

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

7

BETTY GRAY,

Plaintiff,

vs.

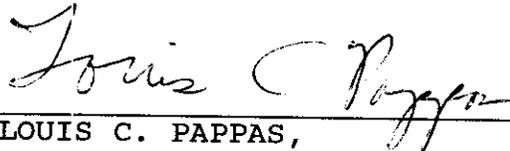
SAND SPRINGS GROUP HOMES,  
INCORPORATED, an Oklahoma  
corporation,

Defendant.

Case No. 91-C-586-E

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Betty Gray, and the Defendant, Sand Springs Group Homes, Incorporated, pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, hereby stipulate to dismiss the above styled and captioned proceedings of the Plaintiff, Betty Gray, against the above named Defendant, Sand Springs Group Homes, Incorporated, with prejudice.



LOUIS C. PAPPAS, OBA 6884  
610 South Main Street, Suite 206  
Tulsa, Oklahoma 74119  
(918) 582-6136

Attorney for Plaintiff Betty Gray



Kenneth D. Bodenhammer OBA 908  
5210 East 31st Street, Suite 600  
Tulsa, Oklahoma 74135-5027

Attorney for Defendant Sand Springs  
Group Homes, Inc.

CERTIFICATE OF SERVICE

I, JAN the undersigned, hereby certify that on the 17 day of \_\_\_\_\_, 1992, a true and correct copy of the above and foregoing Stipulation of Dismissal with Prejudice, was mailed, by U.S. Mail, with proper postage thereon fully prepaid, to the following:

Kenneth D. Bodenhammer  
5210 East 31st Street, Suite 600  
Tulsa, Oklahoma 74135-5027

Louis C. Pappas  
610 South Main Street, Suite 206  
Tulsa, Oklahoma 74119



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

**FILED**

JAN 17 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MANN, CALVIN F. L.  
ANDERSON, PATRICIA  
ANDERSON, JAMES T. F.

Plaintiffs,

vs.

No. 90-C-0913-E

HIGHFILL, BOB W.  
HIGHFILL, BOB, D/B/A  
HIGHFILL CORPORATION  
HIGH-FILL CORP.  
FARMLAND INDUSTRIES, INC.

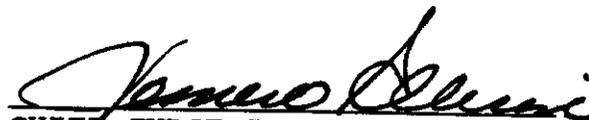
Defendants.

ADMINISTRATIVE CLOSING ORDER

The parties having settled these proceedings are being stayed thereby. It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of completion of the settlement the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 17<sup>th</sup> day of January, 1992.

  
CHIEF JUDGE JAMES O. ELLISON  
UNITED STATES DISTRICT COURT

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

RALPH M. DuBOIS,

Plaintiff,

vs.

OFFICE OF PERSONNEL  
MANAGEMENT, COURT ORDERED  
BENEFITS SECTION,

Defendant.

No. 91-C-634-E

**FILED**

JAN 16 1992

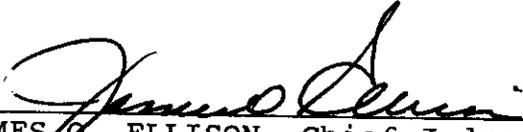
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER CLOSING CASE

The Court has reviewed the record and finds that this matter should be dismissed.

IT IS THEREFORE ORDERED that the above-captioned case is hereby dismissed and closed.

So ORDERED this 15<sup>th</sup> day of January, 1992.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

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

FILED

JAN 16 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

HUNTCO STEEL, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MALONEY-CRAWFORD, INC., )  
 )  
Defendant. )

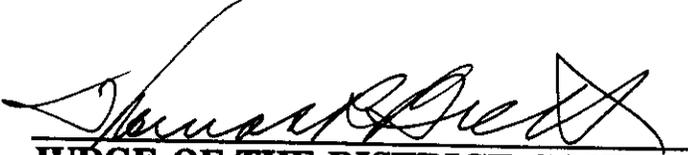
Case No. 90-C-868-B

JOURNAL ENTRY OF JUDGMENT

NOW on this 16 day of Jan, 1992, the above-styled cause comes on for consideration, upon the Plaintiff's Motion to Enter Judgment Pursuant to Settlement Agreement, and after examining the records and Court file herein, the Court finds that the Defendant is indebted to Plaintiff and has failed and defaulted under the terms of the Settlement Agreement between the parties and therefore, Plaintiff should be awarded Judgment against Defendant for the amount of indebtedness remaining unpaid.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by this Court that the Plaintiff, HUNTCO STEEL, INC., is awarded judgment against the Defendant, MALONEY-CRAWFORD, INC., in the amount of \$22,367.10,

*if timely applied for pursuant to local rule 6,*  
together with interest, costs and attorneys fees accrued and accruing in the collection  
of the judgment and such other and further relief as this Court may deem just.

  
**JUDGE OF THE DISTRICT COURT**

**Prepared By:**

**R. BRENT BLACKSTOCK, OBA #839  
BLACKSTOCK & BLACKSTOCK  
5310 E. 31st St., Suite 520  
Tulsa, OK 74135  
(918) 622-3661  
ATTORNEY FOR PLAINTIFF**

WPS1\HUNTCO\JEJUDG

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

**FILED**

JAN 16 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CAPMAC, INC., an Oklahoma  
corporation, formerly McKenzie  
Management, Inc., )

Plaintiff, )

vs. )

BURBANK HYDROCARBONS LIMITED,  
a Nassau corporation, and )  
BEACH PETROLEUM NL, )

Defendants. )

NO. 91-C-345-B

DISMISSAL WITHOUT PREJUDICE

Plaintiff Capmac, Inc., an Oklahoma corporation, formerly McKenzie Management, Inc., hereby dismisses this action only insofar as Plaintiff's claims against Defendant Beach Petroleum NL are concerned, without prejudice for refileing of the same.

Respectfully submitted,



R. Michael Carter, OBA # 1530  
Sandra Lefler Cole, OBA # 13309  
5727 South Lewis, Suite 640  
Tulsa, Oklahoma 74105  
(918) 747-7100

ATTORNEYS FOR PLAINTIFF  
CAPMAC, INC.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 14<sup>th</sup> day of January, 1992, a true and correct copy of the above and foregoing Dismissal without Prejudice was mailed to the following persons by first class mail, postage prepaid, and addressed as follows:

Lawrence A. Waks, Esq.  
Neal A. Kennedy, Esq.  
MILGRIM, THOMAJAN & LEE  
111 Congress Avenue  
Twenty-third Floor  
Austin, Texas 78701

B. Jack Smith  
WORKS, LENTZ & POTTORF  
1717 South Boulder, Suite 200  
Tulsa, Oklahoma 74119

  
\_\_\_\_\_  
Sandra Lefler Cole

SANDRA LEFLER COLE

ATTORNEY AT LAW

5727 SOUTH LEWIS AVENUE, SUITE 640  
TULSA, OKLAHOMA 74105  
918/747-7100

ADMITTED TO PRACTICE IN  
OKLAHOMA AND TEXAS

January 14, 1992

RECEIVED

JAN 16 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Mr. Richard M. Lawrence, Clerk  
United States District Court  
Northern District of Oklahoma  
333 West 4th Street  
Tulsa, Oklahoma 74103

Re: Case No. 91-C-345-B, Capmac, Inc. v.  
Burbank Hydrocarbons Limited, et  
al.; Dismissal Without Prejudice

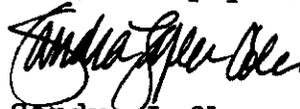
Dear Mr. Lawrence:

Enclosed please find the original and one (1) copy of Plaintiff's Dismissal Without Prejudice, as to Plaintiff's claims against Defendant Beach Petroleum NL, to be filed in the referenced action.

Please file the original of record and return a file-stamped copy to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance. Should you have any questions, please do not hesitate to give me a call.

Very truly yours,



Sandra Lefler Cole

SLC:dm  
Enclosures

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

FILED

JAN 10 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ABATEMENT SYSTEMS, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FIGGIE ACCEPTANCE CORPORATION, )  
 )  
Defendant. )

No. 90-C-900-B

ORDER

Before the Court are the following motions: the motion for partial summary judgment and the motion to stay or administratively close filed by the plaintiff, Abatement Systems, Inc. ("ASI"), and the motion for summary judgment filed by the defendant, Figgie Acceptance Corporation ("Figgie"). ASI's motion for partial summary judgment is now moot as Figgie agrees that the defense of unclean hands is no longer applicable due to ASI's dismissal of its equitable claim of unjust enrichment. As the Court sustains Figgie's motion for summary judgment, ASI's motion to stay or administratively close is also moot.

The following facts are undisputed:

On July 7, 1989, Figgie and 5000 Skelly Corporation ("Skelly") executed a Construction Loan Agreement ("Loan Agreement") by which Figgie agreed to loan Skelly up to \$6,500,000 to be used to purchase and renovate the Park Plaza Inn.

In response to Skelly's solicitation of bids for renovation contracts, ASI submitted a bid for the removal or encapsulation of asbestos in the Park Plaza Inn. On September 7, 1989 Skelly awarded

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the contract to ASI which resulted in the execution of two contracts ("asbestos abatement contracts") to remove or encapsulate the asbestos in the Park Plaza Inn.

At the request of ASI and Skelly, Figgie sent a set aside letter to ASI on February 2, 1990, confirming that Figgie had made certain funds available to ASI for the asbestos abatement work at Park Plaza Inn "for disbursement in accordance with the Loan Agreement." (Defendant's Exhibit C).

On July 26, 1990 Figgie sent a letter to Skelly stating that Skelly was in default of the terms of the Loan Agreement.

On September 12, 1990, Skelly filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Oklahoma. At the time of filing, ASI was due payment for work performed under the asbestos abatement contracts. ASI subsequently perfected a mechanic's lien against the Park Plaza Inn and filed a proof of claim in the Skelly bankruptcy case, Case No. 90-02657-C for \$156,259.00, the amount due under the contracts.

Figgie argues that it is entitled to summary judgment because it is under no obligation to pay ASI under the asbestos abatement contracts. Figgie reasons that the set aside letter from Figgie to ASI merely expresses Figgie's assurance that funds to be disbursed pursuant to the Loan Agreement had been set aside for payment to ASI, rather than Figgie's guarantee to pay ASI in the event Skelly defaulted on the Loan Agreement. Figgie urges that the set aside letter is clear and unambiguous and the Court

must find as a matter of law that Figgie is under no obligation to ASI.

ASI counters that Figgie has a contractual obligation under the set aside letter to pay ASI for the work performed but not paid for under the asbestos abatement contracts. ASI argues that the set aside letter is either ambiguous giving rise to a factual dispute which precludes summary judgment or should be construed as a matter of law as Figgie's payment guarantee to ASI. If the Court should find that the set aside letter is not a guarantee, ASI further argues that a factual question remains concerning estoppel.

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

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

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

574, 585 (1986).

The existence of ambiguity in a contract is an issue to be decided by the Court. Corbett v. Combined Communications Corp., 654 P.2d 616, 617 (Okla. 1982). If the language of a contract is clear and unambiguous, the Court interprets the contract as a matter of law, id., and determines the intent of the parties from the language. Ollie v. Rainbolt, 669 P.2d 275, 279 (Okla. 1983). "The intention of the parties cannot be determined from the surrounding circumstances, but must be gathered from a four-corners' examination of the contractual instrument in question." Mercury Investment Co. v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okla. 1985).

The Court finds that the set aside letter of November 2, 1990 is clear and unambiguous. The language of the set aside letter confirms that funding for ASI's asbestos abatement contracts has been set aside and is "now available for disbursement in accordance with the Loan Agreement." (Defendant's Exhibit C). While the letter assures that certain funds have been earmarked for ASI out of the loan proceeds, it does not evidence Figgie's guarantee of payment to ASI for work performed under the asbestos abatement contracts should Skelly default on the Loan Agreement. Neither does Figgie's guarantee arise from the terms of the Loan Agreement referenced in the set aside letter. In fact, the terms of the Loan Agreement not only fail to state Figgie's direct obligation to guarantee payment to ASI, but they expressly exclude Figgie's indirect obligation to ASI as a third party beneficiary of the Loan Agreement:

No Third Party Beneficiaries. The terms, provisions, conditions and requirements made

and set forth herein are for the benefit of the parties hereto and to better define the terms of the Loan, and in no event shall the Lender be construed to be the Borrower's agent or to assume the Borrower's responsibility for proper payments to the Contractor and others. It is specifically further intended that no party shall be a third party beneficiary hereunder except and unless it is specifically provided herein that any provision shall operate or inure to the use and benefit of a third party (i.e., no subcontractor, sub-subcontractor or material supplier shall have any rights hereunder against the Lender or shall be entitled to protection of any of the covenants herein contained, although such parties may have recourse to the Borrower).

(Defendant's Exhibit A, ¶15).

From a review of the contractual instrument - the set aside letter in accordance with terms of the Loan Agreement - the Court concludes as a matter of law that Figgie has no contractual obligation to guarantee payment to ASI for work performed under the asbestos abatement contracts.<sup>1</sup>

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<sup>1</sup> In so holding, the Court does not address whether Figgie is obligated to ASI for any payments under Paragraph 13 of the Loan Agreement. Paragraph 13 states in pertinent part the following:

13. Remedies. Upon the occurrence of an Event of Default, the Lender may, at its option, take any or all of the following actions, at the same or different times:

. . . .

(b) Perform any work necessary to complete the Renovations substantially in accordance with the Plans, and the Borrower hereby names and constitutes the Lender its true and lawful attorney-in-fact with full power in the Premises to complete the Renovations in the name of the Borrower, pay all bills and expenses incurred thereby (but in such event the Lender does not assume responsibility to pay bills owed by the Borrower at the time the Lender elects to take possession of the Premises), and do all other acts on behalf of

The Court further rejects ASI's estoppel argument. ASI has presented no facts which support its allegation of Figgie's misrepresentation or concealment regarding the set aside letter. The fact that ASI interpreted the plain language of the set aside letter as a guarantee calls into question ASI's good judgment, not Figgie's good faith. Likewise, ASI's contention that Figgie should have corrected the contractors' misapprehension that the set aside letter constituted a guarantee assumes Figgie had a duty to do so, yet ASI offers no legal basis for such.

Therefore, for the reasons stated above, the Court sustains Figgie's motion for summary judgment.

IT IS SO ORDERED, this 16<sup>th</sup> day of January, 1992.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

and in the Borrower's name necessary or desirable for the completion of the Renovations, this power being a power coupled with an interest which cannot be revoked.

(Defendant's Exhibit A, ¶13(b)). There is insufficient evidence in the record concerning Skelly's default or Figgie's election to take possession of the Park Plaza Inn to allow the Court to determine whether Figgie is under any obligation to pay ASI pursuant to paragraph 13(b) of the Loan Agreement. The Court, however, need not reach this issue as ASI has not stated any claim against Figgie under paragraph 13(b); the only claim asserted by ASI in its complaint is Figgie's contractual obligation to guarantee payment pursuant to the set aside letter.

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

FILED

JAN 10 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

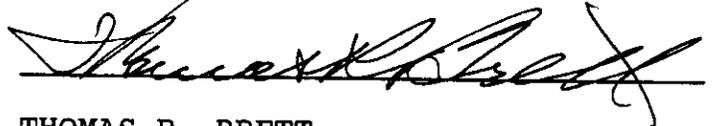
ABATEMENT SYSTEMS, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FIGGIE ACCEPTANCE CORPORATION, )  
 )  
 Defendant. )

No. 90-C-900-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Figgie Acceptance Corporation, and against the Plaintiff, Abatement Systems, Inc. Plaintiff shall take nothing of its claim. Costs are assessed against the Plaintiff, if timely applied for pursuant to Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 16 day of January, 1992.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

36

entered  
does not close

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

FILED

JAN 16 1992

RICHARD L. LAWRENCE  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OK

JULIE CHAPMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DOUG NICHOLS, individually and )  
 as Sheriff of Creek County, )  
 et al., )  
 )  
 Defendants. )

No. 91-C-539-C

ORDER

This matter came on for hearing on plaintiff's motion for preliminary injunction.<sup>1</sup> Rule 52(a) F.R.Cv.P. requires that the denial or grant of a preliminary injunction be supported by findings of fact. Pretty Punch Shopettes, Inc. v. Hauk, 844 F.2d 782, 784 (Fed.Cir. 1988). Herewith are the Court's findings:

1. On or about March 10, 1991, plaintiff was arrested by the Oklahoma Highway Patrol near Bristow, Oklahoma for a traffic violation.
2. Plaintiff was taken to the Creek County Jail in Sapulpa, Oklahoma.
3. As part of the "booking" procedure, plaintiff was taken to a separate room and was required to change from her "street" clothes into clean jail clothes. The arrestee's own clothes were placed in a secure locker.

<sup>1</sup>Plaintiff seeks to enjoin the "strip search" policy of the Creek County Jail.

4. Plaintiff's change of clothes was under the observance of a female jail employee.

5. No body cavity search or touching of plaintiff's body took place.

6. The Creek County Jail has a written policy regarding searches of arrestee.

7. The policy requires a "thorough" search, but does not contain any statement requiring body cavity searches.

8. In practice, all searches are conducted as was the one under review. The change of clothes takes place with one jail employee, of the same sex as the arrestee, present. No touching of the prisoner takes place.

9. Female arrestees are required to remove their bras during the change of clothing. Any wire contained in the bra is removed and the bra is then returned to the arrestee.

Based upon the foregoing findings of fact, the Court now enters its ruling. A party seeking a preliminary injunction must demonstrate the following:

(1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

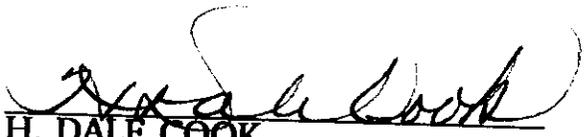
*Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980).

The Court finds that the cases upon which plaintiff relies deal with searches of a much more intrusive nature than the one involved here. Indeed, it is a stretch of the imagination to even call defendants' procedure a search. The Creek County Jail permits the

minimal amount of intrusion on privacy which could be required to fulfill the necessary purpose of the procedure, namely protection of jail personnel, other inmates, and the arrestee herself. The Sheriff has a legal obligation and an official duty to protect the individual arrested and the other inmates, to see that no dangerous instrument or substance is carried into the jail population. The Court cannot be oblivious to the fact that the Sheriff and the County might be subject to civil liability if a personal injury occurred as a result of an inadequate protective procedure. Of course, such procedure cannot be overly intrusive or punitive, but the policy under review here is not. The Court concludes therefore that plaintiff has failed to sustain her burden of proof as to the first required element for a preliminary injunction. No evidence was presented as to the other three elements and the Court concludes that they are not met as well. Because of the clear evidence on the merits, the Court will not address the murkier issue of standing under City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

It is the Order of the Court that the motion of the plaintiff for preliminary injunction is hereby denied.

*IT IS SO ORDERED* this 15<sup>th</sup> day of January, 1992.

  
H. DALE COOK

United States District Judge

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

**F I L E D**

JAN 15 1992

JAMES SCOTT DICKEY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STATE OF OKLAHOMA, et al, )  
 )  
 Defendants. )

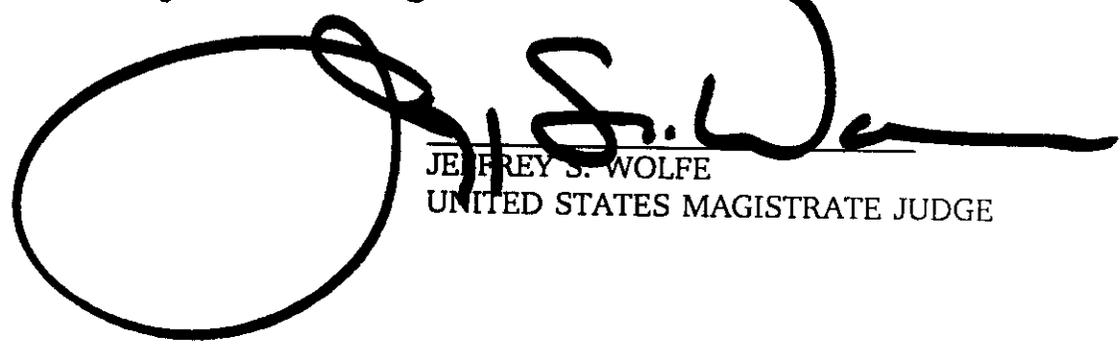
Richard M. Lawrence, Court  
U.S. DISTRICT COURT

90-C-907-E ✓

ORDER

An order was issued by this Court on January 9, 1992 (See docket #14). Defendant's counsel responded to that order on February 4, 1991. Therefore, the January 9, 1992 order is withdrawn. In addition, the State of Oklahoma and the Delaware County District Court were not defendants in this case. As a result, this case is dismissed in its entirety.

SO ORDERED THIS 15<sup>th</sup> day of Jan, 1992.

  
JEFFREY S. WOLFE  
UNITED STATES MAGISTRATE JUDGE

16

**FILED**

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

JAN 15 1992

RICHARD BELL and GEORGE BUBRICK, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

90-C-71-C

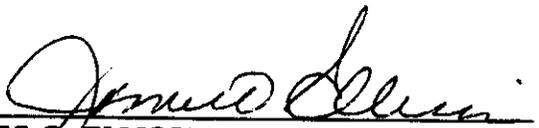
ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed December 11, 1991, in which the Magistrate Judge recommended that Plaintiffs' Motion for Partial Summary Judgment be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that Plaintiffs' Motion for Partial Summary Judgment is denied.

Dated this 14<sup>th</sup> day of Jan., 1992.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JAN 15 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Spectrum Gas Systems, et al )  
 )  
 )  
 Plaintiff(s), )  
 )  
 vs. )  
 )  
 Daniel-Price Exploration, et al )  
 )  
 )  
 Defendant(s). )

No. 90-C-408-E

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 December 9, 1992. 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 14<sup>th</sup> day of Jan, 1992

*James O. Allison*  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JAN 15 1992

MOUNTAIN STATES FINANCIAL )  
RESOURCES, CORP., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DODSON AND COCHRAN AIR )  
CONDITIONING, INC., and )  
RUSSELL G. DODSON, an )  
individual, )  
 )  
Defendants. )

**Richard M. Lawrence, Clerk**  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 91-C-89-E

JOURNAL ENTRY OF JUDGMENT

NOW ON THIS 14<sup>th</sup> day of Jan, 1992, judgment is herein entered in favor of the plaintiff, Mountain States Financial Resources, Corp., and against the defendants, Dodson and Cochran Air Conditioning, Inc., and Russell G. Dodson, individually, pursuant to the Court's December 11, 1991, order granting plaintiff's motion for summary judgment. The Court finds that the defendants have failed to respond to plaintiff's motion and the Court, having made an independent assessment of defendants' position as it appears on the record, finds that under Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and its progeny, plaintiff's motion for summary judgment should be granted, as the Court finds that there is no substantial controversy as to any material fact in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff is granted judgment against the defendants, Dodson and Cochran Air Conditioning, Inc., and Russell G. Dodson, on its first cause of action, for the principal sum of \$21,952.64, accrued interest in the amount of \$11,194.00 through December 16, 1991, interest from December 17, 1991, at a per diem interest rate of \$9.623 until paid, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff is granted judgment against the defendants, Dodson and Cochran Air Conditioning, Inc., and Russell G. Dodson, an individual, on its second cause of action, for the principal sum of \$62,510.90, accrued interest in the amount of \$32,557.12 through December 16, 1991, interest from December 17, 1991, at a per diem interest rate of \$27.402 until paid, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff is granted judgment against the defendants, Dodson and Cochran Air Conditioning, Inc., and Russell G. Dodson, foreclosing its security interest in the following described collateral:

1. All inventory of Debtor, now owned or hereafter acquired, and all additions, accessions and substitutions thereto and therefore, and all accessories, parts and equipment now or hereafter attached thereto or used in connection therewith;
2. All accounts of Debtor, including contract rights, now existing or hereinafter arising;
3. All general intangibles of Debtor, now existing or hereafter arising, including choses in action;

4. All instruments, documents of title, policies and certificates of insurance, securities, chattel paper, deposits, cash or other property owned by Debtor or in which Debtor has an interest which are now or may hereafter be in possession of Lender;
5. All equipment of Debtor, now owned or hereafter acquired, an all additions, accessions and substitutions thereto and therefore;
6. All proceeds and products of the foregoing, and
7. All inventory, accounts, general intangibles, equipment, chattel paper, securities and instruments acquired with the proceeds of the foregoing and products of the foregoing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the above-described collateral be sold pursuant to 12A O.S. Section 9-501, et seq., of Oklahoma's Uniform Commercial Code, and the proceeds arising therefrom be applied in satisfaction of the judgment granted in the first cause of action set out in the February 12, 1991, complaint herein, and that the surplus, if any, be paid into the Court to abide further order of this Court; that upon completion of the sale of the collateral, that judgment against the defendants, Dodson and Cochran Air Conditioning, Inc., and Russell G. Dodson, be entered in plaintiff's favor in the event of any deficiency.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the above-described in personam judgment against the defendants, Dodson and Cochran Air Conditioning, Inc., and Russell G. Dodson, is stayed pending the sale of the above described collateral pursuant to 12A O.S. Section 9-501 et seq.,

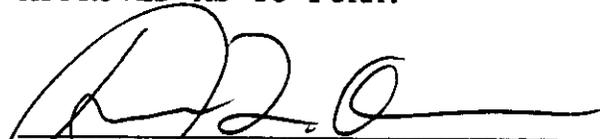
provided, in the event that the United States Marshall is unable to locate the collateral, or the collateral has been damaged or destroyed, such that the value is of salvage only, the Marshall shall so state on his return and the plaintiff shall be permitted to make application to the Court to move the stay imposed, and proceed to execute and/or garnish the assets of the defendants, Dodson and Cochran Air Conditioning, Inc., and Russell G. Dodson.

S/ JAMES O. ELLISON

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JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:



BRUCE F. KLEIN OBA #11389  
Attorney for Plaintiff  
205 N.W. 63rd, Suite 160  
Oklahoma City, OK 73116  
(405) 848-8842

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

**FILED**

JAN 15 1992 ✓

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JIMMIE DEAN STOHLER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STEVE HARGETT, et al., )  
 )  
 Defendants. )

No. 90-C-600-E ✓

O R D E R

The Court has for consideration the Petition for Writ of Habeas Corpus filed herein by Jimmie Dean Stohler on July 2, 1990. In that Petition Stohler challenges his convictions for first degree murder and for conspiracy to commit murder on the following grounds:

1. That he is entitled to relief because the state's prosecution of the first degree murder charge against him violated the Double Jeopardy Clause of the Fifth Amendment;
2. That he was prosecuted in violation of a plea agreement;
3. That his confession was tainted by assurances of leniency and he was prohibited from introducing evidence in support of this allegation at trial;
4. That he was impermissibly denied a jury instruction on solicitation to murder;
5. That certain evidentiary rulings of the Court were substantially prejudicial and denied him a fair trial;
6. That the cumulative effect of the trial court's errors

resulted in the denial of his due process rights;

7. That he was denied a mandatory post examination competency hearing;

8. That he was denied effective counsel as a matter of law.

Pursuant to 28 U.S.C. §636, the matter was presented to the Magistrate Judge who determined that three issues warranted a Rule 8 evidentiary hearing.<sup>1</sup> The Magistrate Judge, in his Order of September 19, 1991, fashioned the issues to be heard as follows:

1. Stohler's allegations of a violated plea agreement by the Tulsa District Attorney's Office;

2. The circumstances concerning the validity of his confession; and

3. The ineffective assistance of counsel claim.

Accordingly, those issues were set for hearing on October 28, 1991,

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<sup>1</sup>Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts states:

If the petition is not dismissed at a previous stage in the proceedings the judge, after the answer and the transcript and record of state court proceedings are filed, shall upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

Specifically, the Magistrate Judge found that five of the issues raised were legal in nature and did not require additional evidentiary consideration. The Magistrate Judge concluded that while 28 U.S.C. §2254(d) did not mandate a hearing on the remaining issues, these issues could be heard pursuant to relevant case law authority. See, Townsend v. Sain, 83 S.Ct. 745 (1963); Osborne v. Shillinger, 861 F.2d 612 (10th Cir. 1988). For a complete discussion of the Magistrate Judge's analysis of the propriety of holding a hearing, see, Order entered September 19, 1991 (Docket #20).

and subsequent thereto, on November 5, 1991, the Magistrate Judge entered his Report and Recommendation. In the Magistrate's Judge's view, the Petitioner succeeded in sustaining his evidentiary burden on the three issues presented; therefore he recommended that Mr. Stohler's §2254 Petition be granted. This determination, of course, rendered the remaining five issues moot and they were not addressed by the Magistrate Judge. This Court heard the aforesaid three issues de novo. The hearing was held from December 2, 1991 through December 5, 1991.

At the outset, the Court acknowledges the exemplary juristic efforts of the Magistrate Judge in this matter. While the result this Court reaches on the three issues presented de novo departs significantly from that of the Magistrate Judge, it should be noted that the genesis of the divergence is to be found principally in the Court's view of the weight and credibility of the evidence presented to the Court at the de novo hearing. And because the Court is not persuaded that, as to the issues raised at the de novo hearing, Mr. Stohler "is in custody in violation of the Constitution or laws or treaties of the United States," the Court will reach beyond the issues raised at hearing and consider the balance of Petitioner's claims. 28 U.S.C. §2254(a).

I. Facts and Procedural History of the Case

The Court incorporates herein the succinct rendition of the facts and procedural history as they appear in the Report and Recommendation at pages 2 through 4, except as follows:

1. Footnote number 1 at page 2 states that "Stohler admitted

in the interview that he obtained the crossbow and arranged for another person to do the killing." (Emphasis added; citation omitted.) While it is certainly a fact that Stohler asserted that he secured the weapon and the assassin, the Court refrains from employing the term "admitted" because it tends to invite the conclusory inference that his assertion was true. It is the Court's view that that conclusion falls outside the narrowly proscribed parameters of its fact-finding duties herein.

2. Footnote number 4 at page 3 states, in part, that "the State well knew from earlier Grand Jury testimony that the Defendant and his wife were at Jamil's Restaurant having dinner [during the commission of the murder]." Again, the inference of truth must be avoided by the Court. The record indicates only that it was Mr. Stohler's testimony during his September 2, 1982, statement that he was at Jamil's with his wife while the murder was committed by Mr. Ensminger. Aside from the somewhat ambivalent account of Kay Stohler before the Grand Jury<sup>2</sup> no other evidence appears on the record in support of this testimony. Thus, a largely unsupported assertion that Mr. Stohler had a valid "alibi"<sup>3</sup> leads

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<sup>2</sup>Transcript of Grand Jury Proceedings March 14 and 16, 1983, testimony of Kay Stohler pp. 11, 64, 80-87.

<sup>3</sup>For an analysis of the merits of this "alibi" evidence, see, infra. at p. 31 et seq.

consequentially to an inference that counsel Gann was egregiously remiss in deciding not to put Kay Stohler, (or for that matter the Jamil waitress described by Mr. Stohler in his statement) on the stand at trial. Again, the fact finding required in that process falls outside the parameters of the Court's role herein. Therefore, the Court will not reach the conclusion found in the last sentence of footnote number 42 at page 25. However, in all other respects, the Court incorporates the Magistrate Judge's "Overview of Events".

II. Applicable Legal Standards Relative to Issues Considered at the De Novo Hearing

28 U.S.C. §2254(d) provides that:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the

applicant to establish by convincing evidence that the factual determination by the State court was erroneous. (Emphasis added).

The issues heard by the Magistrate Judge and, thereafter, by this Court were predicated on Mr. Stohler's Sixth Amendment claim that he was denied effective counsel because of counsel's conflicts of interest. That claim, raised on the grounds of conflicts of interest, was never before the Court of Criminal Appeals of the State of Oklahoma (state court). The Magistrate determined that the proper evidentiary standard to be applied to the issues heard would be the preponderance standard because the material facts were not adequately developed at the state level (see 28 U.S.C. §2254(d)(3), supra). The Court will adopt the Magistrate's determination on the evidentiary standard because it is the Court's view that Stohler's evidence, as it was presented to this Court, failed to meet not only the "convincing" standard required of factual issues previously addressed at the state level but also the less stringent standard of "preponderance" adopted herein.

The more compelling problem for the Court is not the evidentiary standard to be applied but rather the availability of federal habeas review for the issues considered at the evidentiary hearings. An analysis of that problem must commence by drawing what may appear to be a gossamer distinction. Specifically, the clear implication of the Magistrate's approach is that the allegation of conflict of interest is to be considered a question of material fact not sufficiently developed at the state level. However, viewed through a different prism, the allegation of

conflicts of interest is an issue that should first have been presented to the state courts. An overview of recent Supreme Court cases on the availability of federal habeas in the context presented herein seems to compel that result. The applicable case law can be summarized as follows: While a petitioner for federal habeas relief incarcerated pursuant to a final judgment of a state court is entitled to consideration by a federal court of his federal claims (Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953)), he must first totally exhaust all claims raised by presenting them to state court for consideration (Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)) and if presentation is now barred by a state procedural rule then petitioner has lost his entitlement to federal habeas review (Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)) unless he can show either (1) cause for his procedural default and actual prejudice flowing from the alleged violation of federal law (Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 [1973]; Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 [1976]; Wainwright, supra.), (2) a fundamentally unjust incarceration (Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 [1982]), (3) or, more generally stated, a fundamental miscarriage of justice (Coleman v. Thompson, 111 S.Ct. 2546 [1991]).

Indeed, then, it would appear at first blush that the Sixth Amendment ineffectiveness of counsel issue presents an exhaustion problem. Understandably, Stohler did not raise any ineffectiveness

of counsel claim in his direct appeal wherein he was represented by Attorney Gann. In his pro se Petition for Post Conviction relief he did raise the Sixth Amendment issue but there he based his claim of ineffective counsel on Attorney Gann's failure to request a post examination competency hearing and on his failure to append proper documentation to his appellate brief. Here, Stohler argues that he was denied effective assistance of counsel in part because Attorney Gann's alleged romance with Stohler's wife and Mr. Gann's legal representation of Mr. Doss, also charged with the murder of Michelle Powers, operated to create conflicts of interest. Stohler testified in his videotaped statement that he was aware of the legal relationship between Doss and Gann. To the extent that his claim of conflict of interest rests on this relationship it should be precluded from consideration by a federal habeas court.<sup>4</sup> The evidence of an alleged romance between the attorney and his client's wife seems to present an exhaustion problem rather than a procedural default: in Stohler's §2254 Petition, on file herein, at entry #16C(3) as supplemented on page 11b of that petition, Stohler explains that he did not raise the issue of a conflict of interest based upon the alleged romance because "Petitioner did not obtain proof or belief of the affair and misconduct or (sic) his attorney until late October 1989 ..." Assuming the truth of that assertion then to that extent his failure to raise this conflict of

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<sup>4</sup>Preclusion is mandated by procedural default without adequate cause pursuant to Wainwright, supra. It could also be argued that any conflict issue concerning Gann's representation of Doss was waived pursuant to the principles discussed in United States v. Winkle, 722 F.2d 605, 612 n. 12 (10th Cir. 1983).

interest issue as a predicate to his Sixth Amendment claim during the post conviction proceedings might be excused either for cause or in order to prevent fundamental miscarriage of justice. See, Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990). Indeed, under Oklahoma's Post-Conviction Procedure Act it would appear that the state court might still take cognizance of Stohler's Sixth Amendment claim even at this late date. 22 O.S. §1086 provides that:

All grounds for relief available to an applicant under this Act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

The liberal reach of the last sentence, supra, would seem to encompass Stohler's situation and present a simple exhaustion problem, the remedy for which is dismissal of the petition, pursuant to Rose v. Lundy, supra. However, as the Magistrate stated at page 18 of his Report and as this Court found from the evidence submitted and testimony heard, de novo, Stohler knew and believed the allegations of a romance well before October 1989. The weight of the evidence is that Stohler learned of and believed the allegations in April of 1988 (See, e.g., Plaintiff's Exhibit 1: letter from Stohler dated April 24, 1988). Therefore, it is the Court's view that the matters heard first at the evidentiary hearing before the Magistrate, then de novo before the undersigned

were precluded under Wainwright, supra. Insofar as Stohler's request for habeas relief rests on his proffered evidence that he was denied effective assistance of counsel and the voluntariness of his confession was tainted because of Attorney Gann's alleged conflict of interest vis a' vis petitioner and his wife and petitioner and Doss, then that evidence should have been first considered by the state court. Claims of ineffective assistance of counsel rest on mixed issues of law and fact (Strickland v. Washington, 104 S.Ct. 2052 (1984)). Principles of comity as construed in recent Supreme Court cases invoke the rule of total exhaustion. Rose v. Lundy, supra. The evidence shows that Stohler knew of the alleged affair between Kay Stohler Gann and Attorney Gann as well as Gann's representation of Doss well before he filed his Petition for Post Conviction Relief where these issues should have been first addressed. Therefore the Court concludes that Petitioner should now be procedurally barred from raising them. 22 O.S. §1086. See, also, Delo v. Stokes, 110 S.Ct. 1880, 1881 (1990); McCleskey v. Zant, 111 S.Ct. 1454, 1470, 1472 (1991); Rodriguez v. Maynard, \_\_\_ F.2d \_\_\_, No. 91-6175, slip op. at 5-6, 8 (10th Cir. Nov. 6, 1991)(1991 WL 225 147 at \*2). Nevertheless, a substantial amount of judicial time and resources have been invested in this case both at the state and federal levels. The court believes that at this juncture it would be in the best interests of all concerned - the public, the petitioner and the state - for the Court to make a complete record of its findings and conclusions on all issues presented to it.

### III. Issues Heard De Novo

The Court considered evidence, de novo, on the following disputed issues: Whether Attorney Gann was subject to a conflict of interest in his representation of Stohler that rendered his legal assistance of Stohler ineffective pursuant to the Sixth Amendment; whether the conflict of interest or the ineffective assistance tainted either Stohler's plea to a conspiracy charge or the voluntariness of his videotaped statement; and whether that statement was offered as a part of a plea agreement.

#### A. Conflict of Interest: The Relationship Between Attorney Gann and Stohler's Wife

The Magistrate has well stated the elements of proof required for an ineffectiveness of counsel claim predicated on a conflict of interest:

To prevail on an ineffective assistance claim of this variety "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). "Once an actual conflict and an adverse effect are shown, an accused need not show prejudice to receive relief." Id. at 349-50, 100 S.Ct. at 1718-19. See also, United States v. Winkle, 722 F.2d 605, 609-10 (10th Cir. 1983).

The petitioner is required to show: 1) an actual conflict which 2) adversely affected the representation given by his attorney. He need not show actual prejudice to his case flowing from the impaired representation. In this case it is obvious that a romance between Attorney Gann and Kay Stohler Gann occurred at some point ... they are now married. What Stohler must establish, in order to

meet the first element, is that the romance occurred during a time frame relevant to the claims raised regarding the confession, the trial, the appeal. And, as stated above, he must do so by a preponderance of the evidence.

Stohler presented the following witnesses in support of his claim: Devonna Cook, Teresa Knight, Tiffany Knight, Jackie Dean Bingamon, Kelly Ohman, Chris Ohman, Jimmie Dean Stohler, Sr. It should be noted that these individuals, for the most part, comprise the same witness pool presented at the Magistrate's hearing. And their testimony was substantially the same. The state's position in response was presented by testimony of the following witnesses: Tom Gann, Kay Gann, David Moss, Kathryn Wilson, David Wilson, Donna Priore and Jeanna Woodardson. The state presented more witnesses de novo than it did before the Magistrate. The Court considered the testimony of the witnesses and found Stohler's witnesses to be earnest, but did not find their testimony to be any more credible than the state's witnesses. Again, it is the Petitioner's burden to prove his claim ... by a preponderance of the evidence.

The Court considered evidence of a romantic liaison between Gann and Kay Stohler Gann at the following junctures:

1. September 1982: The videotaped statement or confession.

No evidence was submitted tending to show a romantic involvement at that time; indeed, in support of his position that the romance began in 1985 before the trial, Stohler's sisters contrasted their perception of Kay Stohler Gann's behavior then and in 1984. The Court finds there was no romance at that time; it

could not affect Gann's representation of Stohler in 1982, hence, the confession could not have been tainted thereby.

2. September 1985: The Trial.

Stohler's sisters, Devonna Renee Cook and Teresa Knight, and his niece, Tiffany Suzanne Knight, were his principal witnesses in support of his allegation that a romantic liaison developed between Gann and Stohler's wife some time before his trial in 1985. While the Court found their loyalty to their brother/uncle understandable, the Court did not find their perception of the events trustworthy nor was their testimony more credible than that of the state's witnesses in contradiction. The Court finds that Stohler failed to meet his burden of establishing, by a preponderance of the evidence, that there was a romantic relationship between his counsel and his wife prior to or during his trial which might have given rise to a conflict of interest. The Court also finds, therefore, that no conflict of interest tainted Stohler's plea of nolo contendere to the charge of conspiracy, which was entered on February 9, 1984, well in advance of the trial.

3. 1987 - 1988 - The Appeal.

The evidence conclusively supports a finding of a romantic liaison during the summer of 1988 after Gann's representation of Stohler ceased. However, even if the Court were to find that a liaison did exist prior thereto - during the appeal - it would then consider the second prong of the test enunciated in Cuyler: whether that conflict of interest adversely affected Gann's

performance as Stohler's attorney. It is the Petitioner's burden to specify those instances in the record which evince the impairment of counsel's representation. Regarding the appeal, Petitioner identified the appellate brief filed by Mr. Gann and noted,<sup>5</sup> as did the Oklahoma Court of Criminal Appeals,<sup>6</sup> that it was devoid of authority and documentation on critical issues. While Mr. Gann was sadly remiss in his written presentation of the appeal, the Court does not find that his oversight impermissibly imperiled Stohler's right to a fair trial or, for that matter, to adequate consideration of his case on appeal. The Court simply does not find the requisite nexus between an actual conflict of interest and an adverse effect rendering the legal process in Stohler's case violative of the Sixth Amendment. Recall that Justice Stevens, writing for the majority in Cronic, explained that the purpose sought to be advanced by the Sixth Amendment right to counsel is to ensure a fair trial by way of the adversarial system. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty will be convicted and the innocent go free." United States v. Cronic, 104 S.Ct. 2039, 2045 (1984) quoting, Herring v. New York, 95 S.Ct. 2550, 2555 (1975). The Justice went on to explain that the Sixth Amendment right to counsel is the right to an adequate legal advocate.

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<sup>5</sup>See also, Magistrate's Report and Recommendation, pp. 3, 24-26.

<sup>6</sup>See, Stohler v. State of Oklahoma, 751 P.2d 1087 (Okl.Cr. 1988).

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred.

Cronic at 2045. (citations omitted).

In the Court's view Stohler has not met the test fashioned by Mr. Justice Powell in Cuyler v. Sullivan, supra., which requires a demonstration of an "actual conflict of interest" which denied him a fair trial by adversely affecting his counsel's performance as an advocate. The Court finds that Stohler was not denied effective assistance of counsel either on the grounds of a romantic liaison with Kay Stohler Gann or on the grounds of multiple representation.

B. Conflict of Interest: Multiple Representation.

It is settled that multiple representation does not violate the Sixth Amendment unless it gives rise to an actual conflict of interest. Cuyler v. Sullivan, supra. at 1718. Cuyler teaches that petitioner must first establish the existence of multiple representation and then an actual conflict of interest arising therefrom which impugned the integrity of the adversarial process and compromised petitioner's case. Id. at 1718-1719.

Stohler alleges that his defense was unconstitutionally impaired by Gann's representation of Kay Stohler Gann, her parents, and Mr. Doss. The Court finds that there was no actual conflict of interest between Kay Stohler Gann and the Petitioner or between her parents and the Petitioner during the relevant time periods;

therefore there was no violation of the Petitioner's Sixth Amendment rights on these grounds. The evidence establishes that Mr. Gann represented Mr. Doss in a child custody matter against the Deceased, Michelle Powers, prior to his representation of the Petitioner in the criminal case. It also establishes that Mr. Stohler knew of the representation prior to retaining Mr. Gann. This issue is, as stated above, now barred. Even if it were not barred, it must fail on the merits. The situation describes successive representation rather than simultaneous representation. The Eleventh Circuit has determined that mere proof of prior representation is insufficient to establish a conflict of interest. At the very least, Petitioner must show either "1) counsel's earlier representation ... was substantially and particularly related to counsel's later representation of defendant or 2) counsel actually learned particular confidential information during the prior representation..." Smith v. White, 815 F.2d 1401, 1405 (11th Cir. 1987). The Circuit then cautioned that under the facts of a particular case, even those two tests in the conjunctive might not be enough to establish impermissible inconsistent interests. The Court hereby adopts that approach and finds that Petitioner has failed to establish either prong of the Smith test.

#### IV. Remaining Claims

Stohler also seeks habeas relief on the grounds previously identified herein: double jeopardy, breach of plea agreement, confession tainted by breach of leniency assurances, fair trial

denied by trial court because of evidentiary rulings and rulings on proffered jury instructions, trial court's failure to hold statutorily mandated post examination competency hearing, counsel's representations rendered unconstitutionally ineffective by pre-trial, trial and appellate errors, cumulative effect of trial court's errors. In reviewing these issues, a presumption of correctness pursuant to 28 U.S.C. §2254(d) will be applied to factual issues resolved by the state court; de novo consideration will be given to issues of law and mixed issues of law and fact. See, e.g., Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986), cert. denied, 107 S.Ct. 1911.

A. Double Jeopardy

Stohler first presented his double jeopardy claim to the Oklahoma Court of Criminal Appeals seeking to bar prosecution of the first degree murder charges filed against him after he pled nolo contendere to a charge of conspiracy to commit murder. The Oklahoma appellate court ruled that the first degree murder charge was not barred by the prior conspiracy prosecution pursuant to the Double Jeopardy Clause of either the Fifth Amendment or Article II, Section 21 of the Oklahoma Constitution or 21 O.S. 1981 §11.<sup>7</sup> The appellate court found that because conspiracy requires an accord between at least two individuals and murder requires a corpus delicti, the charges describe two different offenses. Therefore, the separate prosecutions were permitted under the Blockburger analysis of double jeopardy. Blockburger v. United States, 284

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<sup>7</sup>Stohler v. State of Oklahoma, 696 P.2d 1038 (1985).

U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Further, the separate offenses may give rise to separate punishments pursuant to 21 O.S. §1981 §11. Stohler at 1040. Petitioner urges this Court to consider whether the double jeopardy analysis found in Grady v. Corbin, 110 S.Ct. 2084 (1990) should change that result. For the reasons set forth below, the Court finds that it should not.

As the Oklahoma Court stated, under Oklahoma law, murder requires the "death of a person", while conspiracy requires "two or more persons planning together." Stohler at 1040. Thus the two charges filed against Stohler constitute two distinct statutory offenses arising from the same transaction. Since each offense requires proof of an additional fact that the other does not, subsequent prosecution of the murder charge after a plea to the conspiracy charge is permitted by the Blockburger test. Blockburger, supra., 284 U.S. at 304, 52 S.Ct. at 182. In Grady, Blockburger became a threshold test.<sup>8</sup> Pursuant to Grady, if the successive prosecutions at issue survive that test then the inquiry becomes whether "the government, to establish an essential element of an offense charged in that, [the second], prosecution, will prove conduct that constitutes an offense for which the defendant

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<sup>8</sup>To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional Blockburger test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease and the subsequent prosecution is barred. Grady, 110 S.Ct. at 2090. (Citations omitted).

has already been prosecuted." Grady, 110 S.Ct. at 2093.<sup>9</sup> Applied to the case at bar, because conspiracy is neither a lesser included offense of murder nor an offense with elements identical to murder,<sup>10</sup> the murder prosecution survives the Blockburger test. Therefore, the inquiry becomes whether the state, in order to establish an essential element of first degree murder, proved conduct that constitutes conspiracy.

The new double jeopardy test enunciated in Grady is not entirely self-evident. In order to apply its teachings correctly, it may first be instructive to review this seminal case and some of its nascent progeny.

The Grady court relied upon the following facts: Thomas Corbin drove his car across the double yellow line on a roadway in New York state and collided with two other vehicles. After the accident he was served with two traffic tickets: one for the misdemeanor of driving while intoxicated; the other for failure to keep to the right of the median. That same evening, one of the occupants of the stricken vehicles died of injuries sustained in the collision. Three days later, the District Attorney's office

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<sup>9</sup>The Court goes on to say that "conduct" as used in the Grady test does not mean the evidence used to prove the conduct. It means, as it did in Blockburger, the statutory elements of the offense. Specific evidence may be used in subsequent prosecutions without running afoul of the Double Jeopardy Clause. Grady, 110 S.Ct. at 2093, citing Dowling v. United States, 493 U.S. \_\_\_\_\_, 110 S.Ct. 668, 107 S.Ct. 708 (1990).

<sup>10</sup>See, Stohler v. State of Oklahoma, 696 P.2d at 1040, citing Combs v. State, 94 Okl.Cr. 226, 233 P.2d 314 (1951); McCreary v. Venable, 86 Okl.Cr. 169, 190 P.2d 467 (1948); Burns v. State, 72 Okl.Cr. 432, 117 P.2d 155 (1941).

began a homicide investigation but failed to inform the local court and Assistant District Attorney assigned to the traffic violation case of the fatality. The local court accepted Corbin's guilty plea to the two traffic tickets. Subsequently Corbin was indicted for, inter alia, reckless manslaughter, second-degree vehicular manslaughter and criminally negligent homicide. The State's Bill of Particulars indicated that it would rely on Corbin's intoxication and his failure to keep to the right of the median in order to prove the reckless/negligent elements of the crimes charged in the indictment. Grady, 110 S.Ct. at 2087-2090. That reliance ran afoul of the Double Jeopardy Clause, said the Grady Court: in order to prove elements of this second prosecution it would rely on conduct for which Corbin had already prosecuted. Id. at 2093.

In United States v. Felix, 926 F.2d 1522 (10th Cir. 1991), the Tenth Circuit found that Felix's second conviction for violations of 21 U.S.C. §846 and 841(a)(1) in Oklahoma, following a prior conviction in Missouri for violation of the same statutes during the same course of events was impermissible under Grady. Id. at 1524. In so ruling, the Tenth Circuit cited, with approval, the Second Circuit's application of Grady, in United States v. Calderone and Catalano, 917 F.2d 717 (2nd Cir. 1990). In Calderone, the two named defendants were first acquitted, by directed verdict, on charges involving participation in a broad-based drug conspiracy. The Circuit held that their subsequent indictment, charging involvement in a narrower conspiracy, should

be dismissed under Grady.

In the instant case, Stohler was first charged with first degree murder by preliminary information on March 23, 1982. That information filed in Tulsa County District Court, case no. CRF-82-1067 alleged that Stohler and Jack Ensinger, Jr., "while acting in concert" "with malice aforethought" killed Michelle Rae Powers "by shooting her with a bolt from a crossbow." A year later Stohler was indicted. The indictment, filed in Tulsa County District Court, case no. CRF 83-1588 charged Stohler and Robert Doss with Conspiracy to Commit Murder and it charged Robert Doss with first degree murder. It listed the following overt acts allegedly committed in furtherance of those crimes: 1) Doss furnished Stohler with a map to the victim's residence; 2) Stohler purchased a crossbow and bolts; and 3) "On January 21, 1982, a person, the exact identity of whom is unknown, shot Michele (sic) Rae Powers in the chest with a crossbow bolt, which caused the death of Michelle Rae Powers." Stohler pled nolo contendere to conspiracy<sup>11</sup> in February of 1984 and he was convicted of the murder charge in September of 1985.

There is some interface between the language charging murder in the preliminary information and the indictment for conspiracy. The Court takes notice of the similarity because the Circuit considered the relevancy of conduct described in the overt acts pled in the indictment and the jury's determination of guilt in

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<sup>11</sup>The Oklahoma appellate court found that the plea was entered for the express purpose of barring the murder prosecution. Stohler, 696 P.2d at 1040.

Felix. The indictment received particular attention from the Felix court because it was presented to the jury and the overt acts it described were used to prove the conspiracy in the Oklahoma case. Those same acts were found to be the conduct sufficient to convict Felix in the prior case in Missouri. Felix at 1529.<sup>12</sup> By contrast, in the instant case, the evidence sufficient to prove the conspiracy between Stohler and Robert Doss need not reach the act of murder described in overt act #3 of the indictment (CRF 83-1588) and similarly described in the information (CRF 82-1067). Under 21 O.S. §421A, overt act #1 of the indictment would have been sufficient. See, Russell v. State, 654 P.2d 1058 (1982) (Elements of conspiracy are an agreement by at least two people and an overt act committed by one or more of the conspirators in furtherance of the conspiracy). Doss' map alone would satisfy that element of "overt act". In addition, prior to Stohler's entry of plea, the state had available the whole panoply of overt acts described in Stohler's videotaped statement with which to prove its allegations of a conspiracy between Doss and Stohler. By the same token, sufficient evidence was presented at the murder trial to prove the elements of murder without reliance on the conspiracy with Doss to which Stohler had previously pled. The Court therefore does not

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<sup>12</sup>The emphasis our Circuit places on the indictment is not misplaced, since Grady declared the State's Bill of Particulars to be relevant to application of the "same conduct" test it enunciates. Grady 110 S.Ct. at 2094. However, Justice Brennan's response to Justice Scalia concerning reliance on the Bill of Particulars makes it clear that the courts are not irrebuttably bound to the indictment in applying the test. See, 110 S.Ct. at 2094, n. 14, quoting, United States v. Ragins, 840 F.2d 1184, 1192 (4th Cir. 1988).

find the overlap in the conduct described first in the information and then in the indictment determinative of the Grady issue.

The Court turns now to the concurring opinion in Calderone for its concise interpretation of the rule announced in Grady. There, Judge Newman considered carefully how the specific language of the rule was intended:

Justice Scalia's dissent assails the idea that the "element" component of the Grady test is a real limitation. As he points out, "All evidence pertaining to guilt seeks 'to establish an essential element of [the] offense', and should be excluded if it does not have that tendency." 110 S.Ct. at 2103. He may well be right, but he is in dissent. I think we are obliged to apply Grady in a way that gives the "element" component significance. That means barring the second prosecution only when the conduct previously prosecuted is to be used to "establish" the element of the second crime, which I think must mean "constitute the entirety of" the element.

917 F.2d at 724. Based upon the foregoing interpretation of the rule enunciated in Grady, the Court finds that Double Jeopardy did not preclude the second prosecution of Stohler because the record does not show that the state used the conspiracy plea to "constitute the entirety" of any element of murder in the first degree.<sup>13</sup> The Court finds Stohler to be readily distinguishable

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<sup>13</sup>The relevant section of operative statute describing first degree murder at the time of Stohler's trial, 21 O.S. 1981 §701.7 states:

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

from the cases cited. Unlike Grady, the charging papers for first degree murder did not rely on the conspiracy involving Doss to prove either the element of "malice aforethought" or the element of "causes the death...." Unlike Felix, the second prosecution did not require reliance on the same statutes and course of events. Unlike Calderone, the second prosecution did not describe a narrower version of an earlier prosecution based upon the same conduct. The petition for a writ of habeas corpus based upon double jeopardy grounds will, therefore, be denied.

B. Violation of a Plea Agreement and Confession Tainted by Assurances of Leniency

The next two grounds asserted by Stohler are related and will be considered together. The weight of the evidence overwhelming supports a finding that there was no plea agreement. Indeed, Stohler himself so testified whenever queried on the issue during the pendency of this matter. The Court finds that evidence alone<sup>14</sup> is analogous to similar statements given by Defendants at the time of their plea and "constitute a formidable barrier in any subsequent collateral proceeding." Worthen v. Meachum, 842 F.2d 1179, 1183-84 (quoting Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)).

The Oklahoma Criminal Appeals Court has addressed the leniency issue. Stohler v. State, 751 P.2d 1087, 1089-1090 (Okla.Cr. 1988).

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<sup>14</sup>Petitioner's own statements under oath that there was no plea agreement. See, his videotaped statement of September, 1982 and his Grand Jury testimony; see e.g., Transcript of Grand Jury Proceedings, Testimony of Jimmie Dean Stohler, pp. 19 - 27, 48 - 55; Transcript of Proceedings, Sept. 21, 1982, testimony of Jimmie Dean Stohler at the Ensminger Trial, pp. 7 - 10, 81 - 82.

That court reviewed the record and, citing Chatham, affirmed the trial court's findings that the videotaped statement was knowingly, intelligently and voluntarily made. Id. at 1089, quoting Chatham v. State, 712 P.2d 69, 71 (Okl.Cr. 1986). This Court has made an independent evaluation of the "voluntariness" issue and concurs in that assessment. Stohler argues here, as he has argued in other fora, that a promise of leniency tainted his confession and that he should have been permitted to introduce at trial, evidence impeaching the district attorney's trial testimony on that issue.<sup>15</sup> The trial court found that the Grand Jury testimony which Stohler sought to introduce was misleading and it was therefore excluded from the trial. Stohler, 751 P.2d at 1090. In affirming, the appeals court stated:

The district attorney testified that he had informed defense counsel before the appellant had surrendered to authorities that any leniency would have to be earned and that if the appellant surrendered, the district attorney would not ask for the death penalty. The record reveals that the prosecution did not ask for the death penalty.

Id. The Court has reviewed the record in its entirety and concurs

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<sup>15</sup>In his Petition (Docket #1) Stohler does not specify the impeaching evidence that was excluded. In his Brief in support of Petitioner's Request for Relief and Objection to Respondent's Motion to Dismiss (docket #6) he intimates and, therefore, the Court presumes that is the Grand Jury testimony of the district attorney which he identified when the same issue was raised on direct appeal. See e.g., Transcript of Grand Jury Proceedings, Testimony of David Moss, March 18th and 28th 1983, pp. 49-53, 89-97, 117-130; see also Transcript of Proceedings, Testimony of David Moss and Jerry Quinton, June 7, 1985, pp. 13, 25, 26, 47, 88, 100, 101, Trial Transcript, Testimony of David Moss, September 16-20, 1985, pp. 772, 781-790.

with the Oklahoma appeals court. Stohler's petition for a writ of habeas corpus on the grounds that the state violated an alleged plea agreement; that his confession was tainted by assurances of leniency and that he was not permitted at trial to impeach the state's testimony in this regard will be denied.

C. Denial of Jury Instruction on Solicitation to Commit Murder

This issue was also raised on direct appeal. There, the Oklahoma Court of Criminal Appeals held that the trial court was not required to give an instruction on solicitation to commit murder because it is not a lesser included offense of murder in the first degree. Id. at 1091 (citations omitted). This Court agrees and, finds that since there was no denial of a fair trial based upon the refusal of the proffered instruction, the Court should decline to issue a writ on this ground as well. See, Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979) (issue of instructions can only be entertained by federal habeas court on grounds of denial of fair trial).

D. Evidentiary Rulings of the Trial Court as Prejudicial

Stohler alleges that he was denied a fair trial because of certain evidentiary rulings by the trial court: the inculpatory statement he made to reporters was admitted into evidence while evidence of Michelle Powers' character and behavior was excluded. These matters were also addressed by the Oklahoma court on direct appeal. No abuse of discretion was found; no fundamental error was shown; therefore these assignments of error were adjudged to be without merit. Id. at 1090. The Court, after reviewing the record

concur and finds that Stohler was not denied a fair trial on these grounds.

E. Failure to Conduct Mandatory Post-examination Competency Hearing

22 O.S. §1175.4 requires that, after the accused has been examined by doctors to ascertain his competency to stand trial, "a hearing on the competency of the person shall be held." The plain meaning of the statute along with the cases construing it make it clear that the post-examination hearing is mandatory under Oklahoma law. See, e.g., Porter v. State, 795 P.2d 105 (Okl.Cr. 1990); Wolfe v. State, 778 P.2d 932 (Okl.Cr. 1989); Scott v. State, 730 P.2d 7 (Okl.Cr. 1986). However, that matter is simply one of state law, not cognizable, as such, under federal law. (Indeed, that issue should have been earlier raised on direct appeal and was dismissed on that ground by the appellate court. It is now procedurally barred from habeas review.) Here, because no reasonable doubt was ever shown as to Stohler's competency,<sup>16</sup> it cannot be said that his right to a fair trial under federal law was denied him. The failure of the trial court to hold a post-examination hearing in this case has no constitutional dimension.

F. Cumulative Effect of Trial Court's Errors

In U.S. v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990) the court stated that:

"The cumulative effect of two or more individually harmless errors has the potential

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<sup>16</sup>The medical expert who examined Stohler at Eastern State Hospital, Dr. R. D. Garcia, found him competent. See his letter to trial Judge dated October 24, 1983 (O.R. 40, 41).

to prejudice a defendant to the same extent as a single reversible error. The purpose of a cumulative-error analysis is to address that possibility. ... Such an analysis is an extension of the harmless-error rule, which is used to determine whether an individual error requires reversal. The federal harmless-error provisions are found in 28 U.S.C. §2111 and Fed.R.Crim.P. 52(a)... Rule 52(a) counsels federal courts to disregard "[a]ny error, defect, irregularity or variance which does not affect substantial rights. The policy underlying those provisions is clear. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." [citations omitted] ... The Supreme Court has articulated different harmless-error standards depending upon whether the error is of constitutional dimensions. A non-Constitutional error is harmless unless it had a "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect. [citations omitted]"

Guided by the teachings of Riviera this Court, having found that the only error of the trial court identified in these proceedings was the failure to hold a post-examination hearing, now rules that the error was non-Constitutional in the context of this case. Because no serious question was raised as to Stohler's competency the Court finds the failure to hold the hearing did not have a substantial influence on the outcome of Stohler's trial. The Court declines to find any cumulative effect of the other trial issues raised by Stohler because it did not find any other errors in the conduct of his trial. The Riviera court has declared that "a cumulative-error analysis should evaluate only the effects of matters determined to be error, not the cumulative effect of non-errors. Id. at 1471 (citations omitted).

G. Denial of Sixth Amendment Right to Counsel Based Upon Grounds Other than Conflicts of Interest

Stohler alleges that his attorney's performance at trial and on appeal was unconstitutionally ineffective on the following grounds:

1. Gann did not move to dismiss the trial based upon a plea agreement;
2. Gann did not insist upon a post-examination competency hearing;
3. Gann did not provide requisite documentation (records and citation) in support of his arguments on direct appeal;
4. Gann did not consult Stohler on the issue of whether Stohler should testify;
5. Gann failed to present alibi testimony after telling the jury he would do so.

Stohler's claims must be viewed under the Strickland test: 1) that his attorney's performance was not reasonably effective and that 2) Stohler's defense was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, the Court must presume that counsel's performance was reasonably effective; "the burden rests on the accused to demonstrate a constitutional violation. U.S.v. Cronin, 104 S.Ct. 2039, 2046 (1984). Under the Strickland rule the presumption of effective representation is a strong one. Indeed, [j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 104 S.Ct. at 2065. The overriding concern which must be borne in mind when evaluating this Sixth Amendment claim is "whether counsel's conduct so undermined the proper functioning of

the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 2064. With the standard in view the Court has considered the arguments urged by Stohler and has concluded:

1. That since the record supports a finding that there was no plea agreement, it was neither serious error nor prejudicial to the defense that Gann failed to move for dismissal on the grounds of a plea agreement.
2. That it was neither serious error nor prejudicial to the defense that Gann failed to demand a post-examination competency hearing, because no credible issue of Stohler's competency has ever been shown.
3. That Gann's failure to document his appellate brief, while clearly error was not of the magnitude contemplated by Strickland. The Court has given independent consideration to the issues raised in Gann's brief, and has found that Stohler was not prejudiced by Gann's omissions.
4. That there is no credible evidence in support of Stohler's allegation that Gann did not consult him concerning the question of whether Stohler should testify;
5. That Gann's decision not to introduce "alibi" testimony was not necessarily error. Stohler urges the Court to adopt the approach of the First Circuit in Anderson v. Butler, 858 F.2d 16, 19 (1st Cir. 1988) wherein the Court

held that under the facts of that case, failure of counsel to place doctors on the stand after promising the jury he would do so was prejudicial to accused's case. The Court declines to adopt that approach. The Court finds, first, that Gann made a strategic decision which is entitled to deference under Strickland, supra. The Court is more persuaded, as was the dissent in Anderson, by the approach of the Eleventh Circuit in Howard v. Davis, 815 F.2d 1429 (11th Cir. 1987), cert. denied, 108 S.Ct. 184 (1987) that "a change of strategy in the midst of a trial did not constitute ineffective assistance. Anderson at 21 (Judge Breyer dissenting). The Court next finds that Anderson is distinguishable. There, the medical testimony was the only evidence in support of the accused's principal defense - his mental condition. Here it should first be noted that, under Oklahoma law, in order to be convicted of first degree murder, Stohler neither had to commit the physical act of murder nor, indeed, be physically present when the act was committed. Oklahoma law provides that:

All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.

21 O.S. §172 (emphasis added). See, e.g., Van Woundenberg v. State, 720 P.2d 328 (Okla. Cr. 1986) cert.

denied, stay denied, 107 S.Ct. 447. Thus, the "alibi" testimony did not offer a defense to the crime charged as the medical testimony did in Anderson. Second, unlike the medical testimony in Anderson, the alibi testimony in this case could be subject to impeachment. See n.2, supra. As a matter of strategy, Gann might reasonably have concluded that the testimony could weaken his client's position. The Court finds that Gann's decision not to offer "alibi" testimony "falls within the wide range of reasonable professional assistance" and was, therefore, not error. See Strickland, 104 S.Ct. at 2065. The Court further finds that the decision was not prejudicial as a matter of law.

### Conclusion

Jimmie Dean Stohler has come before this Court petitioning for a Writ of Habeas Corpus. Whenever an inmate invokes the offices of the Great Writ, it behooves the Court to be mindful of its extraordinarily important role in our American jurisprudence. For it is not too much to say that the Writ has been designated Protector of Due Process - the very essence of our notions of justice and fair play. From its inception in English common law,<sup>17</sup> to its first codification in England,<sup>18</sup> thence to America

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<sup>17</sup>Drawing on principles enunciated in the Magna Charta, Common law courts in Britain employed the tenets of habeas corpus in the 16th Century. See, e.g., cases cited in Fay v. Noia, 83 S.Ct. 822, 829 n. 11 (1963).

where it appears first in our Constitution,<sup>19</sup> and now in statute<sup>20</sup> it has been the patron of those imprisoned by the government in violation of federal law. In explaining the underlying purpose and proper application of the Writ, the Supreme Court has pointed out that state prisoners are entitled to relief on federal habeas corpus only upon proving their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Townsend v. Sain, 83 S.Ct. 745, 756 (1963). The applicable statute itself states that habeas relief is available only where it is shown that petitioner "is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §2254. Thus the Writ should issue only where a petitioner can show that his incarceration is fundamentally illegal under federal law. As previously stated herein, it is the Court's view that several issues raised by the Petitioner should have been precluded from consideration because of procedural default. Nevertheless, the Court elected to consider each issue on the merits. The Court has concluded that Stohler has not succeeded in proving that his detention violates fundamental rights safeguarded by the federal law; therefore a Writ of Habeas Corpus shall not issue.

IT IS THEREFORE ORDERED that the Petition of Jimmie Dean

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<sup>18</sup>Habeas Corpus Act of 1679, 31 Car.II, c. 2.

<sup>19</sup>U.S. Const. Art. I, §9.

<sup>20</sup>28 U.S.C. §2241 et seq. The Act of February 5, 1867, c. 28 §1, 14 Stat. 385-386 extended federal habeas to state prison inmates. Townsend v. Sain, 83 S.Ct. 745, 756 (1963).

Stohler for a Writ of Habeas Corpus is denied.

ORDERED this 15<sup>TH</sup> day of January, 1992.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MARVIN DAVID BROWN, DEBRA BROWN; )  
 COUNTY TREASURER, Ottawa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Ottawa County, )  
 Oklahoma; and General Motors )  
 Acceptance Corp., )  
 )  
 Defendants. )

**FILED**

JAN 15 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

) CIVIL ACTION NO. 91-C-726-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14<sup>th</sup> day  
of Jan, 1992. 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, Ottawa County,  
Oklahoma, and Board of County Commissioners, Ottawa County,  
Oklahoma, appear by Barry V. Denney, Assistant District Attorney,  
Ottawa County, Oklahoma; the Defendant, General Motors Acceptance  
Corp., appears by Richard A. Robinson, Esq. and the Defendants,  
Marvin David Brown and Debra Brown, appear not, but make default.

The Court, being fully advised and having examined the  
court file, finds that the Defendant, Marvin David Brown,  
acknowledged receipt of Summons and Complaint on October 3, 1991;  
and that the Defendant, Debra Brown, -acknowledged receipt of  
Summons and Complaint on October 3, 1991.

It appears that the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer on September 26, 1991; that the Defendant, General Motors Acceptance Corp., filed its Answer on November 5, 1991; and that the Defendants, Marvin David Brown and Debra Brown, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot 5 of COAL CREEK ACRES, a sub-division of the Southwest Quarter of the Southwest Quarter of Section 35, Township 28 North, Range 22 East of the Indian Meridian, Ottawa County, Oklahoma.

The Court further finds that on January 16, 1990, the Defendants, Marvin David Brown and Debra Brown, 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 \$32,000.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent (7.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Marvin David Brown and Debra Brown, 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 January 16, 1990, covering the above-described property. Said mortgage was recorded on January 16, 1990, in Book 480, Page 545, in the records of Ottawa County, Oklahoma.

The Court further finds that the Defendants, Marvin David Brown and Debra Brown, 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, Marvin David Brown and Debra Brown, are indebted to the Plaintiff in the principal sum of \$31,825.91, plus interest at the rate of 7.5 percent per annum from June 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$28.00 (\$20.00 docket fees, \$8.00 fee for recording Notice of Lis Pendens).

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

The Court further finds that the Defendants, Marvin David Brown and Debra Brown, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, General Motors Acceptance Corp., has a lien on the property which is the subject matter of this action by virtue of a judgment, filed July 31, 1991 in the District Court of Ottawa County, State of Oklahoma, in the amount of \$6,960.23 plus interest, \$1,000.00

attorney fees, plus court costs. Said lien is inferior to the interest of the Plaintiff, United States of America.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendants, Marvin David Brown and Debra Brown, in the principal sum of \$31,825.91, plus interest at the rate of 7.5 percent per annum from June 1, 1990 until judgment, plus interest thereafter at the current legal rate of 4.02 percent per annum until paid, plus the costs of this action in the amount of \$28.00 (\$20.00 docket fees, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Marvin David Brown, Debra Brown, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, General Motors Acceptance Corp., have and recover judgment in the amount of \$6,960.23 plus interest, \$1,000.00 attorney fees, plus court costs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, Marvin David Brown and Debra Brown, 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 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 the Defendant, General Motors Corp., in the amount of \$6,960.23 plus interest, \$1,000.00 attorney fees, plus court costs.

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.

W. J. BROWN

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UNITED STATES DISTRICT JUDGE

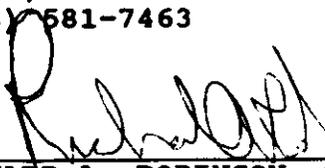
APPROVED:

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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RICHARD A. ROBINSON, OBA #7684  
Attorney for General Motors Acceptance Corp.

Judgment of Foreclosure  
Civil Action No. 91-C-726-E

KBA/esr

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

CECELIA M. BAILEY, )  
)  
Plaintiff, )  
)  
v. )  
)  
SAND SPRINGS GROUP HOMES, )  
INCORPORATED, )  
)  
Defendant. )

91-C-156-B

**FILED**  
JAN 15 1992  
Richard M. Lawrence, Court  
U.S. DISTRICT COURT

ORDER

This order pertains to defendant's Motion for Summary Judgment (Docket # 11)<sup>1</sup> and plaintiff's Response to Defendant's Motion for Summary Judgment (Docket #15). Plaintiff is a direct care staff member employed by defendant, a non-profit corporation that cares for mentally and physically impaired persons who are not self-sufficient in group homes.

During the period of time at issue, direct staff employees resided in the homes for duty periods of five days at a time. Each work day the employees were paid for eight hours of work time at a regular rate, then were expected to spend eight hours of unpaid rest time on the premises in a furnished private room with sleeping facilities on call to care for clients if necessary, and eight hours of unpaid time when it was permissible to leave the premises. Employees were paid at an overtime rate only for those hours actually worked during the eight hour rest time period, unless they were able to sleep less than five hours, in which case they were paid overtime for the entire eight hour period.

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

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1-16

Plaintiff is seeking to recover overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., for all of her uncompensated "sleep time" hours spent at a group home from June 1, 1990 to August 31, 1990. Defendant claims plaintiff is not entitled to overtime payment for all her sleep time unless she was up tending clients, that she has been properly compensated, and therefore summary judgment against her is proper.

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] 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." Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

The issue before this court is whether the sleeping quarters provided to plaintiff provided a "home-like environment" as required by law to allow plaintiff to sleep there.

The parties agree that plaintiff's employment is covered by 29 C.F.R. § 785.23, which states:

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. [Citations omitted.]

Title 29 of the Code of Federal Regulations, § 785.9 states:

(a) The Portal-to-Portal Act. The Portal-to-Portal Act (secs. 1-13, 61 Stat. 84-89, 29 U.S.C. 251-262) eliminates from working time certain travel and walking time and other similar 'preliminary' and 'postliminary' activities performed 'prior' or 'subsequent' to the 'workday' that are not made compensable by contract, custom, or practice. It should be noted that 'preliminary' activities do not include 'principal' activities. See §§ 790.6 to 790.8 of this chapter. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the 'workday.' 'Workday,' in general, means the period between 'the time on any particular workday at which such employee commences [his] principal activity or activities' and 'the

time on any particular workday at which he ceases such principal activity or activities.' The 'workday' may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his 'principal' activities. With respect to time spent in any 'preliminary' or 'postliminary' activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The 'preliminary' or 'postliminary' activity in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted . . . .

The Administrator of the Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor issued Wage and Hour Memorandum - 88.48, Subject: Community Residence (Group Homes) for the Mentally Retarded and similar residential care facilities -- Enforcement Policy. ("Memorandum 88.48"). (See Memorandum - 88.48, dated June 30, 1988, Exhibit "B" to plaintiff's brief and Exhibit "I" to defendant's Motion for Summary Judgment).

Memorandum 88.48 discusses a "special position with regard to sleep time" which the Wage and Hour Division has adopted. (Memorandum 88.48, pg. 2). This position "allows 'relief' employees who are provided with private quarters in a home-like environment to be treated the same as 'full-time' employees . . . whom they relieve with respect to deducting sleep time." (Memorandum 88.48, pg. 2). The discussion clarifies the conditions under which sleep time of employees is to be compensated. Page 2 of Memorandum 88.48 defines "private quarters" as:

living quarters that are furnished; are separate from the 'clients' and from any other staff members; have as a minimum the same furnishings available to clients (e.g. bed, table, chair, lamp, dresser, closet, etc.) and in which the employee is able to leave his or her belongings during on- and off-duty

periods.<sup>2</sup>

Page 3 of Memorandum 88.48 defines "home-like environment" as:

facilities including 'private quarters' as above and also including on the same premises facilities for cooking and eating; for bathing in private; and for recreation (such as TV). The amenities and quarters must be suitable for long-term residence by individuals and must be similar to those found in a typical private residence or apartment, rather than those found in institutional facilities such as dormitories, barracks, and short-term facilities for travelers.<sup>3</sup>

Page 3 goes on to say:

Under circumstances where an employee does not maintain his or her permanent residence on the premises and does not otherwise reside on the premises 7 days a week, WH [Wage and Hour Division] will consider an employee who sleeps in private quarters, in a homelike environment, to reside on the premises for an extended period of time . . . .

Finally, pages 4 and 5 discuss the deduction of sleep time for employees:

In order to deduct sleep time for full-time and relief employees, such employees must be provided private quarters in a homelike environment. Further, a reasonable agreement must be reached, in advance, regarding compensable time. The employer and the employee may agree to exclude up to eight hours per night of uninterrupted sleep time. They may also agree to exclude a period of off-duty time during the day when the employee is completely relieved of all responsibilities. These exclusions must be the result of an employee-employer agreement and not a unilateral decision of the employer. Such an agreement should normally be in writing to preclude any possible misunderstanding of the terms and conditions of an individual's employment.

---

<sup>2</sup> Plaintiff admits that the living quarters furnished at the group home contained a bed, desk, lamp, two drawer nightstand, closet, carpet, ceiling light, file cabinet, and a locked medicine cabinet. (See Affidavit of Cecelia M. Bailey, attached as Exhibit "A" to plaintiff's Brief). However, she contends she was not able to leave her belongings in the furnishings provided because they were used for storage. The record contains no indication that these complaints were ever voiced to the defendant prior to the institution of this litigation, nor is there any indication that plaintiff ever used the grievance procedure contained in paragraph 8 of the employment contract (Exhibit "D" to plaintiff's Brief) so as to provide the defendant with a fair opportunity to address and remedy her complaints.

<sup>3</sup> Plaintiff states that the "residence consisted of four (4) bedrooms which were situated across the hall from each other at one end of the house. (Affidavit of Cecelia M. Bailey, attached as Exhibit "A" to plaintiff's Brief (emphasis added)). Although plaintiff asserts that "the office/bedroom did not contain a TV or have a private connected bathroom or any running water" (Affidavit of Cecelia M. Bailey, paragraph 12), there is no showing that the house lacked facilities for cooking and eating; for bathing in private and for recreation (such as TV) on the same premises.

Where sleep time is to be deducted, the employer should determine if the following criteria are met:

- (1) the employer and the employee have reached agreement in advance that sleep time is being deducted;
- (2) adequate sleeping facilities with private quarters (see above) were furnished;
- (3) if interruptions occurred, employees in fact got at least five hours of sleep during the scheduled sleeping period;
- (4) employees are in fact compensated for any interruptions in sleep; and
- (5) no more than eight hours of sleep time is deducted for each full 24-hour on-duty period.

Memorandum 88.48 clearly provides that an employee of a Group Home who is provided "private quarters" in a "home-like environment" is not entitled to be paid for sleep time, absent a contractual agreement to the contrary.

Plaintiff was provided with a written Job Description (Ex. B to defendant's Brief) and Staff Policies and Procedures (Ex. C to defendant's Brief). Compensation for sleep time was described on page 2 of the Staff Policies and Procedures:

The Professional staff and Housemanager will be salaried employees. The Relief staff and Direct Care staff will be paid an hourly rate. Sleep time for Group Home staff is not considered work time; however, time up due to job related demands (client ill, fire, etc.) will be compensated. If an employee is unable to get five (5) hours total sleep (not necessarily consecutive) due to job related demands, the entire eight (8) hour period will be compensated.

In her deposition at page 19 plaintiff first said that she was told at the time she was hired that "no one is getting paid for sleep time", and then said she did not recall being told she would not be paid for sleep time. The court can draw no conclusion from this

contradictory testimony, as to what was or was not discussed verbally. However, the sleep time policy of the defendant was plainly set out in the Staff Policies and Procedures which plaintiff acknowledged receiving or having access to when she signed her written employment contract. She either knew or should have known of these written terms of her employment.

Plaintiff has failed to show that the quarters provided were not within the Department of Labor's definition of "homelike environment." The group home was not an institution. It was a four bedroom residence. Plaintiff contends the furnished bedroom where she stayed did not have a place where she could keep her personal belongings. However, she admits that a closet, a two-drawer nightstand, a desk, and a file cabinet were furnished. The crux of her complaint is not that appropriate furnishings were not provided, but that they were inappropriately used for general storage purposes.

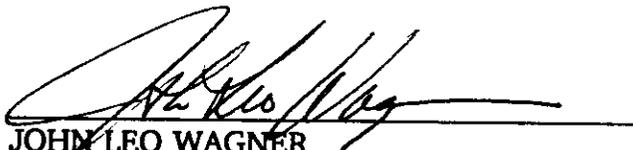
She acknowledges that the fourth bedroom was made available for her private use during her sleep time, but complains that the bedroom door did not lock. Her complaints could have been easily remedied by defendant had they ever been voiced during her employment, or if she had notified defendant of a breach under paragraph 8 of the employment contract. Instead, plaintiff continued to work in the environment provided without complaint. Defendant had no opportunity to take the simple measures of rearranging storage or installing a door lock. Plaintiff has failed to demonstrate that the furnishings provided were different from those furnished to clients, which is the standard employed by Memorandum 88.48. Evidently, other employees found the furnishings and

security adequate, and stored their belongings at the group home.<sup>4</sup> Under these circumstances, plaintiff's complaints regarding storage and security cannot be fairly said to destroy the "homelike" character of the environs.

The main thrust of the Department of Labor's Wage and Hour Memorandum 88.48 was to allow non-compensated sleep time for employees such as plaintiff engaged in the care of developmentally disabled persons in a residential setting. Presumably, this four bedroom residence had a kitchen, bathroom(s), living room, etc., in addition to the four bedrooms. Memorandum 88.48 contrasts a "homelike" environment with an "institutional" environment. Plaintiff's working environs were not institutional in nature, but rather designed to provide a "homelike" residential setting for the clients and their caregivers. Accepting all of plaintiff's deposition and affidavit testimony as true, the court must still conclude that defendant has substantially complied with the law and the stated policies of the Labor Department; has fully paid plaintiff according to the applicable regulations and official interpretations of those regulations, and that plaintiff is therefore not entitled to any additional compensation.

Defendant's Motion for Summary Judgment is granted.

Dated this 15<sup>th</sup> day of January, 1992.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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<sup>4</sup> See Affidavit of Cecelia M. Bailey, Exhibit "A" to plaintiff's Brief, paragraph 11(c).



**FILED**

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

JAN 1 1992

CARPET EXCHANGE DENVER, INC.,  
 a Colorado corporation,  
  
 Plaintiff,  
  
 vs.  
  
 PAUL BODKIN, aka BUD BODKIN;  
 MIKE HOPKINS; KELLI HOPKINS;  
 HAPPY HOMES, INC., an Oklahoma  
 corporation; CARPET TECH, INC.  
 an Oklahoma corporation;  
 CARPET EXCHANGE OF OKLAHOMA,  
 INC., an Oklahoma corporation.  
  
 Defendants.

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 91-C-578-E

**AGREED ADMINISTRATIVE CLOSING ORDER**

NOW on this 13<sup>th</sup> day of January, 1992 the above-referenced matter comes before the Court for an administrative closing by the Plaintiff, CARPET EXCHANGE DENVER, INC., a Colorado corporation, and the Defendants, PAUL BODKIN, MIKE HOPKINS, KELLI HOPKINS, HAPPY HOMES, INC., an Oklahoma corporation, CARPET TECH, INC., an Oklahoma corporation, and CARPET EXCHANGE OF OKLAHOMA, INC., an Oklahoma corporation, pending the execution of settlement documents. The Court orders that the above-styled case be dismissed with prejudice if no application to reopen the case is filed within sixty (60) days of the execution of this Order.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the above-referenced case should be administratively closed pending the execution of settlement documents as agreed by both Plaintiff and



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

**FILED**

JAN 14 1992

Richard M. Lawrence, Court  
U.S. DISTRICT COURT

LINDA HAYMAN,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D.,  
Secretary of Health  
and Human Services,

Defendant.

Case No. 90-C-985-B

ORDER

This matter comes on for consideration of the objection of the Plaintiff, Linda Hayman, to the Findings and Recommendations of the United States Magistrate Judge affirming the Administrative Law Judge's denial of disability insurance benefits.

Plaintiff filed the instant action pursuant to 42 U. S. C. § 405 (g) seeking a review of the decision of the Secretary of Health and Human Services. The matter was referred to the United States Magistrate who entered his Report and Recommendations on July 31, 1991, finding that the Secretary's decision should be affirmed.

The only issue before the Magistrate Judge was whether there was substantial evidence in the record to support the Secretary's decision that Plaintiff is not disabled within the meaning of the Social Security Act. "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment."

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42 U.S.C.A. §423 (d) (1) (A).

Further, the Secretary's findings shall stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The Secretary has established a five-step process for evaluating a disability claim, as set forth in Reyes v. Bowen 845 F.2d at 243:

- (1) A person who is working is not disabled.  
20 CFR § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 CFR § 404, subpt. P, app. 1, is conclusively presumed to be disabled.  
20 C.F.R. § 416.920(d).
- (4) A person who is able to perform work he has done in the past is not disabled.  
20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity.  
20 C.F.R. § 416.920(f).

If at any point the Secretary finds that a person is or is not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F. 2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. §416.920. In the present case, the Administrative Law Judge found that, although the Plaintiff had not been employed since July of 1988, Plaintiff did not satisfy the fourth section of this test; in her present medical condition she would be capable of performing several jobs previously held.

Dr. H.H. Modrak, an orthopedic surgeon, diagnosed Hayman on July 13, 1988, as having degenerative disc disease and moderate

bulging of the disc. He prescribed "conservative" treatments, and by October 1988, announced Plaintiff's condition was sufficiently improved to allow her return to work. He restricted her from lifting over 20 pounds, and from bending and twisting. There is nothing in the record to indicate that Modrak's assessment of Hayman's work ability is not still applicable. Dr. Michael Farrar, a general practitioner, confirmed the findings of Dr. Modrak, opining that Hayman could "return to the work force in some acceptable position," as long as she followed the same restrictions imposed by Modrak.

These findings would contraindicate Hayman returning to her most recent position as a stock clerk for American Airlines. They would not, however, preclude her from seeking employment as a records clerk, office worker, or fork lift operator - all positions she has held in the past, that require, by Plaintiff's own testimony, no twisting or bending of the back, or the lifting of more than 10 pounds. Dr. J.P. Skelly, the Medical Director for American Airlines, confirmed these findings. He stated, in an undated memorandum, that Hayman should discontinue her work as a stock clerk. He suggested placement in a position that would not involve any "bending, twisting, stooping or squatting," as an acceptable alternative. The memo did not mention a restriction on lifting. Skelly said that "otherwise", permanent disability was recommended, and went on to describe the degenerative nature of the disease, and the possibility of future surgery.

Plaintiff relies on the findings of Dr. Don Hawkins in a report dated 12/18/90, in which Hawkins stated that Hayman was in

"too much pain to work at this time." This report was, apparently, never submitted to the Administrative Law Judge, but instead was attached to the brief submitted to the Magistrate Judge. The Magistrate Judge then determined the report was "cumulative" evidence, and should not be considered. The Court finds that the report by Hawkins should not be considered because it was not a part of the record, rather than because it was "cumulative". The report was submitted over a year after the Administrative hearing. Even assuming, *arguendo*, that the report could be considered, the Court would nonetheless conclude the opinions of Drs. Modrak, Farrar and Skelly, that Plaintiff can work within the prescribed limits, are sufficient substantial evidence upon which the ALJ based the decision denying disability benefits.

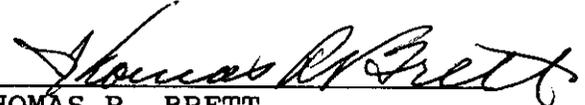
Other factors considered by both the Administrative Law Judge and the Magistrate Judge are: (1) Hayman did not seek medical attention from November of 1988, until August of 1989, although she claims to have been totally disabled during that time; (2) She has primary responsibility for the care of her home and two young children, including cooking and most housework; (3) She attends church regularly, drives a car, and vacationed twice in 1989.

At the Administrative hearing, Hayman testified that she did not know how she would care for her children if she had to work. The ALJ concluded that her motivation to return to work was lacking. It was also noted at the Administrative Hearing that Hayman appeared to be functioning normally and was not in pain.

Hayman's condition is degenerative. Surgery, or even a reconsideration of the situation, may be in order at some future

point. Notwithstanding, it is the opinion of three doctors that Hayman is employable, as long as the stated bending and lifting restrictions are adhered to. Therefore, the Court agrees with the Magistrate Judge's Report & Recommendations, and the same are adopted and affirmed, with the exception noted. The Court therefore concludes the Secretary's decision should be and the same is hereby AFFIRMED. Plaintiff's Objection to Findings and Recommendations of the Magistrate Judge should be and the same are hereby DENIED.

IT IS SO ORDERED this 14 day of January, 1992.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD L. CALDWELL; DEBORAH A.  
CALDWELL; THOMAS J. McCOY;  
JOHN DOE, Tenant; STATE OF  
OKLAHOMA ex rel. OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Tulsa County, Oklahoma; and  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

FILED

JAN 14 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 90-C-254-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 14<sup>th</sup> day  
of Jan, 1992, 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 Kathleen Bliss Adams,  
Assistant United States Attorney, and the Defendants, Donald L.  
Caldwell and Deborah A. Caldwell, 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  
Donald L. Caldwell and Deborah A. Caldwell, 9014 East 33rd  
Street, Tulsa, Oklahoma 74145, and all other counsel and parties  
of record.

The Court further finds that the amount of the Judgment  
rendered on July 19, 1990, in favor of the Plaintiff United  
States of America, and against the Defendants, Donald L. Caldwell

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

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and Deborah A. Caldwell, with interest and costs to date of sale is \$88,517.86.

The Court further finds that the appraised value of the real property at the time of sale was \$65,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered July 19, 1990, for the sum of \$58,376.00 which is less than the market value.

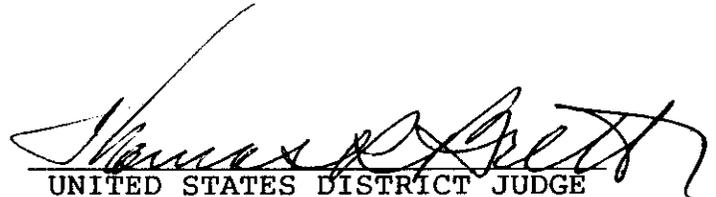
The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on October 4, 1991.

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, Donald L. Caldwell and Deborah A. Caldwell, as follows:

Principal Balance as of 7-19-90	\$70,735.66
Interest	15,642.10
Late Charges to Date of Judgment	694.08
Appraisal by Agency	500.00
Management Broker Fees to Date of Sale	360.00
Abstracting	211.00
Publication Fees of Notice of Sale	150.02
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$88,517.86
Less Credit of Appraised Value	- <u>65,000.00</u>
DEFICIENCY	\$23,517.86

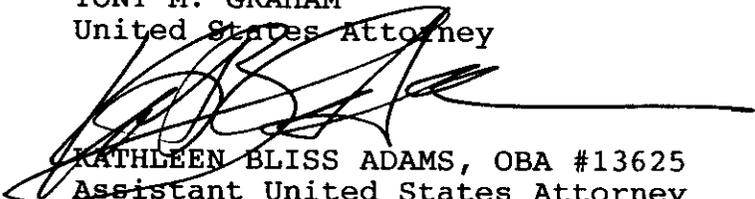
plus interest on said deficiency judgment at the legal rate of 4.02 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

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, Donald L. Caldwell and Deborah A. Caldwell, a deficiency judgment in the amount of \$23,517.86, plus interest at the legal rate of 4.02 percent per annum on said deficiency judgment from date of judgment until paid.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM  
United States Attorney

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

KBA/esr

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

FILED

JAN 16 1992

Richard M. Leighton, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 RICHARD DUVALL FIELDS, et al, )  
 )  
 Defendants. )

89-C-41-B

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 12, 1991 in which the Magistrate Judge recommended that Defendants' Motion to Vacate Default Judgment and the Application of Fields For Leave To File Amended Answer and Cross-Claim be denied.

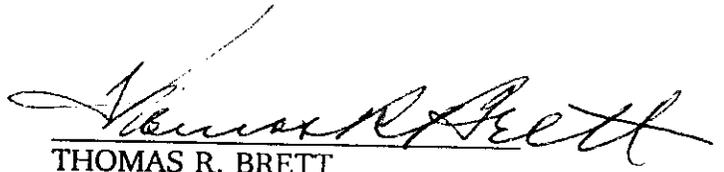
No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is, therefore, Ordered that Defendants' Motion to Vacate Default Judgment and the Application of Fields For Leave To File Amended Answer and Cross-Claim is denied.

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Dated this 14 day of Jan, 1992.



THOMAS R. BRET  
UNITED STATES DISTRICT JUDGE

GLH/ta  
12/11/91

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

BLAYDES, ROBERT

Plaintiff(s),

vs.

ANCHOR PACKING COMPANY, et al.,

Defendants.

No. 88-C-1201-B

**FILED**

JAN 14 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

Upon Plaintiffs' motion, this action is hereby dismissed with the following reservations:

1. This dismissal in no way affects Plaintiffs' rights to pursue claims against Defendants currently seeking the protection of bankruptcy courts.

2. This dismissal is subject to prior dismissals regarding Plaintiffs' right to their potential claims for cancer and fear of cancer.

S/ THOMAS R. PRETT  
U.S. DISTRICT COURT

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

FILED

JAN 14 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DAVID A. WHITE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNIVERSITY OF TULSA, et al, )  
 )  
 Defendants. )

90-C-421-B ✓

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 11, 1991 in which the Magistrate Judge recommended that Defendant's Motion for Partial Summary Judgment on Causes VI, VII and VIII be granted and that those claims be dismissed. The Magistrate Judge further recommended that Plaintiff's oral motion to dismiss Defendant Sheila Powers from Claim No. V be granted, there being no objection from said Defendant.

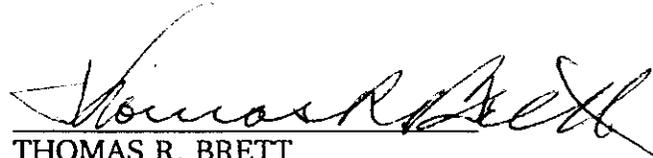
No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is, therefore, Ordered that Defendant's Motion for Partial Summary Judgment on Causes VI, VII and VIII is granted and that those claims are dismissed. Further, Plaintiff's oral motion to dismiss Defendant Sheila Powers from Claim No. V is granted, there being no objection from said Defendant.

144

Dated this 14 day of Jan., 1992.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JAN 20 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JOSHUA ALAN AVEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HOWARD & WIDDOWS, P.C. et al )  
 )  
 Defendants. )

Case No. 91-C-870C

D I S M I S S A L

COMES NOW, Joshua Alan Aven, the plaintiff in the above-captioned matter and does hereby dismiss his action against the defendants, without prejudice to the Plaintiff, to refile in the District Court of Tulsa County.

  
Joshua Alan Aven, Plaintiff

CERTIFICATE OF MAILING

I, Joshua Alan Aven, do certify that on the 18 day of January, 1992, that I did mail a true and identical copy of this document to the following parties, same being deposited in the U.S. Mail, with postage affixed thereto:

S. Wayne Whited  
6772 S. 70 E. Ave.  
Tulsa, OK 74133

Howard & Widdows, P.C.  
Gene Howard & P. Gae Widdows  
2021 S. Lewis Ave., Ste. 570  
Tulsa, OK 74104



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

FILED

JAN 13 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

SUE GOUDEAU-DAVID MORRIS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MARIE WILLIAMS NICHOLS, )  
 )  
 Defendant. )

91-C-127-C ✓

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 16, 1991 in which the Magistrate Judge recommended that Plaintiff's claim against Defendant be dismissed, without prejudice to its refiling.

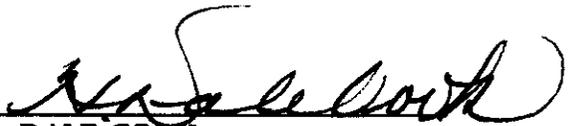
No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is, therefore, Ordered that Plaintiff's claim against Defendant is dismissed, without prejudice to its refiling.

4

Dated this 13 day of January, 1992.

  
H. DALE COOK,  
UNITED STATES DISTRICT JUDGE

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

HARDY C. NORTHCROSS, )  
 )  
 Plaintiff, )  
 )  
 v. ) 91-C-185-E /  
 )  
 LOUIS W. SULLIVAN, M.D., )  
 )  
 Defendant. )

FILED  
JAN 13 1992 ✓  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

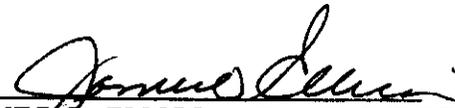
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 13, 1991 in which the Magistrate Judge recommended that Defendant's Motion to Remand be granted.

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

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

It is, therefore, Ordered that Defendant's Motion to Remand is granted.

Dated this 10<sup>th</sup> day of Jan., 1992.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

14

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

**FILED**

JAN 13 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CHARLES KRAUSS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 D. CRAWFORD, et al, )  
 )  
 Defendants. )

90-C-796-E

ORDER

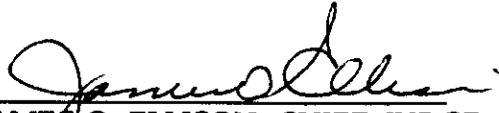
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 11, 1991 in which the Magistrate Judge recommended that Defendant's Motion To Dismiss be granted and that Krauss' Motion for Appointment of Counsel be denied.

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

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

It is, therefore, Ordered that Defendant's Motion To Dismiss is granted and that Krauss' Motion for Appointment of Counsel is denied.

Dated this 9<sup>th</sup> day of Jan., 1992.

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

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

JAMES DAVID WHEELER and )  
ELSA J. TOVAR, )

Plaintiffs, )

vs. )

Case No. 91-C-397-B

OSTEOPATHIC HOSPITAL FOUNDERS )  
ASSOCIATION, an Oklahoma )  
corporation, d/b/a TULSA REGIONAL )  
MEDICAL CENTER, TULSA OSTEOPATHIC )  
EMERGENCY PHYSICIANS, INC., an )  
Oklahoma corporation, CHRISTINE )  
ARENTZ, D.O., individually, )  
WILLIAM R. HOLCOMB, D.O., d/b/a )  
NORTHEAST OKLAHOMA PROCTOLOGY )  
CLINIC, and WILLIAM R. HOLCOMB, )  
D.O., individually, )

Defendants. )

**FILED**

**JAN 13 1992**

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**O R D E R**

This matter comes on for consideration of the Motion To Dismiss filed by Defendants Christine Arentz, D.O. (Arentz) and Tulsa Osteopathic Emergency Physicians, Inc. (TOEP). Also, for the Court's consideration is the Motion of Defendants William R. Holcomb, D.O. and Northeast Oklahoma Proctology Clinic (collectively, Holcomb) For Judgment On The Pleadings, Or For Summary Judgment.

Plaintiffs James David Wheeler (Wheeler) and Elsa J. Tovar (Tovar), husband and wife,<sup>1</sup> allege: that on February 12, 1990,

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<sup>1</sup> Tovar's claim is a derivative claim for loss of consortium, etc.. Plaintiffs will be referred to as Plaintiff or Wheeler.

Wheeler was admitted to Osteopathic Hospital Founders Association d/b/a Tulsa Regional Medical Center (TRMC), where Holcomb performed a colonoscopy on Wheeler; that during the colonoscopy, Wheeler's bowel was punctured; that on February 16, Wheeler was discharged from TRMC and the same evening Wheeler was taken by ambulance to the emergency room of TRMC suffering from acute abdominal pain and shortness of breath. Wheeler further alleges: that TRMC, TOEP and Arentz failed to properly screen, stabilize, and diagnose Wheeler's emergency medical condition; that Wheeler was not admitted to TRMC but was transferred home by these Defendants in an unstable condition; that Wheeler continued to deteriorate, going into septic shock; that on February 18, Wheeler was again seen at the emergency room of TRMC, was finally admitted and diagnosed, and on that same date was operated and a colostomy was performed on Wheeler.

Wheeler alleges in section I of his First Claim<sup>2</sup> in the Complaint this ". . . action is brought under 42 U.S.C.S. §1395dd, et seq., and therefore this Court has jurisdiction of the parties and subject matter herein and damages exceed the sum of Fifty Thousand and no/100 Dollars (\$50,000.00)". There is no allegation in the Complaint that jurisdiction exists by reason of diversity of citizenship and the factual allegations suggest lack of diversity.<sup>3</sup>

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<sup>2</sup> The Second Claim of the Complaint is a derivative consortium claim of Tovar.

<sup>3</sup> Plaintiffs allege they are "residents of Pawnee County, State of Oklahoma"; that the corporate defendants are Oklahoma corporations and that individual defendants Arentz and Holcomb are practicing physicians in Tulsa County, State of Oklahoma.

Wheeler alleges in section V of his First Claim that "[A]s a result of the concurrent negligence, carelessness, malpractice, and violation (of) the above-mentioned statute, by each of the Defendants, jointly and individually, in the care and treatment of the Plaintiff, Defendants caused severe and permanent injuries and damages to Plaintiff."

Wheeler alleges a violation of COBRA<sup>4</sup>, or alternatively called the Emergency Medical Treatment and Active Labor Act (Emergency Act) enacted to address the problem of "patient dumping". Reid v. Indianapolis Osteopathic Medical Hosp., 709 F.Supp. 853, 853-54 (S.D.Ind.1989). "Patient dumping" refers to the practice of a hospital that, despite being capable of providing the needed medical care, transfers patients to another institution or refuses to treat patients because the patient is unable to pay." Sorrells v. Babcock, 733 F.Supp. 1189, 1191 (N.D.Ill.1990). See, also Evitt v. University Heights Hospital, 727 F.Supp. 495 (S.D.Ind.1989); Gatewood v. Washington Health Care Corp., 933 F.2d 1037 (D.C.Cir.1991). The Act imposes on Medicare-provider hospitals specific duties as to medical screening and stabilizing treatment to patients who seek care in a hospital emergency room. The "medical screening requirement" is set out in §1395dd(a), and provides, in part:

" . . . if any individual (whether or not eligible for [Medicare] benefits under this sub-chapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a

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<sup>4</sup> Consolidated Omnibus Budget Reconciliation Act of 1986.

medical condition, a hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department . . ."

The "necessary stabilizing treatment" requirement is set out in §1395dd(b)(1), and provides, in part:

(1) In general

If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either--

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or to provide for treatment of the labor, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

Subsection (c) restricts transfers until the patient is stabilized.

In their Motion To Dismiss, Arentz and TOEP allege Wheeler's Complaint fails to state a claim upon which relief can be granted because the Emergency Act only provides civil actions against "the participating hospital"; that Wheeler did not allege these Defendants "failed to accord Plaintiff the same level of treatment regularly provided to patients in similar medical circumstances and absent any allegation of any facts known to Defendants at the time to imply that Plaintiff was not stabilized, no claim is stated under the Emergency Act."

Wheeler responds, averring his Complaint alleges, in addition to the "strict liability" violation of §1395dd *et seq*, the

traditional tort cause of action based upon medical negligence. Wheeler further argues a split of authority exists whether the Emergency Act allows a private cause of action against other than the participating hospital, citing Sorrells v. Babcock, *supra*.

Further, Wheeler urges that, even if his Emergency Act claim is limited to the hospital (TRMC), his state pendent claims against all the Defendants are allowed to be joined with the §1395dd claim under 28 U.S.C. §1367, a recently enacted supplemental jurisdiction statute.

The Court concludes that Wheeler's Complaint, although failing to clearly separate and distinguish the federal statutory claim from the state pendent claims, does minimally allege both a COBRA claim and state based malpractice claims, as evidenced by Section V of his First Claim quoted *supra*. Additionally, both Sections labeled VI and Section VII are phrased in pendent state claim vernacular<sup>5</sup>.

The Court next considers whether COBRA provides a private damage suit remedy against a physician or is it limited to "the participating hospital". A literal reading of the enforcement provision of §1395dd, section (d), prompts the Court to conclude any private damage action is limited as against hospitals only.

"Any individual who suffers personal harm as a direct result of a *participating hospital's* violation of a requirement of this section may, in a civil action *against the participating hospital*, obtain

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<sup>5</sup> An example is Plaintiff's invocation of the doctrine of *res ipsa loquitur*.

those damages available for personal injury under the law of the State in which *the hospital* is located and such equitable relief as is appropriate." emphasis supplied.

Several courts considering this issue have reached the same conclusion. Verhaagan v. Olarte, 1989 WL 146265 (S.D. N.Y. 1989); Lavignette v. West Jefferson Medical Center, 1990 WL 178708 (E.D. La. 1990).

Wheeler argues a split of authority on this issue, as evidenced by Sorrells, *supra*, which case discussed the legislative history of the *civil penalty provisions* of the act.<sup>6</sup> In Sorrells<sup>7</sup>, *supra*, the Court traced the Judiciary Committee's anguish over whether to provide criminal penalties against violating physicians, settling for only civil penalties. The Sorrells Court perhaps read into the Committee's comments something not readily apparent to this Court, as follows:

The Judiciary Committee did, however, recognize the need for civil sanctions against physicians who violate COBRA's provisions. The Judiciary Committee stated:

...(T)he Judiciary Committee amendment would extend the civil fines provision to the responsible physician, so that the physician, like the hospital, could be fined for violating the requirements of

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<sup>6</sup> §1395dd(d)(A) and (B) clearly establish that civil penalties apply to both hospitals and physicians.

<sup>7</sup> Sorrells relies upon Thompson v. St. Anne's Hosp., 716 F.Supp. 8 (N.D.Ill.1989), for the proposition that COBRA applies not only to hospitals but to physicians as well. A reading of Thompson reveals the issue of COBRA providing only a civil damage remedy against the participating hospital but not physicians was not raised nor discussed.

[COBRA] by up to \$25,000 per violation. The current provision allows this civil penalty to be assessed only against the hospital. The Committee believes the ability to assess this fine against the responsible physician as well as the hospital will be a strong incentive for both to respond to the medical needs of individuals with emergency medical conditions and women in active labor.

H.R.Rep.No.241(III), 99th Cong., 1st Sess. 6, *reprinted in* 1986 U.S.Code Cong. & Admin.News 728. The Judiciary Committee noted, however, that damage actions may only be brought against hospitals. H.R.Rep.No.241(III), 99th Cong., 1st Sess. 6-7, *reprinted in* 1986 U.S.Code Cong. & Admin.News 728. Accordingly, this court believes it is clear that a federal court has jurisdiction in COBRA suits against emergency room physicians who are alleged to have violated COBRA's provisions.

By the last sentence quoted above, the Sorrells court allowed a private damage claim to proceed against an individual physician. This Court cannot reconcile such holding with the express language of the statute. This Court recognizes that jurisdiction may exist over emergency room physicians for the purpose of civil penalties or, perhaps, pendent state claims (see below), but not, as held in Sorrells, for a private federal claim against physicians under §1395dd.

The Court next considers the supplemental jurisdiction argument advanced by Wheeler. The relatively new statute, 28 U.S.C. §1367, a part of the Judicial Improvements Act of 1990, effective December 1, 1990, provides, in part:

(a) ". . . in any civil action of which the district courts have original jurisdiction,

the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Section (b) proscribes exercising jurisdiction against persons made parties under Rules 14, 19, 20 or 24, in actions based solely on diversity jurisdiction, when such supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of §1332. Section (c) provides the Court may decline to exercise supplemental jurisdiction over a claim in four situations:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Section (d) provides for the tolling of state statutes of limitation while such claim or claims are pending in Federal Court plus an additional 30 day period after (and if) it is dismissed unless State law provides for a longer tolling period.

Wheeler's pendent state claim for malpractice clearly fits within the new supplemental jurisdiction parameters. The Court's

primary concern is whether such claim would "substantially predominate(s) over the claim or claims over which the district court has original jurisdiction". 28 U.S.C. §1367(c)(2). As noted, Section (c) allows the Court to exercise its discretion on such issue.

Taking the complaint allegations as true for purposes of the Motion To Dismiss, Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir.1969) *cert.den.* 397 U.S. 1074 (1970); Jones v. Hopper, 410 F.2d 1323 (10th Cir.1969) *cert.den.* 397 U.S.991 (1970), the Court concludes the Motion To Dismiss filed by Defendants Christine Arentz, D.O. and Tulsa Osteopathic Emergency Physicians, Inc. should be and the same is herewith SUSTAINED as to Wheeler's First Claim against Arentz and TOEP, based upon §1395dd. Such claim is herewith DISMISSED. The Court further concludes Arentz and TOEP's Motion To Dismiss as to Wheeler's First Claim pendent state malpractice claim against these two Defendants should be and the same is herewith DENIED on the ground that such claim forms part of the same nucleus of operative facts herein. The Court further concludes Arentz and TOEP's Motion To Dismiss should be and the same is herewith SUSTAINED as to Tovar's Second Claim against Arentz and TOEP, based upon §1395dd. Such claim is herewith DISMISSED. The Court further concludes Arentz and TOEP's Motion To Dismiss as to Tovar's Second Claim pendent state malpractice claim against these two Defendants should be and the same is herewith DENIED on the ground that such claim forms part of the same nucleus of operative facts herein. United Mine Workers of America v. Gibbs,

383 U.S. 715, 725 (1966).

The Court next considers Holcomb's Motion For Judgment On The Pleadings Or For Summary Judgment. Consistent with the above, the Court determines no private cause of action exists pursuant to 42 U.S.C.C. §1395dd as against Holcomb. In fact, Wheeler concedes same. The Court concludes Wheeler has alleged a pendent state malpractice claim against Holcomb in his First Claim.

The Complaint alleges Holcomb negligently punctured Wheeler's bowel during the February 12th colonoscopy. In the Court's view this act, if proven at trial, could palpably dominate the alleged improper emergency room screening or failure to stabilize an emergency medical condition federal claim under §1395dd because its the gravamen of the matter.

The Court concludes Holcomb's Motion For Judgment On The Pleadings, based upon his contention that 42 U.S.C. §1395dd limits damage suits as against the participating hospital only, is moot in view of Wheeler's concession. The same is DENIED, as to both the First and Second Claim of the Complaint, on the ground of mootness. Further, the Court, within its discretion, declines to exercise jurisdiction over Wheeler's and Tovar's pendent state claims for malpractice against Holcomb on the ground that such issue would substantially predominate over the COBRA claim against TRMC, which latter claim gives the Court its original jurisdiction.

In summary, the Court herewith DISMISSES WITHOUT PREJUDICE, all claims herein brought by Plaintiffs, on both the First and Second Claims, against ALL Defendants except non-movant TRMC. The

Court's notes that 28 U.S.C. §1367(d) tolls claims for a 30 day period<sup>8</sup> after dismissal, presumably to allow time within which to file a state action, if desired.

IT IS SO ORDERED this 10<sup>th</sup> day of January, 1992.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IT IS FURTHER ORDERED:  
CASE SET FOR A STATUS CONFERENCE BEFORE JUDGE BRETT ON JANUARY  
24, 1992 AT 8:45 A.M.

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<sup>8</sup> or such longer period as state statutes may provide.

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

**FILED**

JAN 13 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

BOBBY MOSLEY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 GARY MAYNARD, et al., )  
 )  
 Defendants. )

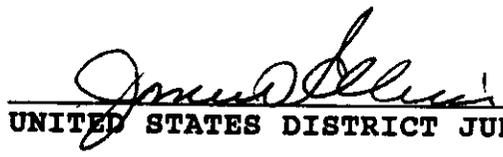
Case No. 90-C-527-E

ORDER

The Court has for consideration the Motion to Dismiss filed by the Plaintiff, Bobby Mosley, seeking a dismissal of the above-styled case pursuant to a settlement between the Plaintiff and the Defendant, Gary Maynard. Upon consideration of Plaintiff's motion, the Court finds that said motion should be granted, thereby dismissing the above-styled case with prejudice.

IT IS THEREFORE ORDERED that the Plaintiff's Motion to Dismiss be granted, and the case be dismissed with prejudice.

ORDERED this 10<sup>th</sup> day of Jan., 1992.

  
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 17 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CIGNA PROPERTY AND CASUALTY )  
INSURANCE COMPANY (formerly )  
AETNA Insurance Company), a )  
foreign corporation, and )  
INSURANCE COMPANY OF NORTH )  
AMERICA, a foreign )  
corporation, )

Plaintiffs, )

v. )

No. 91-C-063-E

MAUREEN BROWN; ROY J. HANNA- )  
FORD, II and EILEEN HANNAFORD, )  
husband and wife, PATSY J. )  
HANNAFORD; ROY J. HANNAFORD )  
COMPANY, INC., an Oklahoma )  
corporation; and RUCKER )  
CONSTRUCTION CO. OF TEXAS, )  
INC., a Texas corporation, )

Defendants. )

ORDER OF DISMISSAL WITHOUT PREJUDICE

Upon application of the Plaintiffs and for good cause shown, the Defendants sued herein as Roy J. Hannaford Company, Inc., an Oklahoma, and Rucker Construction Co. of Texas, Inc., a Texas corporation, are dismissed without prejudice.

S/ JAMES O. ELISON

United States District Judge

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

FILED

JAN 13 1992

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

HOMEWARD BOUND, INC., et al., )  
)  
Plaintiffs, )  
)  
vs. )  
)  
THE HISSOM MEMORIAL CENTER, et al., )  
)  
Defendants. )

No. 85-C-437-E

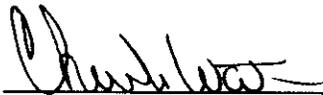
JUDGMENT

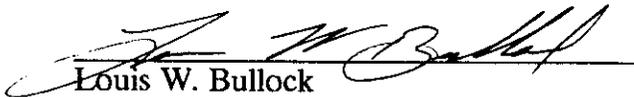
In accordance with the Order entered on the 9<sup>th</sup> day of January, 1992, awarding plaintiffs' counsel, Bullock & Bullock, the uncontested attorney fees and expenses, the Court hereby enters judgment in favor of plaintiffs' counsel, Bullock & Bullock, in the amount of \$10,368.75 for base fees and \$5,425.52 for expenses. The contested issues will be resolved following submission of the evidence.

IT IS SO ORDERED this 9<sup>th</sup> day of January, 1992.

BY JAMES O. ELLISON

James O. Ellison  
United States District Judge

  
\_\_\_\_\_  
Charles Waters  
Oklahoma Department of Human Services  
P. O. Box 53025  
Oklahoma City, OK 73152

  
\_\_\_\_\_  
Louis W. Bullock  
Bullock & Bullock  
320 S. Boston, Suite 718  
Tulsa, OK 74103-3708

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

HOMEWARD BOUND, INC., *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 THE HISSOM MEMORIAL CENTER, *et al.*, )  
 )  
 Defendants. )

No. 85-C-437-E

FILED

JAN 10 1992

Richard M. Lawrence, Clerk  
DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

The Court on this 9<sup>th</sup> day of January, 1992, has reviewed the Joint Stipulation concerning uncontested fees and costs in this matter. In accordance with the stipulation, the uncontested amount of fees totaling \$10,368.75 and expenses in the amount of \$5,425.52 should be paid immediately. The contested issues will be addressed following the submission of evidence. The Department of Human Services shall pay plaintiffs' counsel Bullock and Bullock the sum of \$15,794.27.

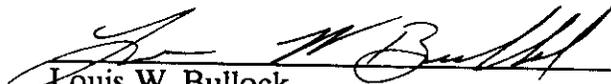
IT IS SO ORDERED this 9<sup>th</sup> day of January, 1992.

S/ JAMES O. ELLISON

James O. Ellison  
United States District Judge



Charles Waters  
Oklahoma Department of Human Services  
P. O. Box 53025  
Oklahoma City, OK 73152



Louis W. Bullock  
Bullock & Bullock  
320 S. Boston, Suite 718  
Tulsa, OK 74103-3708