

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

**FILED**

JUL 31 1991

BAILEY PETROLEUM CORPORATION, )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
SCIENTIFIC DRILLING INTERNATIONAL, )  
INC., a Nevada corporation, )  
 )  
Defendant. )

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

No. 91-C-232-B

O R D E R

Before the Court is the Joint Motion to Transfer Action filed by the plaintiff, Bailey Petroleum Corporation, and the defendant, Scientific Drilling International, Inc.. Pursuant to 28 U.S.C. §1404(a) and for the convenience of the parties and witnesses, the Court transfers this action to the United States District Court for the Western District of Oklahoma.

IT IS SO ORDERED, this 31<sup>st</sup> day of July, 1991.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED**

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

JUL 31 1991

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

MALLOY & ELDER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Defendant. )

91-C-483-E

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed July 11, 1991 in which the Magistrate Judge recommended that Plaintiff's Application for Restraining Order be denied and that as a result of the plain reading of the Rights to Privacy Act, that Defendant's Motion to Dismiss be granted, the issues raised therein merging with those raised by Plaintiff in its Application.

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 Plaintiff's Application for Restraining Order is denied and that as a result of the plain reading of the Rights to Privacy Act, that Defendant's Motion to Dismiss is granted, the issues raised therein merging with those raised by Plaintiff in its Application.

Dated this 31<sup>st</sup> day of July, 1991.

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

JUL 31 1991

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ONE PARCEL OF REAL PROPERTY, )  
 WITH BUILDINGS, APPURTENANCES, )  
 AND IMPROVEMENTS, KNOWN AS: )  
 ROUTE 2, BOX 906, )  
 CLAREMORE, ROGERS COUNTY, )  
 OKLAHOMA, )  
 )  
 Defendant. )

CIVIL ACTION NO. 91-C-315-B

JUDGMENT OF FORFEITURE

This cause having come before this Court upon plaintiff's Application filed herein, and being otherwise fully apprised in the premises, the Court finds as follows:

That the verified Complaint for Forfeiture In Rem was filed in this action on the 13th day of May, 1991; the Complaint alleges that the defendant real property, with buildings, appurtenances, and improvements are subject to forfeiture pursuant to Title 21 U.S.C. § 881(a)(6) because it was furnished, or was intended to be furnished, in exchange for a controlled substance, and pursuant to 21 U.S.C. § 881(a)(7), because it was used, or was intended for use, to commit, or to facilitate the commission of a violation of Title 21 United States Code.

That a Warrant of Arrest and Notice In Rem was issued on the 13th day of May, 1991, by the Honorable Thomas R. Brett, Judge of the United States District Court for the Northern

District of Oklahoma, as to the defendant real property, with buildings, appurtenances, and improvements.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant real property, with buildings, appurtenances, and improvements on the 16th day of May, 1991.

That the United States Marshals Service personally served all persons having an interest in this action, as follows:

|                         |              |
|-------------------------|--------------|
| Michael Kenneth Roberts | May 16, 1991 |
| Aida L. Roberts         | May 17, 1991 |

That USMS Forms 285 reflecting service on the above-named persons are on file herein.

That all persons interested in the defendant real property hereinafter described were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claims.

That the defendant real property, with buildings, appurtenances, and improvements upon whom personal service was

Marshal according to law, and that no right, title, or interest shall exist in any other party.

IT IS FURTHER ORDERED by the Court that the proceeds of the sale of the above-described real property, its buildings, appurtenances, and improvements, located at Route 2, Box 906, Claremore, Rogers County, Oklahoma, shall be distributed in the following priority:

a) First, for the payment to the United States of all expenses of forfeiture of the defendant real property, including, but not limited to expenses of seizure, custody, advertising, and sale.

b) Second, for payment of all real estate taxes owed on the property to date of sale, to the extent that the United States of America is responsible for said taxes.

c) Third, for payment to the United States of America of all amounts remaining after the above disbursements.

~~S/ THOMAS R. BRETT~~  
THOMAS R. BRETT  
Judge of the United States District  
Court for the Northern District of  
Oklahoma

CJD/ch  
01596

FBI SEIZURE NO. - 3580-91-F-049

**OTHER AGENCIES:**

DEA, IRS, USCS, TCSO, RCSO,  
TPD, CPD, INS, ATF, RCDA



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

FILED

JUL 31 1991

DA

CLERK  
U.S. DISTRICT COURT

COMMITTEE FOR THE FIRST AMENDMENT, )  
an unincorporated association of )  
students, faculty, and other )  
members of the University commu- )  
nity of Oklahoma State University, )  
including the following individual )  
members, et al., )

Plaintiffs, )

vs. )

Case No. 89-C-830-B ✓

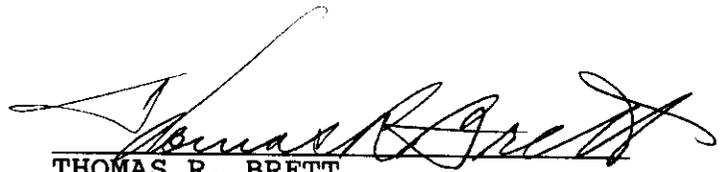
JOHN R. CAMPBELL, individually )  
and in his official capacity )  
as President of Oklahoma State )  
University, et al., )

Defendants. )

J U D G M E N T

In accordance with the Order entered herein on July 31, 1991, awarding attorneys fees and costs in favor of the Plaintiffs and against all Defendants except Defendants Ron Beer and Tom Keys, the Court hereby enters Judgment in favor of the Plaintiffs and against the Defendants John R. Campbell, H. Jerrell Chesney, Carolyn Savage, L.E. Stringer, Jack Craig, Austin Kenyon, Bill Braum, John W. Montgomery, Jimmie Thomas, Robert D. Robbins and Ed Malzahn, in their official capacities only, except no Judgment is entered against Defendants Ron Beer and Tom Keys, for attorneys fees in the amount of \$18,082.50 and costs of \$240.00, plus post-judgment interest on said sums at the rate of 6.26% (28 U.S.C. §1961) from the date hereof until paid.

DATED this 31<sup>ST</sup> day of July, 1991.

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

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 31 1991

JACK SILVER, CLERK  
U.S. DISTRICT COURT

COMMITTEE FOR THE FIRST AMENDMENT, )  
an unincorporated association of )  
students, faculty, and other )  
members of the University commu- )  
nity of Oklahoma State University, )  
including the following individual )  
members, et al., )

Plaintiffs, )

vs. )

JOHN R. CAMPBELL, individually )  
and in his official capacity )  
as President of Oklahoma State )  
University, et al., )

Defendants. )

Case No. 89-C-830-B ✓

O R D E R

This matter comes on for consideration upon the Application of Plaintiffs for Attorneys Fees and Litigation Expenses in the amount of \$46,855.93, and for Review of a Bill of Cost in the amount of \$306.50.<sup>1</sup>

Plaintiffs filed this action, on October 5, 1989, seeking declaratory and injunctive relief for alleged violations of their civil rights under the First and Fourteenth Amendments of the Constitution of the United States. Plaintiffs are students, faculty members and other interested members of the university community at Oklahoma State University (OSU). Plaintiffs, alleging they were

<sup>1</sup> The Bill of Cost assessment, sought by the Plaintiffs was denied by Court Clerk Jack Silver on the ground there was no prevailing party in this matter.

acting out of an interest in seeing the University remain, and promoted as, a free and unfettered forum for the presentation of a wide variety of free expression, ideas and concepts, brought this suit individually and as representatives of students, faculty members and other interested persons who wished to view the film "*The Last Temptation of Christ*", or have the opportunity to view the film on the campus of Oklahoma State University.

Defendants are members of the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, and various officials with responsibility under Oklahoma law for the governing and control of OSU. Plaintiffs alleged Defendants opened and maintained a "limited public forum" by suspending, on or about September 22, 1989, the film's scheduled presentation on October 19, 20 and 21, 1989, until responses to a number of questions posed by the Regents were made. Plaintiffs allege Defendants thereby engaged in a form of "content based discrimination", and that causing cancellation of its presentation at the scheduled time amounted to "prior restraint", all in violation of the First Amendment of the Constitution of the United States.

Between September 22 and October 5, 1989, counsel for the respective parties had several telephone conversations relative to when the Board of Regents would again meet to make a final decision as to the showing of the film on the scheduled dates. Counsel for Defendants urged Plaintiffs' counsel not to file the action until the Board of Regents held its meeting, then unscheduled.

Plaintiffs filed this action on October 5, 1989, seeking Preliminary Injunctive Relief and a Temporary Restraining Order.

Plaintiffs Complaint asked the Court to "enter a judgment for damages on behalf of the Plaintiffs in the event that a delay from the original showing of the movie is occasioned by the actions of the Defendants."

On October 6, 1989, Plaintiffs' requested the issuance of an *ex parte* Temporary Restraining Order which was denied by this Court. The Court held a hearing on October 12, 1989, (a Thursday), which began at approximately 3:30 P.M. and lasted until approximately 9:30 P.M.. As the hearing concluded, the Court stated:

"that before this Court intervenes and directs the Board of Regents of the Oklahoma State University how to run their business on this particular issue, I think wisdom would dictate to let them go forward with their special meeting tomorrow. And depending upon what their decision is between then and 9 o'clock on Monday morning, we'll take this matter back up on Monday morning."

The Board did meet on Friday, October 13, 1989, and decided to allow the film to be shown on the scheduled dates.

This Court, on October 16, 1989, held a telephonic hearing with counsel and denied Plaintiffs' request for a preliminary injunction.

On October 19, 1989, Plaintiffs filed their First Amended Complaint seeking at least nominal damages for violation of their constitutional rights, a trial by jury after which the Court should enter a judgment for damages, and allow Plaintiffs attorneys fees and costs. Plaintiffs sought damages against all Defendants except Defendants Beer and Keys.

Plaintiffs seek attorneys fees in the amount of \$46,855.93, plus litigation expenses of \$1,623.43, and previously denied costs

in the amount of \$306.50, as the "prevailing party", based upon 42 U.S.C. § 1988, which provides in pertinent part:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The parties agree a recent enlightenment of the term "prevailing party" appears in Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 103 L.Ed. 866, 109 S.Ct.1486, (1989).

In that case several Teachers' unions challenged a school board policy limiting communications with teachers concerning union employee organization during the school day and proscribing the use of school mail and internal communications systems by employee organizations. The District Court denied all but one claim,<sup>2</sup> and the unions appealed. The Court of Appeals, granting summary judgment to Petitioners, held that the prohibition on teacher use of internal mail and billboard facilities to discuss employee organizations was unconstitutional. The Supreme Court affirmed. 479 U.S. 801, 107 S.Ct., 41, 93 L.Ed.2d 4 (1986).

Thereafter, petitioners filed an application for attorneys fees pursuant to 42 U.S.C. § 1988. The District Court denied the application because Petitioners were not "prevailing parties" and

---

<sup>2</sup> The District Court held that the requirement of school principal approval of teacher meetings with union representatives after school hours was unconstitutionally vague in that no guidelines limited the discretion of the principal's decision to grant or deny access to the campus.

were therefore ineligible for any fee award. The Court of Appeals for the Fifth Circuit applied the "central issue" test<sup>3</sup> and concluded that petitioners were not prevailing parties under §1988. Because of the conflict between the "central issue" view, favored by the Fifth and Eleventh Circuits, and other circuits which applied a less stringent standard (requiring only that a party succeed on a significant issue and receive some of the relief sought), the Supreme Court granted *certiorari*. 488 U.S. 815, 109 S.Ct. 51; 102 L.Ed.2d 30 (1988).

The Supreme Court concluded the "central issue" test, applied by the District Court and Fifth Circuit *sub judice*, was directly contrary to its decision in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). In Hensley the Court held that plaintiffs may be considered "prevailing parties" for attorney's fees purposes "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Id.* at 433, 103 S.Ct. at 1939, quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978). The Court noted that in Hensley certain principles were established to guide the lower courts in setting fee awards in cases where plaintiffs have not achieved complete success. One guideline is where the plaintiff's claims are based on disparate facts and legal theories, and prevailed on only some of those claims, the court concluding that the unrelated claims are to be treated as if they had been

---

<sup>3</sup> This test requires that a party succeed on the "central issue" in the litigation and achieve the "primary relief sought" to be eligible for an award of attorney's fees under 42 U.S.C. §1988.

raised in separate lawsuits, and therefore no fee may be awarded for services on an unsuccessful claim. Another guideline relates to the more typical situation, where the plaintiff's claims arise out of a common or central core of facts, involving similar legal theories. In these more complex inquiries, ". . ."the most critical factor is the degree of success obtained." *Id.* at 436". *Id.* at 1492.

The Court went on to state that

" . . . *Hensley* does indicate that the *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all." *Id.* at 1492.

The Supreme Court concluded that fee awards are proper where a party ". . ."has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980). " *Id.* at 1492, noting that in Texas State Teachers the Supreme Court's summary affirmance of the Court of Appeal's judgment for respondents on the union access issues and for petitioners on the teacher-to-teacher communication issues effectively ended the litigation.

The Court concludes, based upon the rationale of Texas State Teachers, *supra*, and cases cited therein, that Plaintiffs are entitled to an award of attorneys fees as prevailing parties on at least some of the relief sought and success gained in this matter. While dispute existed whether OSU Regents had or had not yet scheduled a meeting to make a final decision as to the showing or non-showing of "*Last Temptation of Christ*", the filing of this lawsuit on

October 5, 1989, and the Court hearing on October 12, 1989, served as a salutary catalyst in the Regents decision to allow the showing of the controversial film on the scheduled dates. However, to continue the litigation beyond the showing of the subject film on the scheduled dates was to continue, in essence, a moot controversy. See the Court's Orders of March 15, 1990, and July 9, 1990.

Plaintiffs' requests for a Temporary Restraining Order and Preliminary Injunction were both denied. Upon considering Defendants' Motion for Summary Judgment the Court dismissed Plaintiffs' action as moot. Yet the film was shown upon the scheduled dates, an avowed object of Plaintiffs' legal action. Plaintiffs' perceived need of filing a lawsuit, arguably unnecessary, was not, in the Court's view, an unreasonable perception.

The Court concludes any relief sought by Plaintiffs beyond the initial Complaint, by the filing of the First Amended Complaint, was superfluous to the primary issue in this matter, i.e. the threatened prevention of the showing of the film "The Last Temptation of Christ", in potential derogation of First Amendment rights of the Plaintiffs and others they represented.

The Court further concludes Plaintiff's are entitled to attorneys fees and costs up to and including October 18, 1989, the date prior to filing the First Amended Complaint. The subject film was shown as scheduled, beginning October 19, 1989. Attorneys fees and costs beyond October 18, 1989, are to be borne by each respective party.

According to the pleadings<sup>4</sup> the parties are in substantial agreement as to the hourly rates and numbers of hours spent on the case by Plaintiffs' attorneys up to October 19, 1989. The Court calculates the attorneys fees and costs allowable to Plaintiffs as follows:

|                    |                                 |
|--------------------|---------------------------------|
| Louis W. Bullock   | \$3,320.00 <sup>5</sup>         |
| D. Gregory Bledsoe | \$1,612.50 <sup>6</sup>         |
| Michael Salem      | <u>\$13,150.00</u> <sup>7</sup> |
|                    | \$18,082.50                     |

The Court concludes the litigation expenses enumerated by Plaintiffs' counsel Michael Salem (\$798.86 up to October 19, 1989) are not appropriate claims as attorneys fees.

Costs are assessed in favor of Plaintiffs and against Defendants in the amount of \$240.00.<sup>8</sup>

The Court concludes Plaintiffs should be and they are hereby awarded attorneys fees and costs herein of \$18,082.50 and \$240.00, respectively, against the Defendants John R. Campbell, H. Jerrell Chesney, Carolyn Savage, L.E. Stringer, Jack Craig, Austin Kenyon, Bill Braum, John W. Montgomery, Jimmie Thomas, Robert D. Robbins

---

<sup>4</sup> See Exhibit H, attached to Defendants' Response To Motion To Compel, a letter dated February 28, 1991, from Defendants' counsel Barbara G. Bowersox to Plaintiffs' counsel Michael Salem.

<sup>5</sup> 18.5 hours @ \$175.00, plus paralegal (\$82.50). See docket entry #47.

<sup>6</sup> 10.75 hours @ \$150.00. See docket entry #48.

<sup>7</sup> 105.20 hours @ \$125.00. See docket entry #46.

<sup>8</sup> Of the \$306.50 Bill of Costs filed by Plaintiffs, the Court has excluded \$166.50, the cost of the transcript of the October 12, 1989, hearing. Although the Court has determined the hearing was indeed pertinent to the issues herein, the transcript was ordered on December 21, 1989, a date after which the Court has determined the issues to be essentially moot.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

VICTOR TYRONE BIRMINGHAM;  
EARLENE J. ALLEN; COUNTY  
TREASURER, Tulsa County,  
Oklahoma; and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

JUL 30 1991

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

TIME STUDY CASE  
Time Spent by Judge or Magistrate

CIVIL ACTION NO. 89-C-350-E

DEFICIENCY JUDGMENT

This matter comes on for consideration this 30 day  
of July, 1991, upon the Motion of the Plaintiff, United  
States of America, acting on behalf of the Secretary of Veterans  
Affairs, for leave to enter a Deficiency Judgment. The Plaintiff  
appears by Tony M. Graham, United States Attorney for the  
Northern District of Oklahoma, through Phil Pinnell, Assistant  
United States Attorney, and the Defendant, Earlene J. Allen,  
appears neither in person nor by counsel.

The Court being fully advised and having examined the  
court file finds that a copy of Plaintiff's Motion was mailed to  
Defendant, Earlene J. Allen, 336 East Zion Place, Tulsa, Oklahoma  
74106, and all other counsel and parties of record.

The Court further finds that the amount of the Judgment  
rendered on October 10, 1989, in favor of the Plaintiff United  
States of America, and against the Defendants, Victor Tyrone  
Birmingham and Earlene J. Allen, with interest and costs to date  
of sale is \$34,185.20.

The Court further finds that the appraised value of the real property at the time of sale was \$2,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered October 10, 1989, for the sum of \$5,334.00 which is more than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on July 18, 1991.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Earlene J. Allen, as follows:

|  |                   |
|--|-------------------|
| Principal Balance as of 10-10-89       | \$24,510.51       |
| Interest                               | 7,793.77          |
| Late Charges to Date of Judgment       | 211.48            |
| Appraisal by Agency                    | 500.00            |
| Management Broker Fees to Date of Sale | 622.10            |
| Abstracting                            | 286.00            |
| Publication Fees of Notice of Sale     | 156.34            |
| Court Appraisers' Fees                 | <u>105.00</u>     |
| TOTAL                                  | \$34,185.20       |
| Less Credit of Sale Proceeds           | - <u>5,334.00</u> |
| DEFICIENCY                             | \$28,851.20       |

plus interest on said deficiency judgment at the legal rate of 6.26 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of

Judgment rendered herein and the sale proceeds of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Earlene J. Allen, a deficiency judgment in the amount of \$28,851.20, plus interest at the legal rate of 6.26 percent per annum on said deficiency judgment from date of judgment until paid.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM  
United States Attorney



PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

PP/esr

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

**F I L E D**

**JUL 30 1991**

CHERYL A. GUNKEL, )  
)  
Plaintiff, )  
)  
v. )  
)  
SECRETARY OF HEALTH AND HUMAN )  
SERVICES, )  
)  
Defendant. )

Jack C. Silver, Clerk  
U.S. DISTRICT COURT  
89-C-299-B

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed June 18, 1991 in which the Magistrate Judge recommended that the decision of the Secretary's denial of disability benefits be affirmed.

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 the Secretary's denial of disability benefits be affirmed.

Dated this 30<sup>th</sup> day of July, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED**

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

JUL 30 1991

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SEVEN THOUSAND FIVE HUNDRED )  
TWENTY-THREE AND 09/100 )  
DOLLARS (\$ 7,523.09) IN )  
UNITED STATES CURRENCY, )  
and )  
ONE 1986 CHRYSLER LeBARON, )  
VIN 1C3BC51E5GG120390, )  
 )  
Defendants. )

CIVIL ACTION NO. 90-C-0041-E

JUDGMENT OF FORFEITURE

IT NOW APPEARS that the forfeiture proceeding herein has been fully compromised and settled, as more fully appears in the written Stipulation For Compromise entered into by and between the Claimants, Robert Turner and Linda Taylor, and executed by their attorney, Robert G. Green, and the plaintiff, United States of America, and executed by Catherine J. Depew, Assistant United States Attorney for the Northern District of Oklahoma, filed herein, to which Stipulation for Compromise reference is hereby made and incorporated herein.

It further appearing that no other claims to the defendant currency and vehicle have been filed since such property was seized, and that no other persons have any right, title, or interest in and to the following-described defendant properties:

SEVEN THOUSAND FIVE HUNDRED  
TWENTY-THREE AND 09/100  
DOLLARS (\$ 7,523.09) IN  
UNITED STATES CURRENCY,

and

ONE 1986 CHRYSLER LeBARON,  
VIN 1C3BC51E5GG120390,

Now, therefore, on motion of Catherine J. Depew,  
Assistant United States Attorney, and with the consent of  
Claimants, Robert Turner and Linda Taylor, it is

ORDERED, ADJUDGED, AND DECREED that the following-  
described vehicle:

ONE 1986 CHRYSLER LeBARON,  
VIN 1C3BC51E5GG120390,

be, and it is, hereby forfeited to the United States of America  
for disposition by the United States Marshals Service according  
to law; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the  
defendant currency, the sum of Seven Thousand Five Hundred  
Twenty-three and 09/100 Dollars (\$7,523.09) be returned to the  
Claimant Robert Turner.

DATED this 30<sup>th</sup> day of July, 1991.

S/ JAMES O. ELLISON

---

JAMES O. ELLISON  
Judge of the United States District  
Court for the Northern District of  
Oklahoma

CJD/ch  
01502

**FBI SEIZURE NOS.:**

VEHICLE - #3580-89-F-047  
CURRENCY - #3580-89-F-048

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

**FILED**

JUL 30 1991

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

WANDA RAMSEY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WAL-MART STORES, INC., )  
 a Delaware Corporation, )  
 )  
 Defendant.)

Case No. 90-C-625E

ORDER OF DISMISSAL WITHOUT PREJUDICE

This matter coming on before the undersigned Judge on this 30 day of July, 1991, upon the Motion To Dismiss of Plaintiff, and the Court being fully advised in the premises hereby finds that said Plaintiff should be allowed to Dismiss without prejudice.

IT IS THEREFORE ORDERED that Plaintiff for good cause shown is allowed to dismiss this cause without prejudice.

*By James D. ...*

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

JAD/sw/6/28/91

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

**FILED**

JUL 30 1991

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

THELMA R. SPENCER, and )  
ROBERT E. SPENCER, )  
individually and as )  
husband and wife, )

Plaintiffs, )

vs. )

Case No. 90-C 640 E

KEVIN COLE; AMERICAN )  
FAMILY INSURANCE COMPANY, )  
a foreign corporation; )  
UNITED SOUTHERN ASSURANCE )  
COMPANY, a foreign )  
corporation; PORT CASTA- )  
WAYS; KATHY HIX, as owner )  
proprietor and/or license )  
holder of Port Castaways; )  
and PHILLIPS PETROLEUM )  
COMPANY, a Delaware )  
corporation, d/b/a )  
WASHINGTON EXPRESS CON- )  
VENIENCE-DELI, a/k/a )  
PHILLIPS 66 FOOD PLAZA, )

Defendants. )

ORDER

NOW on this 30<sup>th</sup> day of July, 1991, the  
above-captioned cause comes on before the undersigned Judge of  
the District Court for consideration of defendant, American  
Family Mutual Insurance Company's Application to Dismiss Cross-  
Claims with prejudice. The Court, having reviewed said  
Application, finds that the following Order should issue:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, American Family Mutual Insurance Company's, Cross-Claims against defendants, Kevin Cole, Port-Castaways, Kathy Hix and Phillips 66 Company, a Delaware corporation, d/b/a Washington Express-Convenience Deli, be and the same are hereby dismissed with prejudice with said parties to bear their respective costs.

IT IS SO ORDERED this 30<sup>th</sup> day of July,  
1991.

  
HONORABLE JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT / OKLAHOMA

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

FILED

JUL 30 1991

JAMES EDWARD GOOCH, and )  
CATHERINE M. GOOCH, )  
 )  
Plaintiffs, )

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

-vs-

Case No. 89-C-202-B

HOW INSURANCE COMPANY, )  
N. D. HENSHAW, BARBARA F. )  
HENSHAW, DARRELL G. JENKINS )  
and BARBARA J. JENKINS d/b/a )  
HOLLYWOOD HOMES CONSTRUCTION, )  
 )  
Defendants. )

ORDER

Due to lack of citizenship diversity as required by 28 U.S.C. §1332, this cause is remanded to the District Court of Tulsa County, State of Oklahoma, from which it was removed.

Done this 30 day of July, 1991.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUL 30 1991

AURORA ANN VEALE,  
Plaintiff,

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

vs.

No. 91-C-415-B

RELIANCE STANDARD LIFE  
INSURANCE COMPANY,  
an insurance corporation,  
Defendant.

ORDER OF DISMISSAL WITH PREJUDICE

Upon Application by the parties, and for good cause shown, the Court finds that the above styled and numbered cause of action should be dismissed with prejudice to refiling in the future.

IT IS SO ORDERED this 30<sup>th</sup> day of July, 1991.

**S/ THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 30 1991

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

FRANCES T. GATHRIGHT and )  
CARY K. GATHRIGHT, husband and )  
wife, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
AMERICAN REPUBLIC INSURANCE )  
COMPANY, )  
 )  
Defendant and )  
Third-Party Plaintiff, )  
 )  
vs. )  
 )  
LINUS MUSE, )  
 )  
Third-Party Defendant. )

Case No. 89-C-1059-C

ORDER

On July 22, 1991, the Plaintiffs' Application for Recovery of Attorneys' Fees and Costs came on for hearing before United States Magistrate Judge Jeffrey S. Wolfe pursuant to previous notice to the parties herein. Dallas E. Ferguson of Doerner, Stuart, Saunders, Daniel & Anderson appeared on behalf of the plaintiffs, Frances T. and Cary K. Gathright, and Mary Quinn-Cooper of Rhodes, Hieronymus, Jones, Tucker & Gable appeared on behalf of defendant American Republic Insurance Company. Counsel for plaintiff notified the Court that plaintiffs and defendant had entered into a settlement agreement with respect to Plaintiffs' Application and that under such settlement agreement, the parties had agreed that plaintiffs should be awarded recovery of their attorneys' fees from defendant American Republic Insurance Company in the amount of

14

\$90,000, and that the parties further agreed that such amount, together with the costs herein previously awarded to plaintiffs in the amount of \$7,353.65, would be paid and delivered to plaintiffs and their attorneys of record by defendant within ten days of the date of this hearing. Counsel for defendant American Republic Insurance Company agreed with plaintiffs' representations as to the settlement agreement reached between the parties, and said agreement was approved by the Magistrate Judge.

IT IS, THEREFORE, ORDERED that plaintiffs Frances T. and Cary K. Gathright are hereby awarded recovery of their attorneys' fees from defendant American Republic Insurance Company in the amount of \$90,000.

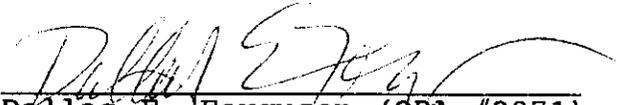
IT IS FURTHER ORDERED that defendant American Republic Insurance Company is to pay the plaintiffs Frances T. and Cary K. Gathright, and their attorneys of record Doerner, Stuart, Saunders, Daniel & Anderson, the total amount of \$97,353.65, said amount representing \$90,000 in attorneys' fees awarded by this Order and \$7,353.65 in costs previously awarded to plaintiffs, with such total amount to be delivered to said counsel of record for plaintiffs no later than August 1, 1991.

Dated this 29 day of July, 1991.

  
~~JEFFREY S. GOFF~~  
UNITED STATES ~~MAGISTRATE~~ JUDGE  
*District*

APPROVED AS TO FORM & CONTENT:

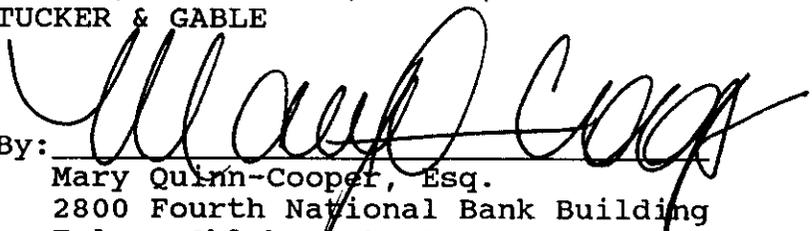
DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON

By: 

Dallas E. Ferguson (OBA #2871)  
Charles Greenough (OBA #12311)  
Susan S. Brandon (OBA #12501)  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for Plaintiffs Frances T.  
Gathright and Cary K. Gathright

RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE

By: 

Mary Quinn-Cooper, Esq.  
2800 Fourth National Bank Building  
Tulsa, Oklahoma 74119  
(918) 582-1173

Attorneys for the Defendant  
American Republic Insurance Company

FILED

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

JUL 30 1991

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

TERRY WAYNE HILL and,  
SUSAN HILL,

Plaintiffs,

vs.

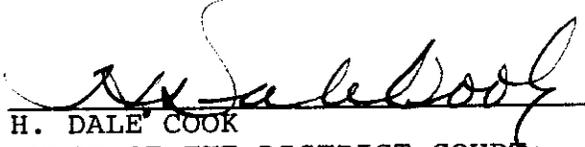
THE CITY OF SAPULPA, OKLAHOMA,  
a municipal corporation; and  
MIKE NAPIER, Police Officer,  
individually, and as an  
employee of the City of  
Sapulpa through the Sapulpa  
Police Department,

Defendants.

Case No. 91-C-0099-C

ORDER OF DISMISSAL WITH PREJUDICE

Upon application of the Plaintiffs, Terry Wayne Hill and Susan Hill, and for good cause being shown, this case is hereby Dismissed with Prejudice at the cost of the Plaintiffs.

  
H. DALE COOK  
JUDGE OF THE DISTRICT COURT

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

**FILED**

JUL 30 1991

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

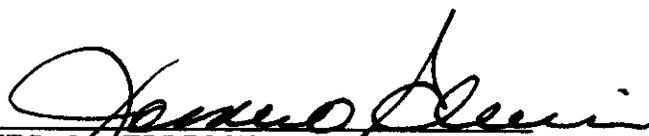
DEBBIE WATKINS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SEARS, ROEBUCK & CO., a New York )  
 corporation; and an unkown )  
 white male, )  
 )  
 Defendants. )

Case No. 90-C-1003-E

DISMISSAL

It is hereby stipulated and agreed between the parties, Debbie Watkins and Sears, Roebuck & Co., by and through their attorneys of record, that this action be, and the same hereby is dismissed with prejudice, pursuant to the Plaintiff's Dismissal With Prejudice which was filed on the 17th day of July, 1991.

IT IS SO ORDERED THIS 30<sup>th</sup> DAY OF JULY, 1991.

  
JAMES O. ELLISON  
JUDGE OF THE DISTRICT COURT

OF COUNSEL:  
Reuben Davis  
Boone, Smith, Davis, Hurst  
& Dickman  
500 ONEOK Plaza  
100 West Fifth Street  
Tulsa, Oklahoma 74103  
(918) 587-0000  
Attorneys for the Defendant  
Sears, Roebuck & Co.

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

FILED

JUL 30 1991

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

DEBBIE WATKINS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SEARS ROBUCK & CO., a )  
 New York corporation; and )  
 an unknown white male, )  
 )  
 Defendant. )

Case No. 90-C-1003-E

ORDER

The Court finds good cause to grant Plaintiff's request for dismissal with prejudice of all her claims and causes of action against all parties in the above styled case as evidenced by her signed Dismissal With Prejudice, and the same is hereby ordered dismissed with prejudice as to its refiling.

7/20/91  
Date

*James O. Silver*  
U.S. District Court Judge/Magistrate

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

JUL 29 1991

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

THE PRUDENTIAL INSURANCE COMPANY )  
OF AMERICA, )

Plaintiff, )

vs. )

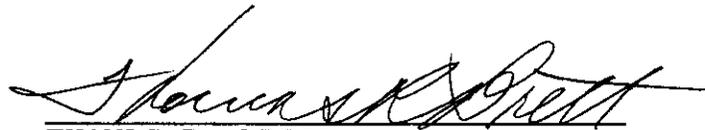
Case No. 90-C-332-B

CARRI A. OMSTEAD (formally )  
Watters), CHARLES THOMAS )  
WATTERS, SR., and DANIEL B. )  
JONES, Administrator of the )  
Estate of CHARLES THOMAS )  
WATTERS, JR., Defendants. )

A M E N D E D J U D G M E N T<sup>1</sup>

In accordance with the Amended Order filed July 29<sup>th</sup>, 1991, sustaining Charles Thomas Watters, Sr.'s Motion For Summary Judgment and denying Carri A. Omstead's Motion For Summary Judgment the Court enters judgment in favor of Charles Thomas Watters, Sr. and against Carri A. Omstead. Each party is to pay his or her own costs and attorneys fees. The Clerk of the Court is directed to disburse to Charles Thomas Watters, Sr. the principal sum of \$135,387.55, less the sum of \$7700.00 previously disbursed to Plaintiff for Interpleader costs and attorneys fees, less the sum of \$3040.87 previously disbursed to Terry M. Thomas, Guardian and Attorney Ad Litem for Charles Thomas Watters, Sr., plus accrued interest on the principal sum, less registry fee.

DATED this 29<sup>th</sup> day of July, 1991.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

<sup>1</sup> The appeal time herein commences from the filing of this Amended Judgment.

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

**FILED**

JUL 29 1991

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

|                     |   |                      |
|---------------------|---|----------------------|
| THOMAS TROY WAITES, | ) |                      |
|                     | ) |                      |
| Plaintiff,          | ) |                      |
|                     | ) |                      |
| vs.                 | ) | Case No. 90-C-1036-E |
|                     | ) |                      |
| FORD MOTOR COMPANY, | ) |                      |
|                     | ) |                      |
| Defendant.          | ) |                      |

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties by and through their counsel of record and, pursuant to Rule 41(a)(1) of the Fed. R. Civ. P., submit the following Stipulation of Dismissal With Prejudice of the above-captioned matter. The parties would advise the Court that a settlement has been reached in this matter.

Respectfully submitted,

  
 Timothy L. Olsen  
 SAVAGE, O'DONNELL, SCOTT,  
 McNULTY, AFFELDT & GENTGES  
 1100 Petroleum Club Building  
 601 South Boulder  
 Tulsa, Oklahoma 74119

ATTORNEYS FOR PLAINTIFF,  
THOMAS TROY WAITES

  
 Dennis Cameron, OBA No. 12236  
 GABLE & GOTWALS  
 2000 Fourth National Bank Building  
 Tulsa, Oklahoma 74119  
 (918) 582-9201

ATTORNEYS FOR DEFENDANT,  
FORD MOTOR COMPANY

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

JUL 29 1991

THE PRUDENTIAL INSURANCE COMPANY )  
OF AMERICA, )  
 )  
Plaintiff, )

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

vs. )

Case No. 90-C-332-B ✓

CARRI A. OMSTEAD (formally )  
Watters), CHARLES THOMAS )  
WATTERS, SR., and DANIEL B. )  
JONES, Administrator of the )  
Estate of CHARLES THOMAS )  
WATTERS, JR., )  
 )  
Defendant. )

A M E N D E D O R D E R

This matter comes on for consideration upon the Cross Motions for Summary Judgment filed by the Defendant Carri A. Omstead (formerly Watters-hereinafter Omstead) and Defendant Charles Thomas Watters, Sr. (hereinafter Watters, Sr.).

Plaintiff, Prudential Insurance Company of America (Prudential), filed this statutory interpleader action pursuant to 28 U.S.C. § 1335, depositing into Court the sum of \$130,000.00, plus accrued interest, which represented the face value of two life insurance policies issued by Prudential upon the life of Charles T. Watters, Jr. (Watters, Jr.), deceased. Defendant Omstead<sup>1</sup> was married to Watters, Jr. during 1987 when Prudential issued these

---

<sup>1</sup> Apparently misspelled, in Prudential's Complaint in Interpleader, as Olmstead.

policies, and is listed as the primary beneficiary of each policy.<sup>2</sup> Omstead and Watters, Jr. divorced in 1989, a Decree of Divorce being entered by the District Court of Pawnee County, Oklahoma, on April 20, 1989. Watters, Jr. died on October 29, 1989, while living in Lewisville, (Denton County) Texas, as a result of a motor vehicle accident.

Defendant, Charles Thomas Watters, Sr. (Watters, Sr.), the father of the deceased, is listed on the two policies as a contingent beneficiary. The whereabouts of Watters, Sr. had been unknown for several years but efforts to locate him were successful. Watters, Sr. has made an appearance<sup>3</sup> in this case and claims the proceeds of the two insurance policies.

The County Court of Denton County, Texas, issued, on April 17, 1990, an Order Granting Letters of Administration, appointing Daniel B. Jones Administrator of the Estate of Charles T. Watters, Jr., Deceased. Because Watters, Sr. had not been located, the Estate of Watters, Jr. claimed the proceeds of the insurance policies. In view of the location and appearance of Watters, Sr., Defendant Jones has herein disclaimed any interest in the insurance proceeds.<sup>4</sup> Plaintiff Prudential has also been discharged from this matter.<sup>5</sup>

---

<sup>2</sup> Under the name of Carri A. Watters.

<sup>3</sup> Watters, Sr. appears by attorney Terry Thomas, appointed by the Court as Guardian Ad Litem and Attorney Ad Litem for Watters, Sr., which appointment is herewith terminated by the Court.

<sup>4</sup> See Agreed Journal Entry of Judgment Discharging Plaintiff, filed herein on February 19, 1991.

<sup>5</sup> Prudential, as interpleader, was granted by agreement of the parties the sum of \$7,400.00 attorneys fees and \$300.00 costs.

By stipulation, the parties agree that the insurance policies at issue in the case were in the physical possession of Charles Thomas Watters, Jr. at the time of the divorce decree entered between Watters, Jr. and Carri A. Watters (Omstead) and remained in the possession of Watters, Jr. until the time of his death. The parties dispute which law, Florida or Oklahoma, should apply to the interpretation of the Prudential policies as well as Omstead's status as ex-wife/primary beneficiary.

Watters, Sr. argues the principal issue herein is the application of Oklahoma's choice of law principles. He argues the policies in question were issued from Prudential's Home Office in Jacksonville, Florida; that premium payments were accepted by Prudential at its Florida office; that the policies identify Jacksonville, Florida as Prudential's "Home Office"; and lastly, from their inception until the payment of benefits, the policies were administered by Prudential from its Home Office in Jacksonville, Florida; that under these facts Oklahoma's choice of law statute dictates that Florida law should be applied by the Court to the interpretation of these policies and the relative claims thereto.

Watters, Sr. further argues that, under Florida law, Omstead has relinquished any possible claim she may have had under the policies as a result of the divorce decree entered in 1989.<sup>6</sup> The operative language in the Pawnee County, Oklahoma, District Court divorce decree between Omstead and Watters, Jr., now relied upon by

---

<sup>6</sup> The actual decree itself was prepared by Omstead's attorney and submitted to the Judge for signature. The divorce was apparently a default situation.

Watters, Sr., provides:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court that the Plaintiff be and she is hereby awarded as his (sic) sole and separate property free and clear of any claims, rights, or interest whatsoever of the Defendant all of her personal effects and belongings now in his (sic) possession. That the Defendants be and he is hereby awarded as his sole and separate property free and clear of any claims, rights, or interest whatsoever of the Plaintiff all of his personal effects and belongings now in his possession.

Omstead, on the other hand, argues that the policies in question list *three* "Home Offices" for Prudential<sup>7</sup>; that in any event precedent dictates, in contract actions, that the law of the place where the contract was made governs with respect to the contract's nature, validity, and interpretation, absent (as allegedly in the policies in question) any specific manifestation of intent to be bound by the laws of a particular jurisdiction. Omstead further argues that since the policies were negotiated and executed in Oklahoma, with insurance premiums being drawn on an Oklahoma bank, that the law of the State of Oklahoma applies.

Oklahoma's choice of law statute, 15 O.S. §162, provides:

A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place it is made.

Both parties cite Rhody v. State Farm Mutual Insurance Company, 771 F.2d 1416 (10th Cir.1985) as a declarative analysis of §162. In Rhody the Court held the language of §162 dictates restricting the application of the "law of the place of performance of a contract

---

<sup>7</sup> One "Home Office" each in the states of Minnesota, Pennsylvania, and Florida.

to cases in which the *place of performance is indicated in the contract.*"

*Ibid.* at 1420. The Court went on to state:

"In the context of insurance policies we have held that the specification of a place for payment of premiums and benefits under the policy signifies the parties' designation of that location as the place of performance of the contract. *Monahan v. New York Life Ins. Co.*, 26 F.Supp. 859 (W.D.Okla.) *aff'd.* 108 F.2d 841 (10th Cir. 1939); *Head v. New York Life Ins. Co.*, 43 F.2d 517 (10th Cir.1930).

footnote 6, following the above, reads, in part, as follows:

"6. Both *Head* and *Monahan* involved life insurance policies. The policies state that premiums and benefits were payable at the insurer's head office in New York. . . ."

In both Head and Monahan the policy provided, as do the instant policies herein, that premiums were payable at the Home Office or to any authorized agent. However, neither opinion in Head or Monahan reflects that the insurance companies involved, New York Life Ins. Co. and Mutual Life Ins. Co. of New York, respectively, had multiple "Home Offices" as does the Plaintiff herein, The Prudential Insurance Company of America.<sup>8</sup> The Court concludes the policies at issue herein do not contain sufficient language to indicate either where the insurance contracts were to be performed, or which jurisdiction's laws would bind the parties in the event of conflict. Therefore, the Court concludes the law of place where the contracts were made should govern the interpretation. 15 O.S. §162

---

<sup>8</sup> In fact, not only does Prudential have, according to the policies, three home offices in Fort Washington, Pa., Minneapolis, Minn., and Jacksonville, Fla., it has its "Principal Office" in Newark, New Jersey.

(1981).

The Court further concludes, under the record now before the Court, the insurance contracts were "made" in the State of Oklahoma and are subject to that forum's laws. Continental Casualty Company v. Owens, 131 P.2d 1084 (Okla. 1913); Minton v. Minton, 39 P.2d 538 (Okla. 1935). The policies were negotiated, executed (by Watters, Jr.) and delivered in the State of Oklahoma. The premiums payments were drawn on a Cleveland, Oklahoma bank apparently through an automatic draw on the Watters/Omstead joint checking account known as Pru-Matic.

Having determined that Oklahoma law governs the interpretation of the insurance policies in issue, the Court next turns to the statutory provision relating to ex-spouses who remain as beneficiaries on insurance policies. 15 O.S. §178, added by Laws, 1987, c. 201, § 2, effective November 1, 1987, provided as follows:<sup>9</sup>

**"§ 178. Death benefits contract for spouse  
revoked upon death of maker--Divorce or  
annulment--Exemptions**

A. If, after entering into a written contract in which provision is made for the payment of any death benefit (including life insurance contracts, annuities, retirement arrangements, compensation agreements and other contracts designating a beneficiary of any right, property or money in the form of a death benefit), the party to the contract with the power to designate the beneficiary of any death benefit dies after being divorced from the beneficiary named to receive such death benefit in the contract, all provisions in

---

<sup>9</sup> This section was amended by Laws 1989, c. 181, §10, effective Nov. 1, 1989. The amendment relates to express trusts created by a decedent during decedent's lifetime, not an issue in the present matter. The amendment also alters the language of paragraph D, quoted and discussed *infra*.

such contract in favor of the decedent's former spouse are thereby revoked. Annulment of the marriage shall have the same effect as a divorce. In the event of either divorce or annulment, the decedent's former spouse shall be treated for all purposes under the contract as having predeceased the decedent.

\*                    \*                    \*

D. This section shall apply to any contract of a decedent dying on or after November 1, 1987.

§178 was amended by Laws 1989, c. 181, §10, effective November 1, 1989. The amendment altered paragraph D. to read:

D. This section shall apply to any contract of a decedent made and entered into on or after November 1, 1987.

Charles Thomas Watters, Jr. died on October 29, 1989. On that date the rights of the parties vested as to the insurance policies on Charles Thomas Watters, Jr.' life. The statutory provision relating to ex-spouses who remain as beneficiaries on insurance policies, in effect at Watters, Jr.'s death was the 1987 version, which read:

D. This section shall apply to any contract of a decedent dying on or after November 1, 1987.

Since Watters, Jr. died after November 1, 1987 but before the 1989 amendment took effect, the earlier paragraph D. clearly applies. Had Watters, Jr. died on November 2, 1989, the earlier paragraph D. would not have been law at the time of his death and therefore the 1989 version of paragraph D. would have applied. This would have resulted in § 178 having no application to the instant matter since all agree the insurance contracts were entered into prior to November 1, 1987. In that event, Carrie Omstead would have prevailed herein, not Charles Thomas Watters, Sr..

The rights of beneficiaries to insurance policies vest upon

the death of the insured. Baird v. Wainwright, et al, 260 P.2d 1060 (Okla. 1953).

Omstead argues Section D. only applies to a contract of a decedent made and entered into on or after November 1, 1987. (emphasis in original). The Court reads this section to apply to decedents who *die* after November 1, 1987, not who have contracted *after* that date. The Watters/Prudential policies were taken out in March, 1987, before the effective date, but Watters, Jr. died *after* the effective date of the act. The Court has been cited no authority for the proposition that a legislative act can divest parties of substantive rights already vested prior to the effective date of such act. The Court concludes Omstead's reading of subsection D is essentially an urging of the 1989 amended paragraph D, and/or an averment that *if* the 1987 version applies, the 1989 paragraph D. *explains* what the earlier paragraph D. means. The Court declines to adopt either Omstead view.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient

to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

It is the Court's view that 15 O.S. §178 applies to the issues herein, effectively revoking Omstead's beneficiary status. Omstead, under the statute's application, "shall be treated for all purposes under the contract as having predeceased the decedent." *Ibid.* at paragraph A. Such revocation of Omstead's status as beneficiary places Watters, Sr., the contingent beneficiary, as the proper recipient of the insurance proceeds, less the heretofore approved and disbursed proceeds paid in connection with the Interpleader action.

The Court concludes Watters, Sr. Motion for Summary Judgment should be and the same is hereby SUSTAINED. Conversely, the Court concludes Omstead's Motion for Summary Judgment should be and the same is hereby DENIED. A Judgment in accord with the views expressed herein will be entered simultaneously herewith.

IT IS SO ORDERED this 29<sup>th</sup> day of July, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

BONNIE PERRY, and )  
ROBERT PERRY, Husband )  
and Wife, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
KOCH INDUSTRIES, INC., a )  
Kansas corporation; KOCH )  
ENGINEERING CO., INC., a )  
Kansas corporation; ERIC )  
SCHLUMPF, an Individual, )  
and JOHN VAN GELDER, an )  
Individual. )  
 )  
Defendants. )

**FILED  
IN OPEN COURT**

JUL 29 1991

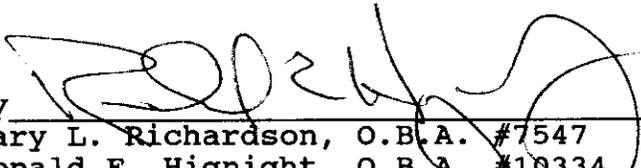
No. 90-C-351-B

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

**JOINT STIPULATION OF DISMISSAL  
OF DEFENDANT KOCH INDUSTRIES, INC.**

COMES NOW, the Parties herein pursuant to Rule 41(a)(1)(ii), and enter into a Joint Stipulation of Dismissal, without prejudice, of the Defendant Koch Industries, Inc., from this action.

Respectfully submitted,

By   
Gary L. Richardson, O.B.A. #7547  
Ronald E. Hignight, O.B.A. #10334  
RICHARDSON, MEIER & ASSOCIATES, P.C.  
5727 South Lewis, Suite 520  
Tulsa, Oklahoma 74105  
(918) 492-7674  
(800) 456-2825

Attorneys for Plaintiff

RICHARDSON & MEIER  
5727 South Lewis, Suite 520  
Tulsa, Oklahoma 74105  
(918) 492-7674  
Perry 91077.1

By Rick E. Bailey  
Mr. Rick E. Bailey  
KOCH INDUSTRIES, INC. 204  
P.O. Box 2256  
Wichita, Kansas 67201

and:

By Marcia Scott  
Ms. Marcia Scott  
ZARBANO, BRIDGER-RILEY,  
LEONARD & SCOTT  
5051 South Lewis  
Tulsa, Oklahoma 74105

Attorneys for Koch & Van Gelder

By Patterson Bond  
Mr. Patterson Bond  
BOND, BALMAN & HYMAN  
2626 East 21st Street, Suite 9  
Tulsa, Oklahoma, 74114

Attorneys for Schlumpf

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

**FILED**

JUL 26 1991

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

ANJA T. GHADIALI, )  
)  
Plaintiff, )  
)  
vs. )  
)  
LOCAL AMERICA BANK, et al )  
)  
Defendant. )

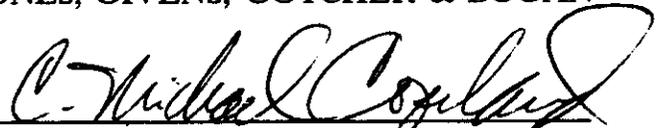
Case No. 90-C-1013-E

**STIPULATION OF DISMISSAL**

COMES NOW the plaintiff, Anja T. Ghadiali, defendant, Local America Bank, and intervenor defendant, Federal Deposit Insurance Corporation, in its capacity as Receiver of MidAmerica Federal Savings and Loan Association (collectively the "Parties"), and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the Parties dismiss with prejudice all claims and causes of action asserted by the Parties against each other, including any claim for recovery of costs and attorney fees incurred by the Parties in the above-captioned civil action.

Respectfully submitted,

JONES, GIVENS, GOTCHER & BOGAN



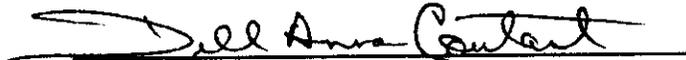
C. Michael Copeland, OBA NO. 13261  
3800 First National Tower  
Tulsa, Oklahoma 74103-4309  
(918) 581-8200

Attorneys for Local America



Michael Mitchelson  
301 N.W. 63rd St., Suite 600  
Oklahoma City, OK 73116

Attorneys for Federal Deposit Insurance  
Corporation



Dell Anna Coutant  
550 Oneok Plaza  
Tulsa, OK 74103

Attorneys for Anja T. Ghadiali

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

PAVITER CORPORATION, a general  
partnership of the Republic  
of Singapore,

Plaintiff,

vs.

Case No. 89-C-1017-C

C & S EQUIPMENT SALES, INC.,  
an Oklahoma corporation,  
MICHAEL T. RAWLINS, an Oklahoma  
resident, S & S ERECTION RENTALS,  
INC., a Missouri corporation,  
HAROLD STOUT, a Missouri resident,  
RAWLINS MANUFACTURING, INC., an  
Oklahoma corporation, RONALD B.  
STOCKWELL, an Oklahoma resident,  
HAROLD CLARK, an Oklahoma resident  
R. BLACK, INC., a Kansas  
company, and ALSOP-BLACK, an  
Oklahoma partnership.

Defendants.

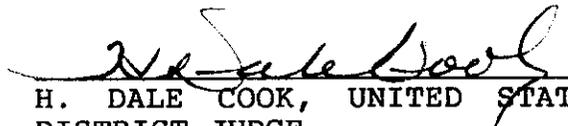
FILED

JUL 26 1991

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

ORDER OF DISMISSAL

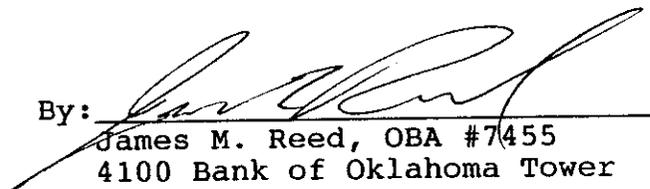
Upon the Application of the Plaintiff, Paviter Corporation,  
all of the Plaintiff's claims against the Defendants, Ronald B.  
Stockwell, Michael T. Rawlins, and Rawlins Manufacturing, Inc., are  
hereby dismissed with prejudice. AND IT IS SO ORDERED.

  
H. DALE COOK, UNITED STATES  
DISTRICT JUDGE

174

APPROVED AS TO FORM:

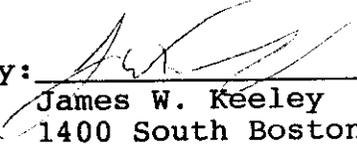
HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.

By: 

James M. Reed, OBA #7455  
4100 Bank of Oklahoma Tower  
Bank of Oklahoma Tower  
Tulsa, Oklahoma 74172  
(918) 588-4166

ATTORNEYS FOR PAVITER CORPORATION

GILL & KEELEY

By: 

James W. Keeley  
1400 South Boston Building  
Suite 680  
Tulsa, Oklahoma 74119

ATTORNEYS FOR RONALD B.  
STOCKWELL, MICHAEL T. RAWLINS AND  
RAWLINS MANUFACTURING, INC.

JCD/jo  
6/3/91

JUL 16 1991  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

GINA TAYLOR,  
  
Plaintiff,  
  
vs.  
  
THE CITY OF TULSA, a Muni-  
cipal corporation; PHIL  
LESSER; PAUL REINKOBER and  
JEROME MCNULTY,  
  
Defendants.

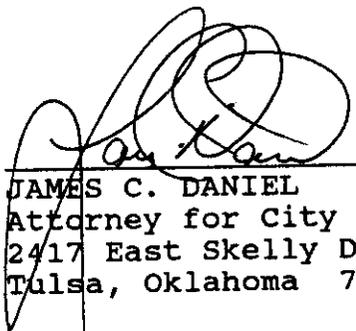
Case No.: 90-C-956-B

DISMISSAL WITH PREJUDICE BY STIPULATION

Come now all attorneys of record, representing all parties herein, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, and by stipulation, agree to the Dismissal of the above-styled and numbered lawsuit, with prejudice to the Plaintiff's right of refileing the same, as all issues of law and fact have been fully compromised and settled.

  
\_\_\_\_\_  
JAMES GARLAND, III  
Attorney for Plaintiff  
1700 Southwest Blvd.  
P.O. Box 799  
Tulsa, Oklahoma 74101

  
\_\_\_\_\_  
SCOTT CANON  
Attorney for Phil Lesser,  
Paul Reinkober and Jerome  
McNulty  
902 South Boulder  
Tulsa, Oklahoma 74119

  
\_\_\_\_\_  
JAMES C. DANIEL  
Attorney for City of Tulsa  
2417 East Skelly Drive  
Tulsa, Oklahoma 74105

  
\_\_\_\_\_  
JACKSON ZANERHAFT  
Attorney for Jerome McNulty  
1717 South Boulder  
Suite 910  
Tulsa, Oklahoma 74119

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

CIVIL ACTION NO. 90-C-904-C

ONE 1988 MERCEDES, )  
VIN WDBEA90DXJF071052, )

and )

ONE LADIES DIAMOND )  
AND SAPPHIRE RING, )

Defendants. )

JUDGMENT OF FORFEITURE

IT NOW APPEARS that the forfeiture proceeding herein has been fully compromised and settled, as more fully appears in the written Stipulation For Compromise entered into by and between the Claimant, James Clinton Garland, and executed by him on the date indicated thereon, and plaintiff, United States of America, and executed by Catherine J. Depew, Assistant United States Attorney for the Northern District of Oklahoma, on the date indicated thereon, and filed herein on the 17<sup>th</sup> day of ~~June~~ <sup>July</sup>, 1991, to which Stipulation for Compromise reference is hereby made and incorporated herein.

It further appearing that no other claims to said property have been filed since such property was seized and that no other persons have any right, title, or interest in the following-described property which is the only defendant property remaining in this cause of action:

The sum of Twenty-nine  
Thousand Dollars  
(\$29,000.00) in United  
States Currency,  
representing proceeds  
from the sale of the  
defendant 1988 Mercedes  
Benz 300 TE Station  
Wagon, VIN  
WDBEA90DXJF071052.

Now, therefore, on motion of Catherine J. Depew,  
Assistant United States Attorney, and with the consent of  
Claimant, James Clinton Garland, it is

ORDERED that the claim of James Clinton Garland in  
this action be, and the same hereby is, dismissed with prejudice  
and without costs, and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that Ten  
Thousand Dollars (\$10,000.00) in United States Currency,  
representing a portion of the proceeds from the sale of the  
defendant 1988 Mercedes Benz 300 TE Station Wagon, VIN  
WDBEA90DXJF071052, be, and it hereby is, condemned as forfeited  
to the United States of America and shall remain in the custody  
of the United States Marshal for disposition according to law,  
and it is

FURTHER ORDERED that the remaining defendant property  
in this cause of action, to-wit: The sum of Nineteen Thousand  
Dollars (\$19,000.00) in United States Currency, representing the  
remaining proceeds from the sale of the 1988 Mercedes Benz 300

TE Station Wagon, VIN WDFBEA90DXJF071052, be, and it is, hereby  
dismissed from this cause of action.

DATED this 24 day of July, 1991.

(Signed) H. Dale Cook  
H. DALE COOK,  
Chief Judge of the United States  
District Court for the Northern  
District of Oklahoma

**FBI SEIZURE #3580-91-F-006**

CJD/ch  
01527

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

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
DON ADAMS AND SHIRLEY A. )  
ADAMS, a/k/a SHIRLEY ANN )  
ADAMS; WAGONER COUNTY )  
TREASURER; THE BOARD OF )  
COUNTY COMMISSIONERS OF )  
WAGONER COUNTY, OKLAHOMA; )  
TRANSAMERICA COMMERCIAL )  
FINANCE CORPORATION; )  
ROGERS COUNTY TREASURER; )  
THE BOARD OF COUNTY )  
COMMISSIONERS OF ROGERS )  
COUNTY, OKLAHOMA; KAMPGROUNDS )  
OF AMERICA, INC.; and STATE OF )  
OKLAHOMA ex rel. OKLAHOMA )  
TAX COMMISSION, )  
 )  
Defendants. )

No. 90 C-910-B ✓

**FILED**  
JUL 24 1991

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

ORDER

Plaintiff, Federal Deposit Insurance Corporation in its corporate capacity as holder of assets of the failed Bank of Commerce & Trust Company, Tulsa, Oklahoma ("FDIC"), has moved for assessment of attorneys' fees against Defendants, Don Adams and Shirley A. Adams. Said Defendants have failed to respond to FDIC's Motion. Accordingly, pursuant to Local Court Rule 15(A), FDIC's Motion is deemed confessed and is granted. Additionally, the Court finds that FDIC is entitled to attorneys' fees pursuant to Okla. Stat. Tit. 12, § 936, and the terms of the Note executed by Don Adams and Shirley A. Adams. See, e.g., Webster Drilling

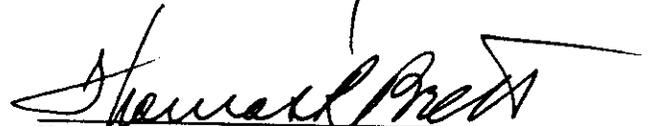
15

16

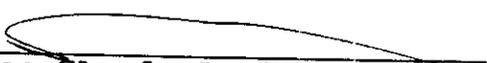
Co. v. Walker, 286 F.2d 114 (10th Cir. 1961). Moreover, the Court finds that the amount of attorneys' fees, \$1,950.00, for which FDIC seeks recovery, is reasonable in light of the factors set forth in Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), and that Defendant is obligated to pay said amount pursuant to the terms of the Notes. See Webster Drilling Co. v. Walker, 286 F.2d 114 (10th Cir. 1961).

FDIC's Motion for Assessment of Attorney's Fees in the amount of \$1,950.00 against Defendants, Don Adams and Shirley A. Adams, is granted, said amount to be included in the Judgment.

IT IS SO ORDERED this 27 day of July, 1991.

  
U. S. DISTRICT COURT JUDGE

APPROVED:

  
R. Pope Van Cleef, Jr./OBA 9176  
Attorneys for Federal Deposit  
Insurance Corporation

BUSH AND UNDERWOOD  
Jamestown Office Park, Suite 200-W  
3037 N.W. 63rd Street  
Oklahoma City, Oklahoma 73116  
Telephone: (405) 848-2600



2. That the policy issued by the defendant, Life Insurance Company of North America is an accidental death and disability policy whereby benefits are payable in the event of loss of life by accidental means.

3. That the plaintiffs' decedent, Ronald Terry Kirby, was an employee of Phillips Petroleum Company and was the insured under accidental death and dismemberment policy OK 2042.

4. That the plaintiffs were named beneficiaries under the policy.

5. The Court concluded a de novo review of the defendant's decision to deny benefits was appropriate.

6. That the plaintiffs' decedent, Ronald Terry Kirby, the named insured under policy OK 2042, disappeared on or about June 14, 1981.

7. On September 28, 1988, the District Court in and for Washington County, State of Oklahoma, made a judicial declaration that Ronald Terry Kirby was legally dead.

8. That the plaintiffs had failed to meet their burden of proof that Ronald Terry Kirby's death resulted from accidental means.

9. That the plaintiffs' decedent, Ronald Terry Kirby, had mysteriously disappeared, but there was no evidence that he had suffered loss of life as a result of violence or accident.

10. That the disappearance of the insured, whose body has not been found since the date of disappearance, was not related to

the disappearance, stranding, sinking or wrecking of any vehicle in which the insured was an occupant.

11. The Court found there was no evidence that the insured was an occupant of the vehicle at the time it was parked on U.S. Highway 75 North, 2 miles south of the Washington County line. Moreover, that there is no evidence that the insured's vehicle was a "stranded" vehicle at the location in which it was found on U.S. Highway 75 North.

12. The Court upon consideration of the agreed Pre-Trial Order, the parties' stipulated exhibits and testimony and upon hearing oral argument of the parties' respective counsel, finds for the defendant, Life Insurance of North America.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that judgment be rendered in the above captioned case in favor of the defendant, Life Insurance of North America, and against the plaintiffs, Denise DeShong, Michelle DeShong and David DeShong, and for their costs herein expended.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

\_\_\_\_\_  
DON ED PAYNE  
Attorney for Plaintiffs

\_\_\_\_\_  
GEORGE GIBBS  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUL 24 1991

SABRE INTERNATIONAL, INC.,  
a Washington corporation,

Plaintiff,

v.

FOUR-FOUR, INC.,  
a New Mexico corporation,

Defendant.

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

Case No. 91 C-361-B

DEFAULT JUDGMENT

NOW on this 24 day of July, 1991 this cause comes before the Court on the request of the Plaintiff, Sabre International, Inc., appearing by and through its attorney, Charles A. Gibbs III, and the Defendant appearing not, and the Court, having examined the record containing pleadings and exhibits filed herein and being fully advised in the premises, finds as follows:

THE COURT FINDS that the Defendant, Four-Four, Inc., was duly served with Summons and a copy of the Petition in the cause herein and Defendant has failed to answer or otherwise plead.

THE COURT FURTHER FINDS that Defendant, Four-Four, Inc., is indebted to the Plaintiff in the principal sum of \$62,000.00 with interest on that amount from the 22nd day of April, 1991 at the contract annual rate of eighteen percent (18%), costs of this action and a reasonable attorney fee which is adjudged to be \$6,000.00.

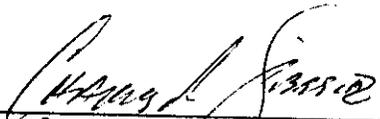
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by this Court

that Plaintiff, Sabre International, Inc., be and is hereby awarded a judgment of and said Defendant, Four-Four, Inc., in the principal sum of \$62,000.00 plus interest as set forth and all costs of this action.

S/ THOMAS R. BRETT

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

Submitted by:



Charles A. Gibbs III (OBA #3341)  
427 S. Boston, Suite 1702  
Tulsa, Oklahoma 74103  
(918) 587-6640

H:\ws5\doc  
SABDEF.JUD  
SNB

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

JEROME D. MAYES, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STANLEY D. GLANZ, et al, )  
 )  
 Defendants. )

91-C-50-C ✓

7-24-91 PW

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed June 6, 1991, in which the Magistrate Judge recommended that plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 be dismissed for failure to prosecute. A copy of the Report and Recommendation was mailed to plaintiff at his last known address, but was returned marked "Attempted Not Known". The plaintiff has not been in touch with this court since filing his complaint on January 31, 1991, and has not given notice of his present whereabouts.

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

It is therefore Ordered that plaintiff's complaint is dismissed for failure to prosecute.

Dated this 24 day of July, 1991.

  
H. DALE COOK, CHIEF  
UNITED STATES DISTRICT JUDGE

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

7-24-91

IN RE: STOCKTON OIL/GAS CO., INC., et al, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 J. SCOTT McWILLIAMS, )  
 )  
 Defendant. )

Bky. Case No. 85-01974-W  
Bky. Case No. 85-02114-W  
  
(Administratively Consolidated  
under Case No. 85-01974)  
Chapter 11

90-C-957-C

ORDER

This order pertains to Plaintiffs' Motion to Vacate Order Denying Leave to Appeal and Request for Hearing (Docket #30)<sup>1</sup>. A hearing is not proper in this case. Plaintiffs ask the court to vacate its order of January 24, 1991, in which it found that Plaintiffs' appeal was not timely and that the corporate debtor, Stockton Oil/Gas Co., Inc., could appear in this court only by attorney, and thus Plaintiffs' Motion for Leave should be and was denied.

There is no merit to Plaintiffs' contentions in their motion to vacate. They claim that the order did not address the fact that Stockton Oil/Gas Co., Inc., and the Remington Company were personal property of Plaintiffs. This fact is irrelevant to the untimely filing of the appeal and the issue of corporate representations only by an attorney. They also allege certain facts which only would be relevant if an appeal was proper: that the Trustee circumvented certain individuals when paying interim trustee fees and legal fees for a lawsuit in the Western District of Oklahoma, that Plaintiffs in fact are not appealing certain bankruptcy orders issued since January 4, 1986, but instead appeal the general conduct of

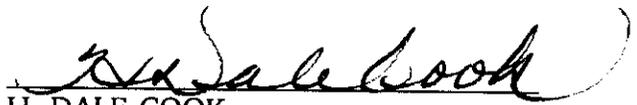
<sup>1</sup> "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

31

the Trustee and Predecessor Trustee, that no question of law is involved in the appeal, that the Trustee has been untruthful in claiming he has received no legal fees from the estate, that Plaintiffs' leaseholds are being fraudulently operated by the receivers appointed by the Trustees, and that their appeal of the bankruptcy hearing on January 11, 1991, was improperly denied. Plaintiffs also distinguish the facts from Devilliers v. Atlas Corp., 360 F.2d 292 (10th Cir. 1966), which the court relied on in finding that a corporate debtor may appear in a court of record only by attorney. The court recognizes that the facts in Devilliers were not the same as the facts in this case, but the principle of law relied on does not change regardless of whether a corporation is publicly held or closely held.

Plaintiffs' Motion to Vacate Order Denying Leave to Appeal and Request for Hearing (Docket #30) is denied.

Dated this 24 day of July, 1991.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 23 1991

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

THE PRUDENTIAL INSURANCE COMPANY )  
OF AMERICA, )

Plaintiff, )

vs. )

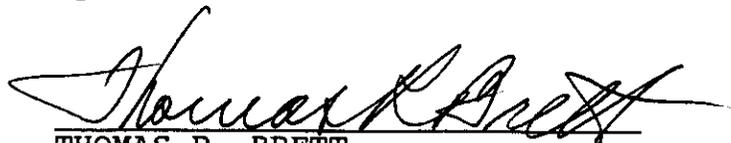
Case No. 90-C-332-B

CARRI A. OMSTEAD (formally )  
Watters), CHARLES THOMAS )  
WATTERS, SR., and DANIEL B. )  
JONES, Administrator of the )  
Estate of CHARLES THOMAS )  
WATTERS, JR., Defendants. )

J U D G M E N T

In accordance with the Order filed July 23<sup>rd</sup>, 1991, sustaining Charles Thomas Watters, Sr.'s Motion For Summary Judgment and denying Carri A. Omstead's Motion For Summary Judgment the Court enters judgment in favor of Charles Thomas Watters, Sr. and against Carri A. Omstead. Each party is to pay his or her own costs and attorneys fees. The Clerk of the Court is directed to disburse to Charles Thomas Watters, Sr. the principal sum of \$135,387.55, less the sum of \$7700.00 previously disbursed to Plaintiff for Interpleader costs and attorneys fees, less the sum of \$3040.87 previously disbursed to Terry M. Thomas, Guardian and Attorney Ad Litem for Charles Thomas Watters, Sr., plus accrued interest on the principal sum, less registry fee.

DATED this 23<sup>rd</sup> day of July, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

*clm*

**FILED**

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

JUL 26 1991

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

THE PRUDENTIAL INSURANCE COMPANY )  
 OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CARRI A. OMSTEAD (formally )  
 Watters), CHARLES THOMAS )  
 WATTERS, SR., and DANIEL B. )  
 JONES, Administrator of the )  
 Estate of CHARLES THOMAS )  
 WATTERS, JR., )  
 )  
 Defendant. )

Case No. 90-C-332-B

ORDER

This matter comes on for consideration upon the Cross Motions for Summary Judgment filed by the Defendant Carri A. Omstead (formerly Watters-hereinafter Omstead) and Defendant Charles Thomas Watters, Sr. (hereinafter Watters, Sr.).

Plaintiff, Prudential Insurance Company of America (Prudential), filed this statutory interpleader action pursuant to 28 U.S.C. § 1335, depositing into Court the sum of \$130,000.00, plus accrued interest, which represented the face value of two life insurance policies issued by Prudential upon the life of Charles T. Watters, Jr. (Watters, Jr.), deceased. Defendant Omstead<sup>1</sup> was married to Watters, Jr. during 1987 when Prudential issued these

<sup>1</sup> Apparently misspelled, in Prudential's Complaint in Interpleader, as Olmstead.

1-4

policies, and is listed as the primary beneficiary of each policy.<sup>2</sup> Omstead and Watters, Jr. divorced in 1989, a Decree of Divorce being entered by the District Court of Pawnee County, Oklahoma, on April 20, 1989. Watters, Jr. died on October 29, 1989, while living in Lewisville, (Denton County) Texas, as a result of a motor vehicle accident.

Defendant, Charles Thomas Watters, Sr. (Watters, Sr.), the father of the deceased, is listed on the two policies as a contingent beneficiary. The whereabouts of Watters, Sr. had been unknown for several years but efforts to locate him were successful. Watters, Sr. has made an appearance<sup>3</sup> in this case and claims the proceeds of the two insurance policies.

The County Court of Denton County, Texas, issued, on April 17, 1990, an Order Granting Letters of Administration, appointing Daniel B. Jones Administrator of the Estate of Charles T. Watters, Jr., Deceased. Because Watters, Sr. had not been located, the Estate of Watters, Jr. claimed the proceeds of the insurance policies. In view of the location and appearance of Watters, Sr., Defendant Jones has herein disclaimed any interest in the insurance proceeds.<sup>4</sup> Plaintiff Prudential has also been discharged from this matter.<sup>5</sup>

---

<sup>2</sup> Under the name of Carri A. Watters.

<sup>3</sup> Watters, Sr. appears by attorney Terry Thomas, appointed by the Court as Guardian Ad Litem and Attorney Ad Litem for Watters, Sr., which appointment is herewith terminated by the Court.

<sup>4</sup> See Agreed Journal Entry of Judgment Discharging Plaintiff, filed herein on February 19, 1991.

<sup>5</sup> Prudential, as interpleader, was granted by agreement of the parties the sum of \$7,400.00 attorneys fees and \$300.00 costs.

By stipulation, the parties agree that the insurance policies at issue in the case were in the physical possession of Charles Thomas Watters, Jr. at the time of the divorce decree entered between Watters, Jr. and Carri A. Watters (Omstead) and remained in the possession of Watters, Jr. until the time of his death. The parties dispute which law, Florida or Oklahoma, should apply to the interpretation of the Prudential policies as well as Omstead's status as ex-wife/primary beneficiary.

Watters, Sr. argues the principal issue herein is the application of Oklahoma's choice of law principles. He argues the policies in question were issued from Prudential's Home Office in Jacksonville, Florida; that premium payments were accepted by Prudential at its Florida office; that the policies identify Jacksonville, Florida as Prudential's "Home Office"; and lastly, from their inception until the payment of benefits, the policies were administered by Prudential from its Home Office in Jacksonville, Florida; that under these facts Oklahoma's choice of law statute dictates that Florida law should be applied by the Court to the interpretation of these policies and the relative claims thereto.

Watters, Sr. further argues that, under Florida law, Omstead has relinquished any possible claim she may have had under the policies as a result of the divorce decree entered in 1989.<sup>6</sup> The operative language in the Pawnee County, Oklahoma, District Court divorce decree between Omstead and Watters, Jr., now relied upon by

---

<sup>6</sup> The actual decree itself was prepared by Omstead's attorney and submitted to the Judge for signature. The divorce was apparently a default situation.

Watters, Sr., provides:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court that the Plaintiff be and she is hereby awarded as his (sic) sole and separate property free and clear of any claims, rights, or interest whatsoever of the Defendant all of her personal effects and belongings now in his (sic) possession. That the Defendants be and he is hereby awarded as his sole and separate property free and clear of any claims, rights, or interest whatsoever of the Plaintiff all of his personal effects and belongings now in his possession.

Omstead, on the other hand, argues that the policies in question list *three* "Home Offices" for Prudential<sup>7</sup>; that in any event precedent dictates, in contract actions, that the law of the place where the contract was made governs with respect to the contract's nature, validity, and interpretation, absent (as allegedly in the policies in question) any specific manifestation of intent to be bound by the laws of a particular jurisdiction. Omstead further argues that since the policies were negotiated and executed in Oklahoma, with insurance premiums being drawn on an Oklahoma bank, that the law of the State of Oklahoma applies.

Oklahoma's choice of law statute, 15 O.S. §162, provides:  
A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place it is made.

Both parties cite Rhody v. State Farm Mutual Insurance Company, 771 F.2d 1416 (10th Cir.1985) as a declarative analysis of §162. In Rhody the Court held the language of §162 dictates restricting the application of the "law of the place of performance of a contract

---

<sup>7</sup> One "Home Office" each in the states of Minnesota, Pennsylvania, and Florida.

to cases in which the *place of performance is indicated in the contract.*"

*Ibid.* at 1420. The Court went on to state:

"In the context of insurance policies we have held that the specification of a place for payment of premiums and benefits under the policy signifies the parties' designation of that location as the place of performance of the contract. *Monahan v. New York Life Ins. Co.*, 26 F.Supp. 859 (W.D.Okla.) *aff'd.* 108 F.2d 841 (10th Cir. 1939); *Head v. New York Life Ins. Co.*, 43 F.2d 517 (10th Cir.1930).

footnote 6, following the above, reads, in part, as follows:

"6. Both *Head* and *Monahan* involved life insurance policies. The policies state that premiums and benefits were payable at the insurer's head office in New York. . . ."

In both Head and Monahan the policy provided, as do the instant policies herein, that premiums were payable at the Home Office or to any authorized agent. However, neither opinion in Head or Monahan reflects that the insurance companies involved, New York Life Ins. Co. and Mutual Life Ins. Co. of New York, respectively, had multiple "Home Offices" as does the Plaintiff herein, The Prudential Insurance Company of America.<sup>8</sup> The Court concludes the policies at issue herein do not contain sufficient language to indicate either where the insurance contracts were to be performed, or which jurisdiction's laws would bind the parties in the event of conflict. Therefore, the Court concludes the law of place where the contracts were made should govern the interpretation. 15 O.S. §162

---

<sup>8</sup> In fact, not only does Prudential have, according to the policies, three home offices in Fort Washington, Pa., Minneapolis, Minn., and Jacksonville, Fla., it has its "Principal Office" in Newark, New Jersey.

(1981).

The Court further concludes, under the record now before the Court, the insurance contracts were "made" in the State of Oklahoma and are subject to that forum's laws. Continental Casualty Company v. Owens, 131 P.2d 1084 (Okla. 1913); Minton v. Minton, 39 P.2d 538 (Okla. 1935). The policies were negotiated, executed (by Watters, Jr.) and delivered in the State of Oklahoma. The premiums payments were drawn on a Cleveland, Oklahoma bank apparently through an automatic draw on the Watters/Omstead joint checking account known as Pru-Matic.

Having determined that Oklahoma law governs the interpretation of the insurance policies in issue, the Court next turns to the statutory provision relating to ex-spouses who remain as beneficiaries on insurance policies. 15 O.S. §178, added by Laws, 1987, c. 201, § 2, effective November 1, 1987, provided as follows:<sup>9</sup>

**"§ 178. Death benefits contract for spouse  
revoked upon death of maker--Divorce or  
annulment--Exemptions**

A. If, after entering into a written contract in which provision is made for the payment of any death benefit (including life insurance contracts, annuities, retirement arrangements, compensation agreements and other contracts designating a beneficiary of any right, property or money in the form of a death benefit), the party to the contract with the power to designate the beneficiary of any death benefit dies after being divorced from the beneficiary named to receive such death benefit in the contract, all provisions in such contract in favor of the decedent's former spouse are thereby revoked. Annulment

---

<sup>9</sup> This section was amended by Laws 1989, c. 181, §10, effective Nov. 1, 1989. The amendment relates to express trusts created by a decedent during decedent's lifetime, not an issue in the present matter.

of the marriage shall have the same effect as a divorce. In the event of either divorce or annulment, the decedent's former spouse shall be treated for all purposes under the contract as having predeceased the decedent.

\* \* \*

D. This section shall apply to any contract of a decedent dying on or after November 1, 1987.

Omstead argues this section only applies to a contract of a decedent made and entered into on or after November 1, 1987. (emphasis in original). The Court reads this section to apply to decedents who *die* after November 1, 1987, not who have contracted *after* that date. The Watters/Prudential policies were taken out in March, 1987, before the effective date, but Watters, Jr. died *after* the effective date of the act. The Court concludes Omstead's reading of sub-section D. is disingenuous.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish

that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

It is the Court's view that 15 O.S. §178 applies to the issues herein, effectively revoking Omstead's beneficiary status. Omstead, under the statute's application, "shall be treated for all purposes under the contract as having predeceased the decedent." *Ibid.* at paragraph A. Such revocation of Omstead's status as beneficiary places Watters, Sr., the contingent beneficiary, as the proper recipient of the insurance proceeds, less the heretofore approved and disbursed proceeds paid in connection with the Interpleader action.

The Court concludes Watters, Sr. Motion for Summary Judgment should be and the same is hereby SUSTAINED. Conversely, the Court concludes Omstead's Motion for Summary Judgment should be and the same is hereby DENIED. A Judgment in accord with the views expressed herein will be entered simultaneously herewith.

IT IS SO ORDERED this 23<sup>rd</sup> day of July, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



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

FILED

JUL 22 1991

JAC. G. ZIEREN, CLERK  
U.S. DISTRICT COURT

MARCUS MAKAR, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SOONER FEDERAL SAVINGS AND )  
 LOAN ASSOCIATION, )  
 )  
 Defendant. )

Case No. 91-C-129-E  
(Tulsa County Dist. Ct.)  
(No. CJ-90-04650)

STIPULATION OF DISMISSAL  
PURSUANT TO RULE 41(a)(1)(ii)

Plaintiff hereby dismisses the above captioned action with  
prejudice.

Marcus Makar  
Marcus Makar

Leslie Zieren  
Leslie Zieren, Counsel for  
Defendant Sooner Federal Savings  
Association, by and through its  
Receiver, Resolution Trust  
Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22 day of  
July, 1991, a true and correct copy of the foregoing was  
mailed to the following by depositing the same in the United States  
mail in Tulsa, Oklahoma, with first class postage fully prepaid  
thereon:

David Nelson  
123 W. Commercial  
Broken Arrow, OK 74012

Leslie Zieren

**F I L E D**

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

JUL 22 1991 *JS*

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

|                      |   |
|----------------------|---|
| LEONARD P. FITCHEW,  | ) |
|                      | ) |
| Petitioner,          | ) |
|                      | ) |
| v.                   | ) |
|                      | ) |
| RON CHAMPION, et al, | ) |
|                      | ) |
| Respondents.         | ) |

91-C-218-B ✓

ORDER

This order pertains to petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)<sup>1</sup>, respondents' Motion to Dismiss as Abusive Petition (#5), and petitioner's Traverse to Respondents' Motion to Dismiss Petition (#8). Respondents argue that dismissal is proper because petitioner's application is an abuse of the writ under Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 cases in the United States District Court.

FACTS AND HISTORY

Petitioner was convicted in Stephens County Court on January 23, 1984, of Attempting to Obtain a Controlled Drug by Forged Prescription, After Two or More Felonies, by a jury in a bifurcated trial, Case No. CRF-83-127. Based on Oklahoma's recidivist statute, 21 O.S. § 51(B), petitioner was sentenced to life in prison after a showing of four previous felony convictions. One of the previous convictions was dismissed by the Tulsa County Court upon petitioner's application for post-conviction relief,

<sup>1</sup> "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

λ

*clm*

because the state could not prove that the petitioner had been advised of his rights, represented by counsel, or that his confession was free and voluntary. Case No. 18049 (Mar. 7, 1985) (Petitioner's Exhibit #1-A (Docket #3)). The conviction dismissed was from 1959 and was the earliest conviction used in the sentencing procedure at issue here. The state also offered proof of at least six other previous convictions (Petitioner's Exhibit #1, p. 2 (Docket #3)). Petitioner appealed his conviction and it was affirmed. Fitchew v. State, 738 P.2d 177 (Okla. Crim. 1987).

Petitioner then applied for post-conviction relief in Stephens County Court. It was denied and the denial was affirmed by the Oklahoma Court of Criminal Appeals in Case No. PC-88-740, on October 14, 1988. Petitioner filed his first petition for habeas corpus relief in the United States District Court for the Western District of Oklahoma, Case No. CIV-89-1025-T, alleging a vacated conviction was used to enhance his sentence, and the petition was denied September 14, 1989.

After dismissal of his first federal habeas corpus petition, petitioner made another application for post-conviction relief in Stephens County Court. It was also denied and the denial was upheld by the Oklahoma Court of Criminal Appeals, Case No. PC-90-0950, on October 4, 1990.

Petitioner filed this habeas corpus action on April 5, 1991, citing three grounds:

1. The state has failed to provide the petitioner with a public forum in which to challenge the constitutionality of the prior convictions used to enhance the present sentence; as the state courts have refused to recognize the principles of Maleng v. Cook, 109 S.Ct. 1923 (1989).
2. The state failed to prove beyond a reasonable doubt that the petitioner was guilty of Attempting to Obtain a Controlled Drug by Forged Prescription, After Former Conviction of Two or More Felonies.

3. Petitioner was denied reasonably effective assistance of trial and appellate counsels, whereby both counsels were prohibited from challenging the constitutionality of the prior convictions used to enhance the present sentence, by reason of legislative mandate and judicial doctrine, in contravention to the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner's argument can be summarized as follows: (1) that he complains only of the second, or sentencing, portion of his trial (Brief in Support of Petition for Writ of Habeas Corpus at 2 (Docket #2)); (2) that four previous felony convictions were used to support an augmented sentence; (3) that one of the previous convictions, the earliest, was later overturned; (4) that the dismissed conviction tainted all later convictions, either because (a) it frightened him into plea bargaining and confessing or, (b) the confessed crimes (in (a)) were used to extend his sentences in those crimes where a jury found him guilty; (5) that he was denied effective assistance of counsel when his attorneys were not allowed to attack these previous convictions during the sentencing proceedings and were required to carry out any such attacks in collateral proceedings; and (6) that the state failed to prove beyond a reasonable doubt that he was guilty of the crime.

#### STANDARD FOR ABUSE OF THE WRIT

Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts states that a second petition may be dismissed if the judge finds that it does not allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the petitioner's failure to assert those grounds in a prior petition was an abuse of the writ. The doctrine of abuse of the writ has been plagued with uncertainty, but the Supreme Court recently attempted to clarify the situation in McCleskey v. Zant, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1454 (1991). The

Court used the same elements as those of the doctrine of procedural default in enunciating a standard for determining abuse of the writ through deliberate abandonment or inexcusable neglect. Id. at 1470.

When a prisoner files a second or subsequent petition for habeas corpus, the government bears the burden of pleading abuse of the writ. Id. That burden is satisfied if the government, "with clarity and particularity", recites the petitioner's earlier habeas corpus history, points to those claims appearing for the first time, and alleges abuse of the writ. Id. That is what the government has done in its motion. The burden now shifts to the petitioner.

A finding of abuse of the writ does not require that petitioner deliberately abandon a claim. Id. at 1467. Abuse also occurs when a petitioner raises a claim in a subsequent petition which he could have raised in the first, whether or not the failure to do so resulted from a deliberate choice. Id. at 1468. This is referred to as inexcusable neglect. Id.

According to McCleskey, to survive this motion, petitioner must show cause for his failure to raise the claim and prejudice therefrom. Id. at 1470. These concepts follow the definitions set out in procedural default decisions. Thus, "[o]nce the petitioner has established cause, he must show "actual prejudice" resulting from the errors of which he complains." Id. (quoting United States v. Frady, 456 U.S. 152, 168 (1982)).

If a petitioner cannot show cause and prejudice, any abuse of the writ may be excused if he can show that a fundamental miscarriage of justice will occur without consideration of the petition. A fundamental miscarriage of justice occurs in those cases where a constitutional violation probably has caused an innocent person to be convicted

of a crime. Id. at 1470. Such is not the case here. Petitioner was convicted by a jury and his prior convictions were not a factor. Petitioner himself states that he is not challenging his conviction.

Petitioner, in his Traverse to the Respondents' Motion to Dismiss (Docket #8), has had an opportunity to respond to the state's claim of abuse of the writ. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. Id. Petitioner has attempted to justify his failure to raise the other issues in the previous petition. The court finds that, not only has he not done so, he cannot do so. Indeed, nothing in the petitioner's pleadings indicates a valid justification for the delayed issues or even a colorable constitutional claim on any of the grounds. No hearing is necessary and this petition can be dismissed as an abuse of the writ of habeas corpus for the following reasons.

#### GROUND ONE

1. The state has failed to provide the petitioner with a public forum in which to challenge the constitutionality of the prior convictions to enhance the present sentence; as the state courts have refused to recognize the principles of Maleng v. Cook, 109 S.Ct. 1923 (1989).

Petitioner's arguments do not all fit neatly under one ground or another. The separate grounds are essentially different facets of his claim that the state improperly used invalid convictions in enhancing his sentence. Since the grounds are interrelated, it is under just this one that most of the petitioner's arguments will be considered.

The state has stated that this claim is substantially similar to the main issue in

petitioner's first habeas corpus action (Docket #6). The difference here is that the petitioner claims that all four previous convictions are invalid, whereas in the first petition, he only challenged the use of the oldest conviction. In his Memorandum Opinion, filed September 14, 1989, denying the petition, Chief Judge Ralph G. Thompson, of the Western District of Oklahoma, ruled that, even if the use of the first conviction was improper, there was no showing that the other three were invalid or improperly used and that since only two previous convictions were needed under Oklahoma recidivist law, the use of the invalid conviction was harmless error. Fitchew v. Saffle, Case No. CIV-89-1025-T at 3 (W.D.Okla. 1989).

Petitioner responds to Judge Thompson's ruling by stating that he would have challenged the three remaining convictions had the judge given him an opportunity. Nevertheless, petitioner does not show cause for failing to challenge the other three convictions in his original application for a writ. According to his Exhibit #7, Order Affirming Denial of Post-Conviction Relief, No. PC-90-950 (Okla. Crim. 1990) (Docket #3), petitioner challenged all of the prior felony convictions used to enhance the disputed sentence in his first application for post-conviction relief at the state level, filed June 20, 1988, one year before petitioner's first federal application for habeas corpus relief. Petitioner does not address this disparity.

Instead of explaining his failure to challenge all four previous convictions, petitioner sidesteps the issue by arguing that the law has changed since the first habeas corpus action and that the state refuses to recognize the law. Petitioner argues that Maleng v. Cook, 490 U.S. 488 (1989), means that the state erred by not allowing him to challenge the prior

convictions directly during the sentencing portion of his trial and that Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. den. 110 S.Ct. 1539, invalidates the State of Oklahoma's method of using records of prior convictions as evidence to augment a sentence.

Petitioner's reading of the law of both cases is incorrect. Maleng deals not with requirements for state court procedure, but with federal subject matter jurisdiction of habeas corpus proceedings. In Maleng, the Supreme Court held that, when a sentence is fully expired, the collateral consequences of the conviction upon which the expired sentence was based are not sufficient to render a person "in custody" for purposes of a habeas petition attacking that conviction, even though the prison conviction was used to enhance punishment for a later conviction which the petitioner is presently serving.

Dunn, although it does deal with the use of prior convictions in sentencing matters, concerns a state's presumption of regularity in judicial proceedings in the absence of more than a bare record of a guilty plea. Oklahoma law, unlike the Kentucky law at issue in Dunn, requires more than a bare record of a guilty plea. In Oklahoma, if a prior conviction based on a guilty plea is used to enhance punishment, the state must show affirmatively that the defendant was represented by counsel and advised of his rights before entering the guilty plea. Houston v. State, 567 P.2d 1002, 1006 (Okla. Crim. 1977). Petitioner does not claim that he was not represented by counsel before any of his later guilty pleas or that they were not made intelligently.

What petitioner does claim is that later guilty pleas were somehow coerced by the existence of the now invalid 1959 guilty plea. It is not entirely clear which of the three

later convictions were based on guilty pleas and which were based on jury trials. Even if all three were based on guilty pleas, the fact that the petitioner considered his subsequently invalidated 1959 conviction in deciding to plead guilty to a later crime does not make the guilty plea involuntary.

The Tenth Circuit ruled on this precise issue in Bailey v. Cowley, 914 F.2d 1438 (10th Cir. 1990). Bailey claimed that his guilty plea was rendered involuntary because it was based on counsel's advice that the prosecution would use a prior conviction against him that was subsequently invalidated as unconstitutional. The court said that prosecutors can use prior convictions as negotiating tools in plea bargaining and that the guilty plea thus obtained is not rendered involuntary, even if the prior conviction is later nullified. Id. at 1441. "[W]hen a defendant pleads guilty, he makes a decision based on a calculated risk that the consequences that will flow from entering the guilty plea will be more favorable than those that would flow from going to trial. This inherent uncertainty does not make the plea involuntary." Id.

Clearly the situation remains as it did in petitioner's first habeas corpus petition. The change in law which he relies upon is not applicable and he has given no other reason for failing to challenge the use of the other three convictions in the previous petition, nor has he presented a successful argument that those convictions are invalid. Petitioner's secondary argument that the subsequently invalidated 1959 conviction was used to enhance the punishment for the later convictions has no bearing on the validity of those convictions.

The petitioner's remaining grounds can be dealt with summarily.

## GROUND TWO

2. The state failed to prove beyond a reasonable doubt that the petitioner was guilty of Attempting to Obtain a Controlled Drug by Forged Prescription, After Former Conviction of Two or More Felonies.

This is apparently a restatement of the challenge to the validity of the "after former conviction of two or more felonies" portion of the conviction. As such, it has been dealt with in the previous section. If petitioner is indeed challenging the sufficiency of the evidence, such a challenge raises no federal constitutional question and cannot be considered in federal habeas corpus proceedings. Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971), cert. den., 405 U.S. 1048 (1972).

## GROUND THREE

3. Petitioner was denied reasonably effective assistance of trial and appellate counsels, whereby both counsels were prohibited from challenging the constitutionality of the prior convictions used to enhance the present sentence, by reason of legislative mandate and judicial doctrine, in contravention to the Sixth and Fourteenth Amendments to the United States Constitution.

In this ground, petitioner is not challenging the performance of his counsel, but rather the state's procedure for challenging previous convictions used in punishment enhancement. The law shows that the state is not obligated to provide counsel for post-conviction relief to challenge such previous convictions. "It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief." Johnson v. Avery, 393 U.S. 483, 488 (1969).

The Supreme Court has found that, while the right of an indigent defendant to

counsel at the trial stage and on appeals as of right is fundamental and binding by virtue of the Sixth and Fourteenth Amendments, the Equal Protection and Due Process clauses of the Constitution do not require a state to provide free counsel for indigent defendants seeking to take discretionary appeals to state courts or to file petitions for certiorari to the Supreme Court. Ross v. Moffitt, 417 U.S. 600 (1974). "[T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." Id. at 616.

The state, then, is not required to provide counsel for post-conviction relief and the state's procedure for seeking that relief is a matter of state law. Matters relating to sentence and service of sentence are questions of state law and thus not cognizable under federal habeas corpus statutes. Handley v. Page, 279 F.Supp. 878 (W.D.Okla.), aff'd., 398 F.2d 351 (10th Cir. 1968), cert. den. 394 U.S. 935 (1969).

That the state does not allow direct attacks on previous convictions used in sentence enhancement proceedings during those proceedings is not a constitutional question. Requiring a collateral proceeding does not amount to a denial of effective assistance of counsel at trial or appeal.

#### CONCLUSION

McCleskey, \_\_\_ U.S. at \_\_\_, 111 S.Ct. at 1470, requires that a petitioner must show two things to defend a second habeas corpus petition against a charge of abuse of the writ: cause for failure to raise the claim originally and prejudice. Petitioner has done neither. He has given no valid reason for failure to challenge all four convictions in the first habeas corpus petition, particularly since he had done just that in an earlier state proceeding.

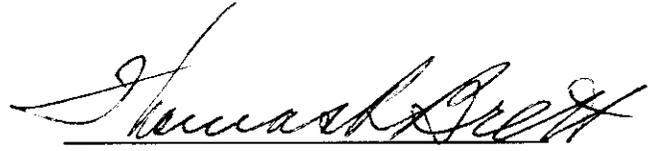
Additionally, petitioner has not shown, and cannot show, prejudice arising from the use of the remaining three previous convictions used to support his augmented sentence, because he has not made a credible argument that they are invalid.

The courts have found that, where there are other prior convictions that could be utilized to enhance a sentence being served, use of a conviction, even if deemed invalid, should be considered harmless error. Beavers v. Alford, 582 F.Supp. 1504 (W.D.Okla. 1984). In Lane v. Williams, 455 U.S. 624 (1982), the Supreme Court recognized that a criminal defendant must suffer actual harm from the judgment he attacks to be entitled to collateral review of a final judgment.

Petitioner's own exhibits show that there are numerous convictions that the prosecution could have used in the sentencing portion of his trial. Title 21 O.S. § 51(B) requires only two. Clearly, petitioner suffered no prejudice other than that naturally occurring, in a constitutionally valid manner, from numerous previous felony convictions.

For the reasons stated above, respondents' Motion to Dismiss is granted and petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed as an abuse of the writ under Rule 9(b) of the Rules Governing 28 U.S.C. Section 2254 Cases in the United States District Courts.

Dated this 22<sup>nd</sup> day of July, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

JUL 22 1991

JERRY STEVEN THURMAN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STANLEY GLANZ, Sheriff of Tulsa )  
 County Sheriff's Dept., et al, )  
 )  
 Defendants. )

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

90-C-980-B ✓

ORDER

Now before the court are plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (Docket #2)<sup>1</sup>, defendants' Motion to Dismiss and/or Motion for Summary Judgment (#7), and the Special Report (#9). Having reviewed the pleadings and applicable law, the court finds as follows.

Plaintiff alleges that he has been constantly denied prescribed medications while in defendants' custody. Defendants seek dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and/or summary judgment for failure to show elements essential to the case. Although on June 11, 1991, plaintiff was granted an additional thirty (30) days in which to respond to defendants' Motion to Dismiss and or Motion for Summary Judgment (Order - #10), no such response has been filed.

As to plaintiff's claim that he was denied medications, the Supreme Court established the legal standard for the review of such claims in Estelle v. Gamble, 429 U.S. 97 (1976).

---

<sup>1</sup> "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

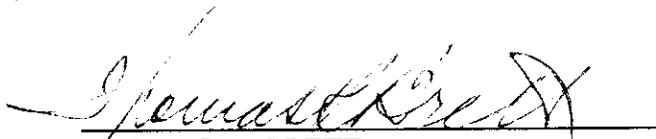
*plm*

It stated that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain." Id. at 104. While the deliberate indifference standard applies to prison doctors in their handling of a prisoner's needs, as well as to prison officials, the failure to provide adequate medical care must be intentional, not merely inadvertent. Id. at 104-105. In this circuit, the test is satisfied when an inmate is prevented from receiving the recommended care, or is refused access to medical staff competent to evaluate the need for treatment. Garcia v. Salt Lake Community Action Program, 768 F.2d 303, 307-308 fn.3 (10th Cir. 1985). Even if the facts showed negligence on the part of the doctors, "a complaint that a physician has been negligent in diagnosing and treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." Estelle v. Gamble, 429 U.S. at 106.

The court has examined plaintiff's complaint and the Special Report submitted by the Department of Corrections and finds that they completely fail to show that plaintiff did not receive medications. Exhibits 3 and 5 show that plaintiff has been given Motrin, Robaxin, Clenani, Indocin, methacarbonyl, viskin, and ibuprofen numerous times for his back pain caused by spondylolisthesis, a displacement of a lumbar vertebral body which causes nerve irritation and resultant pain. From July 28, 1990 to December 13, 1990, plaintiff filled out sixteen sick-call slips and made several additional verbal requests for medications. He was seen by medical personnel after each request, except on the one occasion when he was in court during sick-call. It appears that, while plaintiff has received the amount of medication believed to be proper by medical personnel, he disagrees with the amount of medication he has been given.

The court finds that plaintiff has failed to show sufficient facts that defendants have violated any of his clearly established rights or showed any deliberate indifference to his medical needs. He has certainly not been prevented from receiving care -- in fact, the record shows he received a great amount of medical attention in the six-month period reviewed. It is therefore ordered that defendants' Motion to Dismiss is granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Dated this 22<sup>nd</sup> day of July, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 22 1991

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DAVID ALAN SMOCK, et al., )  
 )  
 Defendants. )

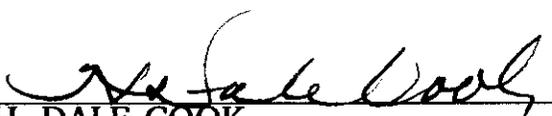
No. 90-C-826-C

ORDER

Before the Court is the motion of the plaintiff for summary judgment. The motion was filed on May 17, 1991, and no response by the defendants has been filed. Pursuant to Rule 15 of the Local Rules, the motion is deemed confessed. Further, the Court has independently reviewed the record and finds the motion to be well taken.

It is the Order of the Court that the motion of the plaintiff for summary judgment is hereby granted. Plaintiff is directed to submit a proposed Judgment within ten days of the date of this Order.

IT IS SO ORDERED this 22 day of July, 1991.

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

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

FILED  
JUL 22 1991

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

DEBRA D. DAVIS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 NCH CORPORATION, a Foreign )  
 corporation; ST. JOHN MEDICAL )  
 CENTER, INC., an Oklahoma )  
 corporation d/b/a WORK MED or )  
 ST. JOHN MINOR EMERGENCY )  
 CENTER-EAST, LLOYD T. ANDERSON, )  
 M.D., and FRANK DeMARCO, M.D., )  
 )  
 Defendants. )

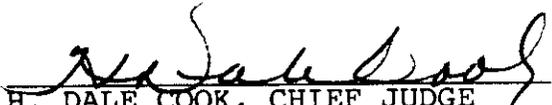
Case No. 90-C-729-C

ORDER OF DISMISSAL WITH PREJUDICE  
AS TO DEFENDANT NCH CORPORATION ONLY

The court has considered the joint stipulation of Plaintiff Debra D. Davis ("Davis") and the Defendant NCH Corporation for an entry of dismissal with prejudice of claims filed by Davis against NCH Corporation only in this litigation. Upon such consideration and being otherwise fully advised, the court finds that the stipulation should be approved and the relief requested should be granted *instanter*.

It is therefore ordered that the claim filed by Debra D. Davis against NCH Corporation in this litigation should be and the same is hereby dismissed with prejudice to the prosecution or filing of a future action with each party to bear its own costs of litigation; and no other claims are dismissed by this order.

25

  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT  
OF OKLAHOMA

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

FILED  
JUL 22 1991

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

THE F&M BANK & TRUST COMPANY, )  
an Oklahoma Banking corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JACK WILDER, an individual, )  
 )  
Defendant. )

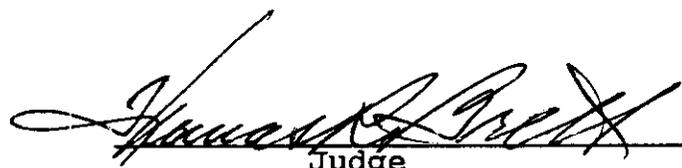
Case No. 90 C 220 B ✓

AGREED ORDER

This cause coming on upon the joint motion of the parties for an order vacating the court's judgment orders of January 4, 1991 and March 6, 1991 pursuant to agreement, and the court having been duly advised in the premises,

IT IS HEREBY ORDERED:

The Court's Judgment Orders dated January 4, 1991 and March 6, 1991 are hereby vacated and held for naught, and this lawsuit is hereby ordered dismissed with prejudice and without costs.

  
\_\_\_\_\_  
Judge

Dated: July 22, 1991

28

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
  
Plaintiff,

vs.

ALEX G. BERRY, JR.; MARSHA J.  
BERRY; FIDELITY FINANCIAL  
SERVICES, INC.; VICKERS  
EMPLOYEE'S FEDERAL CREDIT  
UNION; COUNTY TREASURER, Tulsa  
County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma; and STATE  
OF OKLAHOMA ex rel. OKLAHOMA  
TAX COMMISSION,

Defendants.

FILED

JUL 22 1991

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

CIVIL ACTION NO. 90-C-181-B ✓

DEFICIENCY JUDGMENT

This matter comes on for consideration this 22<sup>nd</sup> day  
of July, 1991, upon the Motion of the Plaintiff, United  
States of America, acting on behalf of the Secretary of Veterans  
Affairs, for leave to enter a Deficiency Judgment. The Plaintiff  
appears by Tony M. Graham, United States Attorney for the  
Northern District of Oklahoma, through Peter Bernhardt, Assistant  
United States Attorney, and the Defendant, Alex G. Berry, Jr.,  
appears neither in person nor by counsel.

The Court being fully advised and having examined the  
court file finds that a copy of Plaintiff's Motion was mailed to  
Defendant, Alex G. Berry, Jr., 254 East 54th Street North, Tulsa,  
Oklahoma, 74126 and all other counsel and parties of record.

The Court further finds that the amount of the Judgment  
rendered on May 30, 1990, in favor of the Plaintiff United States  
of America, and against the Defendant, Alex G. Berry, Jr., with  
interest and costs to date of sale is \$36,895.14.

sk

The Court further finds that the appraised value of the real property at the time of sale was \$7,600.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered May 30, 1990, for the sum of \$6,826.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on July 10, 1991.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Alex G. Berry, Jr., as follows:

|  |                   |
|--|-------------------|
| Principal Balance as of 7-1-88         | \$25,824.00       |
| Interest                               | 9,211.81          |
| Late Charges to Date of Judgment       | 276.76            |
| Appraisal by Agency                    | 500.00            |
| Management Broker Fees to Date of Sale | 220.00            |
| Abstracting                            | 150.00            |
| Publication Fees of Notice of Sale     | 156.57            |
| Taxes for 1989                         | 331.00            |
| Court Appraisers' Fees                 | <u>225.00</u>     |
| TOTAL                                  | \$36,895.14       |
| Less Credit of Appraised Value         | - <u>7,600.00</u> |
| DEFICIENCY                             | \$29,295.14       |

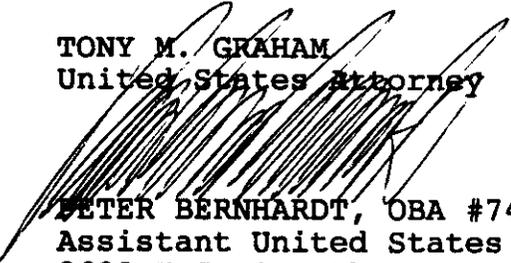
plus interest on said deficiency judgment at the legal rate of 6.39 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of

Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Alex G. Berry, Jr., a deficiency judgment in the amount of \$29,295.14, plus interest at the legal rate of 6.39 percent per annum on said deficiency judgment from date of judgment until paid.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

  
TONY M. GRAHAM  
United States Attorney

PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

PB/esr

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

**F I L E D**

JUL 22 1991

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

GEORGE W. OWENS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
TED J. STEVENS, )  
 )  
Defendant and )  
Third-Party Plaintiff, )  
 )  
vs. )  
 )  
DEL MAR ANGUS FARMS, INC., )  
an Oklahoma corporation; DON )  
SUMTER, an individual; and )  
JERRY L. CRAWFORD, an )  
individual, )  
 )  
Third-Party Defendants, )  
 )  
vs. )  
 )  
MORSE-SEXTON, INC., an )  
Oklahoma corporation; MARVIN )  
MORSE, an individual; and )  
CHARLES T. SEXTON, an )  
individual, )  
 )  
Additional )  
Third-Party Defendants.)

No. 88-C-358-B

O R D E R

The Court has for its consideration the Plaintiff's Notice of Confession of Motion to Dismiss relating to the dismissal motion filed on June 11, 1991, by additional third-party defendants Morse-Sexton, Inc., Marvin Morse and Charles T. Sexton. Upon consideration of the arguments and authorities raised by movants in their dismissal papers, and in view of the plaintiff's confession to, and admission of, all issues raised by the "Additional Third-Party Defendants' Joint Motion to Dismiss," the

Court hereby grants the dismissal motion. Specifically, the Court finds that there is no diversity of citizenship as to the claim or claims of plaintiff against third-party defendants, Marvin L. Morse, Charles T. Sexton and Morse-Sexton, Inc., and under the authorities cited in the movants' dismissal papers, all claims asserted against movants are hereby dismissed.

DATED this 22<sup>nd</sup> day of July, 1991.

~~S/ THOMAS R. BRETT~~  
\_\_\_\_\_  
JUDGE THOMAS R. BRETT  
United States District Judge

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

TANYA M. BESHEAR,

Plaintiff,

vs.

BOARD OF COUNTY  
COMMISSIONERS OF MAYES  
COUNTY, OKLAHOMA and KARIN  
GARLAND, COURT CLERK OF  
MAYES COUNTY, individually  
and in her official  
capacity,

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

No. 90-C-429-C ✓

**F I L E D**

JUL 22 1991

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

**ORDER**

Before the Court is the motion of the defendants urging the Court to rule on their motion for judgment notwithstanding the verdict.

Defendants raise three grounds in support of their motion. First, that the evidence was insufficient for the jury to find that plaintiff was terminated due to her impending bankruptcy. The evidence in this case consisted primarily of conflicting testimony between the plaintiff and the defendant Garland. The jury weighed the evidence and credibility in favor of plaintiff. The Court finds that there was sufficient evidence to sustain the jury's determination.

Defendants contend that there was insufficient evidence to establish a policy or custom of the Board of County Commissioners to permit liability on the part of the county. This contention is clearly without merit. The testimony established that defendant

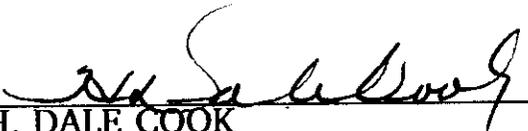
19

Garland was delegated "final policymaking authority" regarding hiring and firing court clerk personnel. Under Starrett v. Wadley, 876 F.2d 808, 818 (10th Cir. 1989) this is a sufficient showing to hold the county liable.

Finally defendants contend there was insufficient evidence to sustain an award of damages. However, plaintiff testified as to loss wages and emotional suffering. Accordingly, there was sufficient evidence to sustain an award of \$10,038.00.

Wherefore, premises considered it is the order of the Court that the motion of the defendants for judgment notwithstanding the verdict is hereby denied.

*IT IS SO ORDERED* this 22 day of July, 1991.

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

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

BRADLEY BONNER, )  
)  
Plaintiff, )  
)  
v. )  
)  
STANLEY GLANCE, TULSA )  
COUNTY SHERIFF (AKA GLANZ); )  
DARRELL SOBEK, JAILER, )  
TULSA COUNTY JAIL; DR. RONALD )  
BARNES, )  
)  
Defendants. )

90-C-984-C

**FILED**  
JUL 22 1991  
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

ORDER

The court has for consideration the Findings and Recommendations of the Magistrate filed June 24, 1991, in which the Magistrate Judge recommended that Defendants' Motion to Dismiss be granted. 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 Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is therefore Ordered that Defendants' Motion to Dismiss is granted and plaintiff's civil rights complaint pursuant to 42 U.S.C. § 1983 is dismissed.

Dated this 22 day of July, 1991.

  
H. DALE COOK, CHIEF  
UNITED STATES DISTRICT JUDGE

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

IN RE: ) No. M-1417  
ASBESTOS CASES ) ASB (TW) 005841

HOWARD RICHARD GREEN and )  
HELEN M. GREEN, )

No. 88-C-706-*PC*

ROY ALVIN EAST and )  
CLEO ADELIA EAST, )

No. 88-C-941-*PC*

Plaintiffs, )

v. )

**FILED**

ANCHOR PACKING COMPANY, et al., )

**JUL 22 1991**

Defendants. )

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

ORDER ALLOWING  
STIPULATED MOTION FOR DISMISSAL WITH PREJUDICE  
(RESERVING CERTAIN RIGHTS)  
AS TO DEFENDANT,  
OWENS-CORNING FIBERGLAS CORPORATION

NOW on this 22 day of ~~January~~ *July*, 1991, this matter comes before the Court upon the Stipulated Motion for Dismissal With Prejudice (Reserving Certain Rights) filed by Plaintiffs and Defendant, Owens-Corning Fiberglas Corporation.

For good cause shown, said Motion is granted and the above-styled actions are hereby dismissed with prejudice, specifically preserving Plaintiffs' right to, and do not dismiss with prejudice, their potential claims for cancer and fear of cancer, against the Defendant, Owens-Corning Fiberglas Corporation, only, specifically reserving Plaintiffs' rights as to all other parties or entities herein. Each party to bear its own costs.

IT IS SO ORDERED.

(Signed) H. Dale Cook  
JUDGE OF THE DISTRICT COURT

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

IN RE: ) M-1417  
ASBESTOS LITIGATION ) ASB(I) No. 005840

BOBBY LEE RHOADS and )  
ANNA MAXINE RHOADS, ) No. 90-C-290-B  
RICHARD EUGENE CAVIN and )  
THELMA ROSE CAVIN, ) No. 89-C-983-C  
HUBERT HUMPHREYS and )  
WILLA MAE HUMPHREYS, ) No. 90-C-541-C  
Plaintiffs, )  
v. )  
ARMSTRONG CORK COMPANY, et al., )  
Defendants. )

FILED  
JUL 22 1991

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

ORDER OF DISMISSAL

Now on this 22 day of July, 1991, the Court being advised that a compromise settlement having been reached between the above-styled Plaintiffs, and the Defendant, Keene Corporation, and those parties stipulating to a dismissal with prejudice, the Court orders that the captioned case be dismissed with prejudice as to Defendant, Keene Corporation.

S/ THOMAS R. BRETT

United States District Judge

(Signed) H. Dale Cook

United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DON E. JOHNSON; DAMALI JOHNSON; )  
 KATHLEEN HORN; MIDLAND MORTGAGE )  
 CO.; STATE OF OKLAHOMA ex rel. )  
 OKLAHOMA TAX COMMISSION; WELLS )  
 FARGO CREDIT CORPORATION; COUNTY )  
 TREASURER, Tulsa County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

**F I L E D**  
JUL 22 1991

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

CIVIL ACTION NO. 90-C-794-B ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22<sup>nd</sup> day  
of July, 1991. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, Assistant United States  
Attorney; the Defendants, County Treasurer, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma, appear by J. Dennis Semler, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendants, Kathleen Horn,  
Midland Mortgage Co., and State of Oklahoma ex rel. Oklahoma Tax  
Commission, appear not, having previously filed their  
Disclaimers; and the Defendants, Don E. Johnson, Damali Johnson,  
and Wells Fargo Credit Corporation, appear not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, Kathleen Horn, acknowledged  
receipt of Summons and Complaint on September 18, 1990; that the

14

C/ma

Defendant, Midland Mortgage Co., acknowledged receipt of Summons and Complaint on September 24, 1990; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on September 19, 1990; that the Defendant, Wells Fargo Credit Corporation, acknowledged receipt of Summons and Complaint on March 12, 1991; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on September 19, 1990; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on September 19, 1990.

The Court further finds that the Defendants, Don E. Johnson and Damali Johnson, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 5, 1991, and continuing through May 10, 1991, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Don E. Johnson and Damali Johnson, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a

bonded abstracter filed herein with respect to the last known addresses of the Defendants, Don E. Johnson and Damali Johnson. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on October 4, 1990; that the Defendant, Kathleen Horn, filed her Entry of Appearance, Disclaimer of Interest and Consent to In Rem Judgment on October 4, 1990; that the Defendant, Midland Mortgage Co., filed its Disclaimer on October 12, 1990; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on October 1, 1990; and that the Defendants, Don E. Johnson, Damali Johnson, and Wells Fargo Credit Corporation, have failed to

answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on August 28, 1989, Don E. Johnson and Damali Johnson filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 89-02579-C. On December 21, 1989, a Discharge of Debtor was entered releasing debtors of all dischargeable debts. On January 26, 1990, this bankruptcy case was closed.

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

Lot Fourteen (14), Block Fourteen (14), VALLEY VIEW ACRES ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 27, 1987, the Defendants, Don E. Johnson and Damali Johnson, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$22,500.00, payable in monthly installments, with interest thereon at the rate of 10.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Don E. Johnson and Damali Johnson, executed and delivered to the United States of America, acting on behalf of the Administrator of

Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated November 27, 1987, covering the above-described property. Said mortgage was recorded on December 1, 1987, in Book 5067, Page 240, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Don E. Johnson and Damali Johnson, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Don E. Johnson and Damali Johnson, are indebted to the Plaintiff in the principal sum of \$22,416.64, plus interest at the rate of 10.5 percent per annum from August 1, 1989 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$309.85 (\$20.00 docket fees, \$289.85 publication fees).

The Court further finds that the Defendants, Kathleen Horn, Midland Mortgage Co., and State of Oklahoma ex rel. Oklahoma Tax Commission, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendant, Wells Fargo Credit Corporation, is in default and therefore has no right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment in rem against the Defendants, Don E. Johnson and Damali Johnson, in the principal

sum of \$22,416.64, plus interest at the rate of 10.5 percent per annum from August 1, 1989 until judgment, plus interest thereafter at the current legal rate of 6.39 percent per annum until paid, plus the costs of this action in the amount of \$309.85 (\$20.00 docket fees, \$289.85 publication fee), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Kathleen Horn, Midland Mortgage Co., State of Oklahoma ex rel. Oklahoma Tax Commission, Wells Fargo Credit Corporation, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

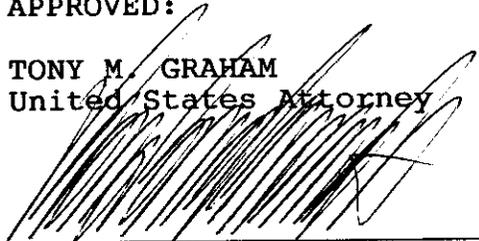
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney

  
PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 90-C-794-B

PB/css

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

FILED

JUL 22 1991

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

MICHAEL MCCARTHY,

Plaintiff,

v.

QUIKTRIP CORPORATION,

Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 90-C-102-B ✓

ORDER

Before the Court for decision is Defendant's, QUIKTRIP CORPORATION (QUIKTRIP), Motion to Dismiss and Motion for Summary Judgment, which is joined by Defendant, QUIKTRIP HEALTH BENEFIT PLAN (HEALTH PLAN), pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure. Defendant's Motion to Dismiss concerns a state law breach of contract claim. The Motion for Summary Judgment relates to whether Plaintiff, MICHAEL MCCARTHY (MCCARTHY), is entitled to long-term disability benefits payable under an "ERISA"<sup>1</sup> plan that are not reduced by Social Security benefits.

The Court will consider the Defendant's Motions as one Motion thereby converting Defendant's Motion to Dismiss to a Motion for Summary Judgment as permitted under Fed.R.Civ.P. 12(b). This will align the two Motions under Fed.R.Civ.P. 56, and, as a result, obviate the determination of the Motion to Dismiss. Since HEALTH PLAN joined QUIKTRIP in its Motions, determination of the Summary

---

<sup>1</sup> Employees Retirement Income Security Act, 29 U.S.C. §1001 *et seq.*

DC

Judgment Motion will apply to both Defendants.

The Court's January 9, 1991, Order concluded no concurrent jurisdiction with state courts existed since the cause of action pled by McCarthy did not fit within the ambit of §1132(a)(1)(B) because he was not seeking to recover benefits under an ERISA plan. The Court concluded exclusive jurisdiction existed under §1132(e)(1) and that McCarthy should be allowed to amend his Complaint to include the ERISA plan or its administrator or both to enable him to seek relief therefrom.

Subsequent to this Court's Order of January 9, 1991, MCCARTHY filed a Second Amendment to Complaint dated the 29th day of January, 1991, joining HEALTH PLAN to the present litigation. The Second Amendment alleges this ERISA action is brought pursuant to 29 U.S.C. §1132(a)(1)(B), which provides as follows:

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

Therefore, a cause of action maintainable by Plaintiff, if any, shall arise pursuant to the rights and benefits due MCCARTHY under the terms of the ERISA plan. The Court concludes, under Plaintiff's Second Amendment to the Complaint, there is but one, single cause of action.

Much of the factual background relating to the terms of the plan is not in dispute. Plaintiff was employed by QUIKTRIP continuously from 1978 (except for a five-month break in late 1982--

early 1983) until Plaintiff became disabled in July 1988 with degenerative arthritis. Some years prior to Plaintiff's disability, QUIKTRIP had put in place an employee's benefit plan (PLAN) under ERISA which provides for long-term disability insurance. The insurance policy (POLICY) issued pursuant to the PLAN was provided through Reliance Standard Life Insurance Company. The POLICY provides that, in calculating long-term disability payments, there be subtracted therefrom "Other Income Benefits."

According to the POLICY "Other Income Benefits" are "benefits resulting from the same Total Disability for which a Monthly Benefit is payable under the POLICY, other than retirement benefits." The POLICY provides these Other Income Benefits include:

(6) disability or Retirement Benefits under the United States Social Security Act, ..which:

(a) you are eligible to receive because of your Total Disability or eligibility for Retirement Benefits.

When Plaintiff became disabled in 1988 he received under the POLICY monthly disability benefits in an amount equal to 60% of his prior gross earnings with QUIKTRIP. In January, 1989, Plaintiff began receiving Social Security benefits of \$789.00 per month<sup>2</sup> due to his total disability. Plaintiff's monthly payments under the POLICY were then decreased by the amount of the Social Security payments.

By affidavits, Defendant established that in 1985, 1986, and 1987, QUIKTRIP mailed to all employees a copy of a booklet (BOOKLET) which explained long-term disability insurance in the

---

<sup>2</sup> Which increased to \$826.00 per month in January, 1990.

same language as stated above. Furthermore, an employee handbook, "Beyond the Paycheck,"<sup>3</sup> was hand-delivered by QUIKTRIP to all employees in May 1988, which contained the same language.

However, MCCARTHY maintains that he never received, viewed, nor was aware of the beforementioned documents at any time prior to this litigation. These averments are not persuasive. The plan administrator, HEALTH PLAN, is not required to prove actual receipt by beneficiaries of the PLAN. O'Hearn v. P\*I\*E\* Nationwide, Inc., 9 E.B.C. (B.N.A.) 2691, 2697 (M.D. Fla. 1988).

In essence, MCCARTHY bases his cause of action on a paragraph found in QUIKTRIP'S Policy and Procedural Manual (MANUAL).<sup>4</sup> That paragraph provided as follows:

Disabled employees eligible for Social Security or Worker's Compensation benefits may receive those benefits in addition to their full long-term disability benefits.

This language obviously contradicts the terminology found in the PLAN and Summary Plan.<sup>5</sup>

However, the relevant information pertinent to this Court's determination lies in the terminology of the PLAN itself, and any cause of action arising extraneous to that terminology is preempted by ERISA. The ERISA preemption clause is to be broadly construed, and has expansive reach. Settles v. Golden Rule ins. Co., 927 F.2d 505, 508, 509 (10th Cir. 1991), and Shaw v. Delta Air Lines, Inc.,

---

<sup>3</sup> Which contains a "Summary Plan Description," required by ERISA.

<sup>4</sup> The MANUAL first existed in written form, later replaced by a computer version, available at all of its stores.

<sup>5</sup> Both the Plaintiff's and Defendant's Briefs indicate that the BOOKLET, Beyond the Paycheck, is considered the Summary Plan as required by ERISA. 29 U.S.C. @1021(a).

463 U.S. 85 (1983).

The issue before this Court concerns the terminology of the PLAN, and whether the language implemented in the PLAN provides for long-term disability benefits that are not reduced by Social Security benefits. The Court concludes it does not.

Summary Judgment pursuant to Fed.R.Civ.P 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

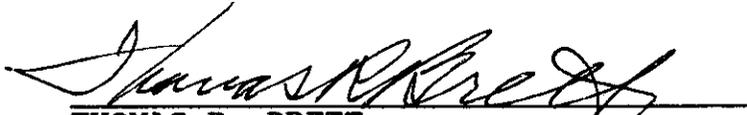
"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a Motion for Summary Judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The Court concludes that there is no genuine issue as to whether the PLAN provides the relief sought by MCCARTHY. The terminology is clear and unambiguous concerning the reduction mandated in the POLICY. Any cause of action that Plaintiff possesses relates to "benefits due him under the terms of the PLAN, his rights under the terms of the PLAN, or a clarification of his

rights to future benefits under the terms of the PLAN," 29 U.S.C. @1132(a)(1)(B). The POLICY clearly enunciates the reduction of long-term disability entitlements in relation to Other Income received due to the same disability such as social security payments. The Court concludes Defendants' Motion for Summary Judgment should be and the same is hereby SUSTAINED.

IT IS SO ORDERED this 22<sup>nd</sup> day of July, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE