~88-CR-23-05-E~~
No. 90-C-1037-E

ORDER

NOW before the Court is Defendant's Motion pursuant to 28 U.S.C. §2255, and for Leave to Proceed In Forma Pauperis.

The Court has carefully examined the record in this case and finds that Defendant's §2255 motion should be dismissed without prejudice until such time as he has exhausted the state remedies available to him. 28 U.S.C.A. §2254(b). Thus, rendering Defendant's Motion for Leave to Proceed In Forma Pauperis moot.

IT IS THEREFORE ORDERED that the Motion pursuant to 28 U.S.C. §2255 is dismissed without prejudice and Leave to Appeal In Forma Pauperis is moot.

ORDERED this 25th day of June, 1991.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
TULSA DIVISION

FILED

JUN 26 1991

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

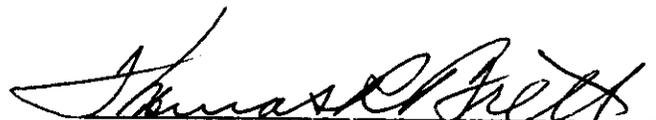
LYNN MARTIN, Secretary of Labor,)
United States Department of)
Labor,) Civil Action
)
Plaintiff,)
)
v.) No. 90-C-577-B
)
)
UNITED METRO MARKETING SURVEYS)
INC., and CLUB PARADISE, INC.)
Corporations, and MARGIE)
MICHAELS, and PAUL MCBRIDE,)
Individuals,)
)
Defendants,)

ORDER

On this day came on for consideration the Plaintiff's Motion for Dismissal without Prejudice as to Defendant Paul McBride. Having carefully considered the motion, the court is of the opinion that the motion should be and is hereby GRANTED.

It is, therefore, ORDERED that the action against defendant, Paul McBride be dismissed, without prejudice and that each party shall bear its own fees and other expenses incurred by such party in connection with this action.

ORDERED this 26th day of June, 1991.


UNITED STATES DISTRICT JUDGE

FILED

JUN 26 1991

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

UNITED STATES OF AMERICA

Plaintiff

vs.

TIMOTHY BELL

Defendant.

CIVIL ACTION NO. 91-C-139-B

AGREED JUDGMENT

This matter comes on for consideration this 26
^{June} day of ~~May~~, 1991, the Plaintiff appearing by Tony M. Graham,
United States Attorney for the Northern District of Oklahoma,
through Kathleen Bliss Adams, Assistant United States Attorney,
and the Defendant, Timothy Bell, appearing pro se.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Timothy Bell, was served
with Summons and Complaint on May 6, 1991. The Defendant has not
filed an Answer but in lieu thereof has agreed that he is
indebted to the Plaintiff in the amount alleged in the Complaint
and that judgment may accordingly be entered against him in the
principal amount of \$2,355.87, plus accrued interest in the
amount of 1,303.72 as of December 11, 1990, plus interest
thereafter at the rate of 7%, until judgment, plus interest
thereafter at the legal rate until paid, plus the costs of this
action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the
Plaintiff have and recover judgment against the defendant in the
principal amount of \$2,355.87, plus accrued interest in the

amount of 1,303.72 as of December 11, 1990, plus interest thereafter at the rate of 7% per annum until judgment, plus interest thereafter at the current legal rate of 6.09 percent per annum until paid, plus the costs of this action.

S/ THOMAS R. BRETT.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

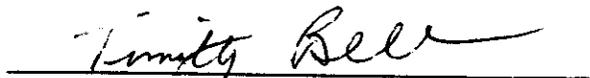
APPROVED;

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney



KATHLEEN BLISS ADAMS
Assistant United States Attorney



TIMOTHY BELL, Debtor

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

FILED

JUN 26 1991

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

CAROL ANN LINDLEY, et al,)
)
) Aappellees,)
)
)
) v.)
)
) LARRY JOE LINDLEY, et al,)
)
) Appellants.)

90-C-936-E

ORDER

This is an appeal from an Order of the Bankruptcy Court denying Larry Joe Lindley ("Debtor") a discharge, and entering judgments against Jack Lindley, Jack Randall Lindley, and Deborah Ann Lindley for stock fraudulently transferred from Debtor. The Lindley appellants raise nine issues for appeal.

In reviewing a Bankruptcy Court's decision, the District Court is bound to accept the Bankruptcy Court's findings of fact unless they are clearly erroneous, but may examine its conclusions of law *de novo*. A factual finding is clearly erroneous when the reviewing court, on review of the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543 (10th Cir. 1988)(cited in *Antweil v. Barnhill*, 931 F.2d 689 (10th Cir. 1991)). In reviewing the factual findings, an appellate Court may not weigh the evidence or reverse a finding because it would have decided the case differently. *Id.* A Bankruptcy Court's factual determinations will not be disturbed on appeal absent the most cogent reasons appearing in the record. *Id.*

The facts of the case are set forth in detail in the Memorandum Opinion of the Bankruptcy Court (R. 58), and will only be summarized here. Debtor owned stock in three closely held hotel corporations. Prior to filing for Bankruptcy protection, Debtor transferred all of his stock holdings to family members. The transfers left Debtor insolvent. Debtor's ex-wife (and creditor) and Fred W. Woodson, Trustee brought the underlying adversary action alleging the stock transfers were fraudulent. After an eight-day trial the Bankruptcy Court agreed, entered judgment against the stock transferees and denied Debtor a discharge.

For their first issue on appeal the Lindleys argue the Bankruptcy Court erred in determining Sharla Lindley was not the *bona fide* lessee of the City Lights Club (in the Shawnee Hotel). The Bankruptcy Court found that between August 1988 and February 1989 the Debtor owned and operated the club. (R. 58 at 8) It further found that the Debtor took over the club, "but pretended Sharla was the owner and operator at a time when she was living and working in the Tulsa area". (*Id.*)

The Appellants fail to show why the finding is clearly erroneous. Rather, Appellants do no more than argue their own interpretation of the evidence and do so without citation to the record. The Bankruptcy Court explained the basis for its finding, and upon review it cannot be said to be clearly erroneous.

The Appellants' second argument is that the Bankruptcy Court erred in finding Debtor concealed assets from his creditors. The Bankruptcy Court found that Debtor had received \$28,000 from the club during that six month period "after it had been laundered through the Sharla Dickenson account". (R. 58 at 8) It further found that Debtor

knowingly and fraudulently failed to include the \$28,000 income in his Bankruptcy Statement of Financial Affairs. (R. 58 at 9)

Here too, Appellants do no more than argue their own conclusions without citing evidence in the record to demonstrate the Bankruptcy Court made a clear error. Even if Appellants proffered findings were plausible, this Court may not reverse a finding simply because the issue could have been decided differently. *Bartmann v. Maverick*, 853 F.2d at 1543. There is no clear error here.

The Appellants' third issue is closely related to their second. They take issue with the Bankruptcy Court's finding that Debtor knowingly and fraudulently made false oaths in his Bankruptcy petition. The Bankruptcy Court found Debtor made the following false oaths:

- (1) He did not disclose his income from the club;
- (2) Did not disclose that he had been an owner of the club;
- (3) Did not disclose the transfer of Okla-Inn stock to Jack Randall Lindley on May 2, 1988. (R. 58 at 8)

Once again, Appellants argue their own findings from the testimony without demonstrating the clear error of the Bankruptcy Court. The Bankruptcy Court found Debtor was intimately familiar with the omitted information, but intentionally concealed it in making the oaths. The basis for the findings are discussed in the Bankruptcy Court's Memorandum Opinion at pages 8-9. (R. 58) This Court finds no clear error here.

The fourth issue Appellants raise is that the Bankruptcy Court erred in its finding that the club lease was material, arguing that because the lease had been transferred away prior to the Bankruptcy petition filing, it was immaterial and thus did not justify the denial of discharge. Whether or not the lease was material, the Bankruptcy Court was correct in

denying discharge based on its further findings that Debtor fraudulently transferred his stock with intent to hinder, delay and defraud creditors, and that Debtor concealed his income from the club to prevent creditors from attaching his income. (R. 58 at 17) The fourth issue is also without merit.

Appellants' fifth argument is that the Bankruptcy Court erred in determining the date of stock transfers. The Bankruptcy Court found that the transfers took place on the following dates: (a) January 1, 1987, 36 shares of Shaw-Meek; (b) January 1, 1987, 50 shares of Lin-Feld; (c) April 22, 1987, 200 shares of Okla-Inn; and (d) May 2, 1988, 100 shares of Okla-Inn. Appellants, on the other hand, argue that the Okla-Inn stock transfer of 200 shares took place on October 2, 1985, and the stock to Jack Lindley stock was transferred on April 25, 1986.

Okla-Inn Stock. Appellants, in support of their October 2, 1985 transfer date recite the testimony and evidence in favor thereof (i.e. Jack Randall Lindley's testimony, a \$25,000 check dated October 2, 1985, Debtor's own testimony, and income tax returns for Okla-Inn). The Bankruptcy Court however, disbelieved Jack Randall Lindley's testimony about the purpose of the \$25,000 check, and relied instead on the endorsement on the stock certificate and the corporate record book. (R. 58 at 4-5) Although more than one conclusion can be drawn from the record, the Bankruptcy Court's finding is supported by enough evidence that it will not be disturbed here.

Stock to Jack Lindley. Appellants continue to urge the transfer of Debtor's stock to Jack Lindley in all three of the hotel corporations took place on April 25, 1986 as evidenced by a \$40,000 check to Debtor and his ex-wife Carol of the same date.

Appellants highlight the handwritten notation on the otherwise typed check indicating the check was for the purchase of stock.

The Bankruptcy Court, however, based the date of January 1, 1987 on the amended corporate tax returns, Debtor's personal tax returns and the stock endorsements and record books. (R. 58 at 3-4) As to the check notation, the Bankruptcy Court found Debtor made the notation out of the presence of Carol (the co-payee) and found the "tampering with the check" suspicious to the point that Jack Lindley and Debtor's testimony was incredible. (R. 58 at 6) The weighing of such competing evidence is always better suited to the trial Court and where, as here, the determination is not clearly erroneous it will not be disturbed.

The sixth argument Appellants make is that claims against Jack, Jack Randall, and Deborah Lindley are time barred. This argument assumes that the transfers (contrary to the Bankruptcy Court's findings) took place in 1985 and 1986. Because the Bankruptcy Court found otherwise¹ and those findings are not clearly in error and subject to reversal, this argument is also without merit.

Appellant's seventh issue for review is that the finding of fraudulent transfer was in error. Here, again, Appellants predicate their argument on their view of the evidence. Appellants do not cite to the record to support any of their contentions. The Bankruptcy Court found the presence of the traditional "badges of fraud", i.e.:

1. The Debtor was rendered insolvent;
2. No consideration was paid;

¹ The court found the transfers took place after the effective date of Oklahoma's Uniform Fraudulent Transfers Act which contains a four (4) year period of limitations. (24 O.S. §12)

3. The transfers violated terms of the Divorce Decree and were kept secret from Carol and the banks.
4. Debtor still received dividends on the stock after the transfers which indicates he was to receive the stock back when the "financial smoke" had cleared.
5. The transfers were made to close family members.

(R. 58 at 7) Based on these findings, this Court concludes the Bankruptcy Court did not err.²

Appellants raise as their eighth issue, the Bankruptcy Court's valuation of the fraudulently transferred stock. The Bankruptcy Court found the Lin-Feld stock to be worth \$118,800.00 and the Okla-Inn stock to be worth \$88,200.00 (R. 58 at 4) The Bankruptcy Court explained the valuation of the Lin-Feld stock was based on the hotel's net operating income and a February 1990 sale of 50% of the hotel stock for \$500,000.00; the valuation of the Okla-Inn stock was based on the net operating income and a 1987 sale of the property for \$2,100,000.00. The opinion evidence of the stock values was not uniform. Plaintiff's expert valued the Lin-Feld stock at \$213,535.00 (Tr 6-6-90, at 71) and the Okla-Inn stock at \$167,000 (*Id.*, at 68). Debtor had valued all of the stock (including the worthless Shaw-Meek stock) at \$835,000 (Plaintiff's Exhibit 5). Appellants have identified no evidence to leave this Court with a firm conviction that a mistake has been made. Rather, the valuation of the Bankruptcy Court is well within the evidence of record. This finding is not clearly erroneous.

Appellants' ninth and final contention is that they did not receive a fair and impartial trial. They complain that the Bankruptcy Court asked questions on its own,

² As the Shaw-Meek stock was found to be valueless, the bankruptcy court excluded that transfer from its findings of actual intent to defraud. (R. 58 at 13)

allowed summaries into evidence, cutoff cross examinations, and showed disenchantment with the Lindley's methods of business record keeping. The transcript portions referred to have in each case been reviewed in context, and, upon review, the Court finds that Appellants did receive a fair bench trial.

Finally, Appellees ask this Court to award prejudgment interest pursuant to *In re Republic Financial Corporation*, 75 BR 840, 846 (Bkrcty. N.D. Okla. 1987). This Court finds the Bankruptcy Court is best suited to make the determination of whether an award of prejudgment interest is appropriate, and if so, the amount.

Therefore, it is ORDERED that the issue of Appellee's entitlement to prejudgment interest be remanded to the Bankruptcy Court for determination. The judgment of the Bankruptcy Court in all other respects is hereby, AFFIRMED.

SO ORDERED THIS 25th day of June, 1991.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

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

JUN 26 1991

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

BEVERAGE PRODUCTS CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 THE O'BANNON BANKING COMPANY,)
)
 Defendant.)

Case No. 90-C-865-E

ORDER OF DISMISSAL

COMES NOW before the Court the Joint Motion to Dismiss of Plaintiff Beverage Products Corporation and Defendant The O'Bannon Bank Company. The Court, based upon a review of the record, and being fully apprised in all relevant matters, finds that the same should be granted.

WHEREFORE, IT IS ORDERED that this action is dismissed with prejudice to the refiling thereof.

DATED THIS 25th day of June, 1991.


UNITED STATES DISTRICT JUDGE

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

GEORGIA MATHIS,
Plaintiff,
vs.
BOARD OF COUNTY
COMMISSIONERS OF
OTTAWA COUNTY, OKLAHOMA,
and THERL WHITTLE,
an individual, and in his official
capacity as Sheriff of Ottawa
County,
Defendants.

No. 90-C-601-B

6-26-91

JOURNAL ENTRY OF JUDGMENT

This cause comes on for hearing on the 26 day of June, 1991, the Plaintiffs, appearing by counsel, D. Gregory Bledsoe, and the Defendants, appearing by counsel, Ben Loring, District Attorney for Ottawa County, Oklahoma. The parties announcing that this matter had been settled during Settlement Conference conducted by Magistrate John Leo Wagner. The terms of the settlement have been approved by all of the parties and approved by the Board of County Commissioners of Ottawa County, Oklahoma, on May 20, 1991. The Court has reviewed the terms of the settlement reached and approved by all the parties, and finds that said settlement is fair and equitable and should be entered as the judgment herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that Plaintiff Georgia Mathis have and recover judgment against the Defendant, the Board of County Commissioners of Ottawa County, Oklahoma, in the total amount of TEN THOUSAND DOLLARS (\$10,000.00), inclusive of all court costs and expenses, with interest at 7.06% per annum from the 20th day of May, 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED BY THE COURT that Plaintiff take nothing against Defendant, Therl Whittle, and that said Defendant be dismissed from this action, with prejudice.

IT IS SO ORDERED.

DATED THIS 26 DAY OF JUNE, 1991.

S/ THOMAS R. BRETT

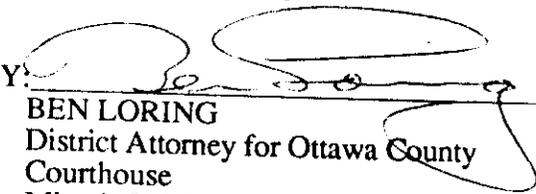
THOMAS E. BRETT
UNITED STATES DISTRICT JUDGE

GEORGIA MATHIS

BY: 
D. GREGORY BLEDSOE, OBA #874
1515 South Denver
Tulsa, Oklahoma 74119-3828
(918) 599-8118
Attorney for Plaintiff

LAURA E. FROSSARD, OBA #3151
Suite 520, The Grantson Building
111 West Fifth Street
Tulsa, Oklahoma 74103
(918) 585-1271
Attorney for Plaintiff

BOARD OF COUNTY COMMISSIONERS
OF OTTAWA COUNTY

BY: 
BEN LORING
District Attorney for Ottawa County
Courthouse
Miami, Oklahoma 74354
(918) 542-5547
Attorney for Defendant Board

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

FILED

JUN 26 1991

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

INTERNATIONAL CHEMICAL)
COMPANY, INC., an Oklahoma)
corporation)
)
Plaintiff,)
)
vs.)
)
TRANSQUIP RESOURCES, INC.,)
f/k/a CONAGRA)
TRANSPORTATION, INC., an)
Oklahoma corporation, d/b/a)
PEAVEY BARGE LINES and)
SUPERIOR BARGE LINES, INC.,)
)
Defendant.)

No. 91-C-311-C ✓

ORDER

Before the Court is the motion of the plaintiff to remand. Plaintiff brought this action for breach of contract in state court on April 18, 1991. Peavey Barge Lines (Peavey) filed Petition for Removal on May 9, 1991, stating that it was a diverse defendant, but that plaintiff had no claim against Transquip Resources, Inc. (Transquip), an Oklahoma corporation, or against Superior Barge Lines, Inc. (Superior), a Delaware corporation. Because of this improper joinder, Peavey asserts, removal is proper.

Plaintiff then filed the present motion, arguing that it has in fact sued a single defendant in state court (Transquip) which is undisputedly an Oklahoma corporation. Plaintiff contends that Transquip has been known by three other names and that all these names have been listed in the caption of the case but refer to

Transquip. Plaintiff concludes that it is for the state court to determine if Transquip is not truly a party to the contract, as Peavey asserts.

Peavey has submitted affidavits from its officers stating that, in their dealings with plaintiff, they never mentioned ConAgra Transportation, Inc. (the former name of Transquip) and that Aaron Choquette, manager of plaintiff, "knew" that the contract was solely undertaken by Peavey. In response, plaintiff submits an affidavit by Choquette, directly contradicting Peavey's affidavits. Plaintiff also points to the contract itself, which lists ConAgra Transportation, Inc., as one of the parties thereto.

The "fraudulent joinder" of a non-diverse defendant cannot defeat the right of removal. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921). Fraud is a term of art. 14A C.Wright, A.Miller & E.Cooper, Federal Practice and Procedure, §3723 at 354 (1985 ed.). The general principles are as follows:

In many cases, removability can be determined by the original pleadings and normally the statement of a cause of action against the resident defendant will suffice to prevent removal. But upon specific allegations of fraudulent joinder the court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available. The joinder of a resident defendant against whom no cause of action is stated is patent sham, and though a cause of action be stated, the joinder is similarly fraudulent if in fact no cause of action exists. This does not mean that the federal court will pre-try, as a matter of course, doubtful issues of fact to determine removability; the issue must be capable of summary determination and be proven with complete certainty.

Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1964). (citations omitted).

The removing party who claims fraudulent joinder must plead such with particularity and prove such by clear and convincing evidence. See McLeod v. Cities Service Gas Co., 233 F.2d 242, 246 (10th Cir. 1956).

From the record presented, the Court concludes that Peavey has failed to carry its burden of proof. It cannot be said with "complete certainty" that plaintiff has no claim against Transquip.

It is the Order of the Court that the motion of the plaintiff to remand is hereby granted. This action is remanded to the District Court of Tulsa County.

IT IS SO ORDERED this 26th day of June, 1991.


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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 25 1991

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHAD F. STITES, et al.,)
)
 Defendants.)

CIVIL ACTION NO. 89-C-613-B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Deficiency Judgment in Case No. 89-C-613-B entered herein on the 22nd day of May, 1991, is vacated. Upon request of the parties and by agreement of Judge Cook and Judge Brett, this case is hereby transferred to Judge Cook to consolidate with Case No. 89-C-592-C for further proceedings.

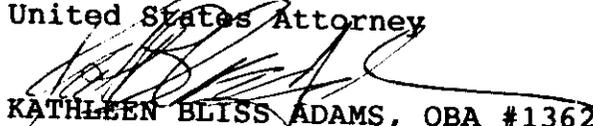
Dated this 25 day of June, 1991.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

TONY M. GRAHAM
United States Attorney


KATHLEEN BLISS ADAMS, OBA #13625
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

FILED

JUN 25 1991

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

SAM P. JONES, III,)
)
 Plaintiff,)
)
 v.)
)
 INTERNATIONAL BUSINESS)
 MACHINES CORPORATION, a)
 New York corporation;)
 and S. CRAIG HODGES,)
 individually,)
)
 Defendants.)

No. 90-C-767-E

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the plaintiff, Sam P. Jones, III, hereby stipulates with the defendants, International Business Machines Corporation and S. Craig Hodges, that this action shall be dismissed with prejudice. Each party is to bear its own costs and attorney fees.

Steven K. Bunting
STEVEN K. BUNTING
MARK S. RAINS

- Of the Firm -

ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, Oklahoma 74103
(918) 585-9211

ATTORNEYS FOR PLAINTIFF

Madalene A. B. Witterholt
LEONARD COURT, OBA #1948
MADALENE A. B. WITTERHOLT,
OBA #10528

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
321 South Boston, Suite 500
Tulsa, Oklahoma 74103-3313
(918) 592-9800

and

JESSICA LORDEN
INTERNATIONAL BUSINESS MACHINES
44 South Broadway
White Plains, New York 10601
(914) 288-4325

ATTORNEYS FOR DEFENDANTS

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

IN RE:

N.D. HENSHAW

Debtor

N.D. HENSHAW

Plaintiff

v.

REDIFFUSION SIMULATION TULSA,
INC., a Delaware corporation,
and HUGHES SIMULATION SYSTEMS
INC., a Delaware Corporation

Defendants.

Case No. 90-C-193-B ✓

Bankruptcy Case No.
89-01264-C
Chapter 11

Adversary No. 90-0036-C

FILED

JUN 25 1991

O R D E R Jack C. Silver, Clerk
U.S. DISTRICT COURT

This matter comes on for consideration upon the Plaintiff N.D. Henshaw's Objection To Report And Recommendation Of U.S. Magistrate Filed November 28, 1990, insofar as it recommends denial of Plaintiff's Motion to Reconsider Withdrawal of the Reference of this case to the Bankruptcy Court.

Defendants, Rediffusion Simulation Tulsa, Inc. and Hughes Simulation Systems, Inc. (the Defendants) oppose Plaintiff's Objection on two grounds: (1) That Plaintiff's appeal was not timely filed and therefore Plaintiff has waived any objection to the Report and Recommendation (Report), and (2) If timely objected to, the appeal should be rejected and the Report adopted.

Magistrate Judge Wagner issued his Report on November 27,

1990, the same being filed November 28, 1990. Rule 32, Local Rules of the Northern District of Oklahoma, provides a party may appeal from a Magistrate's determination of a pretrial matter within eleven days (11) after the Magistrate's written order is filed with the Court Clerk pursuant to Local Rule 32(C). Local Rule 32(D) provides for filing objections to "a Magistrate's proposed findings, recommendations or report under subsection B(3) of this Rule, within ten (10) days after being served with a copy of the proposed findings, recommendations or report by mail, . . ." . Plaintiff's Objection was filed on December 11, 1990 which was thirteen days after the Report was filed with the Court Clerk. Defendants urge Plaintiff's appeal was untimely because more than eleven days, as provided in Rule 32 (C), after the same was filed.

The Court disagrees with Defendants characterization of the Magistrate's Report as being subject to Local Rule 32(C). A Report and Recommendation is not a "Magistrate's Order" nor is a "determination" under 28 U.S.C. §636 (b)(1)(A). Defendants argue the instant Report involved a matter (Motion To Reconsider Withdrawal of Reference) which is not excepted from §636(b)(1)(A) and is therefore an "order" appealable to the district court under Local Rule 32(C). The Court agrees the specific issue appealed from was amenable to disposition by a Magistrate's order rather than a report. However, this issue was combined with other issues "excepted" under §636(b)(1)(A) which a Magistrate is not permitted to hear and determine but only issue a Report and Recommendation thereof.

The Court concludes the matter appealed from comes within the

purview of Local Rule 32(D) allowing ten days within which to file an objection.

Rule 6 (e) provides:

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period."

The case docket sheet indicates copies of the Magistrate's Report were mailed to the parties on November 28, 1991, which adds three days to the ten day period within which to file an objection thereto. Plaintiff filed his objection within the 13 day period allowed herein and the Court concludes such objection was timely filed.

The Court next considers Plaintiff's appeal of the Magistrate's Report on the merits. On February 13, 1990, Defendants filed their Motion for Withdrawal of the Reference of the instant matter to the Bankruptcy Court and the same was served on Plaintiff N.D. Henshaw. Plaintiff failed to respond to the Motion and the Court, on March 12, 1990, entered its Order granting Withdrawal of the Reference.¹ Plaintiff then filed an Amended Complaint, adding two additional claims. These additional claims have, of course, not been before the Bankruptcy Court in any respect.

Plaintiff cites a number of reasons why a district court should not withdraw a reference to a Bankruptcy Court once made. Some are: promoting uniformity in bankruptcy administration,

¹ The Order was granted pursuant to Local Rule 15 (A) which provides that objections to any motion shall be filed within 15 days in a civil case, failing which any objection will be waived by the party not complying and will constitute a confession of the matters raised by the motion.

reducing forum shopping and confusion, conservation of debtors' and creditors' resources, expediting the bankruptcy process, and whether the bankruptcy court can hold a jury trial.² Plaintiff further argues the Bankruptcy Court has a lighter docket, is familiar with the dispute and is in a better position to hear this matter at this time.

Plaintiff chose to first file his Amendment to Complaint (April 2, 1990), then seek the Court's Reconsideration of Withdrawal of Reference (filed May 11, 1990). Plaintiff's own actions, or inactions as the case may be, do not seem to promote judicial expediency. The far better approach would have been to present these matters in a timely fashion by responding to the initial Motion to Withdraw within the required fifteen days.

Motions for Reconsideration whether meritorious, repetitious or frivolous, require some portion of this Court's limited resources. Orders entered based upon non-response deserve credence and uniform enforcement and should merit reconsideration only in cases of substantial injustice. Otherwise Local Rule 15(A) would cease to have meaningful impact to the detriment of judicial economy.

This Court, not the Magistrate Judge, entered the original Order Withdrawing the Reference to the Bankruptcy Court. This Court has fully reviewed Plaintiff's argument and authorities in the reconsideration motion. In addition, the Magistrate Judge had before him for consideration the same argument and authorities now

² Collier on Bankruptcy, citing Holland America Ins. Co. v. Succession of Roy, 777 F.2d 992,999 (5th Cir. 1985).

urged to this Court, reporting that: "This case is a relatively simple breach of contract action where each side has the potential right to a jury trial to determine contested issues of fact." , and recommending that the Motion to Reconsider Withdrawal of Reference be denied.

The Court concludes that Plaintiff's objection to the Magistrate Judge's Report and Recommendation should be and the same is hereby DENIED. The Magistrate Judge's Report and Recommendation is Adopted and Affirmed.

IT IS SO ORDERED this 25 day of June, 1991.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written in black ink. The signature is positioned above the printed name and title.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA **JUN 24 1991**

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

RENEE CROOK,)
)
 Plaintiff,)
)
 vs.)
)
 AETNA LIFE INSURANCE COMPANY,)
)
 Defendant.)

Case No. 91-C-174-E

STIPULATION OF VOLUNTARY DISMISSAL

COME NOW all of the parties who have entered an appearance in the above-referenced action, and stipulate the dismissal of this action and all claims made therein with prejudice, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

Respectfully submitted,

Margaret S. Millikin

Gene L. Mortensen
Margaret S. Millikin
ROSENSTEIN, FIST & RINGOLD
525 S. Main, Suite 300
Tulsa, OK 74103

ATTORNEY FOR THE PLAINTIFF

R. David Whitaker

R. David Whitaker, OBA No. 10520
of BOESCHE, McDERMOTT & ESKRIDGE
800 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103
(918) 583-1777

ATTORNEY FOR AETNA LIFE INSURANCE
COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of June, 1991, a true and correct copy of the above and foregoing was deposited in the United States Mail in Tulsa, Oklahoma, postage prepaid thereon, addressed to:

Margaret S. Millikin
Rosenstein, Fist & Ringold
525 S. Main, Suite 300
Tulsa, OK 74103

R. David Whitaker, Esq.
800 ONEOK Plaza
100 West 5th St.
Tulsa, OK 74103



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

FILED

JUN 24 1991

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

ERVIN MELVIN WALKER,)
)
 Petitioner,)
)
 vs.)
)
 R. MICHAEL CODY,)
)
 Respondent.)

No. 90-C-247-E

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate filed January 30, 1991. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Petitioner did not abuse the writ under Rule 9(b) of Rules governing §2254 cases, however, the Petition for Writ of Habeas Corpus is denied.

ORDERED this 21st day of June, 1991.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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reviewing the evidence and the arguments of counsel, and being fully advised in the premises, finds as follows:

1. That this Court has jurisdiction over the subject matter and the parties to this action.

2. That venue properly lies with this Court.

A. CASE NO. 90-C-138-E.

3. That on or about May 3, 1983, Tulsa Marriott Hotel Limited Partnership ("TMHLP") executed and delivered a Real Estate Mortgage and Security Agreement (the "Mortgage") to Mercury Savings and Loan Association ("Mercury") to grant a security interest unto Mercury in and to all of the TMHLP's leasehold estate and right, title and interest in that certain real property located in the City of Tulsa, County of Tulsa, State of Oklahoma known as the Tulsa Marriott Hotel (the "Tulsa Marriott" -- hereinafter also described as the "Mortgaged Property"). The Mortgage also granted Mercury a security interest in and to TMHLP's right, title and interest in those goods, fixtures, furnishings, equipment, property and other items more particularly described in pages 1 through 3 of the Mortgage.

4. That on or about May 3, 1983, TMHLP and MHI entered into a certain Management Agreement ("the Management Agreement") pursuant to which MHI was to manage and operate the Tulsa Marriott Hotel.

5. That on or about May 3, 1983, TMHLP and MHI executed and delivered to Mercury a certain Assignment of Management Agreement ("the Assignment") pursuant to which TMHLP assigned all its right, title and interest in, to and under the Management Agreement as further security for the payment of the Note hereinafter described.

6. That on or about December 13, 1983, TMHLP executed and delivered to Mercury a (Permanent Loan) Secured Promissory Note in the principal amount of \$37,614,000, with principal and interest and other charges payable as provided therein (the "Note"). The RTC is the owner and holder of the Note, which is secured by the

Mortgage dated May 3, 1983 given by TMHLP to Mercury. The Note is also secured by the Assignment dated May 3, 1983.

7. That Chesapeake has defaulted under the terms and conditions of the Note by failing to make required payments thereunder.

8. That after applying all credits, there remains an amount outstanding under the Note as of June 1, 1991 in the principal sum of \$31,710,463.79, plus interest accruing from April 1, ¹⁹⁸⁹~~1991~~ to June 1, 1991 in the amount of \$3,968,016.61, with interest continuing to accrue thereafter at the rate of \$7,087.29 per diem to July 1, 1991; late charges due and owing to the 1st day of June, 1991, in the amount of \$271,305.23, and late charges continuing to accrue thereafter at the rate of \$0.05 per month for each \$1.00 of overdue principal and interest; together with further costs or expenses, including attorney's fees and the costs of this action.

9. That on or about August 24, 1984, TMHLP, Chesapeake, MHI and Mercury entered into an Assignment and Assumption Agreement (the "Assumption Agreement") wherein Chesapeake assumed the obligations of TMHLP under the Note, Mortgage and other Security Documents referenced therein.

10. The Court finds that RTC has a valid first and prior lien upon Chesapeake's leasehold estate and right, title and interest in that certain real property described as follows:

Lot One (1), Block One (1), ATRIA ONE, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

(the "Mortgaged Property") by virtue of the Real Estate Mortgage and Security Agreement executed by TMHLP to Mercury, to-wit:

Real Estate Mortgage and Security Agreement made and entered into May 3, 1983, recorded in Book 4690, at Page 1933, et. seq., on the 11th day of May, 1983, in the records of the County Clerk of Tulsa County, Oklahoma (the "Mortgage").

and that RTC has, pursuant to the Mortgage, a valid first and prior security interest in the furniture, fixtures, equipment, property and other items more particularly described in pages 1 through 3 of the Mortgage.

11. The Court further finds that RTC has a valid first and prior security interest in the Management Agreement by virtue of the Assignment of Management Agreement.

12. That by virtue of the default of Defendant Chesapeake, RTC is entitled to foreclose its Mortgage on the above-described property and to have the property sold with or without appraisal, at the election of the RTC, and the proceeds applied as payment on the amount of RTC's judgment herein; and that RTC elects to have said Mortgaged Property sold with appraisal. Also by virtue of the default of Defendant Chesapeake, RTC is entitled to foreclose its security interest in the Management Agreement, and to exercise all rights and remedies accruing to its benefit under the Management Agreement and Assignment of the Management Agreement.

13. That RTC should be granted an in rem judgment against Defendant Chesapeake determining that RTC's Mortgage is a valid, first lien and foreclosing the interest of said defendant therein.

14. The judgment rendered herein in favor of the RTC and against Chesapeake is solely in rem, and no deficiency or other personal money judgment on the Note, Mortgage, Security Documents or otherwise, is or may be entered against Chesapeake, or its limited or general partners, including any claim or entitlement by the RTC relating to attorney's fees or costs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the RTC have and recover an in rem judgment against Defendant Chesapeake in the principal sum of \$31,710,463.79, plus interest accruing from April 1, ¹⁹⁸⁹ ~~1991~~ to June 1, 1991, in the amount of \$3,968,016.61, with interest continuing to accrue thereafter at the rate of \$7,087.29 per diem to July 1, 1991; late charges due and owing to June 1, 1991 in the amount of \$271,305.23, and late charges continuing to accrue thereafter at the rate of \$0.05 per month for each \$1.00 of overdue principal and interest; together with all costs of this action, including reasonable attorney's fees in an amount to be determined by this Court at a later date upon the application of the RTC; however, no deficiency or other

personal money judgment is or may be entered against Chesapeake, or its general or limited partners.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the RTC's Mortgage on the Mortgaged Property and security interest in the Management Agreement are hereby foreclosed, and that the said Mortgaged Property and security interest in the Management Agreement be ordered sold in order to satisfy the judgment herein, with appraisal of the Mortgaged Property; that a Special Execution and Order of Sale in Foreclosure shall issue, commanding the Marshal to levy upon the Mortgaged Property, and security interest in the Management Agreement, and after having the Mortgaged Property appraised as provided by law, shall proceed to advertise and sell the same as provided by law and apply the proceeds arising from such sale as follows:

FIRST: In payment of the costs of said sale and of this action;

SECOND: In payment of the RTC herein for the full amount of its judgment; and

THIRD: That the residue, if any there be, be deposited with the Court Clerk and distributed to the appropriate parties according to their interests upon further determination and adjudication by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that upon confirmation of the sale of the property described hereinabove, Marriott, Chesapeake and MHI shall be forever barred, foreclosed and enjoined from asserting or claiming any right, title, interest, estate or equity of redemption in and to said premises or any part thereof.

B. CASE NO. 89-C-225-E.

15. Marriott executed and delivered to Mercury a certain Debt Service Guaranty dated May 3, 1983. An actual controversy exists as to the proper interpretation to be placed upon the Debt Service Guaranty. Marriott has requested that the Court enter a declaratory judgment that it has fulfilled all obligations under the Debt Service Guaranty. RTC has asserted counterclaims against Marriott, requesting that the Court

enter judgment in favor of the RTC and against Marriott for breach of contract, an accounting, and a declaratory judgment, asserting that Marriott has not fulfilled its obligations under the Debt Service Guaranty and asking the Court to enter an injunction against Marriott requiring Marriott to comply with the terms of the Debt Service Guaranty.

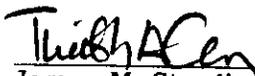
16. Pursuant to the Court's Order of May 28, 1991, filed May 29, 1991, the Court granted summary judgment in favor of Marriott and against the RTC as to Marriott's claim for a declaratory judgment, as well as the RTC's claims of breach of contract, an accounting, a declaratory judgment, and an injunction. Judgment is hereby entered in favor of Marriott and against the RTC declaring that Marriott has fulfilled all obligations under the Debt Service Guaranty of May 3, 1983, and that Marriott has no further obligation thereunder. Judgment is also hereby entered in favor of Marriott and against the RTC as to all claims of the RTC against Marriott, which include RTC's claims of breach of contract, an accounting, a declaratory judgment and an injunction. Marriott is entitled to costs of this action pursuant to F.R.C.P. 54(d).

IT IS SO ORDERED this 21st day of June, 1991.

57 JAMES O. ELLISON

JAMES O. ELLISON,
UNITED STATES DISTRICT JUDGE

AGREED TO AND APPROVED:



James M. Sturdivant, OBA #8723
Timothy A. Carney, OBA #11784
GABLE & GOTWALS
2000 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119
(918) 582-9201

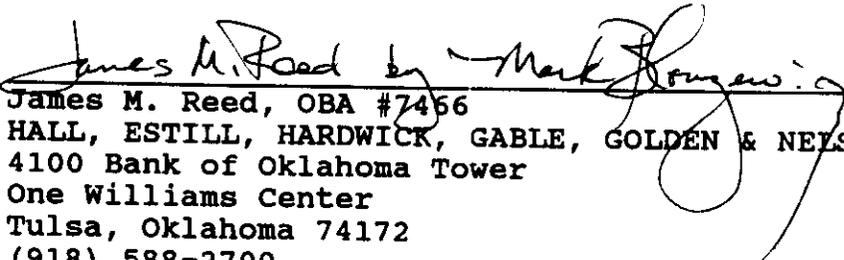
Attorneys for MARRIOTT CORPORATION,
CHESAPEAKE HOTEL LIMITED PARTNERSHIP
AND MARRIOTT HOTELS, INC.

AGREED TO AND APPROVED:



Patrick J. Hogan
TARKINGTON, O'CONNOR & O'NEILL, APC
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Spear St. Tower, 41st Floor
San Francisco, CA 94105
(415) 777-5501

and



James M. Reed, OBA #7456
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

Attorneys for
THE RESOLUTION TRUST CORPORATION AS RECEIVER
FOR MERCURY FEDERAL SAVINGS AND LOAN ASSOCIATION

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

FILED

JUN 21 1991

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

MARK ANTHONY ADAMS and JACKIE)
ADAMS, individually and as)
husband and wife,)
)
Plaintiffs,)
)
v.)
)
51 MARINA, INC., an Oklahoma)
Corporation, and AMERIGAS)
PROPANE, INC., a Delaware)
Corporation, d/b/a AMERIGAS,)
)
Defendants.)

CASE NO. 91 C 0032 B

DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiffs, MARK ANTHONY ADAMS and JACKIE ADAMS, individually and as husband and wife, by and through their attorney of record, Donald E. Smolen, and hereby dismisses without prejudice any and all claims and rights they have against the Defendant, AMERIGAS PROPANE, INC., a Delaware Corporation, d/b/a AMERIGAS, only.

Respectfully submitted,

SMOLEN & PAYDEN

BY: Bryan Smith
DONALD E. SMOLEN, OBA # 8431
BRYAN L. SMITH, OBA #11521
Attorneys for Plaintiff
201 West 5th Street, Suite 320
Tulsa, Oklahoma 74103
(918) 583-7800

CERTIFICATE OF MAILING

This will certify that on the 21 day of June, 1991, I mailed a true, correct and exact copy of the foregoing instrument via First Class Mail with proper postage thereon fully prepaid to: Mr. James E. Green, Attorney at Law, Comfort, Lipe & Green, P.C., 2100 Mid-Continent Tower, 401 South Boston Avenue, Tulsa, Oklahoma 74103; and to: Mr. Jack Y. Goree, Attorney at Law, Goree & King, Inc., 7335 South Lewis, Suite 306, Tulsa, Oklahoma 74136.

Bryan L. Smith
Bryan L. Smith

FILED

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

JUN 21 1991

MARCIA C. ALLISON,)
)
Plaintiff,)
)
v.)
)
MOORE FUNERAL HOME,)
INCORPORATED, an Oklahoma)
corporation, JIM JOHNSTON,)
JOHN TWOLATE, DARRELL PRICER,)
and LOUIS RICHARDSON,)
)
Defendants.)

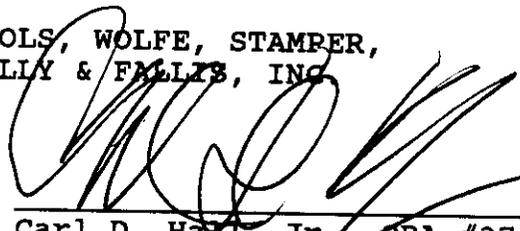
Civil Action No. 90-C 585 C
JAMES E. HAYES, CLERK
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL
WITH PREJUDICE

COMES NOW the Plaintiff Marcia C. Allison, and the Defendants Moore Funeral Home, Incorporated, Darrell Pricer and Louis Richardson, and by and through their respective attorneys stipulate that this action is dismissed with prejudice. Each party is to bear, his or her, or its own costs and expenses, including attorneys fees.

NICHOLS, WOLFE, STAMPER,
NALLY & FALLIS, INC.

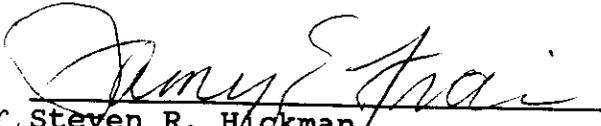
BY:



Carl D. Hall, Jr., OBA #3716
S. M. Fallis, Jr., OBA #2813
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-4004
(918) 584-5182

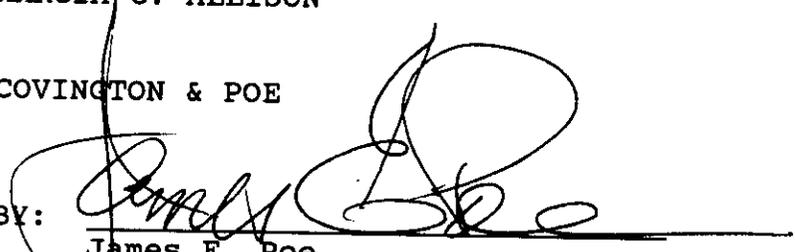
ATTORNEYS FOR DEFENDANT,
MOORE FUNERAL HOME, INCORPORATED

FRASIER & FRASIER

BY: 
for Steven R. Hickman
Post Office Box 799
Tulsa, Oklahoma 74101

ATTORNEYS FOR PLAINTIFF,
MARCIA C. ALLISON

COVINGTON & POE

BY: 
James E. Poe
740 Grantson Building
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Tulsa, Oklahoma 74103

ATTORNEYS FOR DEFENDANT,
DARRELL PRICER

WAGNER, STUART & CANNON

BY: 
Scott D. Cannon
902 South Boulder
Tulsa, Oklahoma 74119

ATTORNEYS FOR DEFENDANT
LOUIS RICHARDSON

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

FILED

DEBORAH S. MARSHALL,)
)
 Plaintiff,)
 v.)
)
 NELSON ELECTRIC, a Unit of)
 General Signal, et al.,)
)
 Defendants.)

JUN 21 1991

No. 88-C-1213-P
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

ORDER GRANTING DEFENDANTS' MOTIONS FOR JNOV ON THE
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS JURY CLAIM,
FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
TITLE VII NON-JURY CLAIM, AND JUDGMENT

I. INTRODUCTION

Plaintiff, Deborah Marshall ("Marshall"), after being laid off by her employer, Nelson Electric, filed the instant action alleging violation of Title VII of the Civil Rights Act of 1964, and intentional infliction of emotional distress. Defendants are Nelson Electric and Luther Noah ("Noah").

Marshall alleged Noah, an employee of Nelson Electric who served as a foreman during most of Marshall's tenure there, engaged in continued sexual harassment at the workplace, and further alleged Nelson Electric ignored and acquiesced in that harassment. Marshall also alleged defendants retaliated against her because she refused to succumb to this harassment. Marshall alleged these actions constituted extreme and outrageous conduct which caused her to suffer severe physical and emotional distress.

Defendants denied Marshall's claims and asserted Marshall initiated and participated in much of the sexually-related conduct

which occurred at the workplace. Defendants further asserted Marshall's layoff was not in retaliation for her actions but rather was a result of a significant economic downturn at the Tulsa location. Finally, defendants denied that any physical or emotional distress suffered by Marshall was due to any conduct of the defendants, but rather was due to conditions unrelated to Marshall's employment at Nelson Electric, including but not limited to Marshall's prior suicide attempt, physical abuse she was suffering at the hands of her husband, an extramarital affair she was having while employed at Nelson Electric, and other factors.

The intentional infliction of emotional distress claim was determined by the jury. The Title VII claim against Nelson Electric was tried to the Court. Although both claims were tried simultaneously, the Court heard some brief testimony outside the presence of the jury which pertained only to the Title VII claim.¹ At the conclusion of the evidence, both defendants moved for a

¹ This testimony related to the arbitration hearing. The Arbitrator's Decision and Award contains the following pertinent findings:

Finally, I find that there is not sufficient evidence in the record to show that sexual harassment on the part of Grievant's Supervisor played a role in selecting her for layoff. I further find that there was an admitted economic reason which justified the Company's decision to call a layoff, and because it appears that Grievant has the low seniority among Electricians in the Department, I conclude that sufficient neutral reasons have been shown to explain her selection for layoff. There is no evidence at all to show Grievant was laid off for complaining to the Company about being sexually harassed. I conclude that Grievant was not improperly laid off on August 15, 1986.

See Defendant's Exhibit 18.

directed verdict. The Court took these motions under advisement. On the intentional infliction of emotional distress claim, the jury awarded Marshall \$2,500 compensatory damages against Noah, \$93,000 compensatory damages against Nelson Electric, \$2,500 punitive damages against Noah, and \$62,000 punitive damages against Nelson Electric. The Court entered a partial judgment based on the jury award on October 26, 1990, and took the Title VII matter under advisement. Both defendants subsequently filed motions for judgment notwithstanding the verdict ("jnov") on the intentional infliction of emotional distress claim and filed proposed findings of fact and conclusions of law on the Title VII claim. Marshall filed a brief in opposition to defendants' motions for jnov on the emotional distress claim, and also filed proposed findings of fact and conclusions of law on the Title VII claim.

The Court grants the defendants' motions for directed verdict and jnov on the emotional distress claim, finds in favor of Nelson Electric on the Title VII claim, and renders judgment in favor of defendants.

II. WITNESSES AND EXHIBITS

Marshall called the following witnesses at trial: Tom Birmingham, John Bell, George T. (Terry) Camp, Bill Coday, Bill Coleman, John Edwards, Randy Edwards, John Fitzgerald, Thomas Goodman, M.D., Jerry Holloman, Juanita Holloman, Jackie Howell, David Huettner, Ph.D., Charles Marshall, Deborah Marshall, Metta McGee (by deposition), Luther Noah, Wayne Schnee, Harold Wallace, and Vicki Williams.

Defendants called the following witnesses at trial: Dr. Jan Capehart, Dr. William Chop, Billy G. Coleman, Randy L. Edwards, Patricia A. McDannald, Luther Noah, Doris W. Skock, and Edward M. Wall.

The Court received into evidence numerous exhibits at trial, introduced by both plaintiff and defendant. The Court's rulings on the offer of these documentary exhibits are reflected in the trial transcript.

III. STIPULATIONS

The parties entered into the following factual stipulations:

1. Plaintiff was employed at Nelson Electric from October 4, 1976 until July 2, 1987.
2. On August 16, 1986, plaintiff was laid off from Department 411 and chose to bump into Department 710.
3. Luther Noah's employment with Nelson Electric ceased as of November 1, 1986.
4. On June 15, 1987, plaintiff voluntarily chose to be laid off from Department 710 and chose to bump into Department 411.
5. Effective July 2, 1987, plaintiff and Jackie Howell were laid off from Department 411.
6. Plaintiff filed a formal complaint of sexual harassment with the Oklahoma Human Rights Commission on December 16, 1987.
7. On September 12, 1988, plaintiff filed this lawsuit.

See Jury Instruction No. 3 (Oct. 18, 1990). The Court adopts these stipulations.

IV. SUMMARY OF KEY TESTIMONY

Although numerous witnesses testified in this matter, the following testimony is pertinent to the pending motions for jnov and provides an overview of the allegations advanced by both sides.

Marshall testified that during her tenure at Nelson Electric, Noah embarked on a course of conduct that constituted sexual harassment. Marshall testified Noah referred to the women who worked for him as his "little harem"; asked Marshall if her jeans rubbed her crotch and made it wet; asked her how far or deep a man could "go inside" her; stated he wanted to marry her, wanted her to lay around the house naked and put his face in her "snatch"; and quoted repeatedly from the Bible in a way that suggested it was proper for Noah to have sex with her. He also allegedly told her that he would be very "gentle" with her and cause her to have multiple orgasms.

Marshall further testified Noah physically touched her in a variety of ways; grabbed at her; deliberately bumped into her rear and breasts; sneaked up behind her when she was bent over; and showed her pictures from Penthouse magazine. She described one occasion at work when Noah touched her between the legs and on the breast and then claimed "the devil made me do it." She also described several occasions when Noah fashioned male penises out of putty, put them in his pants, and pranced around the work area. He also allegedly threatened her job if she did not "meet with him in private." Marshall testified she never succumbed to these advances.

On cross-examination, Marshall acknowledged she also used "dirty talk" in the workplace; admitted from time to time she had asked others at work whether they had sex the night before; admitted she did not mention sexual harassment in the union grievance she pursued in connection with her layoff; conceded she was involved in an incident when Noah's pants were pulled down at work; and acknowledged that despite this alleged harassment at the hands of Noah, she repeatedly contacted Nelson Electric management after her transfer to another department asking to be transferred back into Noah's department and placed under his supervision.

One of the key witnesses called by the defense was Dr. William Chop, Marshall's treating physician. Psychiatry is an integral part of Chop's practice. Unlike other expert witnesses specifically retained to render opinions for this litigation, Chop began treating Marshall before the lawyers on both sides of this lawsuit arrived on the scene. Chop, however, was not called as a witness by Marshall. Instead, Chop was called as a defense witness by Nelson Electric.

Chop began treating Marshall on January 14, 1988, for pain, numbness and physical complaints. He last saw her on March 29, 1988. Despite the fact that Chop treated Marshall for two months, absent from Chop's testimony and medical records is any pre-litigation reference by Marshall to sexual harassment at her workplace. Instead, Marshall blamed her symptoms on a work-related injury that occurred in March of 1987. According to Chop, Marshall specifically attributed her weight gain problem to the

worker's compensation accident. She also related to Chop a suicide attempt which resulted from her husband beating her. In Chop's opinion, it was "almost impossible" to determine the source of Marshall's many problems, including depression. Chop testified that sexual harassment was an unlikely cause of Marshall's emotional problems.

Nelson Electric's exhibit 54 contains Dr. Chop's notes, as well as several other papers. The third page of the exhibit, bearing a page no. of 499, contains Chop's notes of the oral history given by Marshall to Chop during Marshall's initial visit. There is no reference to any sexual harassment. It states in part:

Patient presents with long, somewhat vague history of ten months of problems with pain in her neck, back and numbness extending into the arms and the hands with a very worried affect about this . . . She has had a normal EMG on the left upper extremity where she has experienced most of her numbness and shooting pain a month after the initial work accident which occurred 3/2/87, where she was spun around by a machine . . .

The next page of exhibit 54, bearing page no. 500, contains Chop's notes regarding Marshall's visit of January 27, 1988. There is no reference to harassment. There is mention, however, of Marshall's suicide gesture, which Chop described in part as follows:

In addition, patient has transverse scars on the left wrist from a suicidal gesture about ten to 15 years ago that resulted when her husband was beating her quite a bit.

Dr. Chop also noted that Marshall had a "[h]istory of being abused by her current husband." The notes regarding Marshall's visits of February 25, 1988, and March 29, 1988, are shown on pages 503 and 504 of the exhibit. There is no reference to any harassment. The

only reference to any harassment in the entire exhibit is contained on pages 505-506 which is the note Marshall gave to Chop on April 5, 1988. The note, which was written for litigation purposes, states in part:

Dr. Chop my lawyer needs a copy from you, & I am also getting one from my pshyc., Dr. Farley. He needs the date in Jan. that I first came in and put me on med. & referred me to pshyc.

1. Date in Jan. temporarily disabled to work due to harassment from work &/or injury.

* * *

My lawyer is putting me back on drawing workman's comp. again & making them pay for my pshyco. but he also needs the copy from you that started temp. disabled to work starting Jan. . .

During his testimony, Chop discussed this note and his refusal to provide Marshall's attorney the information requested by Marshall because, according to Chop, he "wasn't willing to try to make this appear to be a work-related injury."

Nelson Electric's exhibit 55 contains eleven pages in Marshall's handwriting, explaining her problems. There is no reference in the exhibit to any alleged harassment. Marshall admitted during her cross-examination that she prepared this document for Dr. Chop to describe the pain that she was suffering.

V. THE JURY'S VERDICT AND ANSWERS TO SPECIAL INTERROGATORIES

The jury was given the following instructions concerning the intentional infliction of emotional distress claim:

Elements of Liability - Intentional Infliction of Emotional Distress

For the plaintiff, Deborah Marshall, to recover from the defendants Nelson Electric and Luther Noah on

plaintiff's claim of emotional distress, you must find that plaintiff has established by a preponderance of the evidence the following essential elements:

1. A defendant intentionally injured the plaintiff, or realized that plaintiff was likely to suffer the injuries complained of, or acted with willful disregard of injuries that plaintiff might suffer;

2. A defendant's actions were extreme and outrageous taking into consideration the atmosphere and circumstances in which such actions occurred; and

3. The plaintiff suffered severe emotional distress as a direct result of a defendant's conduct. Injuries to the nervous system and mental pain are physical injuries which also qualify as severe emotional distress.

If you find plaintiff has proved each of the above elements by a preponderance of the evidence, then you must find in favor of the plaintiff.

On the other hand, if you find plaintiff has failed to prove her claim, then you must return a verdict in favor of the defendants.

See Jury Instruction No. 18 (Oct. 18, 1990). These are the elements of the tort of intentional infliction of emotional distress under pertinent Tenth Circuit and Oklahoma decisions. Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990); Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989); Eddy v. Brown, 715 P.2d 74 (Okla. 1986); Williams v. Lee Way Motor Freight, Inc., 688 P.2d 1294 (Okla. 1984); Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978); Floyd v. Dodson, 692 P.2d 77, 79-80 (Okla. App. 1984) (discussing Oklahoma Uniform Jury Instruction -- Civil, No. 19.1).

After returning a verdict in favor of Marshall and against each defendant on this claim,² the jury answered a series of special interrogatories as follows:

[QUESTION #1 with JURY'S ANSWERS]

Question 1: Was Nelson Electric's liability based in whole or in part on the following:

A. Nelson ignoring the conduct of Noah after it knew or should have known of the harassment?

Yes X No (check one)

B. Nelson acquiescing in the conduct of Noah after it knew or should have known of the harassment?

Yes X No (check one)

C. Nelson failing to take prompt action after it knew or should have known of the conduct of Noah in sexually harassing plaintiff?

Yes X No (check one)

D. Loaning of employees into Dept. 411?

Yes X No (check one)

E. Plaintiff's layoff from Dept. 411 in July, 1987?

Yes X No (check one)

F. Employment of other individuals in Dept. 411 after September 12, 1988?

Yes X No (check one)

G. Conduct of Bill Hardee in March or April 1987?

Yes X No (check one)

H. Conduct of Nelson Electric after September 12, 1986?

² As noted in the introductory section, the jury awarded plaintiff compensatory damages in the amount of \$2,500 against Noah and \$93,000 against Nelson Electric; and awarded plaintiff punitive damages in the amount of \$2,500 against Noah and \$62,000 against Nelson Electric.

Yes X No _____ (check one)

[QUESTION #1 continued]

If yes, briefly describe such conduct. You may also refer to any of the above questions which you may have answered "Yes" in responding to this question. If you answer "No" to this question, fill in nothing below.

[JURY'S ANSWER]

It was our feeling that Nelson was not consistant [sic] with documented procedures in:

- A. Layoffs
- B. Bump Rights
- C. Recall Procedures

It was also our feeling that Nelson had limited procedures on what identified sexual harassment and no procedures on methods of employees or management to deal with this problem.

[QUESTION #2]

Question 2: Focusing on your compensatory damage awards, why was the amount of compensatory damages against Noah \$2,500, whereas the amount of compensatory damages against Nelson \$93,000? Briefly explain.

[JURY'S ANSWER]

Noah was under employment of Nelson Electric who focused on production, not employee relations. Had proper procedures been documented for sexual harassment and correction, more of the responsibility would have fallen on Noah. Refer to Question - 1A, B, C.

October 19, 1990

/s/ Jack M. Hough
Foreperson

See Special Interrogatories (Oct. 19, 1990) (emphasis in original).

VI. TO WHAT EXTENT ARE THE FINDINGS OF THE JURY WITH RESPECT TO PLAINTIFF'S INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS CLAIM BINDING UPON THE COURT IN THE DETERMINATION OF THE NON-JURY TITLE VII CLAIM?

When a case such as this involves both a jury trial (on the emotional distress claim) and a bench trial (on the Title VII claim) "any essential factual issues which are central to both claims must be first tried to the jury, so that the litigants' Seventh Amendment jury trial rights are not foreclosed on common factual issues." Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988) (citing Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73 (1962)). "Moreover, the court is bound by the jury's determination of factual issues common to both the legal and equitable claims." Skinner, 859 F.2d at 1443.

However, to the extent the essential elements of the legal and equitable claims are not the same, the court is not bound by the jury's verdict. Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1345 (10th Cir. 1990). For example, in a case similar to the instant case, where the plaintiff alleged both a Title VII quid pro quo claim and a claim for intentional infliction of emotional distress, the jury found in favor of plaintiff on the emotional distress claim and the district court found in favor of defendant on the Title VII quid pro quo claim. Both findings were upheld on appeal. Snider v. Circle K Corp., 923 F.2d 1404 (10th Cir. 1991) (affirming the district court in part and reversing in part, on other grounds).

In the instant case Marshall asserted a Title VII hostile work environment claim and a claim for intentional infliction of emotional distress. The essential elements of each claim are set forth below.

In order to prevail on a claim for intentional infliction of emotional distress plaintiff must prove:

1. Defendant intentionally injured the plaintiff, or realized plaintiff was likely to suffer the injuries complained of, or acted with willful disregard of injuries plaintiff might suffer;

2. Defendant's actions were extreme and outrageous taking into consideration the atmosphere and circumstances in which such actions occurred; and

3. Plaintiff suffered severe emotional distress as a direct result of defendant's conduct. Injuries to the nervous system and mental pain are physical injuries which also qualify as severe emotional distress.

Eddy v. Brown, 715 P.2d 74 (Okla. 1986); Williams v. Lee Way Motor Freight, Inc., 688 P.2d 1294 (Okla. 1984); Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978); Floyd v. Dodson, 692 P.2d 77, 79-80 (Okla. App. 1984) (discussing Oklahoma Uniform Jury Instruction -- Civil, No. 19.1).

In order to prevail on a Title VII "hostile work environment" claim, plaintiff must prove:

1. Plaintiff belongs to a protected group;

2. Plaintiff was subject to unwelcome sexual harassment;

3. the harassment was based on sex;

4. the harassment affected a 'term, condition, or privilege' of employment; and

5. the employer knew or should have known of the harassment in question and failed to take proper remedial action.

Jones v. Wesco Investments, Inc., 846 F.2d 1154, 1156 (8th Cir. 1988). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to 'alter the conditions of [the

victim's] employment and create an abusive working environment." Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

In the instant case the jury returned a general verdict in favor of Marshall against each defendant on Marshall's intentional infliction of emotional distress claim. Thus, the jury necessarily found Marshall proved each of the essential elements of that claim with respect to each defendant. Moreover, subsequent to receiving the jury's general verdict, the Court asked the jury to return to the deliberation room and answer a series of questions to help the Court interpret the verdict and to serve as an advisory aid to the Court on the remaining Title VII claim. The questions were prefaced with the following note from the Court: "Ladies and Gentlemen of the Jury: What follows is a series of questions known as special interrogatories. Please answer these questions to help us interpret your verdict." See Special Interrogatories (Oct. 19, 1990).

The jury's answers to these special interrogatories likewise constitute factual findings of the jury. Fed. R. Civ. P. 49(b); 9 C. Wright & A. Miller, Federal Practice and Procedure, § 2513 at 532 (1971) (a jury's verdict, whether general, special, or by special interrogatories accompanying a general verdict, constitutes the definitive findings of fact); 5A Moore's Federal Practice, ¶ 49.04 at 49-58 (2d Ed. 1991) (the jury's answers to special interrogatories are the jury's "more specific findings of fact").

However, if the intentional infliction of emotional distress claim should not have been submitted to the jury in the first place, the jury's findings are viewed as an academic exercise, a nullity, and nothing more than advisory. Under such circumstances, the jury's factual findings would not be binding on the Court for purposes of the Title VII claim. Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1560 (11th Cir. 1988) (trial court's conditional rulings concerning damages, in the event its ruling on the motion for jnov was reversed, were "advisory" only and were not binding); Williams v. Slade, 431 F.2d 605, 609 (5th Cir. 1970) (courts have refused to grant a partial new trial on liability alone where the damages issue had been resolved in a "purely academic atmosphere"); O'Neill v. United States, 411 F.2d 139, 146 (3rd Cir. 1969) (trial court's conditional assessment of damages, in the event the defendant's judgment was reversed on appeal, bore the characteristic of an "advisory opinion," was "purely academic" when made, and did not pass through the refining pressure of reality"); Romer v. Baldwin, 317 F.2d 919, 923 (3rd Cir. 1963) (when the jury assessed damages in favor of plaintiff despite finding no liability on the part of defendant, the jury's assessment was "merely an intellectual exercise" and not binding on remand); Swentek v. USAir, Inc., 830 F.2d 552, 559 (4th Cir. 1987) (Seventh Amendment does not require the trial court to conform its findings to a jury verdict that is infirm); see also Williams v. Cerberonics, Inc., 871 F.2d 452, 458, n.4 (4th Cir. 1989).

VII. DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Standard of review for motions for jnov

"Motions for directed verdict and for judgment notwithstanding the verdict are considered under the same standard." Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 498 (10th Cir. 1984).³ The standard was recently summarized by the Tenth Circuit: the test is whether there is evidence upon which the jury could properly find a verdict for the party opposing the motion for directed verdict or motion for jnov. Rajala v. Allied Corp., 919 F.2d 610, 615 (10th Cir. 1990). In making that determination the court "may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury," but rather "must view the evidence most favorably to the nonmoving party and give that party the benefit of all reasonable inferences from the evidence." Brown v. McGraw-Edison Co., 736 F.2d 609, 613 (10th Cir. 1984); see also Rajala, 919 F.2d at 615; Berry v. City of Muskogee, Okla., 900 F.2d 1489, 1496 (10th Cir. 1990); Sandlin v. Texaco Refining & Mktg, Inc., 900 F.2d 1479, 1483 n.5 (10th Cir. 1990); Abercrombie v. City of Catoosa, Okla., 896 F.2d 1228, 1231 (10th Cir. 1990); Royal College Shop, Inc. v. Northern Ins. Co. of N.Y., 895 F.2d 670, 677 (10th Cir. 1990); Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988).

³ Here the defendants moved for a directed verdict at the close of the plaintiff's case and again at the close of the evidence. The Court took these motions under advisement and invited jnov motions after the return of the jury's verdict in favor of plaintiff. See Lucas v. Dover Corp., 857 F.2d 1397 (10th Cir. 1988). The court now grants the motions for directed verdict as well as the motions for jnov.

The district court's ruling on a motion for directed verdict or for jnov is reviewed de novo by the Tenth Circuit, applying the same standard as that used by the district court. Rajala, 919 F.2d at 615; Sandlin, 900 F.2d at 1483 n.5; Brown, 736 F.2d at 613.

The Court notes that this standard of review has recently become somewhat blurred. The following three recent opinions of the Tenth Circuit that could be said to stand for the proposition that a ruling on a motion for directed verdict or for jnov is reviewed under a manifest abuse of discretion standard: Snider v. Circle K Corp., 923 F.2d 1404, 1409 (10th Cir. 1991); Sil-Flo Inc. v. SFHC, Inc., 917 F.2d 1507, 1519 (10th Cir. 1990); and Key v. Liquid Energy Corp., 906 F.2d 500, 502 (10th Cir. 1990).

In Snider the district court apparently denied Circle K's motion for directed verdict. On appeal the Tenth Circuit stated: "Circle K alternatively argues that the district court should not have submitted Snider's . . . claim to the jury [W]e review the district court's decision under an abuse of discretion standard." Snider, 923 F.2d at 1409.

In Key the district court denied a motion for directed verdict and a motion for jnov. The Tenth Circuit stated: "In ruling on an appellant's request to overturn a trial court for failure to direct a verdict or grant a JNOV, the appeals court must determine whether the trial court's refusal to set aside the jury verdict constituted a manifest abuse of discretion." Key, 906 F.2d at 502.

Both Snider and Key cited Karns v. Emerson Elec. Co., 817 F.2d 1452, 1456 (10th Cir. 1987), to support the "abuse of discretion"

standard. However, Karns' "manifest abuse of discretion" language referred to the standard for reviewing a district court's ruling on a motion for new trial, not a motion for directed verdict or for jnov. Karns, 817 F.2d at 1456. Key also cited Brown v. McGraw Edison Co., 736 F.2d 609, 616 (10th Cir. 1984). Again, the Brown "abuse of discretion" language referred to the standard for reviewing a ruling on a motion for new trial. Brown, 736 F.2d at 616.

Sil-Flo reviewed the district court's denial of defendant's motion "for jnov or new trial" and used both standards without distinguishing between them. Sil-Flo, 917 F.2d at 1519. For example, the paragraph discussing the standard of review contains four sentences, each followed by a case citation. First, for its "manifest abuse of discretion" language, Sil-Flo cited Harvey ex rel. Harvey v. General Motors Corp., 873 F.2d 1343, 1346 (10th Cir. 1989). Harvey was a "new trial" case. Second, for its language that "so long as a reasonable basis exists for the jury's verdict, we will not disturb the trial court's ruling," Sil-Flo cited McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1260 (10th Cir. 1988). McAlester used the quoted language with reference to reviewing a ruling on a motion for new trial. Third, for its language that "our role is not to determine anew whether in our judgment [defendant] should have been liable on these claims," Sil-Flo cited Patty Precision Prods. v. Brown & Sharpe Mfg. Co., 846 F.2d 1247, 1251 (10th Cir. 1988). Patty Precision was also a "new trial" case. And fourth, for its language that "we consider only

whether the evidence and all reasonable inferences to be drawn therefrom so clearly mandates that [defendant] could not be held liable that reasonable minds could not differ on this result," Sil-Flo cited Ryder v. City of Topeka, 814 F.2d 1412, 1418 (10th Cir. 1987). Ryder was a "jnov" case.

After carefully studying these authorities, there is no question in this Court's mind that a district court's ruling on a motion for directed verdict or for jnov is reviewed de novo by the appellate court, and a ruling on a motion for new trial is reviewed for manifest abuse of discretion. These two standards were clearly described by Chief Judge Holloway in Brown v. McGraw Edison Co., 736 F.2d 609 (10th Cir. 1984), and have been often repeated. Accordingly, this Court is convinced the three recent opinions discussed above do not properly state the law if, and to the extent, they hold a district court's ruling on a motion for directed verdict or for jnov is reviewed under an abuse of discretion standard.

B. Factual arguments directed toward sufficiency of plaintiff's evidence

Clearly, not every discrimination claim, whether it is based on age, race, national origin, or gender, automatically supports a claim for intentional infliction of emotional distress. Grandchamp v. United Air Lines, Inc., 854 F.2d 381, 384-85 and n.8 (10th Cir. 1988). Only if the manner of discrimination is beyond all possible bounds of decency or is regarded as utterly intolerable in a civilized community may plaintiff reach the jury on an intentional infliction of emotional distress claim. Id. at n.8.

In the instant case, defendants make two arguments that Marshall's evidence was insufficient to warrant submission of the emotional distress claim to the jury.⁴ First, both defendants argue Marshall failed to introduce sufficient evidence of truly outrageous conduct on the part of Noah. Second, defendant Nelson Electric argues that because Marshall failed to introduce any evidence of outrageous conduct other than the acts of Noah, Nelson Electric cannot be held liable. For purposes of the instant motion, the Court accepts Marshall's testimony at face value and views it in the light most favorable to her.

In that light, the Court rejects defendants' first argument. Considering the evidence as summarized in Section IV, supra, the Court finds there was sufficient evidence from which the jury could find Noah engaged in extreme and outrageous conduct causing Marshall emotional distress.

Defendant Nelson Electric's next argument is that it cannot be liable because Marshall introduced evidence of Noah's conduct only, and failed to introduce any evidence of outrageous conduct on the part of Nelson Electric. In response, Marshall points out she advanced two theories of liability with respect to Nelson Electric: (1) that Nelson Electric is vicariously liable for the acts of Noah, under the theory of respondeat superior, since Noah was

⁴ The Court submitted the intentional infliction of emotional distress claim to the jury, but took under advisement the statute of limitations issue discussed in Section VII.C. of this order. The defendants subsequently moved for directed verdicts on the statute of limitations issue at the close of plaintiff's evidence, and for jnov on the statute of limitations issue following the return of the verdict.

acting within the scope of his employment; and (2) that Nelson Electric is directly liable as a result of its own conduct in ignoring and acquiescing in Noah's conduct.

As noted earlier, there was evidence regarding how Nelson Electric responded to Noah's conduct, and the jury expressly found Nelson Electric ignored and acquiesced in Noah's conduct and failed to take prompt corrective action. Moreover, the Tenth Circuit has expressly upheld an intentional infliction of emotional distress jury award against an employer who ignored and acquiesced in the conduct of one of its employees. Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1347 (10th Cir. 1990) ("Baker's action against Weyerhaeuser was based on Weyerhaeuser's own conduct, namely, its utter failure through its officers and supervisors to take action against [co-worker] Caldwell, a known sexual harasser of females."). Accordingly, the Court also rejects Nelson Electric's second argument.

Thus, defendants' motions for jnov are denied to the extent they argue Marshall's evidence was insufficient to submit the intentional infliction of emotional distress claim to the jury.

This, however, does not end the inquiry because at the time the Court submitted the emotional distress claim to the jury it expressly reserved ruling on the statute of limitations issue.

C. The statute of limitations issue

The Court expressed concern about the statute of limitations issue at the time the emotional distress claim was submitted to the jury. Now, after careful consideration, the Court concludes the emotional distress claim should not have been submitted to the jury.

The applicable statute of limitations for the claim of intentional infliction of emotional distress is two years. Chandler v. Denton, 741 P.2d 855 (Okla. 1987). Marshall filed her complaint on September 12, 1988. Thus, absent some exception to the general rule, her claim is barred to the extent it is based on conduct that occurred before September 12, 1986.

Viewing Marshall's evidence in the light most favorable to her, Noah's harassment began in 1985. However, Marshall left Department 411 on August 12, 1986, and thus was no longer in the same department as Noah. Marshall testified Noah's harassment "pretty much stopped" at that time, and she acknowledged Noah's conduct was less frequent and less explicit when compared to his conduct while she was in Department 411. Her testimony concerning Noah's conduct after she left Department 411 and entered Department 710 can be summarized as follows: Noah wriggled his tongue at her in a sexual way, brushed against her in the hallway, called her supervisor in Department 710 to ask where she was, watched her working, and approached her in the new department and touched her by pinching her on the arm. See Plaintiff's Second Proposed Findings of Fact and Conclusions of Law at 4-5 (Oct. 15, 1990).

"It is the trial court's responsibility initially to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the §46 standards. Only when it is found that reasonable [persons] would differ in an assessment of this critical issue may the ... claim be submitted to a jury." Eddy v. Brown, 715 P.2d 74, 76-77 (Okla. 1986). Liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Id. at 77 (quoting Restatement of Torts (Second) §46, comment d). To be actionable, the conduct must be beyond all possible bounds of decency in the setting in which it occurred or be regarded as utterly intolerable in a civilized community. Id. at 77; Haynes v. South Community Hospital Management, Inc., 793 P.2d 303, 306 (Okla. App. 1990); Bostwick v. Atlas Iron Maters, Inc., 780 P.2d 1184, 1188 (Okla. App. 1988).

Since Marshall filed her Complaint on September 12, 1988, the applicable limitations period begins on September 12, 1986. The Court finds as a matter of law the conduct that occurred after September 12, 1986, was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Moreover, in oral argument on this issue Marshall conceded as much.⁵

⁵ In oral argument on this issue on November 9, 1990, Marshall's counsel conceded Noah's conduct after August 12, 1986 (when she transferred into a different department) was not sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress. Marshall indirectly made the same concession in her brief. See Plaintiff's Brief in Response to Nelson Electric's Motion for Directed Verdict at 13-14 (Oct. 12, 1990) ("Plaintiff only testified that the harassment pretty much stopped after she left Department 411 because the

However, in a good faith attempt to defuse this concession, Marshall argues Noah's conduct was a continuing tort and the Court must therefore consider all of Noah's acts, no matter how long ago they occurred, since some non-extreme/non-outrageous acts occurred after September 12, 1986.

This argument presents a difficult and close question of law. However, after careful consideration and for the reasons set forth below, the Court rejects Marshall's argument. The Court concludes that under the circumstances of this case the statute of limitations requires the Court to initially consider the conduct that occurred within the limitations period. Unless the conduct that occurred within the limitations period was sufficiently extreme and outrageous to support an intentional infliction of emotional distress claim, plaintiff's claim is time-barred.⁶

While the continuing tort doctrine has long been applied to a variety of actions, including trespass, nuisance, and false imprisonment, it has only in recent years begun to be applied to claims for intentional infliction of emotional distress.

There are no decisions from Oklahoma courts or from the Tenth Circuit on this exact issue. However, the Tenth Circuit addressed

conduct by Noah was less frequent and less explicit when compared to his conduct in the Mod Center.")

⁶ During the trial of the case, the Court admitted evidence of defendant's conduct outside the statute of limitations on the assumption the continuing tort doctrine might apply, with the understanding the matter would be reviewed at the close of the evidence. The Court also believed evidence outside the statute of limitations period would be admissible under Federal Rule of Evidence 404(b) if defendants' statute of limitations arguments were overcome.

a strikingly similar issue in Manders v. Oklahoma ex rel. Dept. of Mental Health, 875 F.2d 263 (10th Cir. 1989), and other jurisdictions have addressed the issue.

In Manders, plaintiffs raised sexual harassment claims against their supervisor under Title VII and 42 U.S.C. § 1983. The statute of limitations on a section 1983 claim is two years. Since the plaintiffs filed their complaint on May 5, 1986, the Tenth Circuit looked at the evidence concerning defendant's conduct after May 5, 1984, and found no acts or allegations sufficient to support plaintiffs' claim. The plaintiffs argued defendant Haney continued to sexually harass them after May 5, 1984, by acting vengefully in response to their rebuffs. Manders, 875 F.2d at 265. Plaintiffs contended Haney's vengefulness was a continuation of his earlier sexual harassment because it was intended to punish them for not acquiescing to his sexual advances. Id. However, the Tenth Circuit disagreed and affirmed the trial court's decision to grant summary judgment based on the statute of limitations.

Similarly, in Koster v. Chase Manhattan Bank, 609 F. Supp. 1191 (S.D.N.Y. 1985), plaintiff sued for sex discrimination under Title VII and for intentional infliction of emotional distress. Applying the New York one-year statute of limitations for the emotional distress claim, the court held "all acts occurring before the limitations period are excluded from consideration." Id. at 1198. Since there was no evidence that any conduct occurring within the limitations period "in and of itself [was] sufficiently

extreme, outrageous and uncivilized to be actionable," the court entered summary judgment in favor of defendant. Id.

The Eighth Circuit appears to take the same approach as that taken by the Tenth Circuit in Manders and by the district court in Koster. In Gross v. United States, 676 F.2d 295 (8th Cir. 1982), a farmer sought damages for intentional infliction of emotional distress allegedly resulting from a government agency's actions to thwart plaintiff's participation in the United States Department of Agriculture's feed grain program. The Eighth Circuit held the statute of limitations for the claim of intentional infliction of emotional distress "generally runs from the date of the last tortious act." Id. at 300. "[T]he focus should be on when the last tortious act occurred." Id. In Gross the appellate court could not determine from the record whether the last tortious act occurred within the limitations period and accordingly remanded for a determination of that issue. Although the district court had made a finding concerning an incident that occurred within the limitations period, the district court had not made clear whether the incident was an extreme and outrageous act constituting intentional infliction of emotional distress. Id. The Eighth Circuit stated that unless that incident constituted tortious (i.e. extreme and outrageous) conduct, plaintiff's action must be dismissed as outside the statute of limitations. Id. Here, there clearly was no tortious (extreme and outrageous) conduct by Noah within the two year statute of limitations.

The Ninth Circuit has taken a somewhat different approach. Applying California law, the Ninth Circuit focused on the severity of the harm done to the plaintiff, holding that a cause of action for intentional infliction of emotional distress accrues at the moment plaintiff's injury is "severe enough to constitute intentional infliction of emotional distress." Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1292 (9th Cir. 1987). Even applying this standard, however, plaintiff's intentional infliction claim arose well prior to September 12, 1986.

There are authorities apparently holding any continuing act that occurs within the limitations period is sufficient to bring with it all the previous acts that occurred outside the limitations period. In Page v. United States, 729 F.2d 818 (D.C.Cir. 1984), a veteran sued the Veterans Administration for injuries allegedly resulting from being subjected to harmful drugs during a course of treatment from 1961 to 1980. The Court of Appeals held "the cause of action [based on] continuous drug treatment did not accrue, and the statutory limitations did not come into play, until the allegedly tortious conduct came to a halt in 1980." Id. at 823. In Everly v. United Parcel Service, Inc., 1989 WL 81961 (N.D.Ill. 1989) (not reported in F.Supp.), the plaintiff alleged she was subjected to years of harassment, insults and discriminatory treatment at the workplace. The district court denied defendants' motion to dismiss the action, finding the cumulative effect of the conduct stretching across the years was sufficiently outrageous to

defeat the dismissal motion. On the statute of limitations issue, the court stated "the statute of limitations does not begin to run on a continuing wrong until the wrong is 'over and done with' . . . and [plaintiff's claim] is not time barred by the statute of limitations." Id. The court focused on the last act of the defendant, apparently without regard to whether that act was extreme and outrageous. In Twyman v. Twyman, 790 S.W.2d 819 (Tex. App. 1990), error granted, No. 3-88-095-CV (Dec. 19, 1990), plaintiff sought damages for negligent infliction of emotional distress based on her husband's continued attempts, over a period of years, to have her engage in deviant sexual acts with him. The Texas appellate court stated the statute of limitations on plaintiff's claim did not begin to run "until the tortious acts [had] ceased." Id. at 821. Also, in Rochon v. FBI, 691 F.Supp. 1548 (D.D.C. 1988), involving racial discrimination claims under Title VII, 42 U.S.C. § 1985, and a claim for intentional infliction of emotional distress, the court applied the continuing tort doctrine and held the statute of limitations did not start running until the time the tortious conduct ceased. Id. at 1563.

The Court recognizes this legal issue is a close one. However, the Court believes it should follow the Tenth Circuit's approach in Manders as discussed above. Further, the Court believes the reasoning underlying the decisions in Manders, Koster, and Gross is sound. Any other result would subject defendants to never-ending liability for such claims, which could at any time be triggered by non-extreme, non-outrageous, and non-tortious acts.

Merely alleging that such non-actionable conduct was an extension of actionable conduct would resurrect stale time-barred conduct. Such a result would be fundamentally foreign to the purpose of statutes of limitation.

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence." Wood v. Carpenter, 101 U.S. 135, 139 (1879). They balance "the interests in favor of protecting valid claims" against "the interests in prohibiting the prosecution of stale ones." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975).

Once the statutory period has passed, a party can carry on its affairs with confidence that it need not worry about contingent liabilities.

[Statutes of limitation] are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979). Courts recognize that the application of "statutes of limitation result in hardship to plaintiffs in some cases." Steele v. United States, 599 F.2d 823, 828 (7th Cir. 1979). However, "alleviation of that hardship is a matter of policy for the Congress." Kaltreider Const., Inc. v. United States, 303 F.2d 366, 368-69 (3d Cir.), cert. denied, 371 U.S. 877 (1962).

[Statutes of limitation] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They present a public policy about the privilege to litigate.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (footnote omitted). Legislatures enact a statute of limitations to apply to all cases covered by the statute. Since the legislature is the appropriate body to make such policy decisions, the only task for the courts is to determine whether the claim is within the coverage of the statute.

Here, faced with this limited task, the Court determines that Marshall's claim is not within the coverage of the statute.

In the instant case Marshall concedes, and the Court finds as a matter of law, the alleged conduct that occurred during the two-year period immediately preceding the filing of the complaint, that is, the conduct that occurred after September 12, 1986, was not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress. Because no "extreme and outrageous" conduct occurred within the statute of limitations period, and because Marshall cannot use the continuing tort doctrine to resurrect the time-barred conduct under the circumstances of this case, Marshall's claim is barred by the statute of limitations.

Accordingly, defendants' motions for directed verdict and jnov on Marshall's emotional distress claim are granted based on the two-year statute of limitations.⁷

D. If the Court's grant of jnov is incorrect as a matter of law, the Court conditionally grants defendants' motion for a new trial

Rule 50 of the Federal Rules of Civil Procedure is titled "Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict." Rule 50(c)(1) provides, in pertinent part:

(c) [Motion for Judgment Notwithstanding the Verdict]:
Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict . . . is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial....

Fed. R. Civ. P. 50(c)(1).

The Eleventh Circuit has noted "the only conditional ruling allowed by Fed. R. Civ. P. 50 is a conditional ruling for a new trial should the trial court's grant of a motion for judgment n.o.v. be overruled." Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1561 (11th Cir. 1988).

As indicated previously, the statute of limitations issue in this case is a difficult and close one. Recognizing that the Court's grant of defendants' motion for judgment notwithstanding the verdict on statute of limitations grounds might be reversed on

⁷ Because the intentional infliction claim should not have been submitted to the jury, the jury's findings on this claim are not binding on the Court. See Section VI, supra.

appeal given the split of authority on the statute of limitations issue, the Court next proceeds to determine whether the defendants' motion for new trial should be conditionally granted. Fed. R. Civ. P. 50(c)(1); see also 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537-2540 (1971 & Supp. 1991).

In this case, the jury found Noah's harassment was extreme and outrageous and awarded compensatory damages in the amount of \$2,500 against Noah. The jury also found Nelson Electric's conduct was extreme and outrageous and awarded compensatory damages in the amount of \$93,000 against Nelson Electric. Because of the jury's varying awards of compensatory damages against Noah and Nelson Electric, and because these varying awards are so contrary to the evidence, the Court finds the jury's verdict may not stand even if the statute of limitations question was wrongly decided.

Compensatory damages are meant to compensate a plaintiff for actual injuries. Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 288 (N.D. Ind. 1985). Such damages are not intended to provide a windfall to plaintiff. Corporate Air Fleet of Tennessee, Inc. v. Gates Learjet, Inc., 589 F. Supp. 1076, 1082 (M.D. Tenn. 1984). Nor are they for the purpose of punishing a defendant or deterring similar conduct in the future. In Re Klotz, 53 B.R. 148 (D.N.M. 1985).

The jury explained the differing amounts of actual damages in their responses to special interrogatories. The jury believed Nelson Electric did not act consistent with its documented procedures regarding layoffs, "bump rights," and recalls. The jury

also believed Nelson Electric had limited procedures concerning the identification of sexual harassment and had no procedures concerning how its employees or management personnel were to deal with the problem. The jury believed Nelson Electric focused on production rather than on employee relations. Finally, the jury stated: "Had proper procedures been documented for sexual harassment and correction, more of the responsibility would have fallen on Noah." Special Interrogatories (Oct. 19, 1990) (Jury's answer to question #2).

While the jury clearly found fault with Nelson Electric's conduct, which conduct they punished by way of punitive damages, the varying awards of \$93,000 compensatory damages against Nelson Electric and \$2,500 compensatory damages against Noah are irreconcilably inconsistent and against the great weight of the evidence. Swentek v. U.S. Air, Inc., 830 F.2d 552, 559 (4th Cir. 1987) (Seventh Amendment does not require the trial court to conform its findings to a jury verdict that is infirm); see also Williams v. Cerberonics, Inc., 871 F.2d 452, 458, n.4 (4th Cir. 1989).

While it is, of course, impossible to determine the jury's actual intention when it awarded such drastically differing amounts of compensatory damages, it is more likely than not that the awards arose out of the jury instructions on compensatory damages, which permitted jury confusion on the issue. Although the jury instructions may not have made it clear, the injury to Marshall may not be reasonably or logically divided in the way the jury

attempted to do it. The jury apparently attempted to apportion damages between the individual defendant and the deep-pocket corporate defendant. But, if defendants are liable to Marshall for tortious conduct, they are jointly and severally liable, Bell v. Mickelson, 710 F.2d 611 (10th Cir. 1983), and the jury's attempted apportionment of compensatory damages was improper.

Accordingly, the Court conditionally grants defendants' motion for a new trial pursuant to Federal Rule of Civil Procedure 50 in the event the Court's directed verdict/jnov ruling is reversed.

VIII. FINDINGS OF FACT ON MARSHALL'S TITLE VII CLAIM AGAINST NELSON ELECTRIC

If any finding of fact in this order should more properly be designated a conclusion of law, it is hereby deemed a conclusion of law.

A. Stipulated Facts

1. Plaintiff was employed at Nelson Electric from October 4, 1976 until July 2, 1987.

2. On August 16, 1986, plaintiff was laid off from Department 411 and chose to bump into Department 710.

3. Luther Noah's employment with Nelson Electric ceased as of November 1, 1986.

4. On June 15, 1987, plaintiff voluntarily chose to be laid off from Department 710 and chose to bump into Department 411.

5. Effective July 2, 1987, plaintiff and Jackie Howell were laid off from Department 411.

6. Plaintiff filed a formal complaint of sexual harassment with the Oklahoma Human Rights Commission on December 16, 1987.

7. On September 12, 1988, plaintiff filed this lawsuit.

B. Noah's conduct and Marshall's participation in the sexually charged atmosphere

1. Marshall was an employee of Nelson Electric, a Unit of General Signal Corporation, from October 4, 1976 to July 2, 1987. In 1978, Marshall transferred into the Modification ("Mod") Center of Department 411, Cast Assembly. Approximately four women worked in the Mod Center as regular employees in 1985 and 1986. Department 636, Flame Seals or firestop putty, was added to the workload of Department 411 in the mid-80's. For all accounting and labor reports, Department 636 work was treated as part of Department 411. During the years 1985 and 1986, while employed with Nelson Electric and working in Department 411 with foreman Noah, Marshall was subjected to numerous specific instances of sexual harassment. This harassment was not made a condition of her continuing employment. She was the victim of offensive touchings by Noah and was subjected to sexual comments and innuendos by Noah.

2. Noah also subjected other women, including Juanita Holloman, to similar harassments, but of less magnitude.

3. Specifically, Noah would call Marshall up to his desk and show her pornographic pictures, read sexual acts from the Bible to her, comment about her body, tell her that he would like to do specific sexual things to her.

4. Marshall's version of the alleged harassment was seriously called into question. Moreover, sexual harassment was an unlikely source of Marshall's emotional problems. Her treating physician, Dr. Chop, credibly demonstrated this point.

(a) Chop began treating Marshall on January 14, 1988, for pain, numbness and physical complaints. He last saw her on March 29, 1988. Despite the fact the Chop treated Marshall for two months, absent from Chop's testimony and medical records is any prelitigation reference by Marshall to sexual harassment at her workplace. Instead, Marshall blamed her symptoms on a work-related injury that occurred in March 1987.

(b) According to Chop, Marshall specifically attributed her weight gain problem to the worker's compensation accident. She also related to Chop a suicide attempt which resulted from her husband beating her. In Chop's opinion, it was "almost impossible" to determine the source of Marshall's many problems, including depression. Chop credibly testified that sexual harassment was an unlikely cause of Marshall's emotional problems.

(c) Nelson Electric's exhibit 54 contains Dr. Chop's notes as well as several other papers. The third page of the exhibit, bearing a page number of 499, contains Chop's notes of the oral history given by Marshall to Chop during Marshall's initial visit. There is no reference to any sexual harassment. It states in part:

Patient presents with long, somewhat vague history of ten months of problems with pain in her neck, back and numbness extending into the arms and the hands with a very worried affect about this She has had a normal EMG on the left upper extremity where she has experienced most of her numbness and shooting pain a month after the initial work accident which occurred 3/2/87, where she was spun around by a machine

(d) The next page of exhibit 54, bearing page number 500, contains Chop's notes regarding Marshall's visit of January 27, 1988. There is no reference to harassment. There is mention, however, of Marshall's suicide gesture, which Chop described in part as follows:

In addition, patient has transverse scars on the left wrist from a suicidal gesture about ten to 15 years ago that resulted when her husband was beating her quite a bit.

(e) Chop also noted that Marshall had a "[h]istory of being abused by her current husband." The notes regarding Marshall's visits of February 25, 1988, and March 29, 1988, are shown on pages 503 and 504 of the exhibit. There is no reference to any harassment. The only reference to any harassment in the entire exhibit is contained on pages 505-506 which is the note Marshall gave to Chop on April 5, 1988.

(f) The note, which was written for litigation purposes, states in part:

Dr. Chop my lawyer needs a copy from you, & I am also getting one from my pshyc., Dr. Farley. He needs the date in Jan. that I first came in and put me on med. & referred me to pshyc.

1. Date in Jan. temporarily disabled to work due to harassment from work &/or injury.

* * *

My lawyer is putting me back on drawing workman's comp. again & making them pay for my pshyco. but he also needs the copy from you that started temp. disabled to work starting Jan

During his testimony, Chop discussed this note and his refusal to provide Marshall's attorney the information requested by Marshall because, according to Chop, he "wasn't willing to try to make this appear to be a work-related injury."

(g) Nelson Electric's exhibit 55 contains eleven pages in Marshall's handwriting, explaining her problems. There is no reference in the exhibit to any alleged harassment. Marshall admitted during her cross-examination that she prepared this document for Chop to describe the pain that she was suffering.

5. Noah was a poor witness as well. His testimony was likewise impaired on cross-examination by plaintiff's counsel. Moreover, it was clear to the Court that Noah was, indeed, a "dirty old man." Unfortunately, however, many of Marshall's claims regarding Noah were exaggerated, with the Court being left to sift through the tattered remains of the credibility of these two witnesses. The Court finds that the truth is somewhere between the two versions advanced, but only as reflected in these findings. Significantly, however, the Court finds that the harassment and sexual atmosphere discussed in this Order was not made known to Nelson Electric's management until late in the game, and when it was, Nelson took proper remedial action.

6. Marshall welcomed much of Noah's conduct and did not find it offensive on many occasions. On other occasions she asked Noah to leave her alone.

7. On cross-examination, Marshall acknowledged she also used "dirty talk" in the workplace; admitted from time to time she

had asked others at work whether they had sex the night before; admitted she did not mention sexual harassment in the union grievance she pursued in connection with her layoff; conceded she was involved in an incident when Noah's pants were pulled down at work; and acknowledged that despite this alleged harassment at the hands of Noah, she repeatedly contacted Nelson Electric management after her transfer to another department asking to be transferred back into Noah's department and placed under his supervision. Several other witnesses corroborated Marshall's central role in the sexually charged atmosphere of Department 411.

8. While working in Department 411, Marshall molded firestop putty, a product of Nelson Electric, into penises and figures with large genitals. These molded figures were proudly displayed by Marshall and by her co-employees in Department 411, Metta McGee, Juanita Holloman and Pat Souhrada McDannald. Marshall's co-employees testified that Marshall made many of the penises, at least as many as the other employees, and seemed to enjoy making them. This rebuts Marshall's testimony that she only made one such penis in an attempt to embarrass Noah so that he would quit making them. Marshall's rebutted testimony is rejected by the Court.

9. The Court also rejects Marshall's claim that on Friday, August 8, 1986, Noah pressured her to meet him at his church to have sex. The Court further rejects the notion that a heated argument ensued when Marshall refused, that Noah threatened to lay her off, and that in retaliation Noah informed Marshall on

the next Monday that she was being laid off. The Court finds this testimony unworthy of belief.

10. Marshall was not subjected to continuous and relentless instances of sexual harassment by Noah, as she alleges, especially when viewed in light of her own conduct, the indications she gave to her co-workers regarding such conduct, the totality of circumstances and the context and environment of Department 411. Acquiescence in sexual harassment was not a condition of her continuing employment. Marshall was a leading participant, if not the leader, in the sexually charged environment, according to the credible testimony of her co-workers, witnesses Metta McGee, Pat Sourhada, Juanita Holloman, and of Noah.

11. Noah did not keep Marshall out of Department 411 in retaliation for her refusal to have sex with him.

12. After Marshall left Department 411 and began working in Department 710, Noah did not continue to harass her. As Marshall testified, the harassment "pretty much stopped" at that time. The Court finds it stopped altogether after Marshall left Department 411.

C. Additional findings regarding liability of Nelson Electric.

1. On June 30, 1986, John Fitzgerald, the Union Shop Steward, told Bill Coleman, Human Resources Specialist for Nelson Electric, that there was a problem with "dirty talk" in Department 411 but that he believed he had solved the problem, that Coleman did not need to take any action, and that if he needed assistance from Coleman in the future he would notify Coleman.

2. As the Union Shop Steward, Fitzgerald was responsible for handling Marshall's complaints and Coleman was justified in relying upon Fitzgerald's representations that he believed he had the problem concerning "dirty talk" in Department 411 solved. Both Fitzgerald and Coleman thereafter checked the Department 411 work area on occasion and observed no problem. After June 30 and until October 20, 1986, Marshall did not complain again. Indeed, in September of 1986, after she had been laid off from Department 411 and bumped into Department 710, she filed a grievance seeking to return to Department 411. These circumstances were further indications to Nelson Electric that Marshall did not object to the environment in Department 411. On October 20, 1986, Marshall complained directly to Nelson Electric for the first time.

3. On August 16, 1986, Marshall was laid off from Department 411 solely due to economic conditions. Orders for products in the Marshall's product group decreased significantly for four to six weeks before Marshall was laid off. Labor hours in Marshall's product group also decreased at the time Marshall was laid off.

4. After her layoff from Department 411, and while Noah still worked in that department, Marshall continuously attempted to return to the department. Marshall testified at her arbitration hearing: "[I] was continuously trying to get back into Department 411."

5. Ultimately, on October 20, 1986, Marshall complained about the harassment to the President of Nelson Electric, Ivan

Ellsworth, and also filed her complaint with the EEOC thereafter. Ellsworth instructed the Human Resources Department to conduct an investigation, which it did. Bill Coleman, the Human Resources Manager for Nelson Electric, took recorded statements of the employees in the Mod Center.

6. Nelson Electric took immediate action after receiving Marshall's written complaint. An investigation was conducted and Marshall's coworkers were interviewed. Upon completion of the investigation Noah was notified that he would no longer work at Nelson Electric effective November 1, 1986. After November 1, 1986, Marshall had no contact with Noah until she filed this lawsuit.

7. On July 2, 1987, Marshall and a male coworker were laid off from Department 411. Upon being notified of this layoff, Marshall read and signed a form indicating she did not wish to bump into any other position.

8. During 1986 and 1987 the non-salaried workforce at the plant where Marshall worked decreased from 198 to 115 employees. The economic downturn in Department 411 merely reflected the continuing decrease in the overall work force at Nelson Electric during these years.

9. Marshall's layoffs were accomplished pursuant to and in compliance with the terms of the Collective Bargaining Agreement.

10. Moreover, Noah was not acting within the scope of his authority as a foreman at Nelson Electric when he sexually harassed Marshall.

11. Nelson Electric had established an effective means for employees to voice complaints of harassment without having to go through the alleged harasser, and had a policy against sexual harassment.

D. Other factual findings

1. The Court finds Marshall belongs to a protected group.

2. The Court finds Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.

3. However, the Court also finds that although Noah was a foreman, he was not a supervisory employee within the meaning of Title VII. Thus, Nelson Electric is not automatically liable for the acts of Noah under Title VII. Rather, Nelson Electric is liable for the acts of Noah only if it knew or should have known of the harassment and failed to take appropriate remedial action.

4. The Court finds Nelson Electric, through its officers and supervisors, neither knew nor should have known of the sexual harassment by Noah until October 1986.

5. Moreover, the Court finds that once Nelson Electric was made aware of the harassment, Nelson took proper remedial action. Nelson did not ignore the conduct of Noah, nor did Nelson acquiesce in the conduct of Noah.

6. The Court finds that none of the layoffs of Marshall were due to sexual discrimination. Rather the layoffs were due solely to economic motives concerning the business turndown at Nelson Electric and/or the lack of work in Department 411.

7. The Court concludes Marshall was not laid off in retaliation for her complaint about harassment.

IX. CONCLUSIONS OF LAW ON MARSHALL'S TITLE VII CLAIM AGAINST NELSON ELECTRIC

If any conclusion of law in this order should more properly be designated a finding of fact, it is hereby deemed a finding of fact.

1. Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [his or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The phrase "terms, conditions, or privileges of employment" encompasses the entire spectrum of disparate treatment of men and women in employment. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

2. Sexual harassment is a form of employment discrimination prohibited by Title VII: Id. at 65; Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987).

3. Circuit courts have expressed their strong concern for the "menace of sexual harassment in the workplace." See, e.g., Starett v. Wadley, 876 F.2d 808, 815 n.9 (10th Cir. 1989); see also Williams v. Maremont Corp., 875 F.2d 1476, 1477 and 1485 (10th Cir.

1989) (employer had legal right to terminate supervisory employee based in part on evidence that he pulled down his zipper and told female employee "if you want it here it is").

4. Two distinct forms of sexual harassment are actionable under Title VII: (a) quid pro quo and (b) hostile work environment. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). See also Meritor, 477 U.S. at 66.

5. In this case Marshall sought relief under the hostile work environment theory.

6. In order to state a prima facie case under the hostile work environment theory Marshall must prove:

- a. she belongs to a protected group;
- b. she was subject to unwelcome sexual harassment;
- c. the harassment was based on sex;
- d. the harassment affected a "term, condition, or privilege" of employment; and
- e. Nelson Electric knew or should have known of the harassment in question and failed to take proper remedial action.

Jones v. Wesco Investments, Inc., 846 F.2d 1154, 1156 (8th Cir. 1988).

7. "[N]ot all workplace conduct that may be described as "harassment" affects a 'term, condition, or privilege' of employment within the meaning of Title VII." Meritor, 477 U.S. at 67. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of

employment and create an abusive working environment.'" Id. (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). "[T]he trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" Meritor, 477 U.S. at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

8. Courts may properly resort to EEOC guidelines for guidance in sexual harassment cases. Meritor, 477 U.S. at 65.

9. Title 29 C.F.R. § 1604.11 sets forth the EEOC guidelines defining sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

* * *

(c) Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

29 C.F.R. § 1604.11 (a), (c), (d) (1988) (emphasis added).

10. In Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), the United State Supreme Court rejected the standard of strict

liability of an employer for sexual harassment by its supervisors in a hostile work environment claim.⁸

11. Title VII defines "employer" to include any "agent" of the employer. Thus, the determination depends on agency principles. In Meritor, the Supreme Court discussed the issue of employer liability for the acts of its employees, but "decline[d] to issue a definitive rule on employer liability." Meritor, 477 U.S. at 72.

The trial court in Meritor had determined that the bank (employer) was not liable because it did not have notice of the alleged conduct, finding that notice to the alleged harasser (who was the vice president of the bank and the manager of the branch office where the conduct occurred) was not the equivalent of notice to the bank. The Court of Appeals took the opposite view and held the bank strictly liable for the manager's conduct even though the bank did not know and could not reasonably have known of the alleged misconduct. The Court of Appeals held that "a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an 'agent' of his employer for all Title VII purposes, since 'even the appearance' of such authority may enable him to impose himself on his subordinates." Id. at 69-70.

⁸ Prior to Meritor the EEOC and some cases held the employer strictly liable for the acts of its supervisors, regardless of knowledge; other courts held that the employer was liable only if it knew or should have known of the harassment and failed to take prompt remedial action. Henson, supra; Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

The Supreme Court rejected the strict liability view adopted by the Court of Appeals. The Supreme Court described the varying positions taken by the plaintiff, the defendant, and the EEOC (amicus curiae), but declined to adopt any of those positions. Instead, the Court said:

We do agree that Congress wanted courts to look to agency principles for guidance in this area. . . . Congress' decision to define 'employer' to include any 'agent' of the employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. Id.

In addition, the Supreme Court rejected the view that the mere existence of a policy against discrimination and a grievance procedure coupled with the plaintiff's failure to invoke the procedure, necessarily insulates the employer. In Meritor the policy was a general one and did not address sexual harassment in particular; moreover, the grievance procedure required the complainant to complain first to the direct supervisor who, in this case, was the alleged harasser. Meritor, 447 U.S. at 72-73.

12. In Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417-18 (10th Cir. 1987), the Tenth Circuit described its application of the agency principles suggested by the Supreme Court in Meritor. The Tenth Circuit said:

We find guidance in the Restatement (Second) of Agency § 219 (1958). Under § 219(1), an employer is liable for any tort committed by an employee "while acting in the scope of . . . employment." Id. However, as

one commentator noted, 'a sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business.' Thus, 'confining liability ... to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees.

Although § 219(1) ... provides scant assistance in assessing employer liability under Title VII, § 219(2) is more helpful. In particular, § 219(2) creates employer liability when (1) the master was negligent or reckless, and (2) where the servant purported to act or to speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Hicks, 833 F.2d at 1418 (citations omitted). With those principles in mind, the Tenth Circuit remanded, noting that "Gates might be liable for the acts of sexual harassment of Gleason." Id. at 1418. (Gleason was a supervisor at Gates Rubber Company.)

13. The following factors, though not exclusive, are relevant to determining employer liability for its own conduct in allowing a hostile environment situation to occur:

a) notice to the employer and the employer's failure to take prompt remedial action;

b) the lack of any policy against sexual harassment;

c) the lack of an established or effective means for employees to voice complaints of harassment without having to go through the alleged harasser;

d) pervasive and long continuing harassment which would constitute constructive knowledge to the employer.

14. Unlike the quid pro quo case, a hostile work environment claim may arise from the harassing conduct of co-employees. Where non-supervisors are involved, the general rule is that the employer is liable only when it has actual or constructive knowledge of the harassment and fails to take immediate and appropriate remedial action. Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990); Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986); Barrett v. Omaha National Bank, 726 F.2d 424, 427 (8th Cir. 1984).

15. The Court concludes Marshall belongs to a protected group.

16. The Court concludes Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.

17. However, the Court also concludes that although Noah was a foreman, he was not a supervisory employee within the meaning of Title VII. Thus, Nelson Electric is not automatically liable for the acts of Noah under Title VII. Rather, Nelson Electric is liable for the acts of Noah only if it knew or should have known of the harassment and failed to take appropriate remedial action.

18. The Court concludes Nelson Electric, through its officers and supervisors, neither knew nor should have known of the sexual harassment by Noah until October 1986.

19. Moreover, the Court concludes that once Nelson Electric was made aware of the harassment, Nelson took proper remedial action. Nelson did not ignore the conduct of Noah, nor did Nelson acquiesce in the conduct of Noah. Unlike Baker v. Weyerhaeuser, 903 F.2d 1342, 1347 (10th Cir. 1990), here the employer, Nelson Electric, did not engage in an "utter failure through its officers

and supervisors to take action against [co-worker] Caldwell, a known sexual harasser of females." Here, Nelson did not ignore or acquiesce in the conduct of its employee Noah. To the contrary, Nelson investigated the matter and Noah was removed.

20. The Court concludes that none of the layoffs of Marshall were due to sexual discrimination. Rather the layoffs were due solely to economic motives concerning the business turndown at Nelson Electric and the lack of work in Department 411.

21. The Court concludes Marshall was not laid off in retaliation for her complaint about harassment.

22. Marshall is not claiming in this lawsuit that her layoff from Department 411 in August, 1986, and the subsequent denials of recall to Department 411, were violations of Title VII.

23. Nelson Electric committed no acts toward Marshall which constitute sexual harassment or which created a hostile work environment, either when analyzed subjectively or objectively, in light of Marshall's own conduct and the work atmosphere in Department 411. Marshall's conduct indicates that the work environment at Nelson Electric was not offensive or unwelcome to her.

24. Nelson Electric is not responsible or liable under Title VII for the improper conduct of Noah. Nelson Electric was not negligent or reckless in handling Marshall's complaints, and Marshall has not proven that Noah, in engaging in the offensive conduct, purported to speak or act on behalf of Nelson Electric, relied upon apparent authority from Nelson Electric, or that his

offensive conduct was aided by the existence of an agency relationship with Nelson Electric.

25. Marshall has not satisfied her burden of proving that a discriminatory motive played a part in her layoff on July 2, 1987.

26. Nelson Electric established a proper non-discriminatory economic motive for laying Marshall off in August, 1986 and June, 1987. Marshall has not satisfied her burden of showing that such motive was mere pretext for discrimination.

27. Marshall was laid off pursuant to the terms of the valid and binding collective bargaining agreement in effect at Nelson Electric.

28. The Arbitrator's decision rendered as a result of Marshall's grievances is entitled to substantial weight.

X. BILL OF COSTS

Marshall filed a bill of costs to which defendants objected. In light of this Order, Marshall's bill of costs is DENIED and defendants' objections are deemed MOOT.

XI. ATTORNEY'S FEES

Title 42 U.S.C. § 2000e-5(k) grants the Court discretion to award attorney's fees to the prevailing party in a Title VII action and the Supreme Court has clearly defined the standard for making such an award to a prevailing defendant. A defendant is entitled to recover attorney's fees in a Title VII action only if the Court makes a finding that the action was brought in bad faith or was frivolous, unreasonable, or without foundation. Christiansburg

Garment Co. v. EEOC, 434 U.S. 412 (1978); EEOC v. St. Louis-San Francisco R.R., 743 F.2d 739, 744 (10th Cir. 1984).

In the instant case, the Court is not able to make such findings. The issues were both novel and complex and there were numerous close legal and factual questions. Indeed, the statute of limitations question was sufficiently close that the Court took the matter under advisement.

While counsel for both sides were contentious at times and the case was hard fought by both sides, the Court finds Marshall's Title VII action was not brought in bad faith and cannot be characterized as frivolous, unreasonable or without foundation.

Accordingly, defendants are not entitled to recover their attorney fees as the prevailing party in this matter.

XII. JUDGMENT

A judgment in favor of defendants accompanies this Order, and is filed separately. The Court's previous partial judgment entered on October 29, 1990, in favor of Marshall on the intentional infliction of emotional distress claim is now withdrawn. The accompanying judgment represents the final judgment of this Court in this matter.

IT IS SO ORDERED THIS 21st DAY OF JUNE 1991.



LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE

FILED

JUN 21 1991

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	
)	
COY A. FISHER,)	
)	
Defendant.)	Civil Action No. 90-C-442-E

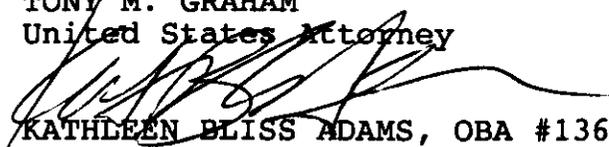
NOTICE OF DISMISSAL

COMES NOW the United States of America by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Kathleen Bliss Adams, 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. This debt has been discharged in Chapter 7 Bankruptcy.

Dated this 21st day of June, 1991.

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney


KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of June, 1991, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Coy A. Fisher at 4227 Evanston Place North, Tulsa, OK 74110



KATHLEEN BLISS ADAMS
Assistant United States Attorney

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

FILED

JUN 21 1991

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

LOUISE M. PENWELL, Independent)
executrix of the Last Will of)
E.L. PENWELL, Deceased, and)
BEN H. COOKSEY III,)

Plaintiffs,)

vs.)

Case No. 90-C 554 C

DEAN B. KNIGHT,)
R. LOUISE KNIGHT,)
VIRGINIA KNIGHT NEEL,)
DEE ANN WHITE, DEAN B.)
KNIGHT, JR, and)
MELVIN T. KNIGHT II,)

Defendants.)

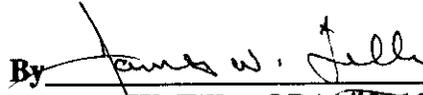
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiffs, Louise M. Penwell, Independent executrix of the Last Will of E.L. Penwell, Deceased, and Ben H. Cooksey III ("Plaintiffs"), and the defendants, Dean B. Knight, R. Louise Knight, Dee Ann White, Melvin T. Knight II, Virginia Knight Neel and Dean B. Knight, Jr. ("Defendants"), pursuant to FED. R. CIV. P. 41(a)(1)(ii), jointly stipulate that the above captioned action be dismissed with prejudice to its refiling, with all parties to bear their own respective cost and attorneys' fees.

**BOONE, SMITH, DAVIS
HURST & DICKMAN**

TILLY & WARD

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Attorneys for Plaintiffs

Attorneys for Defendants

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

FILED

JUN 21 1991

DEBORAH S. MARSHALL,

Plaintiff,

v.

NELSON ELECTRIC, a Unit of
General Signal, et al.,

Defendants.

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

No. 88-C-1213-P

JUDGMENT

In accordance with the Court's order granting defendants' motions for judgment notwithstanding the verdict on plaintiff's intentional infliction of emotional distress claim, together with findings of fact and conclusions of law on plaintiff's Title VII non-jury claim, entered this same date, the Court hereby enters **JUDGMENT** in favor of defendants Luther Noah and Nelson Electric and against plaintiff Deborah S. Marshall on plaintiff's claim of intentional infliction of emotional distress, and **JUDGMENT** in favor of defendant Nelson Electric and against plaintiff Deborah S. Marshall on plaintiff's Title VII claim.

DATED THIS 21st DAY OF JUNE 1991.



LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE