

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

DONNA TAYLOR,

Plaintiff,

vs.

Case No. 90 C 1026 B

JAMES B. BOWYER, individually  
and in his official capacity as  
Mayor of the City of Collinsville,  
Oklahoma; RICK CLARK, individually  
and in his official capacity as  
Commissioner of the City of  
Collinsville, Oklahoma; LESLIE  
KILPATRICK, individually and in  
his official capacity as  
Commissioner of the City of  
Collinsville, Oklahoma; and  
RAYMOND L. JENNINGS, II,  
individually and in his official  
capacity as Commissioner of the  
City of Collinsville, Oklahoma;  
and THE CITY OF COLLINSVILLE,  
Oklahoma,

Defendants.

FILED  
AUG  
1990

STIPULATION OF DISMISSAL WITH PREJUDICE  
OF THE INDIVIDUAL DEFENDANTS

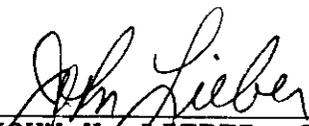
All parties to this action hereby stipulate that any and all causes of action and claims against the individual Defendants, James B. Bowyer, Rick Clark, Leslie Kilpatrick, and Raymond L. Jennings, II, are hereby dismissed with prejudice.

HOOD, THORNBRUGH & RAYNOLDS, P.C.

By: P. Thomas Thornbrugh  
P. THOMAS THORNBRUGH  
1914 South Boston  
Tulsa, Oklahoma 74119

ATTORNEY FOR PLAINTIFF,  
DONNA TAYLOR

ELLER AND DETRICH  
A Professional Corporation

BY: 

JOHN H. LIEBER, OBA #5421  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
(918) 747-8900

ATTORNEYS FOR THE INDIVIDUAL  
DEFENDANTS, JAMES B. BOWYER,  
RICK CLARK, LESLIE KILPATRICK  
and RAYMOND L. JENNINGS, II

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

AUG 9, 1991  
Jack G. ...  
U.S. DISTRICT COURT

UNITED SIDING SUPPLY, INC., )  
 )  
 ) Plaintiff, )  
 )  
v. )  
 )  
GRADY BROTHERS, INC., and )  
JACK HOKE, )  
 )  
 ) Defendants. )

90-C-594-C

JUDGMENT

This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

It is therefore ordered that judgment is entered in favor of the plaintiff, United Siding Supply, Inc., and against defendants Grady Brothers, Inc., and Jack Hoke in the amount of \$106,258.48 plus interest at the rate of 6.26%, and a reasonable attorney fee.

It is further ordered that judgment is entered in favor of the plaintiff, United Siding Supply, Inc., and against defendant, Grady Brothers, Inc., on its Counterclaim.

Dated this 8<sup>th</sup> day of August, 1991.

  
\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

63

8008-12

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 9 1991

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 ) BILLY JOE PURDY; CECILIA MARIE )  
 ) PURDY; COUNTY TREASURER, Tulsa )  
 ) County, Oklahoma; and BOARD OF )  
 ) COUNTY COMMISSIONERS, Tulsa )  
 ) County, Oklahoma, )  
 )  
 ) Defendants. )

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

CIVIL ACTION NO. 90-C-709-B

**DEFICIENCY JUDGMENT**

This matter comes on for consideration this 9<sup>th</sup> day of August, 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 Defendants, Billy Joe Purdy and Cecilia Marie Purdy, appear 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 Steven R. Hickman, Attorney for Billy Joe Purdy and Cecilia Marie Purdy, Post Office Box 799, Tulsa, Oklahoma 74101; Billy Joe Purdy and Cecilia Marie Purdy, 601½ Valley Drive, Sand Springs, Oklahoma 74063, and all counsel and parties of record.

The Court further finds that the amount of the Judgment rendered on October 4, 1990, in favor of the Plaintiff United States of America, and against the Defendants, Billy Joe Purdy and Cecilia Marie Purdy, with interest and costs to date of sale is \$21,066.19.

The Court further finds that the appraised value of the real property at the time of sale was \$10,500.00.

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 4, 1990, for the sum of \$10,000.00 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 the 22nd day of July, 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 Defendants, Billy Joe Purdy and Cecilia Marie Purdy, as follows:

Principal Balance as of 10/4/90	\$17,276.18
Interest	2,779.57
Late Charges to Date of Judgment	205.96
Appraisal by Agency	250.00
Management Broker Fees to Date of Sale	180.00
Publication Fees of Notice of Sale	149.48
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$21,066.19
Less Credit of Appraised Value	- <u>10,500.00</u>
DEFICIENCY	\$10,566.19

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, Billy Joe Purdy and Cecilia Marie Purdy, a deficiency judgment in the amount of \$10,566.19, plus interest at the legal rate of 6.26 percent per annum on said deficiency judgment from date of judgment until paid.

*s/ Thomas R. Brett*  
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/css

*Entered*

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

AUG -9 1991

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

HARMON E. WELSH, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CITY OF TULSA, OKLAHOMA, )  
 )  
 Defendant. )

No. 88-C-1469-C

ORDER

Before the Court is plaintiff's objections to the Report and Recommendation of the United States Magistrate Judge. The Magistrate Judge recommended that plaintiff's motion for partial summary judgment as to his two causes of action be denied. He further recommended that defendant's motion for summary judgment be denied.

Plaintiff applied to be a firefighter with the City of Tulsa in 1986. The City Physician, Dr. Jeffrey Beal, informed plaintiff that he had failed the physical and was not eligible for employment. Plaintiff suffers from a "minor residual sensory deficit" in two fingers of his right hand. Dr. Beal concluded that plaintiff posed a "potential risk for self harm through firefighting." Subsequently, plaintiff has obtained opinions from other physicians, who conclude that the minor nerve problem would not impair plaintiff's ability to perform his firefighting duties.

It is further undisputed that certain special equipment would have eliminated any danger of "self harm" to plaintiff. Defendant's counsel concedes that Dr. Beal "erroneously applied the standard" for employment (Transcript of Oral Argument, p.32). Plaintiff brings this action alleging violations of equal protection and the Rehabilitation Act, 29 U.S.C. §794.

In order to state a valid cause of action under §794, a plaintiff must allege (1) the existence of a program or activity within the state which receives federal financial assistance; (2) that plaintiff was an intended beneficiary of the federal assistance; and, (3) that plaintiff was a qualified handicapped individual who, solely because of his handicap, was excluded from participation in, been denied benefits of, or otherwise subjected to discrimination under such program or activity. John A. by and through Valerie A. v. Gill, 565 F.Supp. 372, 384 (N.D.Ill. 1983) (citing Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980)).

29 U.S.C. §794(a) provides in part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Under the Act, a "handicapped individual" is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. §706(8)(B) (1988). The regulations define "major life activities" as "functions such as caring for

one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. §84.3(j)(2)(ii) (1990). The Magistrate Judge recommended denial of plaintiff's motion, because plaintiff is not handicapped under the Act. Plaintiff has argued that defendant's rejection of plaintiff's job application indicates that he is perceived as being handicapped. Such perception, resulting in substantial limitation of a major life activity, may constitute a violation of the Act. See School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). However, as the Magistrate Judge noted, denial of a single job in a single area does not per se demonstrate a violation. Decisional law supports this conclusion. See Daley v. Koch, 892 F.2d 212 (2nd Cir. 1989); Tudyman v. United Airlines, 608 F.Supp. 739 (C.D.Calif. 1984). The Court concludes that plaintiff is not handicapped under the Act and that defendant's motion should be granted.

Plaintiff also objects to the Magistrate Judge's conclusion that plaintiff's motion for partial summary judgment as to his equal protection claim should be denied. The following general principles apply:

Unless it provokes strict judicial scrutiny, a state practice that distinguishes among classes of people will typically survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose. A state practice will not require strict judicial scrutiny unless it interferes with a "fundamental right" or discriminates against a "suspect class" of individuals.

Vasquez v. Cooper, 862 F.2d 250, 251-52 (10th Cir. 1988) (citation omitted).

The Supreme Court has held that the mentally handicapped do not constitute a suspect class. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 445-46 (1985). This ruling has been

interpreted to apply to all handicapped persons. See Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990). Further, in the equal protection clause context, the Supreme Court has never recognized a fundamental right to pursue a particular line of employment. See Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n, 889 F.2d 929, 932-33 (10th Cir. 1989). Therefore, the rational relationship test applies.

Under this test, it need only be shown that the classification scheme is "rationally related to a legitimate state interest." New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Clearly, having firefighters who are physically capable of performing their duties without injury to themselves or others is a legitimate state interest. The requirement of a medical examination easily passes the rational relationship test. Plaintiff does not actually attack the requirement but rather contends that Dr. Beal reached a totally arbitrary and invidious conclusion in denying plaintiff approval.

In such circumstances, the most applicable statement by the Supreme Court appears to be the following:

But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from

the action itself. But a discriminatory purpose is not presumed, there must be a showing of 'clear and intentional discrimination'.

Snowden v. Hughes, 321 U.S. 1, 8 (1944)  
(citations omitted).

A plaintiff in an equal protection action has the burden of demonstrating discriminatory intent. Watson v. City of Kansas City, 857 F.2d 690, 694 (10th Cir. 1988). No evidence of discriminatory intent is before the Court. Again, defendant's motion is granted.

It is the Order of the Court that the Report and Recommendation of the Magistrate Judge is hereby affirmed in part and reversed in part. The motion of the defendant for summary judgment is hereby granted. Plaintiff's motion for partial summary judgment is hereby denied.

IT IS SO ORDERED this 9<sup>th</sup> day of August, 1991.

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

*entered*

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

AUG -9 1991

JACK J. ... CLERK  
U.S. DISTRICT COURT

HARMON E. WELSH, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CITY OF TULSA, OKLAHOMA, )  
 )  
 Defendant. )

No. 88-C-1469-C

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for defendant and against plaintiff, and that plaintiff take nothing by way of this action.

IT IS SO ORDERED this 9<sup>th</sup> day of August, 1991.

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

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

**FILED**

ROBERT L. ABNER; RICHARD )  
MARCUM; WILLIAM RUSSELL )  
SMART, and STANLEY VULGAMOTT, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
TEXACO, INC., et al., )  
 )  
Defendants. )

AUG 09 1991

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

No. 86-C-283-E

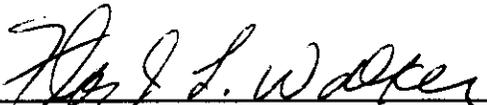
ORDER

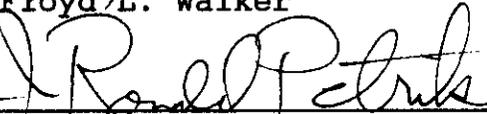
It appearing from the Joint Application of the parties that all matters and controversies have been compromised and settled by and between the parties therefore,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's suit be and same is hereby dismissed with prejudice.

S/ JAMES O. ELLISON

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

  
\_\_\_\_\_  
Floyd L. Walker

  
\_\_\_\_\_  
J. Ronald Petrikin

  
\_\_\_\_\_  
J. Patrick Cremin

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

NEWBERRY FEDERAL SAVINGS BANK, A )  
FEDERALLY CHARTERED SAVINGS BANK )

Plaintiff, )

v. )

CASE NO. 91-C-0035-E

UNION PLANTERS INVESTMENT BANKERS )  
CORPORATION, a Tennessee )  
corporation; UNION PLANTERS )  
INVESTMENT BANKERS GROUP, INC., a )  
Tennessee corporation; INVESTMENT )  
GROUP MORTGAGE CORPORATION, a )  
Tennessee corporation; UNION )  
PLANTERS CORPORATION, a Tennessee )  
corporation; UNION PLANTERS )  
NATIONAL BANK; ALEXANDER J. STONE; )  
PROFESSIONAL INVESTORS INSURANCE )  
GROUP, INC., a Delaware )  
corporation; and PROGRESSIVE )  
ACCEPTANCE CORPORATION, an Oklahoma )  
corporation; )

Defendants. )

**FILED**

AUG 08 1991

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

ORDER OF DISMISSAL

The Court, having considered the Motion and Authority to Dismiss With Prejudice filed herein, and for good cause shown, orders that all counts and causes of action as set forth in the Complaint and First Amended Complaint herein shall be, and are hereby, dismissed with prejudice.

Done this 7<sup>th</sup> day of August, 1991.

APPROVED AS TO FORM  
AND CONTENT:

NEWBERRY FEDERAL SAVINGS BANK

By: *R. Thomas Seymour*  
R. Thomas Seymour  
Its Attorney

UNION PLANTERS CORPORATION

By: *Robert L. Crawford*  
Robert L. Crawford  
Its Attorney

UNION PLANTERS NATIONAL BANK

By: *Robert L. Crawford*  
Robert L. Crawford  
Its Attorney

UNION PLANTERS INVESTMENT BANKERS CORPORATION

By: *Robert L. Crawford*  
Robert L. Crawford  
Its Attorney

UNION PLANTERS INVESTMENT BANKERS GROUP, INC.

By: *Robert L. Crawford*  
Robert L. Crawford  
Its Attorney

INVESTMENT GROUP MORTGAGE CORPORATION

By: *Robert L. Crawford*  
Robert L. Crawford  
Its Attorney

ALEXANDER J. STONE

By: *Rosemary E. Burgher*  
Rosemary E. Burgher  
His Attorney

PROFESSIONAL INVESTORS INSURANCE GROUP, INC.

By: Gene C. Howard

Gene C. Howard  
Its Attorney

PROGRESSIVE ACCEPTANCE CORPORATION

BY: Scott P. Kirtley  
Attorney

Scott P. Kirtley  
Its Attorney

[E] JAMES O. ELLISON

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

**FILED**

IN RE:	)		AUG 07 1991
	)		
OTASCO, INC.,	)	Bky. No. 88-03410-W	Jack C. Silver, Clerk
	)	Chapter 11	U.S. DISTRICT COURT
Debtor.	)		
	)		
WHEELS, INC.,	)	Adv. Pro. No. 89-0204-W	
	)		
Plaintiff/Appellant,	)		
	)		
v.	)	Case No. 90-C-300-E	
	)		
OTASCO, INC.,	)		
	)		
Defendant/Appellee.	)		

**ORDER**

The court now considers the appeal of plaintiff Wheels, Inc. ("Wheels") of the final order of the Bankruptcy Court for the Northern District of Oklahoma dated March 27, 1990, which found in favor of Otasco, Inc. ("Otasco") in a declaratory judgment action to determine the rights of Wheels and Otasco under a motor vehicle lease entered into by the parties.

This appeal concerns the findings of fact of the bankruptcy judge concerning the lease. Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact. In re: Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of mixed questions of law and fact, which are subject to the de novo standard of review. In re: Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988); In re: Mullett, 817 F.2d 677, 679 (10th Cir. 1987). This appeal challenges the legal conclusions drawn from the facts presented at trial, so de novo review is proper.

## FACTS

On February 2, 1984, Wheels entered into an agreement with Otasco (the "Lease"), which governed the terms under which Otasco, from time to time, would obtain motor vehicles from Wheels. A copy of this Lease is attached as Exhibit "A". The Agreement was designated as a "Lease" and identified Wheels as "Lessor" and Otasco as "Lessee". Paragraph 14 of the Lease was entitled "Ownership" and recited in pertinent part: "It is expressly agreed that the Lessee by virtue of this lease acquires no ownership, title, property, right, interest, (or any option therefor) in any leased motor vehicle save as herein provided...."

The first paragraph of the Lease provided that "Lessee hereby leases one motor vehicle for delivery as specified by Lessee and other motor vehicles as may hereafter be ordered by Lessee ... with the Lessee to have possession and right to use said motor vehicles...." The Lease imposed all burdens and expenses of licensing, registration, taxes, fees, fines and penalties, maintenance and replacement, insurance, and liability for use in connection with the operation of leased vehicles on the Lessee in paragraphs 4, 5, 7, 8, and 11. The Lessee could mark the vehicles with its own insignia, according to paragraph 9. The Lease imposed no duty on the Lessor except delivery of each vehicle at the inception of the Lease and acceptance, disposition, and accounting of and for each vehicle at the termination of the Lease.

The Lease in paragraph 12 provided that "[e]ach motor vehicle shall be leased for an initial term of 12 months from the date of the delivery of such vehicle to Lessee, and thereafter for successive 12 month renewal terms; provided that Lessee shall have the right to cancel any vehicle at any time after the end of the first 12 months of the initial lease

term for such vehicle by giving written notice of such cancellation to the Lessor...." No provision in the Lease permitted the Lessor to cancel once a vehicle had been leased, but paragraph 12 stated that "[e]ither Lessee or Lessor may terminate the obligation to lease additional or replacement vehicles at any time upon written notice to the other party". The parties admitted orally that they expected continuation beyond the initial 12-month term, and there was no express limit to the possible number of successive 12-month renewal terms, nor any express option to purchase at any particular time. The rental schedule showed that the parties contemplated renewals of up to fifty (50) months.

The Lease in paragraph 2 provided that "The monthly rental for each motor vehicle shall be computed on the basis of the rider hereto attached marked 'Rental Schedule' and made a part hereof, and is intended to include the Reserve accrued for the estimated depreciation of the leased vehicle." The rentals were computed on the stipulated cost of each vehicle, and 2% of the stipulated cost of each vehicle each month was to be put into the amortization account until 100% of the stipulated cost was paid or for the duration of the contract for each vehicle.

The rental schedule stated that "It is anticipated that at the end of the maximum term herein prescribed, the vehicle will have only scrap value and if for any reason the Lessee desires to continue to operate the vehicle the Lessee agrees to pay to the Lessor a monthly rental of \$3.00 during such extended period."

Paragraph 3 of the Lease provided that:

The Lessor, upon receipt of a leased motor vehicle from the Lessee after the termination of the lease of said motor vehicle, will proceed to sell said motor vehicle at wholesale on the best terms available for cash, in the discretion of the Lessor (the net amount received from the sale of the motor vehicle after

deducting any expenses and charges incurred from the time of delivery of the motor vehicle to the Lessor to the final completion of the sale thereof being called the 'Net Proceeds'). If the Net Proceeds plus the amount accrued for the Reserve for said motor vehicle (the 'Total Recovery') is in excess of the 'stipulated cost' of the motor vehicle, then the amount of such excess shall be promptly credited to the Lessee by the Lessor. If the Total Recovery is less than the 'stipulated cost' of the motor vehicle, then the Lessee shall promptly pay such deficiency to the Lessor; provided that in the event of any such sale the Lessor shall guaranty to Lessee that the Net Proceeds shall at least equal (a) the following percentages of the fair value of the vehicle as of the beginning of the 12 month period during which the date of termination occurs:

<u>Period</u>	<u>Percentage</u>
Initial 12 month period of lease	. . . . 20%
Each subsequent 12 month period	. . . . 30%

less, in any case, (b) the amount of any loss or damage to be insured or borne by Lessee under Section 5 or 11 hereof. As an alternate to sale of the vehicle by the Lessor, the Lessee may, at its option, on 30 days written notice to the Lessor, arrange for the sale of the vehicle for the account of the Lessee (but not to the Lessee), without the services of the Lessor, providing payment is first made to the Lessor by or on behalf of the Lessee of the remaining book balance for said vehicle, and any charges accrued to the Lessor on said vehicle to said date.

Under this provision, lessee could arrange to sell the vehicle at its option, but was expressly prohibited from purchasing it.

The parties agreed that the "amount accrued for the Reserve of said motor vehicle" referred to in Paragraph 3 of the Agreement was calculated on the Rental Schedule under the heading "Amortization Account". The "stipulated cost" referred to was not expressly defined in the agreement, but it provided that "[a]t the beginning of each month, the Lessor shall render a monthly invoice to the Lessee for all payments due to the Lessor for all motor vehicles theretofore delivered to the Lessee, and the Lessee agrees to make

prompt payment thereof. The Lessor will also render to the Lessee details of the 'stipulated cost' together with the term of the lease thereof, the rental rate and charges of all motor vehicles delivered to the Lessee."

On November 6, 1988, Otasco filed its petition for relief under 11 U.S.C. Chapter 11. Otasco continued to operate its business and remained in possession of its property as debtor and debtor-in-possession. On July 11, 1989, Wheels filed its complaint seeking declaratory judgment that the Lease was a true lease which Otasco had to assume or reject and the vehicles were therefore owned by Wheels as Lessor and not part of the bankruptcy estate. In the alternative, Wheels claimed it had a perfected security interest in the vehicles. Otasco argued that the Lease was not a true lease, the vehicles were owned by Otasco and thus property of the bankruptcy estate, the Lease was intended as security, and the security interest was not perfected.

As of December 11, 1989, there were twenty-one (21) vehicles in Otasco's possession which it obtained from Wheels. Ten were titled in Oklahoma, three in Georgia, two in Tennessee, two in Louisiana, two in Kansas, one in Arkansas, and one in Texas. All of the vehicle titles listed Wheels as the owner, but not as a lienholder. No lien entry forms pursuant to 47 O.S. § 1110 were ever delivered to the Oklahoma Tax Commission as to any of the vehicles. Fourteen of the vehicles had been sold and the proceeds escrowed, and Otasco was making scheduled payments on the rest.

#### CHOICE OF LAW

As a first step in deciding whether Otasco had ownership rights to the vehicles, making Wheels a mere creditor, the court examined the Lease, which said it would be

interpreted according to the laws of the State of Illinois. See Exhibit "A", paragraph 15. Wheels is an Illinois corporation, but Otasco is an Oklahoma corporation, most of the vehicles are titled in Oklahoma, and suit was brought in Oklahoma. Wheels asserted that the federal court sitting in Oklahoma must apply the choice of law rules of Oklahoma, that Oklahoma courts use the Restatement 2nd rules for choice of law, and that, under those rules, the parties' choice of law governs, unless there is no reasonable connection between their choice and the forum state or some fundamental policy of the forum state would be infringed. While noting that this assumption was not well founded, since this was not a diversity case, the Bankruptcy Court determined there was no reason why the parties' choice of law should not govern. Thus the applicable substantive law was the Uniform Commercial Code ("UCC") §§ 1-201(37)<sup>1</sup> and 9-102(1)(a)<sup>2</sup>, enacted in identical form in Illinois and Oklahoma (until a recent "clarifying" amendment of § 1-201(37) in Oklahoma), concerning "leases" intended as security.

The Bankruptcy Court recognized that the State of Oklahoma amended its version of UCC § 1-201(37) November 1, 1988, and that Bankruptcy Judge Stephen Covey had

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<sup>1</sup> Title 12A O.S. § 1-201(37) read as follows prior to 1988:

'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a 'security interest'. The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 is not a 'security interest', but a buyer may also acquire a 'security interest', by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a 'security interest' but a consignment is in any event subject to the provisions on consignments sales (Section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

<sup>2</sup> Title 12A O.S. § 9-102(1)(a) reads: "Except as otherwise provided in Section 9-104 on excluded transactions, this article applies to any transaction, regardless of its form, which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts...."

found that the amendments were to "clarify" prior law and to that extent were read back into prior transactions. In re Cole: Woodson v. Ford Motor Credit Co., 100 B.R. 561 (B.C. N.D.Okla. 1989). However, Judge Wilson disagreed with this analysis and concluded that the amendments altered case law interpreting and applying the prior text. This analysis was similar to that previously adopted by Judge Wilson in In re Thompson, 101 B.R. 658 (Bkrcty. N.D. Okla. 1989), which was also directly contrary to Judge Covey's holding in the factually identical case of In re Cole.

Both In re Cole and In re Thompson were appealed to the District Court, and were consolidated for consideration before Chief Judge H. Dale Cook, in In re Cole, 114 B.R. 278 (N.D. Okl. 1990). Judge Cook retroactively applied Oklahoma's 1988 version of UCC § 1-201(37)<sup>3</sup>, holding that it merely clarified, and did not substantively change the earlier

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<sup>3</sup> 12A O.S. § 1-201(37), as amended in 1988, reads:

(37) (a) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods regardless of shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9 of this title. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 of this title is not a "security interest", but a buyer may also acquire a "security interest" by complying with the provisions of Article 9 of this title. Unless a consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2-326).

(b) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

(i) the original term of the lease is equal to or greater than the remaining economic life of the goods,

(ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(c) A transaction does not create a security interest merely because it provides that:

version. He proceeded to reject Judge Wilson's imperfect security interest theory in favor of Judge Covey's true lease analysis, in affirming In re Cole and reversing In re Thompson. This court agrees with and adopts Judge Cook's analysis.

In all fairness, however, it should be noted that when Judge Wilson decided the present case on March 27, 1990, he did not have the benefit of Judge Cook's decision in In re Cole, which was decided on April 18, 1990. It is therefore understandable that Judge

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(i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(ii) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(iii) the lessee has an option to renew the lease or to become the owner of the goods,

(iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) For purposes of this subsection:

(i) additional consideration is not nominal if:

(A) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or

(B) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(ii) "reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(iii) "present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

Wilson would decide this case in a manner that was consistent with his prior ruling in In re Thompson.

Judge Wilson examined the case of In re Loop Hospital Partnership, 35 B.R. 929 (B.C. N.D.Ill. 1983), and found he was not bound by that decision, because it was distinguishable on its facts. In re Loop cited the Tenth Circuit cases of In re Tulsa Port Warehouse Co., Inc., 4 B.R. 801 (D.Ct. N.D.Okla. 1980), aff'd., 690 F.2d 809 (10th Cir. 1982), and U. S. for Eddies Sales and Leasing, Inc. v. Federal Insurance Co., 634 F.2d 1050 (10th Cir. 1980). In In re Loop the court held that a lease of hospital equipment was a true lease because there was no option to purchase, the lease term apparently ended after only five years, there was no evidence to indicate that the property's useful life was exhausted or that the parties intended any continuation of the lease, the lessee was required to return the property to lessor, and there was no evidence to indicate that the property or its value would in any manner be retained by the lessee.

The Bankruptcy Court chose to rely on pre-1988 amendment Oklahoma cases, which were more factually analogous. He cited In re Tulsa Port, In re Breece, 58 B.R. 379, 382-383 (B.C. N.D.Okla. 1986), and In re Harvey, 80 B.R. 533, 537 (B.C. N.D.Okla. 1987), in support of his conclusions. Those Oklahoma cases had found that secured transactions were shown by: (1) the concentration of all incidents of ownership of the vehicles, save bare legal title, in the lessee; (2) the effect of termination provisions, which established an equity in the vehicles in lessee and removed any reversionary interest from lessor; and (3) economic equivalence of the transactions with secured sales or loans.

The Bankruptcy Court held that the termination provisions of the Lease were of an "open-end" type in which the vehicle must be sold, the sale proceeds credited against lessee's monetary obligation, any excess credited to lessee, and any deficiency made up by lessee, placing on the lessee the risk of loss or the expectation of gain upon disposition of each vehicle and establishing an "equity" in the lessee. Indeed, the sale and disposition provisions of this lease are open-ended, and this is a concern, because of the Tenth Circuit's holding in In re Tulsa Port Warehouse Co., Inc., 690 F.2d 809 (10th Cir. 1982).

In that case, the Tenth Circuit affirmed Judge Thomas R. Brett's ruling that the "open-end" lease agreements were intended for security, even though, as here, those "leases" did not include an option to purchase and the lessor retained title plus the right to receive the wholesale purchase price and an amount which the court there deemed to be "apparent" interest. Judge Brett's opinion is reported at 4 B.R. 801 (N.D. Okla. 1980).

The Court of Appeals said, "We agree with the trial judge's conclusion that '[t]he practical effect of this arrangement is the same as if lessee purchased the car, then sold it two or three years later and used the proceeds to pay off the note.'" 690 F.2d at 810.

Of course, in the present case, the lease term was a much shorter twelve months. In the event the lease was terminated after its primary term, the transaction would look little like a secured purchase. Nevertheless, this case demands close factual scrutiny, because "whether a particular lease is intended for security is to be determined by the facts of each case." In re Tulsa Port Warehouse Co., Inc., 4 B.R. at 805; 12A O.S. § 1-201(37)(b). To assist in such factual analysis, it is helpful to turn to the "clarified" 1988

version of 12A O.S. § 1-201(37).<sup>4</sup>

One must look at whether the original term of the lease was equal to or greater than the remaining economic life of the goods. Tit. 12A O.S. § 1-201(37)(b)(i) (1988). Here we are dealing with a vehicle lease with a primary term of twelve months, much less than the fifty month economic life the parties expected.

One must look to whether the lessee was bound to renew the lease for the remaining economic life of the goods, and whether the lessee was bound to become the owner of the goods. Section 1-201(37)(b)(ii) (1988). Here, the lessor was not so bound.

Also, one must look to whether the lessee had an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement. Section 1-201(37)(b)(iii) (1988). Here the lessee had the option to renew, but such renewal required more than nominal additional consideration.

Finally, one must look to whether the lessee had an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement. Here the lessee was expressly prohibited from purchasing it.<sup>5</sup>

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<sup>4</sup> It should be noted that the Tenth Circuit's decision in In re Tulsa Port Warehouse Co., Inc. was handed down in 1982, well before the "clarifying" 1988 amendment to 12A O.S. § 1-201(37).

<sup>5</sup> See also, 12A O.S. § 1-201(37)(c)(i-iv) (1988), which in effect provides that a transaction does not create a security interest merely because it provides for market value consideration, the Lessee to bear the risk of loss and operational expenses, and/or an option to renew the lease.

The Bankruptcy Court noted that, because the vehicle must be sold and the sale was essentially for the benefit of the lessee, there was no true lease-like reversion in the lessor. This court finds that the provision for the sale of vehicles, with proceeds credited toward the stipulated cost, and the obligation of the Lessee to pay a shortfall, were not designed to create an equity interest in the lessee, but rather to protect the lessor from untoward abuse of its vehicle during the lease term, and any resultant loss in its equity, upon reversion of a vehicle. Such a provision seems economically prudent in leasing property easily damaged, destroyed, overused, or abused, such as a motor vehicle. The inclusion of such a provision should not, then, cause a lease to be converted into a security agreement absent additional indicia that the parties' true intention was to so structure the transaction.

The Bankruptcy Court also noted that, under the Lease, the lessor gave up any expectation of recovering the vehicles themselves and their value beyond a set amount and ceased to hold even bare legal title to the vehicle upon sale. However, this court differs with the conclusion of the Bankruptcy Court that these termination provisions indicated a lease intended as security rather than a true lease. Rather, these provisions more likely reflect the market realities in the vehicle leasing business. Who is going to initially "lease" a depreciated used vehicle?

The Bankruptcy Court found that, despite lack of actual sale prices and dollar amounts in evidence and the apparently calculated obscurity of lease terms such as "reserve" and "stipulated cost", the economic effect of the Lease could be inferred from the contractual provisions themselves. However, the Bankruptcy Court's analysis of the "economic effect" of the lease was inherently flawed in that it presumed renewals of the

twelve-month term would be made when there was clearly no obligation to do so.

In In re Cole 114 B.R. 278, 285 (N.D. Okl. 1990), Judge Cook recognized that:

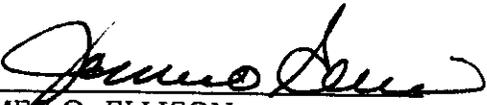
A court may not rewrite the parties' contract, nor read terms or provisions into the contract. See Houston Oilers, Inc. v. Neely, 361 F.2d 36, 42 (10th Cir. 1966); Sloan v. Mud Products, 114 F.Supp. 916, 923 n. 20 (N.D. Okla. 1953); King-Stevenson Gas & Oil Co. v. Texam Oil Corp., 466 P.2d 950, 954 (Okla. 1970).

The Bankruptcy Court's analysis in this case judicially rewrites express contractual terms establishing exclusive ownership in the lessor and a twelve-month primary lease term.

The Bankruptcy Court found that it should apply Illinois law and the Illinois enactment of UCC §§ 1-201(37) and 9-102(1)(a). The Bankruptcy Court then concluded it was not bound by the Illinois court's leading decision in In re Loop Hospital Partnership, due to factual distinctions. This court agrees that the facts in In re Loop are distinguishable and that reference to Oklahoma caselaw involving closely analogous factual patterns is appropriate due to the similarity in the Illinois and Oklahoma statutory enactments of § 1-201(37) of the UCC. However, in light of this court's adoption of Judge Cook's analysis in In re Cole, the Bankruptcy Court's reliance on cases decided prior to the 1988 "clarifying" amendment to Oklahoma's enactment of UCC § 1-201(37) was in error.

This court concludes that the Lease was a true lease. This conclusion is compelled once the lease is properly analyzed pursuant to 12A O.S. § 1-201(37), as clarified by the 1988 Amendment. The decision of the Bankruptcy Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

Dated this 7<sup>th</sup> day of August, 1991.

  
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JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

**WHEELS, Inc.**



**NATIONAL AUTO LEASING**

CHICAGO, ILLINOIS 60659

**LEASE**

AGREEMENT made this 2 nd day of February 1984 , by and between WHEELS, INC., a corporation, duly organized under the laws of the State of Illinois, with its principal place of business in Illinois, party of the first part (hereinafter called "Lessor"), and OTASCO, Inc. a corporation, duly organized under the laws of the State of Nevada party of the second part (hereinafter called "Lessee").

1. **POSSESSION.** Lessee hereby leases one motor vehicle for delivery as specified by Lessee and other motor vehicles as may hereafter be ordered by Lessee. The Lessor hereby agrees to deliver to the Lessee the motor vehicles hereinafter described, with the Lessee to have possession of and right to use said motor vehicles in accordance with the terms of this agreement. When any vehicle is delivered to the Lessee, a delivery memorandum shall be delivered to the agent of the Lessee who shall sign the same as a receipt for the motor vehicle. Such delivery memorandum shall describe in detail the motor vehicle and equipment delivered and the parties hereto agree that all the terms and provisions of this lease shall apply and extend to each motor vehicle delivered on such memoranda, in the same manner as if said motor vehicle was herein specifically described.
2. **LESSEE'S PAYMENTS.** Lessee agrees to pay to the Lessor monthly rental payments in advance for each month for each motor vehicle delivered under this lease. The full monthly rental will be billed for the month in which the vehicle is delivered if delivery is accomplished on or before the 15th day of such month (with payment to be made on the first day of the month following delivery). No billing will be made for the month of delivery in the event the vehicle is delivered after the 15th of that month. If the lease of a vehicle is terminated on or before the 15th of the month, no charge will be made for that month; however, if the lease of the vehicle is terminated after the 15th of the month, a full month will be billed for the month of termination. The monthly rental for each motor vehicle shall be computed on the basis of the rider hereto attached marked "Rental Schedule" and made a part hereof, and is intended to include the Reserve accrued for the estimated depreciation of the leased vehicle. At the beginning of each month, the Lessor shall render a monthly invoice to the Lessee for all payments due to the Lessor for all motor vehicles theretofore delivered to the Lessee, and the Lessee agrees to make prompt payment thereof. The Lessor will also render to the Lessee details of the "stipulated cost" together with the term of the lease thereof, the rental rate and charges of all motor vehicles delivered to the Lessee.
3. **LESSEE ACCOUNT.** The Lessor, upon receipt of a leased motor vehicle from the Lessee after the termination of the lease of said motor vehicle, will proceed to sell said motor vehicle at wholesale on the best terms available for cash, in the discretion of the Lessor (the net amount received from the sale of the motor vehicle after deducting any expenses and charges incurred from the time of delivery of the motor vehicle to the Lessor to the final completion of the sale thereof being called the "Net Proceeds"). If the Net Proceeds plus the amount accrued for the Reserve for said motor vehicle (the "Total Recovery") is in excess of the "stipulated cost" of the motor vehicle, then the amount of such excess shall be promptly credited to the Lessee by the Lessor. If the Total Recovery is less than the "stipulated cost" of the motor vehicle, then the Lessee shall promptly pay such deficiency to the Lessor; provided that in the event of any such sale the Lessor shall guaranty to Lessee that the Net Proceeds shall at least equal (a) the following percentages of the fair value of the vehicle as of the beginning of the 12 month period during which the date of termination occurs:

<i>Period</i>	<i>Percentage</i>
Initial 12 month period of lease .....	20%
Each subsequent 12 month period .....	30%

less, in any case, (b) the amount of any loss or damage to be insured or borne by Lessee under Section 5 or 11 hereof. As an alternate to sale of the vehicle by the Lessor, the Lessee may, at its option, on 30 days written notice to the Lessor, arrange for the sale of the vehicle for the account of the Lessee (but not to the Lessee), without the services of the Lessor, providing payment is first made to the Lessor by or on behalf of the Lessee of the remaining book balance for said vehicle, and any charges accrued to the Lessor on said vehicle to said date.

4. **LICENSE AND USE.** During the term of this lease, Lessee shall have possession of and right to use the said motor vehicles for lawful purposes only and for exclusive use within the United States and Puerto Rico. All motor vehicles shall be registered in the name of the Lessor during the entire term of the lease, and any certificates of title required shall likewise be in the name of the Lessor. The Lessee shall pay all costs, fees and expenses required in licensing and registering said motor vehicles in the state or states where they are used, obtaining certificates of title therefor, and use, sales, personal property and other taxes, license fees, fines and penalties, levied by Federal, State or Local government covering the possession, use, or misuse of the leased motor vehicle, it being the intent of the within lease that all taxes, and charges (other than Federal income taxes) imposed upon the ownership or operation of the leased motor vehicle shall be paid by the Lessee. The limitation as to use of the vehicle within the United States and Puerto Rico, shall not restrict casual or occasional crossing into Canada where the vehicle is used principally and primarily by the Lessee within the United States and Puerto Rico.
5. **MAINTENANCE AND REPLACEMENT.** Lessee shall, at all times, at its own expense, cause the leased motor vehicles to be maintained in good working condition and appearance, and Lessor shall have no responsibility therefor, or for any damages sustained by the Lessee, or others in privity with him, by virtue of any mechanical or operational failure of the leased motor vehicle during the term of the lease. Lessee agrees that all maintenance and replacement expense, including repairs, gasoline, oil, grease, tires, tubes, storage, parking, tolls, adjustments and other services shall be solely at the expense of the Lessee, it being the intent herein that the Lessor shall not be responsible for any charges or claims in connection with the operation of the leased vehicle.
6. **SERVICE OF LESSOR.** In addition to making delivery of the motor vehicles, as herein above described, the Lessor agrees that upon delivery by the Lessee to the Lessor of a leased motor vehicle at the termination of the lease of said motor vehicle, the Lessor will render efficient service in sale or disposal of the leased motor vehicle to obtain the largest net return for the Lessee.
7. **LIABILITY OF LESSOR.** The Lessor shall not be liable for any loss of business or profit, or other damages caused by any interruption of the service herein specified to be given by the Lessor. Lessor shall be responsible for obtaining and delivering to the agents of the Lessee the motor vehicles to be covered by this lease, but Lessor shall not be liable to the Lessee if failure to deliver motor vehicles under this agreement be due to strike or other causes beyond the control of the Lessor in the exercise of reasonable care. It is expressly understood and agreed that Lessor assumes no liability for any acts or omissions of Lessee, or of Lessee's agents, servants or employees, or for any property of Lessee and any persons in privity with Lessee, damaged, lost or stolen in or from the motor vehicles.
8. **LEGAL COVENANTS.** Lessee shall maintain and operate said motor vehicles in strict conformity with all laws and ordinances, State, Federal or Local and shall not permit said motor vehicles to be used for the unlawful transportation of alcoholic beverages or narcotics. Lessee may use said motor vehicles at any and all times for any and all legal purposes, but the Lessee agrees not to permit the leased vehicles to be driven except by agents, employees of the Lessee or persons authorized to drive such vehicles by the Lessee and it is the sole responsibility of the Lessee to provide drivers for the leased vehicles, this responsibility to include Lessee's exclusive control of said drivers, assumption of full responsibility for drivers' wages, employment and workmen's compensation insurance, social security and other requirements, and any traffic violations in which said leased vehicles may be involved. If Lessee uses or allows any vehicles to be used for illegal purposes or for purposes not permitted under this lease, Lessee agrees to pay any fines or penalties thereby incurred, and to reimburse Lessor for all damages sustained by Lessor as a result of such misuse. In addition to and notwithstanding its right to such reimbursement, Lessor may in such event at its option cancel this contract. The possession of the leased vehicle by someone other than the Lessee and its agents, during the time in which the leased motor vehicle is leased to the Lessee, shall be the responsibility of the Lessee and shall require its continued strict compliance with all the terms of this agreement as relates to said motor vehicle.
9. **INSIGNIA.** Lessee shall have the right, at its own expense, to affix to every motor vehicle so leased or loaned to it, any appropriate advertisement or insignia of its own design indicating that it is being used in the service of the Lessee.
10. **DEFAULT.** If Lessee shall fail to make any of the payments herein specified, or shall fail to perform, or permit to be broken, any of the covenants and agreements herein contained, Lessor shall have the right to declare this lease void so far as the rights of the Lessee are concerned and to take immediate possession of said motor vehicles wherever found with or without process of law and to hold Lessee responsible for any damage which the Lessor sustains by virtue of said occurrence.

11. **INSURANCE.** Lessee agrees to assume all liability for injury, death, or property damage occasioned by the operation and possession of the motor vehicle during the term of the lease and agrees to indemnify and save harmless, Lessor, against any claim or liability, loss, or expense, including legal expense, in respect to bodily injury, or death, or damage to property arising out of the possession of the motor vehicle during the term of this lease or any renewal thereof. In addition, Lessee hereby agrees to effect, pay for and maintain indemnity insurance issued by a responsible company, protecting the interests of the parties to this contract against liability for damages for personal injury or death, caused by any motor vehicle leased herein or its operation to the extent of One Million Dollars (\$1,000,000.00) combined single limit for each occurrence covering bodily injuries, and also to effect, pay for and maintain insurance issued by a responsible company in the sum of One Hundred Thousand Dollars (\$100,000.00) per accident against liability for damage to property caused by the operation of any motor vehicle leased herein. Lessee further agrees to be liable to the Lessor for damage, loss or destruction of each motor vehicle during the term of the lease, and agrees that each motor vehicle shall be covered by collision insurance for full fair value and for comprehensive damage, including fire, theft and conversion. The Lessee agrees to furnish the Lessor with insurance certificates or other acceptable written evidence of the within described insurance coverage which will include Lessor's name as an additional assured. Should any action or claim be made against the Lessor for damages arising from any of the causes covered in the within paragraph, Lessor agrees promptly to notify Lessee thereof, and to permit Lessee to conduct the defense of any such claim or action at Lessee's expense. In the event of the cancellation of any of the insurance required under the terms of this agreement, immediate notice thereof shall be given to the Lessor. If the Lessee cannot or does not desire to take out insurance in its own name to cover the risks herein described, the Lessor agrees to attempt to provide such coverage in the name of Lessor with the Lessee named as an additional assured, and the Lessee agrees to make prompt payment to the Lessor for the coverage obtained by the Lessor. If the Lessor is unable to obtain the coverage as herein described, or for other reasons acceptable to the Lessor, the Lessee shall desire to "self-insure," then when requested by the Lessee, and permissible by laws relating to the leased vehicles, the Lessor will offer to the Lessee the alternative of either the Lessor self-insuring with the Lessee to pay the reasonable cost therefor, or permitting the Lessee to self-insure under proper provisions acceptable to the Lessor, but nothing herein contained shall relieve the Lessee for the full and primary liability for the operation and possession of the motor vehicle as hereinabove stated.
12. **TERM OF THE LEASE.** Either Lessee or Lessor may terminate the obligation to lease additional or replacement vehicles at any time upon written notice to the other party. Such termination shall be limited to precluding delivery of additional or replacement vehicles not previously ordered, but this lease shall continue in full force and effect on all vehicles under lease hereunder on the date of such termination and until the expiration of the lease terms for such vehicles. Each motor vehicle shall be leased for an initial term of 12 months from the date of the delivery of such vehicle to Lessee, and thereafter for successive 12 month renewal terms; provided that Lessee shall have the right to cancel any vehicle at any time after the end of the first 12 months of the initial lease term for such vehicle by giving written notice of such cancellation to the Lessor, in which event the effective date of such cancellation shall be the delivery date of a replacement vehicle, or, in case of a cancellation where no replacement vehicle is involved, the first to occur of (a) the date of sale, or (b) the 30th day after the notice of cancellation shall have been received by Lessor and the vehicle shall have been returned to Lessor. Lessee agrees that upon termination of the lease of a motor vehicle for any reason whatsoever, the Lessee will cause the motor vehicle to be returned to the Lessor within the Continental United States, or if such vehicle is originally delivered in Hawaii, Alaska or Puerto Rico, Lessee will cause such vehicle to be returned to the point of original delivery.
13. **ASSIGNMENT.** Lessee agrees not to assign, transfer, sublet or otherwise transfer its rights hereunder, whether by operation of law or otherwise, without the prior written consent of Lessor, and will not pledge, mortgage or otherwise encumber or permit said vehicle to be subjected to any lien, charge, right or interest of the Lessee hereunder. Lessor may at any time assign all or any part of Lessor's right, title and interest in, to and under this lease and in, to and under the rents and other sums at any time due or to become due or at any time owing or payable by Lessee under any provision of this lease. No such assignee shall be obligated to perform any duty, covenant or condition required to be observed or performed by Lessor and any such assignment shall not relieve the Lessor from any of its obligations hereunder. Without limiting the generality of the foregoing, Lessee agrees that, in the event of any such assignment, the rights of any assignee under this lease and in and to the sums payable by Lessee under this lease shall not be subject to any abatement whatsoever and Lessee shall be unconditionally obligated and continue to pay such sums to such assignee, and same shall not be subject to any defense, setoff, counterclaim or recoupment whatsoever, arising between Lessor and Lessee hereunder for any other reason whatsoever.
14. **OWNERSHIP.** It is expressly agreed that the Lessee by virtue of this lease acquires no ownership, title, property, right, interest, (or any option therefor) in any leased motor vehicle save as herein provided, and that the Lessor at its option may title a leased motor vehicle in the name of a trustee instead of in the name of the Lessor, with the same force and effect as though the leased motor vehicle were titled in the name of the Lessor.

15. **GENERAL.** This lease together with the Rental Schedule below embodies the entire agreement between Lessor and Lessee and there are no collateral agreements, either oral or written. The provisions of this lease shall be interpreted according to the laws of the State of Illinois. No change or modification of the terms of this lease shall be binding on the Lessor, unless such change or modification be in writing and signed by an executive officer of Lessor. The term "Lessee" includes any subsidiary of Lessee, and any division of Lessee or any such subsidiary, to whom motor vehicles are delivered hereunder. This Lease supersedes all prior agreements between the parties with respect to all motor vehicles now or hereafter leased by Lessor to Lessee. The section headings herein are for convenience only and shall not affect the interpretation of any of the provisions hereof.

16. **COMMERCIAL LEASE.** This lease is for agricultural, business or commercial purposes, and is not primarily for personal, family or household purposes.

This lease is executed in triplicate and a copy thereof delivered to Lessee, receipt of which copy is hereby acknowledged by Lessee.

IN WITNESS WHEREOF, Lessor and Lessee have caused these presents to be executed the day and year first above written.

LESSEE

LESSOR

OTASCO, Inc.

WHEELS, INC., a corporation

By: X Richard F. Messer  
Vice President of Human Resources

By: X A. L. [Signature]  
Exec. President

## Rental Schedule

(Rider attached to and made a part of this lease.)

The monthly payment for each vehicle shall be computed as follows:

### RENTAL:

The rental shall be computed on the stipulated cost of the vehicle at the rates shown below for the period of rental indicated:

1st - 12th Month	2.9928%
13th - 24th Month	2.7428%
25th - 36th Month	2.4629%
37th - 48th Month	2.2329%
49th - 50th Month	2.0987%

Provided, however, that at no time will the rental be less than a minimum of \$3.00 per month.

### AMORTIZATION ACCOUNT:

2.00% per month of the stipulated cost of each vehicle for the duration of the contract for such vehicle or until a total of 100% of the stipulated cost shall have been paid, whichever occurs first.

It is anticipated that at the end of the maximum term herein prescribed, the vehicle will have only scrap value and if for any reason the Lessee desires to continue to operate the vehicle the Lessee agrees to pay to the Lessor a monthly rental of \$3.00 during such extended period.

The rental hereinabove specified may be changed on notice from the Lessor to the Lessee but only as it affects vehicles delivered after the effective date of change cited in said notice.



ADDENDUM TO PARAGRAPH 5

"Lessor hereby assigns and transfers to Lessee all right, title and interest in and to any and all manufacturers' warranties, guarantees, maintenance protection plans and extended service plans of whatsoever nature or kind for the duration of each Lease Agreement pertaining to vehicles obtained by Lessee by or through Lessor."

"Lessor further agrees to assist Lessee in the processing of policy adjustment claims with the manufacturers and distributors of vehicles leased by Lessee by or through Lessor, and shall assign to Lessee any and all recoveries and other benefits received, directly or indirectly, by Lessor from said manufacturers or distributors."

LESSEE:

LESSOR:

OTASCO, Inc.

WHEELS, Inc., a corporation

By: *Richard Messer*

By: *[Signature]*  
President

Title: Vice President of Human Resources

Date: February 2, 1984

*[Handwritten initials]*

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

JOHN W. SMITH, Natural Father and next of )  
kin of Naomi Smith, Deceased, and )  
EILEEN JOHNSTON, Natural Mother and next )  
of kin of Naomi Smith, Deceased, )

Plaintiffs, )

v. )

ACME BRICK COMPANY, INC., )

Defendant. )

90-C-84-E

AUG 7, 1991

JUDGMENT

This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

It is therefore ordered that judgment is entered in favor of the defendant, Acme Brick Company, Inc., and against plaintiffs, John W. Smith and Eileen Johnston.

Dated this 7<sup>th</sup> day of August, 1991.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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

AUG -7 1988

JACK R. ... CLERK  
U.S. DISTRICT COURT

JERRY L. WHITE, JR., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LOUIS W. SULLIVAN, M.D., )  
 Secretary of Health and )  
 Human Services, )  
 )  
 Defendant. )

No. 87-C-778-C ✓

ORDER

Before the Court is the objection of the plaintiff to the Report and Recommendation of the United States Magistrate Judge, who recommended that the Secretary's decision to deny plaintiff's application for social security benefits under 42 U.S.C. §401-33 be upheld.

The five-step analysis which must be employed is well established. See Jozefowicz v. Heckler, 811 F.2d 1352, 1355 (10th Cir. 1987). The claimant bears the burden of establishing a disability, i.e., the first four steps. Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). At step five, the burden shifts to the Secretary to show that claimant has the residual capacity to perform some other kind of work in the national economy. Gossett v. Bowen, 862 F.2d 802, 804 (10th Cir. 1988).

A reviewing court considers only whether the Secretary's decision is supported by substantial evidence. Bernal v. Bowen,

27

851 F.2d 297, 299 (10th Cir. 1988). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). This Court does not weigh the evidence or substitute its discretion for that of the Secretary. Broadbent v. Harris , 698 F.2d 407, 414 (10th Cir. 1983). Upon review, the Court concludes that the Secretary's decision was supported by substantial evidence.

It is the Order of the Court that the Report and Recommendation of the United States Magistrate Judge is hereby affirmed. Plaintiff's complaint for benefits is hereby denied.

IT IS SO ORDERED this 7<sup>th</sup> day of August, 1991.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ADELLA M. MONDAY; THE PACESETTER )  
 CORPORATION; FEDERAL DIVERSIFIED )  
 SERVICES, INC.; EMPIRE FUNDING; )  
 GOLDOME CREDIT CORPORATION; )  
 ORAL ROBERTS UNIVERSITY; ORAL )  
 ROBERTS EVANGELISTIC ASSOCIATION, )  
 INC.; SPINDLETOP EXPLORATION )  
 COMPANY, INC.; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; and )  
 CHEMICAL BANK, as Trustee for )  
 the GCC Home Equity Trust 1990-1, )  
 )  
 Defendants. )

**FILED**

AUG 07 1991

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

CIVIL ACTION NO. 90-C-919-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6<sup>th</sup> day  
of Aug, 1991. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Kathleen Bliss Adams, 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, Empire Funding,  
Oral Roberts University, Oral Roberts Evangelistic Association,  
Inc., and Spindletop Exploration Company, Inc., appear not,  
having previously filed their Disclaimers; Defendants, Goldome  
Credit Corporation and Chemical Bank, as Trustee for the GCC  
Home Equity Trust 1990-1, appears by their attorney John J.

Livingston; and the Defendants, Adella M. Monday, The Pacesetter Corporation, and Federal Diversified Services, Inc., appear not, but make default.

The Court being fully advised and having examined the court file finds that Defendant, Adella M. Monday, acknowledged receipt of Summons and Amended Complaint on November 17, 1990; that Defendant, The Pacesetter Corporation, acknowledged receipt of Summons and Complaint on November 1, 1990; that Defendant, Federal Diversified Services, Inc., was served with Summons and Second Amended Complaint on February 13, 1991; that Defendant, Empire Funding, acknowledged receipt of Summons and Complaint on November 16, 1990 and Summons and Amended Complaint on November 16, 1990; that Defendant, Goldome Credit Corporation, acknowledged receipt of Summons and Complaint on November 6, 1990; that Defendants, Oral Roberts University and Oral Roberts Evangelistic Association, Inc., acknowledged receipt of Summons and Complaint on November 1, 1990; that Defendant, Spindletop Exploration Company, Inc., was served with Summons and Second Amended Complaint on February 4, 1991; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 1, 1990; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 1, 1990.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on November 26, 1990; that the Defendant, Empire Funding, filed its Disclaimer on June 18,

1991; the Defendant, Goldome Credit Corporation and Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, filed their Answer on December 5, 1990, and their Answer to Second Amended Complaint on February 13, 1991; that the Defendants, Oral Roberts University and Oral Roberts Evangelistic Association, Inc., filed their Disclaimers on November 6, 1990; that the Defendant, Spindletop Exploration Company, Inc., filed its Disclaimer on May 13, 1991; and that the Defendants, Adella M. Monday, The Pacesetter Corporation, and Federal Diversified Services, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Narvis G. Monday, and of judicially terminating the joint tenancy of Narvis G. Monday and Adella M. Monday.

The Court further finds that Narvis G. Monday and Adella M. Monday became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated July 10, 1974, from Donald E. Johnson as Administrator of Veterans Affairs to Narvis G. Monday and Adella M. Monday, husband and wife, as joint tenants, and not as tenants in common, with full right of survivorship, the whole estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on July 12, 1974, in Book 4128, Page 161, in the records of the County Clerk of Tulsa County, Oklahoma.

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 Seven (7), Block Twenty-nine (29), VALLEY VIEW ACRES ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on July 11, 1974, Narvis G. Monday and Adella M. Monday 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 \$10,000.00, payable in monthly installments, with interest thereon at the rate of 8.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, Narvis G. Monday and Adella M. Monday 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 July 11, 1974, covering the above-described property. Said mortgage was recorded on July 12, 1974, in Book 4128, Page 181, in the records of Tulsa County, Oklahoma.

The Court further finds that Narvis Gene Monday died on June 1, 1985. Upon the death of Narvis Gene Monday a/k/a Narvis G. Monday (hereinafter referred to by either of these names), the subject property vested in his surviving joint tenant, Adella M. Monday, by operation of law. Certificate of

Death No. 14187 issued by the Oklahoma State Department of Health certifies Narvis Gene Monday's death.

The Court further finds that Narvis G. Monday, now deceased, and Adella M. Monday, 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 Defendant, Adella M. Monday, is indebted to the Plaintiff in the principal sum of \$7,828.66, plus interest at the rate of 8.75 percent per annum from September 1, 1989, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$31.72 (\$20.00 docket fees, \$11.72 fees for service of Summons and Complaint).

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Narvis Gene Monday, and to a judicial termination of the joint tenancy of Narvis G. Monday and Adella M. Monday in the real property involved herein.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$323.00, plus penalties and interest, for the year 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, has a lien against the subject property in the amount of \$6,595.91, plus interest and a reasonable attorney's fee, by virtue of an

Assignment dated March 1, 1990 and recorded on October 10, 1990, in Book 5282, Page 303 in the records of Tulsa County, Oklahoma.

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

The Court further finds that the Defendants, Empire Funding, Oral Roberts University, Oral Roberts Evangelistic Association, Inc., and Spindletop Exploration Company, Inc., disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, The Pacesetter Corporation and Federal Diversified Services, Inc., are in default and have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the death of Narvis Gene Monday be and the same is judicially determined to have occurred on June 1, 1985, in the City of Tulsa, Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the joint tenancy of Narvis G. Monday and Adella M. Monday in the above described real property be and the same is hereby judicially terminated as of the date of the death of Narvis Gene Monday on June 1, 1985.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against Defendant, Adella M. Monday, in the principal sum of \$7,828.66, plus interest at the

rate of 8.75 percent per annum from September 1, 1989 until judgment, plus interest thereafter at the current legal rate of 6.26 percent per annum until paid, plus the costs of this action in the amount of \$31.72 (\$20.00 docket fees, \$11.72 fees for service of Summons and Complaint), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$323.00, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, have and recover judgment in the amount of \$6,595.91, plus interest and a reasonable attorney's fee, by virtue of an Assignment dated March 1, 1990 and recorded on October 10, 1990, in Book 5282, Page 303 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Pacesetter Corporation, Federal Diversified Services, Inc., Empire Funding, Goldome Credit Corporation, Oral Roberts University, Oral Roberts Evangelistic Association, Inc., Spindletop Exploration Company, Inc., and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Adella M. Monday, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$323.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

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

**Fourth:**

In payment of Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, in the amount of \$6,595.91, plus interest and a reasonable attorney's fee.

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

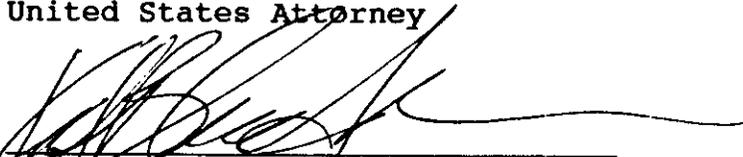
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Second Amended Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof. S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

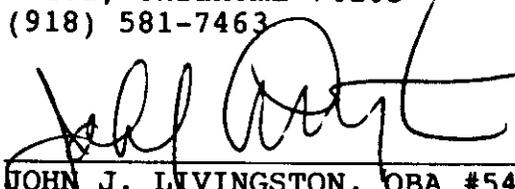
APPROVED:

TONY M. GRAHAM  
United States Attorney



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



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JOHN J. LIVINGSTON, OBA #5477  
Attorney for Defendants,  
Soldome Credit Corporation and  
Chemical Bank, as Trustee for  
the GCC Home Equity Trust 1990-1



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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-919-E

KBA/css

IN THE UNITED STATES DISTRICT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 07 1991

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

THOMAS LEE REAMS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TERRY J. CLAYBROOK, CLEARWATER )  
 TRUCKING COMPANY, a Kansas )  
 corporation, and GULF INSURANCE )  
 COMPANY, a Texas corporation, )  
 )  
 Defendants. )

Case No: 88-C-267 E

ORDER OF DISMISSAL WITH PREJUDICE

Upon application of the parties and for good cause shown, the above case is hereby ordered dismissed with prejudice to the refiling of this action.

S/ JAMES O. ELLISON

JAMES O. ELLISON, DISTRICT JUDGE

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

FILED

AUG -7 1991

CLERK  
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM, INC., )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PHILIP KIRLEY, an individual, )  
PATRICIA KIRLEY, an individual, )  
and K. PACIFIC, INC., )  
a foreign corporation, )  
 )  
Defendants. )

Case No. 91-C-355-E

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, Thrifty Rent-A-Car System, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and dismisses this action with prejudice, for the reason that the parties have reached an agreement to settle and compromise their disputes.

Respectfully submitted,

COMFORT, LIPE & GREEN, P.C.

By: Richard A. Paschal  
Richard A. Paschal #6927  
Nancy G. Gourley #10317  
2100 Mid-Continent Tower  
401 South Boston Avenue  
Tulsa, Oklahoma 74103  
(918) 599-9400

ATTORNEYS FOR PLAINTIFF,  
THRIFTY RENT-A-CAR SYSTEM, INC.

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

**FILED**

AUG 07 1991

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

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, in its corporate )  
capacity, )

Plaintiff, )

vs. )

Case No. 91-C-302-E

MICHAEL E. LORTON; STEPHEN )  
D. EARLEY; ROBERT G. EARLEY; )  
PAULA RUTH KELLEY, formerly Paula )  
Lorton; INA ROSALEE SHANE, )  
formerly Ina Rosalee Earley; )  
THE BOARD OF COUNTY COMMISSIONERS )  
OF WASHINGTON COUNTY, OKLAHOMA; )  
THE TREASURER OF WASHINGTON COUNTY, )  
OKLAHOMA; THE TENANTS/OCCUPANTS OF )  
104 N.E. Katherine, Bartlesville, )  
Oklahoma; THE TENANTS/OCCUPANTS OF )  
3400 E. Tuxedo, Units A-G, Tuxedo )  
Plaza, Bartlesville, Oklahoma, )

Defendants. )

ORDER

Now before the Court for its consideration is the Motion and Brief of FDIC for Order dismissing this action with prejudice, as to all named parties.

By reason of settlement, the Court finds the Motion should be and hereby is granted.

IT IS THEREFORE ORDERED that Plaintiff's Complaint be hereby dismissed as against all named defendants, with prejudice.

DONE THIS 7<sup>th</sup> day of Aug, 1991.

S/ JAMES O. ELLISON

James O. Ellison  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA  
3

4 REXAIR, INC., a Delaware corporation,

5 Plaintiff,

6 v.

7 JAMES LUKER d/b/a RAINBOW SALES  
8 AND SERVICE,

9 Defendant.

CASE NO. 91 C 491 E

**FILED**

AUG 07 1991

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

10  
11 FINAL CONSENT JUDGMENT AND PERMANENT INJUNCTION  
12

13 Plaintiff Rexair, Inc. (hereinafter "Rexair") filed this Complaint on July 15,  
14 1991 against defendant James Luker, individually and doing business as the sole owner  
15 of Rainbow Sales and Service (collectively, "Defendant"). The Complaint avers  
16 Defendant has been, and is now, engaged in the advertisement, sale and distribution of  
17 vacuum cleaners, parts and accessories, in a manner which infringes upon and violates  
18 Rexair's rights under and pursuant to the Trademark Act of 1946 (the "Lanham Act"),  
19 U.S.C. § 1051 et seq. The Complaint also avers Defendant's acts constitute unfair  
20 competition and deceptive trade practices under Oklahoma law. Defendant was  
21 properly served with the Summons and Complaint. Defendant now stipulates and  
22 consents to the entry of this Final Consent Judgment and Permanent Injunction (the  
23 "Final Consent Judgment"), and to each and every provision, order and decree therein.  
24

25 NOW, THEREFORE, upon consideration of all pleadings and prior  
26 proceedings herein, and upon consent of the parties hereto, IT IS ORDERED,  
27 ADJUDGED AND DECREED:  
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I.

This Court has jurisdiction over the subject matter herein and all persons and parties hereto, venue in this Court is proper, and Rexair's Complaint states a cause of action against Defendant under the Lanham Act, under 78 Okla. Stat. § 53(a)(1), (2), (3), and (5), as well as under the common law of the State of Oklahoma.

II.

Defendant and Defendant's officers, principals, agents, servants, and/or employees, and any and all persons and entities in active concert or participation with them or any of them, shall be and are hereby permanently enjoined and restrained from:

- (i) using any reproduction or colorable imitation of any of Rexair's trademarks;
- (ii) using any reproduction or colorable imitation of any of Rexair's trademarks in soliciting the sale or service of vacuum cleaners, parts, or accessories;
- (iii) using any pictorial reproduction of any Rexair product in any way likely to lead the public or individual members of the public to believe that Defendant is in any manner, jointly or individually, directly or indirectly, associated, connected with, licensed, authorized, or approved by Rexair;

- 1 (iv) listing in any telephone directory under the  
2 trademark Rainbow or the tradename Rexair;  
3
- 4 (v) using the trademark Rainbow or the tradename  
5 Rexair as part of any corporate or business  
6 name;  
7
- 8 (vi) using the trademark Rainbow or the tradename Rexair  
9 in any advertisement, printed material, or sign in  
10 which the words "Dealer," "Distributor," and/or any  
11 other word or words suggesting a dealership or a  
12 distributorship with Rexair also appear;  
13
- 14 (vii) using the trademark Rainbow or the tradename  
15 Rexair in any advertisement, printed material,  
16 or sign in which the words "Authorized,"  
17 "Factory Authorized," "Trained," "Factory  
18 Trained," and/or any other word or words  
19 suggesting authorization by or affiliation with  
20 Rexair regarding the service of Rexair products  
21 also appear;  
22
- 23 (viii) making in any manner whatsoever any state-  
24 ment, indication, suggestion, or representation,  
25 or performing any act, likely to lead the public  
26 or individual members of the public to believe  
27 that Defendant is in any manner, jointly or  
28 individually, directly or indirectly, associated,

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connected with, licensed, authorized, or approved by Rexair or by anyone connected with Rexair;

(ix) committing any other act which infringes Rexair's trademarks or constitutes an act of unfair competition or a deceptive business practice;

(x) offering or agreeing to indemnify any publisher, including but not limited to any entity which publishes any newspaper, magazine, or telephone directory, from any costs, attorneys' fees or liability to which such publisher may be subjected in an action instituted by Rexair and based in whole or in part upon the publication of any advertisement placed by Defendant;

(xi) knowingly purchasing, soliciting the purchase of, or otherwise offering or attempting to obtain Rainbow vacuums or other Rexair Products from any registered independent distributor ("RGD") having an existing contractual relationship with Rexair or any subdistributor thereof, for resale except in a manner which would not constitute a violation or breach of

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the Distributor Agreement between such RGD  
and Rexair;

(xii) knowingly communicating with any RGD  
having an existing contractual relationship with  
Rexair or any subdistributor thereof with the  
intent, purpose, or effect of causing or soliciting  
a breach or termination of the contractual  
relationship existing between Rexair and such  
RGD;

(xiii) making false, misleading, or incomplete state-  
ments about the quality, age, performance,  
condition, origin, warranty or price of Rainbow  
vacuums or Rexair Products or services related  
thereto which Defendant offers for sale or sells;

(xiv) making any statement as to a regular or normal  
price for the Rainbow vacuum unless it is  
Defendant's own regular price;

(xv) advertising or offering for sale any Rainbow  
vacuum or Rexair product without disclosing  
whether the Rainbow Power Nozzle is included  
for the price at which Defendant is offering the  
basic Rainbow unit for sale; and

1 (xvi) selling or offering for sale any Rainbow  
2 vacuum or Rexair product from which the serial  
3 number has been in any manner altered,  
4 obliterated, or removed.  
5

6 III.

7 Defendant and Defendant's officers, principals, agents, servants, and/or  
8 employees, and any and all persons and entities in active concert or participation with  
9 them or any of them, shall immediately place signs prominently on the inside front  
10 window and on the wall behind or adjacent to each and every service and cashier's  
11 desk, bay, or counter, at Defendant's place or places of business, stating the following  
12 in capital letters at least three inches high:  
13

14 "THIS BUSINESS IS NOT AFFILIATED OR CONNECTED IN  
15 ANY MANNER WITH REXAIR, INC., THE  
16 MANUFACTURER OF THE RAINBOW VACUUM AND/OR  
17 RELATED ACCESSORIES. WE ARE NOT AUTHORIZED BY  
18 REXAIR TO SELL OR SERVICE ITS PRODUCTS. WE DO  
19 NOT PURCHASE RAINBOWS OR OTHER REXAIR  
20 PRODUCTS FROM REXAIR, AND WE HAVE NOT BEEN  
21 TRAINED BY REXAIR TO SERVICE THE RAINBOW OR  
22 ANY OTHER PRODUCTS MANUFACTURED BY REXAIR."  
23

24 Defendant shall maintain such signs in such locations for as long as Defendant  
25 continues to sell and/or service vacuum cleaners. In addition, Defendant, and  
26 Defendant's officers, principals, agents, servants, and/or employees, and any and all  
27 persons and entities in active concert or participation with them or any of them, shall  
28 post identical signs in the places specified above, for as long as such persons and

1 entities continue to sell and/or service vacuum cleaners from any place or places of  
2 business.

3  
4 IV.

5 Defendant, and Defendant's officers, principals, agents, servants, and/or  
6 employees, and any and all persons and entities in active concert or participation with  
7 them or any of them, shall immediately read the following statement when receiving  
8 telephone inquiries relating to Rexair, Rainbow and/or related accessories at all tele-  
9 phone numbers included in advertisements placed at any time by Defendant which  
10 violate any of the provisions of the foregoing injunction set forth in Section II of this  
11 Final Consent Judgment:

12  
13 "I AM NOT AN AUTHORIZED RAINBOW REPAIRMAN OR  
14 SALESMAN AND I HAVE NO CONNECTION WITH  
15 REXAIR, INC., THE COMPANY THAT MAKES THE  
16 RAINBOW VACUUM CLEANER."  
17

18 Defendant shall read this statement when receiving telephone inquiries at such  
19 numbers for a period of eighteen (18) months from the date of entry of this Final  
20 Consent Judgment. In addition, Defendant, and Defendant's officers, principals, agents,  
21 servants, and/or employees, and any and all persons and entities in active concert or  
22 participation with them or any of them, shall read identical statements in response to  
23 telephone inquiries relating to Rexair, Rainbow and/or related accessories, for a period  
24 of eighteen (18) months from the entry of this Final Consent Judgment if such persons  
25 and entities continue to sell and/or service vacuum cleaners from any place or places of  
26 business contacted through all telephone numbers included in advertisements placed at  
27 any time by Defendant which violate any of the provisions of the foregoing injunction  
28 set forth in Section II of this Final Consent Judgment and Permanent Injunction.

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V.

In the event that Defendant, or Defendant's officers, principals, agents, servants, and/or employees, or any and all persons in active concert or participation with them or any of them, fail to read the statement set forth in Section IV above when receiving telephone inquiries relating to Rexair, Rainbow and/or related accessories during the period of eighteen (18) months from the entry of this Final Consent Judgment, Rexair may move ex parte for an order to immediately disconnect all telephone numbers included in advertisements placed at any time by Defendant which violate any of the provisions of the foregoing injunction set forth in Section II of this Final Consent Judgment, or which otherwise erroneously intimate that Defendant is in any manner associated with Rexair or authorized by Rexair to sell or service products manufactured by it.

VI.

Defendant shall promptly notify all yellow page directories, newspapers and other publishers with whom Defendant has placed advertisements at any time, that Defendant has no right to utilize any of Rexair's trademarks or represent to the public that Defendant is in any way associated with Rexair or authorized by Rexair to sell or service products manufactured by Rexair. In addition, when seeking to place advertisements hereafter, Defendant shall affirmatively advise all persons and entities with whom Defendant seeks to place advertisements that Defendant consented to this Final Consent Judgment and that Defendant has no right to utilize any of Rexair's trademarks or represent to the public that Defendant is in any way associated with Rexair or authorized by Rexair to sell or service products manufactured by it.

VII.

Rexair's remaining claims for injunctive relief (other than those merged into the foregoing Final Consent Judgment), and Rexair's damages claims (including its claims for statutory and other damages, punitive and exemplary damages, and costs of such including attorneys' fees), are dismissed at this time without prejudice and without costs, attorneys' fees or sanctions. This Court retains jurisdiction over the foregoing Final Consent Judgment and any applications with regard to enforcement of this Final Consent Judgment shall be directed to this Court.

IT IS HEREBY ORDERED.

Tulsa, Oklahoma

S/ JAMES O. ELLISON

August 6, 1991

\_\_\_\_\_  
United States District Judge



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Aug 1, 1991, 1991

OLLIE GRESHAM, Attorney at Law

By: Ollie W. Gresham  
Ollie Gresham  
Attorney for James Luker d/b/a  
Rainbow Sales & Service  
2727 East 21st Street, Suite 206  
Tulsa, Oklahoma 74114  
(918) 743-8884

Aug 1, 1991, 1991

JAMES LUKER

By: James Luker  
James Luker  
1323 East 44th Place  
Tulsa, Oklahoma 74105  
(918) 742-1930

Aug 1, 1991, 1991

RAINBOW SALES & SERVICE

By: James Luker  
James Luker  
1323 East 44th Place  
Tulsa, Oklahoma 74105  
(918) 742-1930

**FILED**

AUG 06 1991

IN THE UNITED STATE DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

JEFF EMERY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE CITY OF WEST SILOAM SPRINGS, )  
 OKLAHOMA, WEST SILOAM SPRINGS )  
 POLICEMAN, BARTO SHELLEY, per- )  
 sonally and in his official )  
 capacity; and TOM PRICE, )  
 DEPUTY SHERIFF, DELAWARE )  
 COUNTY, OKLAHOMA, personally )  
 and in his official capacity )  
 and CONNIE ANDERSON )  
 )  
 Defendants )

Case No. 90-C-636-E

ORDER

Now, on this 31st day of August, 1991, the Court grants Plaintiff's Motion and Dismisses the City of West Siloam Springs, Oklahoma as a Defendant to this cause of action.

IT IS SO ORDERED.

**S/ JAMES O. ELLISON**

James O. Ellison  
United States District Judge

FILED

AUG 6 1991

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

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

GRAIN DEALERS MUTUAL INSURANCE )  
COMPANY, )

Plaintiff, )

v. )

No. 90-C-656-B

HOPE CRAWLEY LOWER, ROGER JONES, )  
CHARLES FRUNK, JERRY LEON GUYNN, )  
AMERICAN LEGION #182 and AETNA )  
CASUALTY AND SURETY COMPANY, )

Defendants. )

AETNA CASUALTY AND SURETY )  
COMPANY, )

Third Party Plaintiff, )

v. )

ROGER JONES and CHARLES FRUNK, )  
and JERRY LEON GUYNN, )

Third Party Defendants. )

ORDER

Before the Court for decision are multiple Motions pursuant to Fed.R.Civ.P 56 and Fed.R.Civ.P. 12(b). Prior to considering the various Motions, the Court will briefly chronologize the pleadings.

In its Complaint Grain Dealers Mutual Insurance Company (Grain Dealers) seeks declaratory relief resolving its liability under an insurance policy issued to Defendant, American Legion #182 of Pryor, Oklahoma (Legion).

Grain Dealers joined Hope Crawley Lower (Lower), Roger Jones

and Charles Frunk, the latter two being Co-Administrators (Co-Administrators) of the Estate of Viola Mae Frunk, Deceased, and Aetna Casualty and Surety Company (Aetna) in its declaratory relief suit.

Cross-Motions for Summary Judgment pursuant to Fed.R.Civ.P. 56, pertaining to Plaintiff's declaratory relief action, were filed by Grain Dealers, Legion, and Co-Administrators/Lower.

Aetna filed its Third Party Complaint (Cross Claim) against Frunk and Jones, as Co-Administrators, and against Jerry Leon Guynn (Guynn), seeking declaratory relief on an insurance policy issued by it to Premark International, Inc. (Premark).

Viola Mae Frunk (Deceased) was an authorized independent Tupperware distributor. Tupperware is an affiliated company of Premark. Guynn was the driver of a vehicle which was involved in an automobile accident on or about April 12, 1988, which claimed the life of Viola Frunk.<sup>1</sup> Guynn, an uninsured motorist, allegedly consumed alcoholic beverages at Legion's bar prior to the accident and was under the influence of alcohol, negligently causing the accident and ultimate death of Viola Frunk.

Co-Administrators Frunk and Jones then filed a Motion to Dismiss pursuant to Fed.R.Civ.P 12(b) in response to AETNA's Cross-Claim. A Motion for Partial Summary Judgment filed by Co-Administrators pursuant to Fed.R.Civ.P. 56 followed.

AETNA responded with a Cross-Motion for Summary Judgment in

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<sup>1</sup> Hope Crawley Lower, a passenger in an automobile driven by Viola Mae Frunk, was allegedly injured in the same accident.

support of its Cross-Claim against Co-Administrators Frunk and Jones. All Motions are pending before this Court for decision. The Court will address the Motions issue oriented, combining the several Motions into two main issues for summary judgment. The Court will consider as an issue for Summary Judgment whether Legion's bar operation is considered a "business" as defined in its liability insurance policy issued by Grain Dealers, and, secondly, as an issue for Summary Judgment, the extent of Aetna's uninsured motorist liability, i.e. is "stacking" of uninsured motorist coverage available to Co-Administrators Frunk and Jones?

It is not before the Court to determine whether GUYNN negligently caused the accident that led to Viola Frunk's demise. Nor is the Court required to resolve whether Legion contributed to the accident by aiding Guynn's alleged inebriation. This Court need only determine whether the exclusionary clause, appearing in Legion's liability policy, exempts Grain Dealers, from a duty to defend and indemnify Legion for any possible misfeasance relating to the accident which occurred on or about the 12th day of April, 1988. The Court must also resolve the extent of Aetna's uninsured motorist liability coverage, which involves a determination of Oklahoma law concerning "stacking" of uninsured motorist benefits.

Frunk and Jones, Co-Administrators of the Estate of the Viola Frunk, have presently pending in Rogers County, Oklahoma, an action against Legion, Guynn and Aetna relative to the accident. Lower has pending an action in Tulsa County District Court against Guynn and

Legion.

The exclusionary clause in LEGION's policy which addresses whether Grain Dealers has a duty to defend and indemnify Legion, the named insured, for bodily injury or property damages for which the insured may be held liable, states as follows:

2. Exclusions.

This insurance does not apply to:

c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person.
- (2) The furnish of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

Legion sells and serves alcoholic beverages everyday of the week,<sup>2</sup> except Monday.<sup>3</sup> The Court presumes that everyday does not include Sundays, precluded by operation of State law.

Legion receives substantial income from its selling of alcoholic beverages.<sup>4</sup> Further, there is no dispute that Legion is properly licensed to serve and sell alcoholic beverages in the

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<sup>2</sup> See Exhibit D, p. 14 & 15, and Exhibit C, p. 20 of LEGION's Brief in support of Motion for Summary Judgment.

<sup>3</sup> See Exhibit E, p. 10 of LEGION's Brief in support of Motion for Summary Judgment.

<sup>4</sup> As indicated by Profit and Loss Statements, Exhibits to Plaintiff's Reply to LEGION's Response to Plaintiff's Motion for Summary Judgment.

state of Oklahoma, and was so licensed on April 12, 1988.

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 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Winton Third Oil and Gas v. Federal Deposit Ins. Corp., 805 F.2d 342 (10th Cir. 1986), *cert. den.*, 480 U.S. 947 (1987). In Celotex, 477 U.S. at 317, 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, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Cross-Motions for Summary Judgment do not warrant the Court in granting Summary Judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts not genuinely in dispute. Houghton v. Foremost Fin. Servs. Corp., 724 F.2d 112 (10th Cir. 1983); Buell Cabinet Co. v. Sudduth, 608 F.2d 431 (10th Cir. 1979).

It appears the issue of Grain Dealers' Exclusionary Clause, which reads "in the business of" selling and serving alcohol

beverages, is a case of first impression in Oklahoma, as it was in McGriff By and Through Norwest Capital Management & Trust Co. v. U.S. Fire Ins. Co., 436 N.W.2d 859 (S.D. 1989). A review of the limited case precedent on this issue reveals diametrically opposed views on essentially the same factual premise under consideration herein.

In Fraternal Order of Eagles, Cle Elum, Aerie No. 649 v. General Acc. Ins. Co. of America, 792 P.2d 178 (Wash. App. 1990), Eagles, a nonprofit fraternal organization, holding a state liquor license, brought an action against its general liability insurer. Eagles sought declaratory relief contesting the insurer's refusal to provide coverage on a claim filed by an automobile driver following his collision with a car driven by a person who allegedly had been served liquor at Eagles shortly before the accident. The liability policy provided an exclusion markedly similar to the instant case exclusion. The lower court held the exclusion did not apply to the Eagles organization. Upon appeal the Washington appellate court recognized the dispute, as in the present case, was whether the Eagles' status as a nonprofit organization had a qualifying effect on the phrase "engaged in the business . . . of selling or serving alcoholic beverages". *Id.* at 180.

In Eagles, the Washington appellate court recognized that focusing on the "character" of an organization, to determine the liquor-serving-business-exclusion issue, follows the approach of courts in Massachusetts and New Hampshire, both jurisdictions holding similar exclusions do not apply to avoid coverage and

defense liability. See, Newell-Blais Post 443, Veterans of Foreign Wars of the United States, Inc. v. Shelby Mut. Ins. Co., 487 N.E.2d 1371 (Mass. 1986), and American Legion Post # 49 v. Jefferson Ins. Co. 485 A.2d 293 (N.H. 1984). Choosing to emphasize the *activity* for which the liability was claimed, rather than the *character* of the organization, the Eagles court, citing McGriff, *supra*, reversed, holding the exclusionary clause voided coverage and defense responsibilities.

The McGriff court declined to consider the language "engaged in the business of . . . selling or serving alcohol beverages" as creating an ambiguity requiring strict construction against the insurer as was done in American Legion Post # 49, *supra*. To the contrary, the court in McGriff held such clause "plainly and specifically excludes coverage for liability arising out of the business of selling or serving alcoholic beverages. That language could not be more clear. Words are to be give their plain meaning and effect." *Id.* at 862.

In the present case, the Court concludes that, while Legion's function is not private enterprise, Legion participates in activities normally associated with that of an entity engaged in business endeavors to attain profit. This is substantiated by the frequency in which Legion sells, serves and furnishes alcoholic beverages.<sup>5</sup> Also the dollar volume of sales of alcohol beverages

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<sup>5</sup> As indicated previously, LEGION is open every day of the week except Sunday and Monday, selling, serving and furnishing alcoholic beverages.

by Legion supports the view that such activity is one of Legion's principal endeavors.

This Court is not persuaded by the argument that because Legion is a non-profit organization, it therefore does not operate, nor is in the "business" of selling alcohol beverages. To the contrary, this Court views Legion, irrespective of its character, as a "business" as contemplated by the terminology in LEGION's policy. Benally v. Amon Carter Museum of Western Art, 858 F.2d 618 (10th Cir. 1988); Fraternal Order of Eagles, CLE ELUM, Aerie No. 649 v. General Accident Ins. Co. of America, 792 P.2d 178 (Wash. Ct. App. 1990); McGriff v. United States Fire Ins. Co., 436 N.W.2d 859 (S.D. 1989). Legion is in the business of selling, serving and furnishing alcoholic beverages for a profit, for the purpose of supporting and sustaining its other, non-profit endeavors.

Legion sells and serves alcohol in substantial volume creating significant income<sup>6</sup> as evidenced by Profit and Loss Statements, which delineate sources of income for the LEGION. Whether these sales ultimately produce a profit (which they do), or even are intended to yield profit, cannot gainsay the activity of the Legion in devoting a substantial portion of its time and effort toward the selling, serving and furnishing of alcoholic beverages. The Court concludes Legion is a "business" within the Exclusion language of Legion's policy with Grain Dealers.

The Court concludes Grain Dealers Motion for Summary Judgment

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<sup>6</sup> Significant income in relation to Legion's overall income from all endeavors.

should be granted and that Legion's Cross-Motion for Summary Judgment should be denied.

The Court next considers the issue whether "stacking" is permitted pursuant to the uninsured motorist coverage provided in the policy Aetna issued to Premark.

Deceased, Frunk, was a Tupperware distributor, selling Tupperware brand products as an independent contractor. As such, she was furnished an automobile for business use. The automobile was or is owned by Premark, of which Tupperware is an affiliated company. Premark is the named insured in the policy issued by AETNA.<sup>7</sup>

The policy issued by Aetna is a "fleet" policy, covering at least an admitted 250 vehicles. In fact, the pleadings indicate the policy may cover as many as eight thousand Premark vehicles. There is no evidence that deceased ever directly paid any premiums<sup>8</sup> toward the uninsured motorist coverage issued by Aetna.<sup>9</sup> Premark paid a single, one hundred dollar flat fee, instead of separate

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<sup>7</sup> This policy of insurance, No. 08FJ647333SCA, was in force on the day of the accident.

<sup>8</sup> Charles Frunk's self-serving affidavit, that his deceased wife was a "non-employee custodian of said vehicle, having fully(sic) possession, responsibility and control of the vehicle.", is a conclusionary statement unsupported by the present record. As such, it is insufficient to create a genuine issue as to a material fact.

<sup>9</sup> Frunk's affidavit avowal that "A portion of the profits generated from her sales were deducted by Tupperware Home Parties to cover the cost of purchasing the vehicle and the cost of maintaining full insurance coverage provided through Aetna Casualty and Surety Company." is unsupported by the present record. Frunk's allegation is, standing alone, a self-serving conclusion, insufficient to create a genuine issue as to a material fact.

premiums, for all of the 8000 or 250 Premark vehicles for uninsured motorist benefits. For the period 10-31-87 to 10-31-88, Premark paid one fee, \$47,900.00 for liability coverage of \$2,500,000.00, for all of its "owned vehicles assigned to non-employee custodians," a category which included deceased. The liability coverage was subject to a deductible of \$2,475,000.00.

The AETNA policy provided limits of ten thousand for any one person, twenty thousand for any one accident, in relation to uninsured motorist coverage.<sup>10</sup> The advance premium for UM coverage was "100 flat charge," a \$100 charge for UM coverage for the entire fleet of Premark vehicles. According to evidence submitted by Aetna,<sup>11</sup> it was not intended by the parties privy to the Aetna policy to provide UM coverage beyond the statutory liability coverage minimum, which, in Oklahoma, is \$10,000.

Endorsement No. 30, Uninsured Motorists Insurance, provides, in part, as follows:

E. OUR LIMIT OF LIABILITY

1. Regardless of the number of covered autos, insureds, claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the limit of UNINSURED MOTORISTS INSURANCE shown in the declarations.

Endorsement No. 56, UNINSURED MOTORISTS INSURANCE (OKLAHOMA), provides, in part, as follows:

E. OUR LIMIT OF LIABILITY

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<sup>10</sup> Endorsement No. 29.

<sup>11</sup> See the affidavit of Lawrence S. Nora, Manager of Risk Management of Premark International, Inc., so employed since 1986, Ex. 3, Aetna's Supplement filed July 18, 1991.

1. Regardless of the number of covered autos, insureds, claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the limit of UNINSURED MOTORISTS INSURANCE shown in the declarations. If there is more than one covered auto, our limit of liability for any one accident is the sum of the limits applicable to each covered auto.

The "limit . . . shown in the declarations" refers one to Endorsement No. 29 (SPECIAL NO. 29) which lists by abbreviation the 50 states (and presumably Puerto Rico) and the minimum statutory coverage for each. Set beside "OK" is "10/20", which under the endorsement language means \$10,000/\$20,000.

The Court is basically faced with the question whether a single, flat fee of \$100 for all of the fleet vehicles was intended by the parties to make available "stacking" of the minimum coverage as to any one claimant (\$10,000) by multiplying that amount by the number of vehicles, be it 250 or 8000, which would be either \$2,500,000.00 or \$80,000,000.00.

Initially, the Court views the single, one hundred dollar flat fee as indicative of the parties lack of intent to provide the right to "stack" uninsured motorist coverage. A single premium contraindicates "stacking." Scott v. Cimarron Ins. Co., 774 P.2d 456 (Okla. 1989). Secondly, the insurance policy would have no ambiguity but for the inclusion of Endorsement No. 56 and its language relating to "more than one covered auto". However, reading the endorsement in its entirety, particularly its frequent reference to "family member" suggests to the Court the intended use for Endorsement No. 56 was individual family UM coverage involving

only several vehicles. In addition, there is little indication deceased would have been other than a "Class 2" insured<sup>12</sup>, thereby precluding "stacking" of UM coverage. Babcock v. Adkins, 695 P.2d 1340 (Okla. 1984); Rogers v. Goad, 739 P.2d 519 (Okla. 1987); Stanton v. American Mut. Liability Ins. Co., 747 P.2d 945 (Okla. 1987); Aetna Cas. and Sur. Co. v. Craig, 771 P.2d 212 (Okla. 1989). As a non-employee custodian of the accident vehicle, deceased was an additional insured, not the named insured, under the AETNA policy. In addition, an absurdity<sup>13</sup> would be the result if Co-Administrators were permitted to pyramid uninsured motorist benefits, where there is no clear intention of the policy to allow such "stacking." Stanton, *supra*.

The Court concludes the maximum liability of Aetna under the Premark policy for uninsured motorist benefits is ten thousand for any one person, and twenty thousand for any one accident. Co-Administrators may not pyramid insurance benefits on behalf of the deceased's estate.

The Court concludes that there is no genuine issue as to any material fact regarding whether Legion is in the "business" of selling, serving and furnishing alcohol beverages. Under the undisputed facts and applicable law, the Court concludes Legion is in the "business" of selling, serving and furnishing alcohol

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<sup>12</sup> Deceased was a permissive user of the vehicle in question, which, under the policy, was a non-employee custodian.

<sup>13</sup> 8,000 vehicles X 10,000 would result in an exposure of 80,000,000.00. The extent of this exposure in relation to the 100 dollar flat fee would clearly constitute an absurdity.

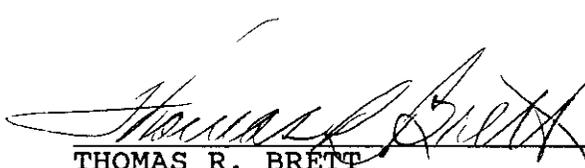
beverages under the terms of the Grain Dealer policy and coverage is excluded thereby.

Plaintiff Grain Dealers' Motion for Summary Judgment should be and the same is hereby SUSTAINED. Co-Administrators', Lower's, and Legion's Motions for Summary Judgment against Grain Dealers should be and the same are hereby DENIED.

Nor is there a genuine issue as to any material fact regarding the issue of "stacking" of uninsured motorist benefits under the Aetna policy. The Court concludes Co-Administrators are precluded from "stacking" uninsured motorist benefits on behalf of the Deceased's Estate. Aetna's Motion for Summary Judgment should be and the same is hereby SUSTAINED. Co-Administrators' Motion for Partial Summary Judgment should be and the same is hereby DENIED. Co-Administrators' Motion to Dismiss is considered moot, subsumed by the Court's ruling herein, and is DENIED.

The Court further DISMISSES, without prejudice, Grain Dealers' Complaint and Aetna's Third Party Complaint and Amended Cross Claim against Defendant (and Third Party Defendant) Jerry Leon Guynn. The putative service upon Guynn, by Certified Mail, Return Receipt Requested, appears to the Court to be facially invalid since not signed for by Guynn nor his agent under the present record.

IT IS SO ORDERED this 6<sup>th</sup> day of August, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

AUG 06 1991

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JON M. JOHNSON, )  
 )  
 Defendant. )

Civil Action No. 91-C-323-E

DEFAULT JUDGMENT

This matter comes on for consideration this 5 day of Aug, 1991, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Jon M. Johnson, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jon M. Johnson, was served with Summons and Complaint on May 20, 1991. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jon M. Johnson, for the principal amount of \$20,420.00, plus accrued interest of \$1,483.81 as of February 28, 1991, plus interest thereafter at the rate of 4 percent per annum until judgment, plus

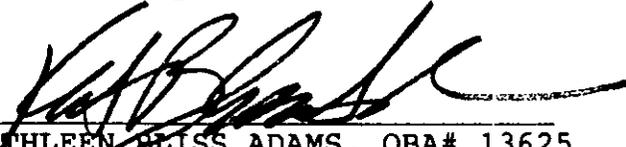
interest thereafter at the current legal rate of 6.26 percent per annum until paid, plus costs of this action.

S/ JAMES O. ELLISON

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United States District Judge

Submitted By:



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KATHLEEN BLISS ADAMS, OBA# 13625  
Assistant United States Attorney  
333 West 4th Street  
Tulsa, Oklahoma 74103  
(918)581-7463

FILED

AUG 6 1991

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

Jack O. Clark, Clerk  
U.S. District Court

GRAIN DEALERS MUTUAL INSURANCE )  
 COMPANY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 HOPE CRAWLEY LOWER, ROGER JONES, )  
 CHARLES FRUNK, JERRY LEON GUYNN, )  
 AMERICAN LEGION #182 and AETNA )  
 CASUALTY AND SURETY COMPANY, )  
 )  
 Defendants. )  
 )  
 AETNA CASUALTY AND SURETY )  
 COMPANY, )  
 )  
 Third Party Plaintiff, )  
 )  
 v. )  
 )  
 ROGER JONES and CHARLES FRUNK, )  
 and JERRY LEON GUYNN, )  
 )  
 Third Party Defendants. )

No. 90-C-656-B

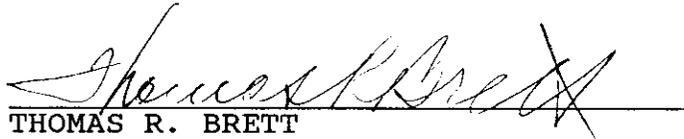
J U D G M E N T

In accord with the Order filed August 6<sup>th</sup>, 1991, the Court hereby enters judgment in favor of Plaintiff, Grain Dealers Mutual Insurance Company, and against Defendants Hope Crawley Lower, Roger Jones, Charles Frunk, and American Legion #182. Costs are assessed against Defendants if timely applied for pursuant to Local Rule 6, each party to pay its respective attorney's fees.

Further, in accord with the Order filed August 6<sup>th</sup>, 1991, the Court hereby enters judgment in favor of Third Party Plaintiff,

Aetna Casualty and Surety Company and against Co-Administrators, Roger Jones and Charles Frunk, Third Party Defendants. Costs are assessed against Third Party Defendants if timely applied for pursuant to Local Rule 6, each party to pay its respective attorney's fees.

DATED this 6<sup>th</sup> day of August, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

AUG 06 1991

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

JOHN D. WILLIAMS, as Personal )  
Representative of the Estate of )  
DR. RICHARD A. PERRYMAN, Deceased, )  
on behalf of the Estate of )  
DR. RICHARD A. PERRYMAN, Deceased; )  
ELIZABETH PERRYMAN, Surviving )  
Spouse and Widow of Dr. Richard A. )  
Perryman; RICHARD T. PERRYMAN )  
and LIBBY PERRYMAN, Children of )  
DR. RICHARD A. PERRYMAN; )  
ELIZABETH PERRYMAN, as Natural )  
Mother and Next Friend of )  
RICHARD T. PERRYMAN, )  
all Oklahoma citizens, )

Plaintiffs, )

vs. )

Case No. 90-C 423 E )

LOUIS E. FRANKE, a citizen of )  
the State of Ohio, Individually )  
and as Agent of SAM TANKSLEY )  
TRUCKING, INC., a Missouri )  
corporation, and SAM TANKSLEY )  
TRUCKING, INC., a Missouri )  
corporation, )

Defendants. )

AGREED TO ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 5<sup>th</sup> day of August, 1991,  
this matter comes on for consideration before the undersigned  
Judge of the U.S. District Court upon Stipulation for Order of  
Dismissal with Prejudice. The Court being fully advised in the  
premises finds that all issues herein have been completely  
compromised and settled and released with all parties to bear  
their own costs, expenses and attorney fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause should be and same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that all parties hereto are to bear their own Court costs, expenses and attorney fees.

IT IS SO ORDERED.

S/ JAMES O. ELLISON

JUDGE OF THE U.S. DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:



JAMES M. STURDIVANT  
Attorney for Plaintiffs

  
EUGENE ROBINSON  
Attorney for Defendants

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

**F I L E D**  
AUG 5 1991

YESSUP MUSIC COMPANY, GONE GATER )  
MUSIC AND HIDEOUT RECORDS AND )  
DISTRIBUTORS, INC., )

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

Plaintiffs, )

vs. )

CASE NO. 91-C-0010 B ✓

BUD BRUMBACK, d/b/a Tri-State )  
Music, )

Defendant. )

ORDER DISMISSING ACTION WITHOUT PREJUDICE  
BY REASON OF SETTLEMENT

Upon the written joint application of the parties in the above styled and numbered cause and after review of the plaintiffs' Complaint and the Stipulation of Settlement entered into between the parties, the Court finds that these proceedings should be held in abeyance pursuant to the Stipulation of Settlement affected by the parties and that the action not remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to re-open the action upon the written application of either party for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation consistent with the terms of the Stipulation of Settlement. If the parties have not made such written application on or before March

8

clm

15, 1992 for the purpose of obtaining such a final determination,  
this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 5<sup>th</sup> <sup>August</sup> day of ~~July~~, 1991.

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

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 5 1991

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

SABRE INTERNATIONAL, INC., )  
a Washington corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FOUR-FOUR, INC., )  
a New Mexico corporation, )  
 )  
Defendant. )

Case No. 91 C-361-B

JUDGMENT - ATTORNEY'S FEE

NOW on this 30th day of July, 1991 this matter comes on for entry of judgment on attorney's fee.

Plaintiff is represented by Charles A. Gibbs III. Having heard the statements of counsel regarding the attorney's fee requested, having reviewed the file and having previously found said fee to be reasonable by order of the Court dated July 24, 1991, the Court finds that judgment for attorney's fee in the sum of \$6,000.00 should be and hereby is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff is granted judgment against Defendant in the sum of \$6,000.00 as a reasonable attorney's fee.

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

5

CLM

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

**FILED**

AUG 05 1991

MCI TELECOMMUNICATIONS  
CORPORATION,

Plaintiff,

v.

FINANCIAL MANAGEMENT  
SYSTEMS, INC.,

Defendant.

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

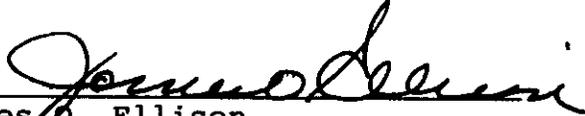
No. 90-C 926 E

DEFAULT JUDGMENT

This matter comes before the Court upon Plaintiff MCI Telecommunications Corporation's Motion for Default Judgment. It appears that defendant Financial Management Systems, Inc. is in default and that the Clerk of the United States District Court has previously searched the records and entered the default of defendant Financial Management Systems, Inc. It appears from the Declaration of Karen Vail in support of Plaintiff's Application for Entry of Default that defendant Financial Management Systems, Inc. is indebted to the Plaintiff in the amount of \$11,493.93.

In accord with the Entry of Default, the Court hereby enters Judgment in favor of the Plaintiff, MCI Telecommunications Corporation, and against the defendant, Financial Management Systems, Inc., for the amount of \$11,493.93, plus post-judgment interest at the rate of 6.26% per annum from the date of judgment until paid. Costs and attorney's fees may be awarded upon proper application pursuant to Local Rule 6.

DATED this 22 day of Aug., 1991.

  
James O. Ellison  
United States District Judge

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

**FILED**

AUG 05 1991

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

HERBERT L. FOSTER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 METROPOLITAN TULSA TRANSIT )  
 AUTHORITY, )  
 )  
 Defendant. )

No. 90-C-285-E

ORDER

The Court has reviewed the authorities submitted by Plaintiff in response to Defendant's Motion to Dismiss. The Court agrees that the authorities submitted are germane to the issues raised. However, in the Court's view the relevant law compels a finding that the Court, in this instance must defer to the Arbitrator's ruling as stated in the Court's Order entered on May 13, 1991.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is hereby granted.

ORDERED this 5<sup>th</sup> day of August, 1991.

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

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

FILED

AUG 5 1991

W. DAVID HOLLOWAY, M.D., ET AL., )  
 )  
 Plaintiffs. )  
 )  
 vs. )  
 )  
 PEAT, MARWICK, MITCHELL & CO., )  
 ET AL., )  
 )  
 Defendants. )

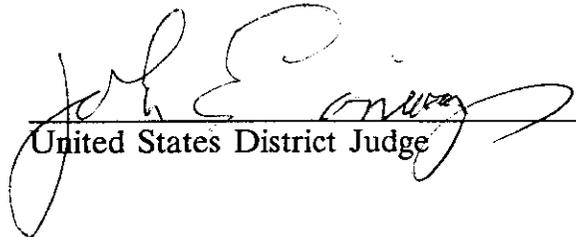
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

Case No. 84-C-814-Conway

**ORDER FOR VOLUNTARY DISMISSAL OF  
THE DEFENDANT CHARLES G. WRAY, ONLY**

Upon consideration of the Motion for Voluntary Dismissal by the Plaintiffs, and no Defendants having objected thereto, it is hereby ordered that the action alleged against the Defendant Charles G. Wray, only, as set forth in the Amended Complaint filed herein on December 10, 1984, is hereby dismissed.

Dated this 27 day of July, 1991.

  
United States District Judge

NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

7/27

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

KENNETH D. JONES; GERALDINE  
JONES; LARNELL TOLES; EMMA  
TOLES; COUNTY TREASURER, Tulsa  
County, Oklahoma; and BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

**FILED**

AUG 5 1991

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

CIVIL ACTION NO. 90-C-677-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5<sup>th</sup> day  
of August, 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, Kenneth D.  
Jones and Geraldine Jones, appear by their attorney Charles O.  
Hanson; and the Defendants, Larnell Toles and Emma Toles, appear  
not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendants, Larnell Toles and Emma  
Toles, acknowledged receipt of Summons and Complaint on  
August 21, 1990; that the Defendant, County Treasurer, Tulsa  
County, Oklahoma, acknowledged receipt of Summons and Complaint  
on August 15, 1990; and that the Defendant, Board of County

Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on August 14, 1990.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on August 29, 1990; that the Defendants, Kenneth D. Jones and Geraldine Jones, filed their Answer and Counterclaim on August 29, 1990 and their Third Party Complaint on September 7, 1990; that the Defendants, Larnell Toles and Emma Toles, have failed to answer and their default has therefore been entered by the Clerk of this Court; and that the Plaintiff, United States of America, filed its Motion to Dismiss Counterclaim and Motion to Dismiss Third Party Complaint on November 13, 1990.

The Court further finds that on December 14, 1990, Kenneth Dean Jones a/k/a Kenny Jones and Geraldine Jones a/k/a Jeri Jones filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-03931-W. On April 18, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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 Twenty-six (26), Block Two (2) ARROW SPRINGS THIRD, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on October 18, 1985, the Defendants, Kenneth D. Jones and Geraldine Jones, 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 \$53,000.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Kenneth D. Jones and Geraldine Jones, 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 October 18, 1985, covering the above-described property. Said mortgage was recorded on October 18, 1985, in Book 4900, Page 415, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Kenneth D. Jones and Geraldine Jones, 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, Kenneth D. Jones and Geraldine Jones, are indebted to the Plaintiff in the principal sum of \$52,369.35, plus interest at the rate of 11.5 percent per annum from August 1, 1988 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, Larnell Toles and Emma Toles, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$11.00 which became a lien on the property as of 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Plaintiff's Motion to Dismiss Counterclaim and Motion to Dismiss Third Party Complaint filed on November 13, 1990, should be granted.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment in rem against Defendants, Kenneth D. Jones and Geraldine Jones, in the principal sum of \$52,369.35, plus interest at the rate of 11.5 percent per annum from August 1, 1988 until judgment, plus interest thereafter at the current legal rate of 6.26 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and

recover judgment in the amount of \$11.00 for personal property taxes for the year 1989, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Larnell Toles, Emma Toles, 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 the Plaintiff's Motion to Dismiss Counterclaim and Motion to Dismiss Third Party Complaint filed on November 13, 1990, are granted.

**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:**

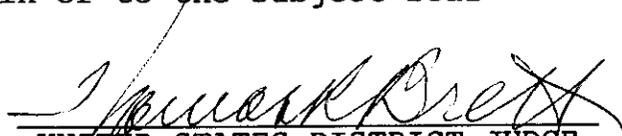
In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$11.00, personal property taxes which are currently due and owing.

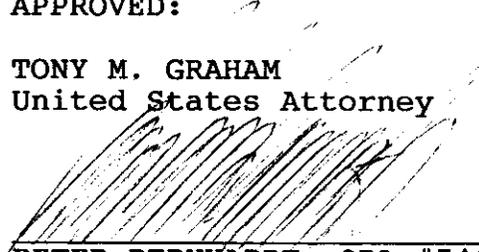
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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.

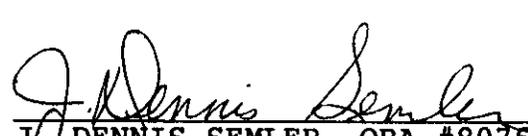
  
UNITED STATES DISTRICT JUDGE

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

  
CHARLES O. HANSON, OBA #3820  
Attorney for Defendants,  
Kenneth D. Jones and Geraldine Jones

  
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-0677-B



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

**FILED**

AUG - 2 1991

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

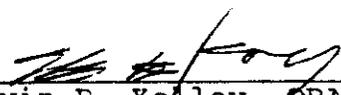
MICHELLE R. LEAL, )  
 )  
 Plaintiff, )  
 )  
-vs- )  
 )  
HERRERA MANAGEMENT, )  
 INCORPORATED, an Oklahoma )  
 Corporation, d/b/a Alfredo's )  
 Mexican Restaurants, and )  
 VIAUD JAIRO RIVERA, an )  
 individual, )  
 )  
 Defendants. )

Case No. 90-C-197-B

DISMISSAL WITH PREJUDICE

Comes now the Plaintiff, Michelle R. Leal, and pursuant to the settlement of her claims herein dismisses with prejudice the above cause of action.

Respectfully Submitted,

  
\_\_\_\_\_  
Kevin R. Kelley, OBA #11889  
Timothy S. Gilpin, OBA #11844  
Sixteen E. Sixteenth, Suite 302  
Tulsa, Oklahoma 74119-4461  
(918) 592-4000

VERIFICATION

STATE OF OKLAHOMA )  
 ) ss  
COUNTY OF TULSA )

Michelle R. Leal, of lawful age, being first duly sworn upon her oath deposes and states that she is the Plaintiff in the above instrument, that she has read and understands the

contents contained therein and further states that the same are true and correct to the best of her knowledge.

Michelle R. Leal  
MICHELLE R. LEAL

SUBSCRIBED AND SWORN to before me this 2<sup>nd</sup> day of August, 1991.

Jina Mitchell  
NOTARY PUBLIC

My Commission Expires:

6-3-95

CERTIFICATE OF MAILING

I, Timothy S. Gilpin, hereby certify that on the 2 day of August, 1991, a true and correct copy of the above and foregoing instrument was mailed with proper postage affixed thereon to:

Tony L. Waller  
500 W. 7th Street  
Suite 150  
Tulsa, OK 74119

George M. Park  
123 W. Commercial  
Broken Arrow, OK 74012

Timothy S. Gilpin  
Timothy S. Gilpin

**F I L E D**

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

AUG 1 1991 *J*

IN THE MATTER OF THE WILL OF )  
 OMER LOUIS JEFFERSON, JR., )  
 Unallotted Osage, Deceased, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MANUEL LUJAN, Secretary of the )  
 Interior Department, United States )  
 of America, )  
 )  
 Defendant. )

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

No. 90-C-628-B ✓

O P I N I O N

This is an appeal of the Secretary of the Interior's decision filed June 22, 1990 affirming the order of the Superintendent of the Osage Agency, Bureau of Indian Affairs, approving the will of Omer Louis Jefferson, Jr. (hereafter "Omer Jefferson"). Omer Jefferson, a member of the Osage Tribe, executed his Last Will and Testament on June 20, 1986 at the First State Bank in Fairfax, Oklahoma. The Superintendent approved the subject will following recommendations of the Special Attorney who had conducted hearings regarding the validity of the will.

Omer Jefferson was an unallotted Osage Indian. He had two children by his first wife whom he had divorced, daughters Anna Marie Jefferson and Tracey Dawn Seago, each of whom survived him. Omer Jefferson had no children by either his deceased second wife, or his third wife and surviving widow, Elvita Louise Jefferson (sometimes referred to as Sally). Elvita Louise Jefferson, Anna Marie Jefferson and Tracey Dawn Seago are the contestants herein. Proponents of the subject will are Christina Louise Irons Bledsoe, the testator's niece, designated executrix and beneficiary, and

Bill Heskett, guardian *ad litem* for Joyce Marie Washington, a minor.

Omer Jefferson, died on September 19, 1986, when he was 50 years old. (Document 10, Transcript of Appeal, Order Approving Will, Finding of Fact No. 1).<sup>1</sup> His principal property consisted of a 1.80082 Osage Headright Interest and other property subject to the jurisdiction of the Secretary of the Interior.

Pertinent provisions of the subject will are as follows:

I hereby state that I am married to Elvita Jefferson, and that we are now legally separated and in the process of a divorce. I state that I have three children, two daughters, Anna Marie Jefferson and Tracey Dawn Seago and a child born to Theresa Washington of 8864 Highway 151, Ignacio, Colorado on May 23, 1986.

\* \* \*

#### ARTICLE II.

1. I hereby give, devise and bequeath unto my two daughters, Anna Marie Jefferson and Tracey Dawn Seago, a one-half (1/2) Osage Indian Headright Interest to each of them. I further state that I am the natural father of a child born on May 23, 1986 to Therese [sic] Washington of 8864 highway 151, Ignacio, Colorado and do give, devise and bequeath unto said child a one-half (1/2) Osage Indian Headright Interest.

2. I hereby give, devise and bequeath unto my neice [sic], Christina Louise Irons Bledsoe, all of the rest, residue and remainder of my property and estate, both real, personal and mixed of whatsoever kind and character and wheresoever situated, without any conditions or restrictions.

---

<sup>1</sup>Contestants on page 1 of their brief filed February 27, 1991 state Omer Jefferson died September 22, 1986.

The contestants objected to the validity of the will of Omer Jefferson asserting that he lacked testamentary capacity as a result of mental deficit from the effects of approximately thirty years of alcoholism. The parties concede that Omer Jefferson was an alcoholic.

In October 1984 Omer Jefferson and his wife, Elvita Louise Jefferson, separated.<sup>2</sup> In the spring of 1985 Omer Jefferson entered the Southern Ute residential Alcoholism and Addiction Recovery Center in Ignacio, Colorado where he participated in an Antabuse program and worked as a secondary cook. He began seeing a waitress, Theresa Lynn Washington, at his place of work in May 1985. In July 1985 he became an outpatient at the Southern Ute recovery center and moved in with Theresa Washington and her family in Ignacio, Colorado. His wife, Elvita Louise Jefferson, filed for divorce in August 1985, but the divorce was never adjudicated. In September 1985, Omer Jefferson and Theresa Washington moved to Colorado Springs, Colorado. It was determined that Theresa Washington was pregnant in October 1985. In November 1985, following one of Omer Jefferson's drinking bouts, he reunited with Theresa Washington in Ignacio, Colorado. On December 2, 1985, Theresa Washington and Omer Jefferson sought prenatal care from the Southern Ute Health Center. On December 2, 1985, at the Southern Ute Tribal Court Clerk's office, Jefferson signed an affidavit acknowledging himself to be the father of the child Theresa

---

<sup>2</sup>Exhibit 12, Petition for Dissolution of Marriage.

Washington was carrying. The affidavit was notarized by the Southern Ute Tribal Court Clerk and was filed at the Indian Health Service Center in Ignacio, Colorado. Such was standard procedure at the Indian Health Center for providing medical care of a non-Indian woman, as was Theresa Washington, who was carrying an unborn child of an Indian. Contestants also assert that Omer Jefferson lacked the mental capacity to acknowledge the child out of wedlock as his.

From February 1986 until May 1986, because of Omer Jefferson's persistent bouts with alcoholism, he and Theresa Washington lived apart.

By May 1986 Omer Jefferson had moved back to Oklahoma where he briefly lived with his niece, Christina Louise Irons Bledsoe, in Fairfax, Oklahoma, before moving to Pawhuska, Oklahoma. On May 31, 1986, Theresa Washington gave birth to Joyce Marie Washington in Durango, Colorado.

In mid-June 1986 Omer Jefferson conferred with attorney Kelly Young in Fairfax, Oklahoma, about his will and executed his self-proving will on June 20, 1986, which is the subject of this lawsuit. As previously stated, Omer Jefferson died on September 22, 1986.

On page thirteen of the Decision of Appeal from Superintendent's Order Approving Will the Secretary commented that the acts of the testator before and after making a will have bearing on the determination of the mental status of the testator at the time of the execution of the will. The Secretary then stated

the following:

While these circumstances are to be taken into consideration, once a *prima facie* case of testamentary capacity has been established, it can only be overcome by clear and convincing evidence. Hobbs v. Mahoney, 478 P.2d 956 (Okla. 1970).

Here the facts indicate that Omer Jefferson was in good appearance and good mind a day before and at the time of signing his will with no indications of being intoxicated. Although later in the evening after Jefferson executed his will, he was arrested for public intoxication, the Superintendent determined that the subsequent arrest for public intoxication did not constitute clear and convincing evidence that at the time he signed his will earlier that day, he did not possess the requisite testamentary capacity.

The parties herein agree that the standard of proof regarding testamentary capacity is preponderance of the evidence, not clear and convincing evidence. (Defendant's Response Brief, p. 5; Plaintiff's Brief filed February 27, 1991, pp. 22-23). Hobbs v. Mahoney, *supra*, cited by the Secretary in his decision concerned the due execution of the subject will by the testatrix. In the instant matter there is no dispute that Omer Louis Jefferson, Jr. signed the subject will in the presence of the required witnesses. The issue is his testamentary capacity to make a will. The uncontroverted standard of proof in the State of Oklahoma regarding testamentary capacity is that of preponderance of the evidence. Duckwall v. Lawson, 197 Okla. 472, 172 P.2d 415 (1946), and American National Red Cross v. Gumberts, 207 Okla. 96, 247 P.2d 735 (1952).

The Secretary injected the erroneous standard of clear and convincing evidence into his decision. Therefore, the case is

REMANDED to the Secretary of the Interior for decision on appeal from the Superintendent's Order Approving Will to apply the appropriate standard of preponderance of the evidence to the issue of testamentary capacity of Omer Louis Jefferson, Jr., on June 20, 1986 at the time of the execution of the subject will.

DATED this 1<sup>ST</sup> day of August, 1991.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 1 1991

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

CHUCK A FIGUEROA

Plaintiff(s),

vs.

No. 91-39-E

MCDONNELL DOUGLAS CORP.,  
INT'L UNION UNITED AUTO AERO  
Defendant(s).

ORDER

Rule 35(a) of the Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

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

In the action herein, notice pursuant to Rule 36(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on JUNE 21, 1991. No action has been taken in the case within thirty (30) days of the date of the notice.

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

Dated this 12<sup>th</sup> day of Dec, 1991.

*James A. ...*  
UNITED STATES DISTRICT JUDGE

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

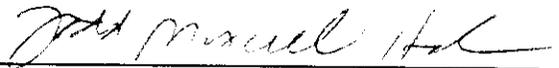
**FILED**  
AUG - 1 1991

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

IN RE:	)	
N.D. HENSHAW,	)	Case No. 90-C-193-B
	)	
Debtor,	)	Bankruptcy Case No.
	)	89-01264-C (Chapter 11)
N.D. HENSHAW,	)	
	)	
Plaintiff,	)	Adversary No. 90-0036-C
	)	
REDIFFUSION SIMULATION TULSA,	)	
INC., a Delaware corporation,	)	
and HUGHES SIMULATION SYSTEMS,	)	
INC., a Delaware corporation,	)	
	)	
Defendants.	)	

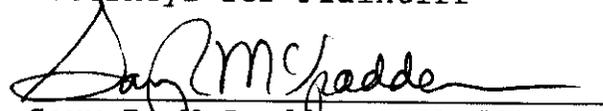
**JOINT DISMISSAL WITH PREJUDICE**

Plaintiff, N. D. Henshaw ("Plaintiff"), and Defendants, Rediffusion Simulation Tulsa, Inc. and Hughes Simulation Systems, Inc. (the "Defendants"), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly dismiss the above captioned cause with prejudice as to any and all of the Plaintiff's and Defendants' claims made therein, each party to bear its respective costs.



Todd Maxwell Henshaw, OBA #4114  
400 ONEOK Plaza  
100 West Fifth Street  
Tulsa, OK 74103  
(918) 582-0033

Sidney K. Swinson, Esq.  
Huffman, Arrington, Kihle,  
Gaberino & Dunn  
1000 ONEOK Plaza  
Tulsa, OK 74103  
(918) 585-8141  
Attorneys for Plaintiff



Gary R. McSpadden, OBA #6093  
Dana L. Rasure, OBA #7421  
Victor E. Morgan, OBA #12419  
BAKER, HOSTER, McSPADDEN,  
CLARK & RASURE  
800 Kennedy Building  
Tulsa, Oklahoma 74103  
(918) 592-5555  
Attorneys for Defendants