

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NOV 10 1992

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GEORGE FRAZIER, JR.; ELISA R.)
 FRAZIER; COUNTY TREASURER,)
 Tulsa County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED
NOV 10 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 92-C-045-E

DEFICIENCY JUDGMENT

This matter comes on for consideration this 6th day of November, 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 Wyn Dee Baker, Assistant United States Attorney, and the Defendants, George Frazier, Jr. and Elisa R. Frazier, 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 by certified return receipt addressee restricted mail to George Frazier, Jr. and Elisa R. Frazier, 2433 No. Pittsburg, Tulsa, Oklahoma 74115, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on April 24, 1992, in favor of the Plaintiff United States of America, and against the Defendants, George Frazier,

Jr. and Elisa R. Frazier, with interest and costs to date of sale is \$36,710.98.

The Court further finds that the appraised value of the real property at the time of sale was \$24,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered April 24, 1992, for the sum of \$21,374.00 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 September 28, 1992.

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, George Frazier, Jr. and Elisa R. Frazier, as follows:

Principal Balance plus pre-Judgment Interest as of April 24, 1992	\$35,557.44
Interest From Date of Judgment to Sale	384.57
Late Charges to Date of Judgment	247.52
Appraisal by Agency	50.00
Abstracting	105.00
Publication Fees of Notice of Sale	141.45
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$36,710.98
Less Credit of Appraised Value	- <u>24,000.00</u>
DEFICIENCY	\$12,710.98

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

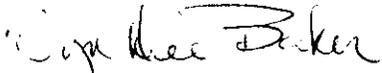
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, George Frazier, Jr. and Elisa R. Frazier, a deficiency judgment in the amount of \$12,710.98, plus interest at the legal rate of 3.24 percent per annum on said deficiency judgment from date of judgment until paid.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney


WYN DEE BAKER, OBA #465
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

WDB/esr

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

NOV 10 1992

Handwritten mark

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

TRACY R. SHIPLET,

Plaintiff,

vs.

Case No. 91-C-510-E

ALL-AMERICAN FITNESS AND
RACQUETBALL CENTERS
INCORPORATED, and RON GIBBONS,

Defendants.

FILED ON DOCKET
NOV 10 1992

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 6th day of November, 1992, this matter comes on for consideration pursuant to the plaintiff's Application for Dismissal With Prejudice. The Court finds that said Application should be granted and that the plaintiff's action should be dismissed with prejudice.

IT IS SO ORDERED this 6th day of November, 1992.

James O. Ellison

JAMES O. ELLISON,
UNITED STATES DISTRICT JUDGE

16

ENTERED
DATE NOV 10 1992

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

FILED

OCT 30 1992

MELVIN EARL WHITE,)
)
 Plaintiff,)
)
 v.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

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

91-C-831-B

ENTERED

ORDER

This order pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (Docket #2),¹ the Special Report (#8), Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Docket #9), and Plaintiff's Opposition to Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Docket #15).

Plaintiff claims that, while he was incarcerated in the Tulsa County Jail, he was denied proper medical treatment by Deputy McClafin for an alleged breathing difficulty on October 20, 1991. The Plaintiff seeks compensatory damages, punitive damages, and other relief to which he is entitled.

Defendants seek dismissal on the ground that Plaintiff's complaint fails to state a claim upon which relief may be granted, as no deliberate indifference to serious illness or injury has been shown.

The rule for reviewing the sufficiency of any complaint is that the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

¹ "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.

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

In order to establish a claim under 42 U.S.C. § 1983, Plaintiff must show the violation of a right secured by the Constitution and laws of the United States and that the alleged deprivation was committed by a person acting under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

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

The court concludes that the Plaintiff's complaint, held to lesser standards than one drafted by an attorney under Haines v. Kerner, 404 U.S. 519, 520 (1972), includes allegations which, if true, would sustain a conclusion that Defendants showed deliberate indifference to Plaintiff's medical needs. Therefore, the court finds that the individual defendants' motion to dismiss should not be granted.

However, in reviewing Plaintiff's claims for inadequate medical care, the court finds that the claims are controverted by the Special Report (#8), which was prepared by an employee of the Tulsa County Sheriff's Office.

The court finds that the submission of the Special Report requires treatment by the court of the motion to dismiss as a motion for summary judgment under Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff has presented affidavits made pertinent to such a motion by Rule 56 in his Opposition to Motion to Dismiss or in the Alternative, Motion for Summary Judgment (#15).

"[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 Special Report shows that when Plaintiff was admitted to jail, he was given a medical screening by a nurse, who noted his condition. (Ex. 5 to Special Report). During the next several months, he was medically treated on numerous occasions for various complaints. However, not until October 20, 1991, when the alleged event giving rise to this suit occurred, did he complain of breathing difficulty. (Ex. 5 to Special Report). Prior to filing this suit, Plaintiff had filled out fifty-one sick-call slips and was seen by medical personnel after at least forty-six of the requests. Only two of the sick-call slips alleged breathing problems and these were both shortly after the alleged incident. Five days after the alleged incident, Plaintiff's lungs were examined and found to be clear. Medical

personnel saw the Plaintiff on several occasions and ordered pain relievers and muscle liniments, various tests, and on one occasion, x-rays. These facts do not demonstrate any deliberate indifference to Plaintiff's medical needs or show that he was refused access to medical personnel.

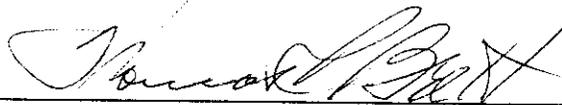
Since he has not pled personal involvement of Defendant Glanz, Plaintiff's only basis on which to base this § 1983 action against Glanz is the theory of respondeat superior. However, § 1983 liability cannot be based on the theory of respondeat superior when the superior has no affirmative link with the misconduct. McClelland v. Facticeau, 610 F.2d 693, 695 (10th Cir. 1979); Kite v. Kelly, 546 F.2d 334, 336-37 (10th Cir. 1976). A defendant must somehow be at fault in order to be held liable for damages under § 1983. In Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1988), the court held that to be liable, a superior must have participated or acquiesced in the constitutional deprivations alleged by Plaintiff. Plaintiff has failed to show that Defendant Stanley Glanz participated or acquiesced in the behavior of Deputy McClafin or had any affirmative link with the Deputy's conduct.

With regard to Defendant Glanz, Plaintiff has not claimed that Deputy McClafin's action in failing to respond to his claim of breathing difficulties was attributable to a conscious and purposeful policy or custom of the Tulsa County Sheriff to deny proper medical care to inmates of the Tulsa County Jail, thereby violating their Eighth Amendment rights. He has failed to allege any facts to support the existence of such a policy or custom which has been approved either formally or tacitly by Defendant Glanz. He has failed to allege that he was denied medical treatment except in this single instance. Plaintiff has

failed to allege that any other inmate has been denied medical treatment.

Defendants' Alternative Motion for Summary Judgment (#9) is granted.

Dated this 30th day of Oct., 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

RECEIVED
OCT 10 1992
DATE

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

CLOSED

MELVIN EARL WHITE,

Plaintiff,

vs.

STANLEY GLANZ, and
EARL McCLAFLIN

Defendants.

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Case No. 91-C-831-B

FILED

OCT 30 1992

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

J U D G M E N T

In accord with the Order entered simultaneously herewith, granting Summary Judgment in favor of Defendants Stanley Glanz and Earl McClafin and against the Plaintiff, Melvin Earl White, Judgment is herewith entered in favor of Defendants Stanley Glanz and Earl McClafin and against the Plaintiff, Melvin Earl White on all issues. Each party is to bear his own costs and attorneys fees.

DATED this 30 day of Oct., 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE **CLOSED**
NOV 10 1992

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

FILED
NOV -4 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

PIPES INC.,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA, et al,)
)
 Defendants.)

92-C-373-B

ORDER

Now before this Court are Motions For Summary Judgment brought by both Plaintiff and Defendants relating to the lease of Indian land.¹ Leases of restricted Indian land must be approved by the Secretary of the Interior ("Secretary"). In this case, the Secretary refused to approve Plaintiff's lease of Indian property. Plaintiff now appeals that decision.

The issue is whether the Secretary's decision was arbitrary, capricious, an abuse of discretion or contrary to law. For the reasons discussed below, the Secretary's decision will be affirmed.

I. Summary of Facts/Procedural History

Sam Tagg, a Cherokee Indian, owned a lot in Claremore, Oklahoma ("Claremore property").² He died in 1952, leaving the property to his heirs. At the time of his death, the heirs had not been legally determined.

¹ The Court will treat these motions as an appeal of an Administrative Agency decision.

² The facts are gleaned from the administrative record submitted by the Defendants. See Submission Of Administrative Record (docket #8). Evidence submitted by the Plaintiff that is not in the administrative record will not be used for the purposes of this decision.

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In 1987, despite the fact that Tagg's heirs had not yet been identified, Plaintiff Pipes Inc. ("Pipes") leased the Claremore property from Venoia Thompson Wright ("Wright").³ The Secretary did not approve the three-year lease, but Pipes started running a smokeshop operation on the land and conducted business for about two years.

In January of 1989, Wright and Pipes began discussing the lease's renewal. The discussions apparently broke down. In the meantime, in June of 1989, a Rogers County state court determined the rightful heirs of the subject property. The court found that Wright, Henry Thompson, Eunice Marie Hawes and Edith Beatrice Thompson Jackson owned a 1/12th interest each. Henry Tagg and Callie Horton were found to each have a one-third property interest.

In November of 1989, Pipes -- apparently unable or unwilling to consummate an agreement with Wright -- contacted Tagg and Horton.⁴ Once Pipes contacted them, the conversations eventually led to the signing of a December 18, 1989 lease on the Claremore property. The lease, however, was only signed by Pipes' representatives, Tagg and Horton. None of the four other heirs -- Thompson, Hawes, Jackson and Wright -- signed the lease. Pipes efforts to contact them included a January 8, 1990 letter, but none of the four responded.

On January 11, 1990, the lease was approved by the Superintendent of the local Bureau of Indian Affairs. That approval, in effect, committed the interest of the heirs that

³ Pipes says Wright claimed to have authority to lease the property as executrix of Tagg's estate and/or trustee of the "Sam Tagg Trust".

⁴ A December 14, 1989 letter from the Cherokee Nation to Pipes states: "Our client, Venoia Wright, has brought to our attention that you are running a business under an unapproved lease. She mentioned she has made several attempts to have you evacuate the land and you have refused. Records maintained by this office reveals that the land is still in restricted status against alienation by Federal Law; therefore, we recommend you turn over the keys to Mrs. Wright and remove yourself from the property or possibly face trespass action." See Administrative Record, page 1.

did not sign the lease. The record does show, however, that the heirs received payments from Pipes.

Wright and Hawes appealed.⁵ The BIA Area Director reversed the Superintendent's decision, finding that the Secretary could not approve the lease. Pipes unsuccessfully appealed the decision to Interior Board of Indian Appeals. On April 29, 1992, the Secretary issued a cease-and-desist order to Pipes. Five days later, Pipes filed this lawsuit. The smokeshop is still operating on the Claremore property pending a decision by this Court.

II. Scope Of Review

This case is an appeal from a agency decision by the Secretary of Interior and, as a result, the scope of review is narrow. The issue is whether the Secretary acted in a manner that was "arbitrary, capricious, an abuse of discretion, or contrary to law." 5 U.S.C. § 706(2)(A). Also, see *Cotton Petroleum v. U.S. Department of Interior*, 870 F.2d 1515, 1525 (10th Cir. 1989). This Court is required to determine whether the Secretary considered all the relevant facts and did not make a clear error of judgment. *Id*

III. Legal Analysis

Plaintiff Pipes asserts that the Secretary erred by not approving the lease of the subject property. Therefore, the issue before this Court is simply whether the Secretary's decision was "arbitrary, capricious, an abuse of discretion, or contrary to law." Below are the Pipes' specific arguments:

⁵ *Wright's appeal was dismissed because she filed it with the wrong agency.*

1. The Acting Area Director and the IBIA used the wrong CFR in making their decision. Pipes maintains that the lease of the Claremore property should be examined under 25 C.F.R. 162.6(b) -- not 25 C.F.R. 162.2(a).

2. The Acting Area Director and the IBIA arbitrarily and capriciously ignored evidence in the record. The crux of this allegation is that Pipes asserts that three months of unsuccessful negotiation did take place prior to the Superintendent's decision.

3. Pipes alleges that the IBIA did not properly exercise its fiduciary responsibilities to Indians by not approving the lease.

A. Did the Secretary Properly Apply 25 C.F.R. 162.2(a)(4)?

The Secretary refused to approve the lease pursuant to 25 C.F.R. 162.2(a)(4), which states:

"The Secretary may grant leases on individually owned land on behalf of...the heirs or devisee to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided the land is not in use by any of the heirs or devisee." *emphasis added.*

The Secretary, after applying §162.2(a)(4), concluded that no evidence indicated that the Tagg heirs, except for Wright, were aware of lease negotiations until late in November of 1989 -- which was less than two months before the lease was approved on January 11, 1990 by the Superintendent. As a result, the Secretary wrote that "it is not possible to conclude that the heirs were unable to agree on a lease over a three-month period."

Pipes rejects that analysis, asserting that the Secretary should have applied 162.6(b).

That regulation reads:

Where the owners of a majority interest, or their representatives, who may grant leases under §162.3, have negotiated a lease satisfactory to the Secretary he may join in the execution of the lease and thereby commit the interests of those persons in whose behalf he is authorized to grant leases

under § 162.2(a) (1)(2)(3), and (5).*emphasis added.*

Pipes' argument is that §162.6(b) should not be applied in this case because Callie and Tagg -- who collectively own two-thirds of the interest -- negotiated a lease and then received approval from the Secretary. Pipes argues that such circumstances mandate that §162.6(b) be applied -- not §162.2(a)(4).

Neither party cites legal authority directly on point, and this Court has found none. But the language of §162.6(b) expressly allows the Secretary to "commit the interests of persons *in whose behalf he is authorized to grant leases under §162.2(a)(1)(2)(3), and (5).*"⁶ The regulation makes no mention of allowing the Secretary to commit the interest of persons falling into the §162.2(a)(4) category. *See, generally, Plains Electric Generation And Transmission Cooperative v. Pueblo of Laguna*, 542 F.2d 1375, 1380 (10th Cir. 1976)("Expressio unius est exclusio alterius (expression of one thing is the exclusion of another)").

Applying that interpretation to this case, no one argues that the four heirs that failed to sign the lease can be described as fitting in §162(a)(1),(2),(3), and (5). They, instead, should be treated, pursuant to §162.2(a)(4) "as heirs or devisee who have been unable to agree on a lease." Therefore, this Court finds that the Secretary's application of §162.2(a)(4) to these facts is not arbitrary, capricious, an abuse of discretion, or contrary to law.⁷

⁶ §162.2(a)(1) Persons who are non compos mentis; (2) orphaned minors; (3) the undetermined heirs of a decedent's estate; and (5) Indians who have given the Secretary written authority to execute leases on their behalf.

⁷ In *McClanahan v. Hodel*, 14 I.L.R. 3113 (D.N.M. 1987), the court held that the Secretary could not approve leases of land for mineral purposes without unanimous consent of the Indian owners or unless some specific statute authorizes the Secretary to do so without unanimous consent. While that court was dealing with a different statute (25 U.S.C. §396), the undersigned believes the same rationale should apply here. That, unless specifically authorized by statute, the Secretary cannot approve leases without unanimous consent. In this case, 25 C.F.R.

B. Did The Secretary Err In Considering The Evidence?

The second question raised by Pipes is that the Secretary misinterpreted or did not properly evaluate all of the evidence. This Court disagrees. The Secretary's evaluation of the evidence was proper.

In this case, the Superintendent approved the lease on January 11, 1990. §162.2(a)(4) would then require that all of the heirs had been unable to reach agreement for the three months prior to the January 11, 1990 approval. The record before this Court clearly shows that the earliest date Pipes discussed a possible lease with heirs other than Wright was in November. And even at that point, Pipes had discussed the idea with only Tagg, Horton and Wright. No evidence suggests that any of the other three heirs participated in negotiations with Pipes at that time. *See No. 6 of Plaintiff's Statement of Material Facts.*⁸ As stated earlier, the lease was signed on December 18, 1989. Therefore, this Court does not find that the Secretary's decision was "arbitrary, capricious, an abuse of discretion, or contrary to law" on this issue.

C. Did The Secretary Breached His Fiduciary Duty To Indians By Not Approving The Lease?

Pipes lastly argues that the IBIA's decision somehow breached fiduciary duties. The Secretary does have a trust responsibility toward the Indians. *See, generally, Kenai Oil & Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (10th Cir. 1982). But there is no evidence in the record that suggests that the subject property will not be leased by another

162.2(a)(4) allows Secretary approval but only after the owners attempt to negotiate a lease for three months.

⁸ This interpretation would seem to favor Plaintiff as the record is sketchy as to the specific date Pipes began actual negotiations with Tagg or Horton. The record suggests that such negotiations did not take place until December. There is little, if any, evidence showing that all of the heirs were unable to reach an agreement for three months prior to the approval.

party or that the property will be without value because of the Secretary's decision. In fact, the circumstances appear to indicate that the property is valuable and that is why the parties are in dispute over who is entitled to possession.

IV. Conclusion

This Court's review of the Secretary's decision is a narrow one. The Court concludes the Secretary correctly applied 25 C.F.R. §162.2(a)(4) to this case. In addition, the Secretary's decision that the circumstances here did not allow lease approval of the Claremore property to Pipes was not arbitrary, capricious, an abuse of discretion, or contrary to law. The Secretary considered all relevant factors and did not make a clear error of judgment. Therefore, the Secretary's decision is AFFIRMED.

SO ORDERED THIS 4 day of Nov., 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED

FILED

NOV 4 1992

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

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

EQUAL EMPLOYMENT OPPORTUNITY	}
COMMISSION,	}
	}
and	}
	}
FRED ZUSCHEK,	}
	}
Plaintiffs,	}
	}
v.	}
	}
CITY OF TULSA,	}
	}
	}
Defendant.	}

CONSOLIDATED
CIVIL ACTION NO.

92-C-299-B

92-C-468-B

EOD 11/9/92

JOINT CONSENT DECREE

THIS JOINT CONSENT DECREE is made and entered into by and between the Equal Employment Opportunity Commission, Fred Zuschek and the City of Tulsa.

RECITALS

WHEREAS, on April 10, 1992, Fred Zuschek instituted suit against the City of Tulsa in the United States District Court for the Northern District of Oklahoma, Civil Action No. 92-C-299-B.

WHEREAS, on May 23, 1992, the Commission instituted suit against the City of Tulsa in the United States District Court for the Northern District of Oklahoma, Civil Action No. 92-C-468-B (hereinafter "Commission's Complaint") based upon a charge of discrimination filed by the Charging Party Mr. Zuschek, against the City of Tulsa.

WHEREAS, the above referenced action alleges that the City of Tulsa had violated Section 4(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. Section 623(a)(1), by failing or refusing

to hire Mr. Zuschek for the positions of microbiologist, lab technician and lab assistant because of his age.

WHEREAS on August 25, 1992, the EEOC's lawsuit was consolidated with the suit filed by Mr. Zuschek, which also alleged a violation of the ADEA for the City of Tulsa's failure or refusal to hire Mr. Zuschek for the positions of microbiologist, lab technician and lab assistant.

WHEREAS, the parties hereto desire to compromise and settle the differences embodied in the aforementioned consolidated lawsuit, and intend that the terms and conditions of the compromise and settlement be set forth in this Joint Consent Decree ("Consent Decree").

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. This Consent Decree resolves all issues raised in the Commission's Complaint. The Commission hereby fully releases and discharges the City of Tulsa, its officers, assigns, employees, representatives and agents of and from all claims, demands, causes of action, suits, damages, losses, and expenses based on, relating to or arising out of the issues raised or the allegations made in the Commission's Complaint and EEOC Charge No. 311 90 0787. The Commission does not waive processing or litigating charges other than the charge referred to in the Commission's Complaint.

2. The parties agree that this Consent Decree does not constitute an admission by the City of Tulsa of any violation of

the ADEA.

3. The City of Tulsa agrees that all hiring and promotion practices and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of age in violation of the ADEA.

4. The City of Tulsa agrees to post and keep posted in conspicuous places on its premises the notice pertaining to the application of the ADEA as prescribed by the Commission and attached as Attachment A.

5. No party shall contest the validity of this Consent Decree nor the jurisdiction of the federal district court to enforce this Consent Decree and its terms or the right of any party to bring an enforcement action upon breach of any term of this Consent Decree by any party. The Commission shall determine whether the City of Tulsa has complied with the terms of this Consent Decree and shall be authorized to seek compliance with the Consent Decree through civil action in the United States District Court.

6. Within 10 days after this Consent Decree is filed with the district court, the City of Tulsa shall deliver to attorney Patterson Bond a warrant or check in the amount of \$107,500.00, payable to Mr. Zuschek, in settlement of this case. The check shall be hand-delivered to Mr. Bond, or shall be delivered by U.S. Certified Mail, return receipt requested. Within 10 days after payment is tendered, a copy of the check and any other payment documents shall be transmitted to the EEOC, including a copy of the

certified return receipt, if any.

7. If the Defendant fails to tender payment or fails to perform timely, the Defendant shall:

- a. Pay interest at the rate calculated pursuant to 26 U.S.C. Section 6621(b) on any untimely or unpaid amounts; and
- b. Bear any additional costs incurred by the plaintiff caused by the non-compliance or delay of the defendant.

8. This agreement is appended to and made part of a Journal Entry of Judgment filed with the court.

IN WITNESS THEREOF, the parties have executed this Consent Decree on this the 3^d day of November, 1992.

FOR THE PLAINTIFFS:



JEFFREY C. BANNON
Regional Attorney
Connecticut No. 301166

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
8303 Elmbrook Drive
Dallas, Texas 75247



PATTERSON BOND
Attorney for Plaintiff Fred Zuschek

FOR THE DEFENDANT:



CHARLES R. FISHER
CITY OF TULSA
Oklahoma Bar No. 2933#
Assistant City Attorney
200 Civic Center, Rm. 316
Tulsa, Oklahoma 74103-3827

Attachment A

NOTICE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

1. This NOTICE to all employees of the City of Tulsa is being posted as part of an agreement between the City of Tulsa and the U.S. Equal Employment Opportunity Commission.
2. Federal law requires that there be no discrimination against any employee or applicant for employment because of that person's race, color, religion, sex, national origin or age with respect to hiring, compensation, promotion, discharge or other terms, conditions or privileges of employment.
3. The City of Tulsa strongly supports and will comply with such Federal law in all aspects and it will not take any action against employees because they have exercised their rights under the law by filing charges with the U.S. Equal Employment Opportunity Commission.
4. This NOTICE will remain posted until November 1, 1994, by direction of the U.S. Equal Employment Opportunity Commission.

SIGNED _____ day of _____, 1992.

CITY OF TULSA

Orig in 92-C-299-B
**ENTERED
FILED**

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

NOV 4 1992

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

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,**)
)
and)
)
FRED ZUSCHEK,)
) **Plaintiffs,**)
v.)
)
CITY OF TULSA,)
)
)
) **Defendant.**)

**CONSOLIDATED
CIVIL ACTION NO.**

92-C-299-B
92-C-468-B EOD 11/9/92

JOINT CONSENT DECREE

THIS JOINT CONSENT DECREE is made and entered into by and between the Equal Employment Opportunity Commission, Fred Zuschek and the City of Tulsa.

RECITALS

WHEREAS, on April 10, 1992, Fred Zuschek instituted suit against the City of Tulsa in the United States District Court for the Northern District of Oklahoma, Civil Action No. 92-C-299-B.

WHEREAS, on May 23, 1992, the Commission instituted suit against the City of Tulsa in the United States District Court for the Northern District of Oklahoma, Civil Action No. 92-C-468-B (hereinafter "Commission's Complaint") based upon a charge of discrimination filed by the Charging Party Mr. Zuschek, against the City of Tulsa.

WHEREAS, the above referenced action alleges that the City of Tulsa had violated Section 4(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. Section 623(a)(1), by failing or refusing

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to hire Mr. Zuschek for the positions of microbiologist, lab technician and lab assistant because of his age.

WHEREAS on August 25, 1992, the EEOC's lawsuit was consolidated with the suit filed by Mr. Zuschek, which also alleged a violation of the ADEA for the City of Tulsa's failure or refusal to hire Mr. Zuschek for the positions of microbiologist, lab technician and lab assistant.

WHEREAS, the parties hereto desire to compromise and settle the differences embodied in the aforementioned consolidated lawsuit, and intend that the terms and conditions of the compromise and settlement be set forth in this Joint Consent Decree ("Consent Decree").

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. This Consent Decree resolves all issues raised in the Commission's Complaint. The Commission hereby fully releases and discharges the City of Tulsa, its officers, assigns, employees, representatives and agents of and from all claims, demands, causes of action, suits, damages, losses, and expenses based on, relating to or arising out of the issues raised or the allegations made in the Commission's Complaint and EEOC Charge No. 311 90 0787. The Commission does not waive processing or litigating charges other than the charge referred to in the Commission's Complaint.

2. The parties agree that this Consent Decree does not constitute an admission by the City of Tulsa of any violation of

the ADEA.

3. The City of Tulsa agrees that all hiring and promotion practices and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of age in violation of the ADEA.

4. The City of Tulsa agrees to post and keep posted in conspicuous places on its premises the notice pertaining to the application of the ADEA as prescribed by the Commission and attached as Attachment A.

5. No party shall contest the validity of this Consent Decree nor the jurisdiction of the federal district court to enforce this Consent Decree and its terms or the right of any party to bring an enforcement action upon breach of any term of this Consent Decree by any party. The Commission shall determine whether the City of Tulsa has complied with the terms of this Consent Decree and shall be authorized to seek compliance with the Consent Decree through civil action in the United States District Court.

6. Within 10 days after this Consent Decree is filed with the district court, the City of Tulsa shall deliver to attorney Patterson Bond a warrant or check in the amount of \$107,500.00, payable to Mr. Zuschek, in settlement of this case. The check shall be hand-delivered to Mr. Bond, or shall be delivered by U.S. Certified Mail, return receipt requested. Within 10 days after payment is tendered, a copy of the check and any other payment documents shall be transmitted to the EEOC, including a copy of the

certified return receipt, if any.

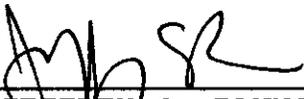
7. If the Defendant fails to tender payment or fails to perform timely, the Defendant shall:

- a. Pay interest at the rate calculated pursuant to 26 U.S.C. Section 6621(b) on any untimely or unpaid amounts; and
- b. Bear any additional costs incurred by the plaintiff caused by the non-compliance or delay of the defendant.

8. This agreement is appended to and made part of a Journal Entry of Judgment filed with the court.

IN WITNESS THEREOF, the parties have executed this Consent Decree on this the 3^d day of November, 1992.

FOR THE PLAINTIFFS:



JEFFREY C. BANNON
Regional Attorney
Connecticut No. 301166

FOR THE DEFENDANT:



CHARLES R. FISHER
CITY OF TULSA
Oklahoma Bar No. 2933#
Assistant City Attorney
200 Civic Center, Rm. 316
Tulsa, Oklahoma 74103-3827

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
8303 Elmbrook Drive
Dallas, Texas 75247



PATTERSON BOND
Attorney for Plaintiff Fred Zuschek

Attachment A

NOTICE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

1. This NOTICE to all employees of the City of Tulsa is being posted as part of an agreement between the City of Tulsa and the U.S. Equal Employment Opportunity Commission.
2. Federal law requires that there be no discrimination against any employee or applicant for employment because of that person's race, color, religion, sex, national origin or age with respect to hiring, compensation, promotion, discharge or other terms, conditions or privileges of employment.
3. The City of Tulsa strongly supports and will comply with such Federal law in all aspects and it will not take any action against employees because they have exercised their rights under the law by filing charges with the U.S. Equal Employment Opportunity Commission.
4. This NOTICE will remain posted until November 1, 1994, by direction of the U.S. Equal Employment Opportunity Commission.

SIGNED _____ day of _____, 1992.

CITY OF TULSA

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

RCB BANK successor by merger to
Bank of Oklahoma-Claremore,)

PLAINTIFF,)

V.)

Case No. 92-C-191 B

R.B. MANTON, INC.)
d/b/a Precision Tubulars;)

R.B. MANTON)
a/k/a Robert B. Manton, individually;)

VERDIGRIS VALLEY ECONOMIC)
DEVELOPMENT CORPORATION;)

WASHINGTON COUNTY TRUST)
AUTHORITY;)

STIFFLEMIER PIPE COMPANY;)
REDWING SERVICE & SUPPLY)

COMPANY;)
HAMILTON METALS, INC.;;)

BBL CO.; FIRST METALS, INC. and)
FEDERAL DEPOSIT INSURANCE)

CORPORATION,)

DEFENDANTS.)

FILED
NOV 11 1992
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
MUSKOGEE COUNTY

ORDER

This Court, having reviewed the Stipulation of Dismissal filed herein by Plaintiff **RCB BANK** ("Plaintiff") and Defendant **BBL CO.**, finds that the Petition for Replevin (the "Petition") filed herein by Plaintiff should be dismissed with prejudice to the refiling of the same insofar and only insofar as it relates to Defendant **BBL CO.**

IT IS THEREFORE ORDERED that the Petition filed herein by Plaintiff is dismissed with prejudice to the refiling of the same insofar and only insofar as it relates to Defendant **BBL CO.** The Petition is not hereby dismissed as against any defendants other than **BBL CO.**

ENTERED ON DOCKET
 DATE 11/9/92
FILED
 NOV 4 1992
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

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

ATLANTIC RICHFIELD COMPANY,)	
)	
Plaintiff,)	Consolidated Cases Nos.
)	
v.)	89-C-868-B
)	89-C-869-B
AMERICAN AIRLINES, INC., Et. Al.,)	90-C-859-B
)	
Defendants.)	

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

Now on this 4 day of Nov., 1992, this matter comes on for consideration of the Plaintiff Atlantic Richfield Company's (ARCO'S) NOTICE OF MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT¹ (docket no. 387). The Plaintiff ARCO appears by its attorney, Larry Gutteridge, the Defendants appear by their respective lead counsel, and William Anderson appears as liaison counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises FINDS, ADJUDGES, ORDERS and DECREES:

¹ On or about August 10, 1992, ARCO filed its Notice of Motion and Motion for Determination of Good Faith Settlement seeking determinations of good faith settlement and bar orders for settlements with 24 potentially responsible parties ("PRPs") of the Sand Springs Site. At the hearing on August 25, 1992, ARCO deleted Deere & Company from the motion.

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r/r

1. The settlements encompassed by the Notice of Motion and Motion for Determination of Good Faith Settlement (docket no. 387) in the above captioned action between the Plaintiff ARCO and the Board of County Commissioners of Tulsa County, Oklahoma ("Tulsa County") is found to be in good faith, and a final judgment barring all claims against Tulsa County based on its arrangement for disposal of off-site hazardous substances, under state and federal law, except to the extent that such claims are preserved by the settlements, should be and is hereby entered.

2. On July 13, 1992, the Board of County Commissioners of Tulsa County, Oklahoma, approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in this case in the amount of \$17,361.25. The Plaintiff ARCO is entitled to and is hereby granted judgment against Tulsa County in the sum of \$17,361.25.

3. Each and every claim asserted by the Plaintiff ARCO against Tulsa County should be and is hereby dismissed in its entirety on the merits, with prejudice and without costs.

4. Each and every claim "deemed filed" by or against Tulsa County, pursuant to the terms of the First Amended Case Management Order, Section VII. B., filed March 6, 1992, is hereby dismissed in its entirety on the merits, with prejudice and without costs.

5. In accordance with the terms of the agreements with Tulsa County, hereinafter referred to as the Agreement, this Judgment shall be conditioned upon the Agreement being and remaining valid and in effect.

6. Entry into the Agreement by an ineligible entity renders the Agreement null and void. An eligible entity is a generator or transporter, or both, of material to the Site, with a volume of less than or equal to 100,000 gallons. The terms "Site" and "volume" are as defined in the Agreement and in ARCO's August 10, 1992 Motion.

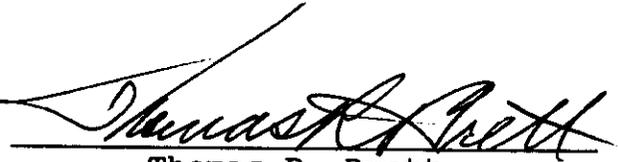
7. Any breach, whether by omission or commission, whether intentional or non-intentional, of a Settling Party's representation and warranty that, it neither possesses, or has a right to possess, nor is aware of any information which indicates that it is responsible for additional or greater volume than is set forth in the Volume Report attached to the Agreement, which has not been included in the documentation provided to ARCO in support of its offer to enter the Agreement, renders the Agreement null and void.

8. In the event that the Agreement is or becomes null and void, this Judgment along with all orders entered in conjunction with the Agreement shall be vacated nunc pro tunc, the settlement reflected in the Agreement shall be terminated pursuant to its terms and the parties to the vacated Agreement shall be deemed to have reverted to their respective status and position in the Action as of the date immediately prior to the execution of the Agreement.

9. Nothing contained in this Judgment and Order shall be construed to affect the rights of the Plaintiff ARCO or Tulsa County with respect to claims which are preserved by the settlements.

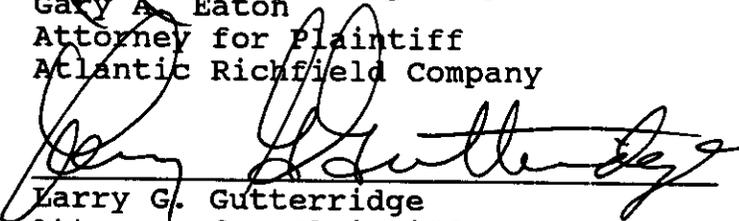
10. There being no just reason to delay the entry of this Judgment, this Court hereby directs entry of this final Judgment and Order of Dismissal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

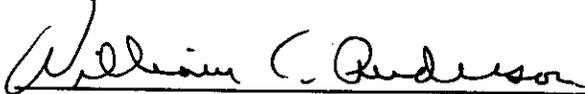
Dated: 11-4-92


Thomas R. Brett
United States District Court Judge

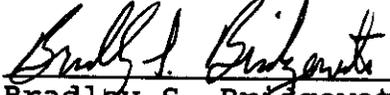
Presented by:


Gary A. Eaton
Attorney for Plaintiff
Atlantic Richfield Company


Larry G. Gutteridge
Attorney for Plaintiff
Atlantic Richfield Company


William C. Anderson,
Liaison Counsel


Dick A. Blakeley,
Assistant District Attorney
for Tulsa County, Oklahoma


Bradley S. Bridgewater,
Assistant United States Attorney
United States Department of Justice 

JUDGMENT.TUL

DATE NOV 09 1992

FILED

NOV 11 1992

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

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

CLOSED

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
and)
)
FRED ZUSCHEK,)
)
Plaintiffs,)
)
v.)
)
CITY OF TULSA,)
)
)
Defendant.)

CONSOLIDATED
CIVIL ACTION NO.

92-C-299-B
92-C-468-B

JOURNAL ENTRY OF JUDGMENT

NOW on this 4th day of November, 1992, this matter comes before this Court pursuant to request by the parties. This Court, having examined the pleadings filed herein, having heard statements of counsel and being fully apprised in the premises finds as follows:

1. This Court has jurisdiction of the parties and the subject matter of this action.

2. The parties have entered into a Consent Decree attached to this Journal Entry of Judgment.

3. Plaintiff Equal Employment Opportunity Commission and Plaintiff Fred Zuschek should have judgment of \$107,500.00, payable to Fred Zuschek, against Defendant in the above captioned action.

4. Said judgment represents all of Plaintiffs' claims against the Defendant, including but not limited to damages for violation of the Age Discrimination in Employment Act, damages for any and all current and potential state tort claims in the nature

CLOSED

**In the United States District Court for the
Northern District of Oklahoma**

Granville Farley,
Plaintiff,

vs.

Occidental Oil and Gas
Corporation, a California
Corporation,
Defendant.

♦
♦
♦
♦
♦
♦
♦
♦
♦
♦
♦

Case No. CIV - 92-430-B

Order of Dismissal with Prejudice

The parties having filed a "Stipulation for Dismissal with Prejudice", the Court finds and ORDERS that this case is Dismissed with Prejudice. Each party shall bear his/its own attorneys fees and costs.

SO ORDERED this 4th day of November, 1992.

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Judge

Orig in 92-C-299-B

CLOSED
DATE *NOV 09 1992*
FILED

NOV 4 1992

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

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

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,**)
)
and)
)
FRED ZUSCHEK,)
) **Plaintiffs,**)
v.)
)
CITY OF TULSA,)
)
)
) **Defendant.**)

**CONSOLIDATED
CIVIL ACTION NO.**

92-C-299-B
92-C-468-B ✓

JOURNAL ENTRY OF JUDGMENT

NOW on this 4th day of November, 1992, this matter comes before this Court pursuant to request by the parties. This Court, having examined the pleadings filed herein, having heard statements of counsel and being fully apprised in the premises finds as follows:

1. This Court has jurisdiction of the parties and the subject matter of this action.
2. The parties have entered into a Consent Decree attached to this Journal Entry of Judgment.
3. Plaintiff Equal Employment Opportunity Commission and Plaintiff Fred Zuschek should have judgment of \$107,500.00, payable to Fred Zuschek, against Defendant in the above captioned action.
4. Said judgment represents all of Plaintiffs' claims against the Defendant, including but not limited to damages for violation of the Age Discrimination in Employment Act, damages for any and all current and potential state tort claims in the nature

of personal injury, interest, costs and attorney's fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs EEOC and Fred Zuschek have judgment against Defendant in the amount of \$107,500.00.

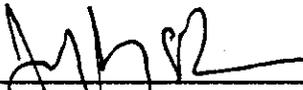
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

Approved:



PATTERSON BOND
Attorney for Fred Zuschek



JEFFREY C. BANNON
Regional Attorney
Equal Employment Opportunity Commission
8303 Elmbrook Drive
Dallas, Texas 75247



CHARLES R. FISHER
Attorney for Defendant City of Tulsa
200 Civic Center, Room 316
Tulsa, Oklahoma 74103-3827

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

FILED

NOV 5 1992

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

SUN REFINING AND MARKETING
COMPANY,

Plaintiff,

vs.

No. 88-C-13-E

GENERAL ELECTRIC COMPANY,

Defendant.

FILED ON DOCKET
NOV 9 1992

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41, F.R.C.P., the parties announce to the Court that they have reached a settlement of the above-entitled matter and that the Complaint and Counterclaim may be dismissed with prejudice to refiling.

Respectfully submitted,

RICHARDS, PAUL, RICHARDS & SIEGEL

By Nancy J. Siegel
Nancy J. Siegel, OBA No. 10611
9 East 4th Street, Suite 400
Tulsa, Oklahoma 74103
918/584-2483
ATTORNEYS FOR PLAINTIFFS

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

By Joseph R. Farris
Joseph R. Farris, OBA #2835
525 South Main
1400 Park Centre
Tulsa, Oklahoma 74103
918/583-7129
ATTORNEYS FOR DEFENDANTS

FILED IN COURT

DA NOV 0 9 1992

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLOSED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ONE RED AND WHITE ULTRALIGHT)
 CHALLENGER SPECIAL AIRCRAFT,)
 MANUFACTURED BY: QUAD CITY)
 ULTRALIGHT AIRCRAFT)
 CORPORATION, MOTOR NO.)
 879112,)
)
 Defendant.)

CIVIL ACTION NO. 92-C-666-B

FILED
NOV 9 1992

JUDGMENT OF FORFEITURE

This cause having come before this Court upon a Complaint for Forfeiture of the defendant aircraft filed herein on July 30, 1992, and pursuant to a Stipulation for Forfeiture entered into by and between the plaintiff, United States of America, and Billy Charles Jackson, Jr., owner of the defendant aircraft, and pursuant to Plea Agreement entered into by Billy Charles Jackson, Jr., in United States v. Billy Charles Jackson, Jr., Case No. 92-CR-50-B, and the Court, being fully advised in the premises, finds as follows:

1) That the verified Complaint for Forfeiture In Rem was filed in this action on July 30, 1992, alleging that the defendant aircraft is subject to forfeiture pursuant to Title 21 § 881(a)(4) and (a)(6).

2) That a Warrant of Arrest and Notice In Rem was issued on the 30th day of July 1992, by the Clerk of the United States

District Court for the Northern District of Oklahoma, pursuant to Order for Warrant of Arrest and Notice In Rem entered by United States District Judge Thomas R. Brett on the 31st day of July, 1992.

3) That the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Order, and the Warrant of Arrest and Notice In Rem on the defendant aircraft on August 11, 1992.

4) That Billy Charles Jackson is the only known individual or entity that claims an interest in the defendant aircraft, and that by virtue of the Plea Agreement of Billy Charles Jackson, Jr. in the aforementioned criminal action and his Stipulation for Forfeiture of the defendant aircraft in this civil forfeiture action, Billy Charles Jackson, Jr. consents to the forfeiture of the defendant aircraft.

5) That USMS Form 285 reflecting the service upon the defendant aircraft is on file herein.

6) That all persons interested in the defendant aircraft hereinafter described were required to file their claims herein within ten (10) days after service upon them of the respective Warrants of Arrest and Notices In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the

Complaint within twenty (20) days after filing their respective claim(s).

7) That no individuals or entities have filed Claims to the defendant aircraft.

8) That the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, on September 3, 10, and 17, 1992, and in The Okmulgee Daily Times on September 11, 18, and 25, 1992.

9) That no other claims, answers, or other defenses have been filed by the defendant property or any persons or entities having an interest therein, and that no other persons or entities have any right, title, or interest in the defendant property.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant aircraft,

**ONE RED AND WHITE ULTRALIGHT
CHALLENGER SPECIAL AIRCRAFT,
MANUFACTURED BY: QUAD CITY
ULTRALIGHT AIRCRAFT
CORPORATION, MOTOR NO.
879112,**

and that such property be, and it hereby is, forfeited to the United States of America for disposition by the United States Marshal according to law.

Entered this 4th day of November, 1992.

S/ THOMAS R. BRETT

THOMAS R. BRETT, Judge of the
United States District Court
for the Northern District of Oklahoma

APPROVED AS TO FORM:


CATHERINE J. DEPEW
Assistant United States Attorney

CJD/ch

N:\UDD\CHOOK\FC\Jackson6\02440

ENTERED ON DOCKET
DATE NOV 8 1992

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

INTERNATIONAL SURPLUS LINES)
INSURANCE COMPANY, a Corporation,)
)
Plaintiff,)

vs.)

Case No. 92 C-959C

STEWART, TODD, CHANEY & BAILEY,)
an accounting partnership;)
BILL STEWART,)
MARTIN E. TODD,)
JACK C. CHANEY, and)
THOMAS C. HERRMANN, individually)
and as general partners;)
GRACE HERSETH, an individual;)
JAMES WHEELER, an individual;)
SEDCO INVESTMENTS,)
an Oklahoma general partnership;)
ROCK LAMBORN and RANDY LAMBORN,)
d/b/a LAMBORN & LAMBORN;)
KEN CAZZELL, an individual;)
DAN FRANK, an individual;)
CHARLES PATTERSON, an individual;)
THE PATTERSON GROUP,)
an Oklahoma general partnership;)
FRED RASCHEN, an individual;)
JAMES BEAVERS, an individual;)
CARL FISHER, an individual; and)
WILLIAM S. FRISBIE, an individual,)
)
Defendants.)

**DISMISSAL WITHOUT
PREJUDICE**

COMES NOW the Plaintiff and pursuant to Fed.R.Civ.P. 41(a)(1) dismisses the above styled action without prejudice to its refiling. In support hereof, Plaintiff would advise the Court that Plaintiff has not served process on any Defendant herein and no

answer or motion for summary judgment has been filed by any Defendant herein.

JONES, GIVENS, GOTCHER & BOGAN, P.C.

By:



Dan A. Rogers (OBA# 7717)
C. Michael Copeland (OBA# 13261)
15 East Fifth Street, Suite 3800
Tulsa, Oklahoma 74103-4309
(918) 581-8200

ATTORNEYS FOR THE PLAINTIFFS

RECEIVED
11/7/92

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

WILLIE FOUST, III, deceased
by and through his natural
parents and next of kin,
CHRISTINE FOUST, as mother
and WILLIE FOUST, Jr., as
his father and executor of
the ESTATE OF WILLIE FOUST,
III, deceased; and LENA
SHAVERS, as the parent and
next of friend of RENATA
FOUST, a minor and daughter
of the deceased,

Plaintiffs,

vs.

THE CITY OF MIDWEST CITY,
GARY MAYNARD, individually
and officially as head of
Oklahoma's Department of
Corrections and The
OKLAHOMA DEPARTMENT OF
CORRECTIONS, RON CHAMPION,
individually and officially
as Warden of the Connors
Correctional Facility, and
THE CONNERS CORRECTIONAL
FACILITY,

Defendants.

FILED

NOV -4 1992

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

Case No. 91-C-0101-B

ORDER

Before the Court is a Motion For Summary Judgment filed on behalf of the Defendant, The City of Midwest City ("the City"). Also before the Court are the Motions of City to strike the affidavits of Willie Foust, Jr., Christine Foust and Charles Stith, which affidavits were attached to Plaintiffs' Response to City's Motion For Summary Judgment.

Parties Allowed
11-4-92 ho

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Earlier on the Court denied City's Motion To Dismiss concluding that Plaintiff had alleged sufficient facts to satisfy the minimal requirements necessary to survive a Rule 12(b)(6) motion to dismiss. The Court noted in such Order that Plaintiffs carry a heavy burden indeed to support their claim.

The facts, as stated in the Court's earlier Order are: Willie Foust, III, ("Foust") was fatally stabbed by a fellow inmate while incarcerated in the Conner Correctional Facility. Plaintiffs, Foust's parents and daughter, filed this §1983 action contending that Foust was killed because Defendant City failed to adequately protect him and tell him that, as a police informant, he could be segregated from the general prison population. The Plaintiffs allege that the City violated the Plaintiffs' Fourth, Fifth, Eighth and Fourteenth Amendment rights by: failing to protect Foust after assuming a duty to protect him; failing to inform Foust that he could be segregated from other inmates while at Conner Correctional Facility; and by failing to inform the Oklahoma Department of Corrections ("DOC") that Foust was an informant, thereby needing protection or segregation from the general prison population.

Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights ... secured by the Constitution ... shall be liable to the party injured

Plaintiffs make the following assertions in support of their claim:

- 1) that the City assumed a duty to protect Foust when Foust

became an informant, and that the duty was non-delegable even when Foust was moved to the DOC system. Because of this alleged duty, the City was responsible for informing Foust of his housing options at DOC, or for telling DOC that Foust was an informant. By not doing so, the City breached its duty to the Plaintiffs.

2) that Foust was deprived of his constitutional rights when the City failed in its non-delegable duty to protect him at Conner Correctional Facility, since the City's policy is to protect its informants. Plaintiffs allege the City's inadequate policies, practices and custom of supervising its personnel violated Foust's constitutional rights. Plaintiffs must show that constitutional rights were not sufficiently protected as the result of a City policy or custom. Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978).

3) that the City's actions were reckless, willful, wanton and obdurate in failing to protect Foust, and that the City has a lack of training and supervision of its officers in handling informants, and that allowed Foust's rights to be violated. Plaintiffs also support this claim by alleging that Foust was assaulted and battered by City police attempting to coerce him into a crack house to gather evidence.¹ Plaintiffs must show that the City acted in a wanton or obdurate manner by not fulfilling its duty of informing Foust of his housing options or sufficiently protecting him in the DOC. Blankenship v. Meachum, 840 F.2d 741, 742 (10th Cir. 1988).

4) that there is an affirmative link between the City's

¹ This claim was added for the first time in Plaintiffs' Second Amended Complaint.

pattern of conduct and deprivation of Plaintiffs' constitutional rights is that supervisory personnel were involved in the pattern of conduct and failed to stop the pattern; there were inadequate policies, practices and customs in place to protect Plaintiffs' constitutional rights. An affirmative link is needed between policy and the alleged deprivation of rights. City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985).

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, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he 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, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein 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 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 Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

City filed its Motion for Summary Judgment on July 31, 1992, contending in its undisputed facts that Willie Foust was not killed because he was an informant; that he was killed on Feb. 20, 1989, by Ronald Dwane Cooper because Foust stole a hamburger from Cooper's cell on Feb. 19, 1989; that Cooper's confession verifies this.

Plaintiffs have responded with affidavits from City Councilman Charles Stith, Christine Foust (Willie's mother) and Willie Foust, Jr. (Willie's father), generally to the effect that Willie told his mother and father that he feared the Midwest City police and feared for his life. City has moved to strike all three affidavits mainly on the grounds they are hearsay statements and unsupported conclusions. The Court concludes City's objections to these affidavits are, for the most part, well taken.

In the Charles Stith affidavit Councilman Stith swears that "he as a City Council member knows that informants are as good as dead when placed in the general population of a prison."; that he recalls conversing with members of the special investigations unit of the Midwest City police department and that "although I may not remember the time and dates of special investigations unit members that I conversed with, I do recall hearing that there were some confidential informants treated as dirt and fourth class citizens, as reported to me by law enforcement officers."

Plaintiffs, in their response, point to the Stith affidavit as evidence that City knew Foust was likely to be killed in prison. The Court concludes Stith's generalized statements regarding informants in a general prison population are of no probative evidentiary value. The Court further concludes Stith's hazy recollections of undated conversations with unnamed officers is also of no probative value.

Plaintiffs further point to the Affidavit of deceased's mother, Christine Foust, as evidence to refute City's assertion that Willie Foust, III, was killed in prison because he was an informant.

In the Christine Foust affidavit the deceased's mother states:

1. I am the mother of Willie Foust, III, which was stabbed to death in prison two days before he was to testify in a drug dealers trial.
2. He was beaten by the Midwest City Police because he refused to enter a drug house and purchase some drugs for the Police.
3. Due to the beating he had bruises on his chest which was very painful.
4. He stated that he did not know who was going to kill him first, the police or the drug dealers.

Christine Foust's Affidavit provides no probative evidence as to the Plaintiffs' Eighth Amendment claim that deceased died because he was an unprotected informant. However, as will be further discussed, *infra*, Christine Foust's Affidavit does relate to Plaintiffs' Fourteenth Amendment claim (City's police officers allegedly physically assaulted and battered Foust in an attempt to coerce him into entering a suspected crack house). There is no evidence Ms. Foust had personal knowledge of such purported altercation. However, the City has not moved for summary judgment on the Fourteenth Amendment claim, there being no mention of it in its Motion and Brief.

Plaintiffs point to the deceased's father's Affidavit as evidence that the deceased was in fear of his life and that Willie Foust, III, made a dying declaration that "I don't know who's going to get me first the drug dealers or the police." The father's deposition² gives several versions of the deceased's alleged fear while in prison. On the occasion of the father's October, November, December and January, 1988-1989, prison visits to the deceased no fear was expressed by Willie Foust, III, with the exception of a general concern because "one or two guys had gotten killed there in prison. One guy had gotten killed in his sleep." However, on the Thursday or Friday before the deceased was killed the father visited with the deceased at the Oklahoma County jail to which he

² Attached in its 79-page entirety as Exhibit F to Plaintiffs' Response to City's Motion For Summary Judgment.

had been transported for the purpose of being a witness in a case.³ According to the father the deceased's life had been threatened "He said because the word had gotten out that he was a snitch." The father explained that is prison jargon someone "had put a snitch jacket on" Willie Foust, III, which meant "that there was a hit being placed on the person's life." The father also testified that Midwest City Councilman Don Walker told him that "there was a snitch jacket placed upon my son that was done by someone in the Midwest City Police Department, but he couldn't say who did it" because "he didn't know the name" but he "knew it came out of the Midwest City Police Department."⁴ The record is devoid of any

³ City points out the Willie Foust, III, was brought to Oklahoma County as a witness for the defense in a criminal case set for trial for February 13, 1989. Defendant's Exhibit K, attached to City's Brief in support of Motion For Summary Judgment.

⁴ The father's testimony expanded upon this allegation, as follows:

Q. So what he told you was that somebody in the Midwest City Police Department had -- had done what? I don't understand this part.

A. You don't watch -- you don't -- you don't read very much. You don't watch very much TV, do you? Or are you just playing the innocent role?

Q. No. I'm going to take the naive role here. I'm not -- I'm not trying to hide from you. I just don't know. You say he put -- let me just tell you what I don't understand.

A. Well, in other words, what I'm trying to say is that someone from the Midwest City Police Department, in the terms that are used by --

Q. I understand what you're saying about snitch jacket. What I don't understand is who with the Midwest City Police Department --

A. Someone -- someone that -- someone at the department had paid someone or had done something to have someone kill someone.

Q. All right. The terminology from the TV shows I do watch is: What he's saying is that someone in the Midwest City Police Department had put a contract out.

A. Same thing.

Q. Paid somebody and said, "Here's the snitch; get him."

A. That's right.

probative corroborative evidence of the father's allegations regarding the Midwest City Police Department's alleged "fingering" of the deceased.

Of importance to the Court's mind is the undisputed fact that the deceased never requested of the state prison officials any separate confinement or special safety measures, nor did he express his alleged fear to the City's police officials. The case authority cited by Plaintiffs essentially relates to factual situations where the at-risk inmate relayed his apprehensions to the officials in charge or where such officials already knew of the danger. See, Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1989) and Blankenship v. Meachum, 840 F.2d 741 (10th Cir. 1988).

Plaintiffs, in an apparent attempt to fit within the strictures of Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), contrast the City's former written policy regarding "Use of Informants" as it existed prior to Foust's death to the City's current policy which involves a setting up of files on each informant. There is no evidence in the record to demonstrate that City changed its policy as a result of Foust's death or that it was other than an up-grading of informant policy based upon other model policies.

In the Court's view the real issue in Plaintiffs' Eighth Amendment claim, i.e. the death of Willie Foust, III, is whether a municipality has any duty to inform a state penal system which receives a new prisoner that such prisoner served as an informant

for the municipality on prior occasions when the prisoner himself denies any need for separate confinement or special safety measures. Plaintiffs have cited no authority for such proposition. Further, under the facts in this case, Plaintiffs cannot prove that Willie Foust, III's death was caused by anything other than a dispute over stolen hamburger(s). Speculation or conclusionary statements that Foust's death occurred because he was an informant are not sufficient to withstand summary judgment where otherwise appropriate. 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 Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

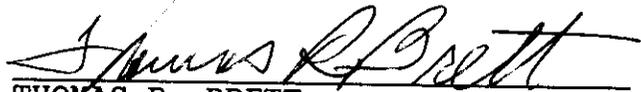
The Court concludes, from the sworn evidence of prison inmates, including Ronald Dwane Cooper, and prison officials, that Foust was indeed killed by Cooper over a dispute involving one or two hamburgers.⁵ The Court further concludes City's Motion For Summary Judgment on Plaintiffs' Eighth Amendment claim (Foust's death which amounted to cruel and unusual punishment) should be and the same is hereby GRANTED. City's Motions To Strike the Affidavits of Willie Foust, Jr., Christine Foust and Charles Stith are GRANTED only insofar as the same relate to Plaintiffs' Eighth Amendment claim.

The remaining claim is Foust's Fourteenth Amendment claim based upon City's alleged assault and battery upon Foust to force

⁵ Plaintiffs' argument that material fact disputes exist because it is in conflict whether it was one or two hamburgers is disingenuous.

him into entering a crack house, all against Foust's will. Both of deceased's parents have testified that they saw bruises and other evidence of physical abuse upon Foust who told them, on separate occasions, the Midwest City police beat him up because of his reluctance to enter a crack house. The City's Motion For Summary Judgment did not mention Plaintiffs' Fourteenth Amendment claim⁶ so the Court will not address the hearsay character or admissibility of Plaintiffs' evidence under FRE 804(4) regarding the Fourteenth Amendment claim. This sole remaining issue will be tried as scheduled on November 16, 1992.

IT IS SO ORDERED this 4th day of November, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁶ Neither does City's Motion address Plaintiffs' Fourth and Fifth Amendment claims. The Court concludes, as City may well have, that Plaintiffs have failed to state any factual claim to which the Fourth and Fifth Amendments are applicable. Berry v. City of Muskogee, 900 F.2 1489 (10th Cir.1990).

CLOSED

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

FILED IN DOCKET
NOV 6 1992

IN RE:)
)
REPUBLIC FINANCIAL)
CORPORATION, an Oklahoma)
corporation,)
)
Debtor.)
)
R. DOBIE LANGENKAMP,)
Successor Trustee,)
)
Plaintiff-Appellee,)
)
vs.)
)
DOLLIE RAPP AND ALLAN J. RAPP,)
)
Defendant-)
Appellants.)

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

F I L E D
NOV 05 1992

Richard M. ...
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Adversary No. 86-773-C

Dist. Ct. No. 92-C-623-E

ORDER

Comes now before the Court for its consideration, pursuant to Rule 41(a)(1)(ii) Fed.R.Civ.Proc., a Stipulation of Dismissal of the above appeal. After review of the record, the Court finds that said stipulation of dismissal should be granted.

IT IS THEREFORE ORDERED that said Stipulation of Dismissal is hereby GRANTED.

ORDERED this 54 day of November, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

15

CLOSED

NOV 6 1992

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

NOV 5 1992
[Handwritten signature]

IN RE)
)
MALONEY-CRAWFORD, INC.)
an Oklahoma corporation,)
)
Debtor,)
)
Employer's Tax Identification)
Number 73-1180253)
_____)
)
MALONEY-CRAWFORD, INC.,)
an Oklahoma corporation)
)
Plaintiff/Appellee,)
)
vs.)
)
HUNTCO STEEL, INC.,)
)
Defendant/Appellant.)

**Case No. 92-00157-C
(Chapter 11)
Adversary Case No. 92-0160-C**

Dist. Court Case # 92-C-848-E

AGREED ORDER OF DISMISSAL

The Plaintiff/Appellee, **Maloney-Crawford, Inc.**, and the Defendant/Appellant, **Huntco Steel, Inc.**, hereby stipulate to the dismissal of the Motion for Leave to Appeal and Notice of Appeal of the Defendant/Appellant and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

6

1. That the Motion for Leave to Appeal and Notice of Appeal of the Defendant/Appellant, **Huntco Steel, Inc.**, be and the same is hereby dismissed with prejudice.

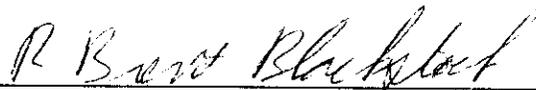
2. That each party shall bear its own respective costs and attorney fees.


JUDGE OF THE DISTRICT COURT

AGREED TO AS TO FORM AND CONTENT:



Neal Tomlins, Esq.
Harold A. Lewis, Esq.
BAKER & HOSTER
800 Kennedy Building
Tulsa, OK 74103
ATTORNEYS FOR PLAINTIFF/APPELLEE



R. BRENT BLACKSTOCK, OBA #839
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(918) 622-3661
ATTORNEY FOR DEFENDANT/APPELLANT

WPS1\HUNTCOBK\APPEAL\DISMISS.ORD

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NOV 6 1992

ENTERED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WONDA L. COX a/k/a WANDA L. COX;)
 FIDELITY FINANCIAL SERVICES, INC.;)
 TULNED UNIVERSAL, INC.; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

OCT 29 1992

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

CIVIL ACTION NO. 90-C-535-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 27 day
of Oct, 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 Peter Bernhardt, Assistant
United States Attorney, and the Defendant, Wonda L. Cox a/k/a
Wanda L. Cox, appears neither in person nor by counsel.

The Court being fully advised and having examined the
court file finds that a copy of Plaintiff's Motion was mailed by
certified return receipt addressee restricted mail to Wonda L.
Cox a/k/a Wanda L. Cox, 2611 East 29th St. North, Tulsa,
Oklahoma 74110, and by first-class mail to all answering parties
and/or counsel of record.

The Court further finds that the amount of the Judgment
rendered on December 20, 1990, in favor of the Plaintiff United
States of America, and against the Defendant, Wonda L. Cox a/k/a

Wanda L. Cox, with interest and costs to date of sale is \$24,963.77.

The Court further finds that the appraised value of the real property at the time of sale was \$4,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered December 20, 1990, which was amended on September 26, 1991 to be sold without appraisal, for the sum of \$4,008.00 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 Oct. 14, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Wonda L. Cox a/k/a Wanda L. Cox, as follows:

Principal Balance plus pre-Judgment Interest as of 12-20-90		\$20,775.88
Interest From Date of Judgment to Sale		2,281.60
Late Charges to Date of Judgment		375.44
Appraisal by Agency		550.00
Abstracting		459.00
Publication Fees of Notice of Sale		296.85
Court Appraisers' Fees		<u>225.00</u>
TOTAL	\$	24,963.77
Less Credit of Appraised Value	-	<u>4,500.00</u>
DEFICIENCY	\$	20,463.77

plus interest on said deficiency judgment at the legal rate of 3.24 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Wonda L. Cox a/k/a Wanda L. Cox, a deficiency judgment in the amount of \$20,463.77, plus interest at the legal rate of 3.24 percent per annum on said deficiency judgment from date of judgment until paid.

THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

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

PB/esr

NOV 05 1992

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

FILED
NOV 2 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

NELLIE LOU LILLIE,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

89-C-632-B ✓

JUDGMENT

This action came to trial before the court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff, Nellie Lou Lillie, is granted judgment against the Defendant, United States of America, in the amount of \$37,322.95 plus costs.

Dated this 2nd day of November, 1992.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

NOV 05 1992

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

F I L E D

NOV 2 1992

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

NELLIE LOU LILLIE,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

89-C-632-B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit under the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq. Nellie Lou Lillie ("Plaintiff") alleges personal injury as the result of a fall on August 15, 1987, at 6:00 a.m. on the outside entryway steps of the United States Post Office in Sand Springs, Oklahoma. The case was tried before Judge Thomas R. Brett on July 30, 1990, and the Court found in favor of Defendant. Notice of appeal by the Plaintiff was filed on August 20, 1990, seeking determination of whether the trial judge's view of the scene of the accident after the close of the evidence, without notice to the parties or opportunity for counsel to attend, and with no court reporter present, was an error requiring reversal of the judgment or whether such action constituted an error requiring an evidentiary hearing to determine whether the district court's findings were based on the view as evidence. The Tenth Circuit held that the court's viewing was improper, that one of the court's findings raised the possibility that the court relied on the view; the Tenth Circuit therefore could not determine from the record that the improper view was "harmless" and had no effect on the district court's findings and thus reversed and remanded the case for a new trial.

The parties consented to proceed before the Magistrate Judge and the case was tried to the Court on August 27, 1992, with closing arguments being presented on September

08

28, 1992. After considering the evidence presented, the arguments of counsel for the respective parties, and the applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Court has jurisdiction of the parties and the subject matter herein as it is a proper case under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., Plaintiff having timely complied with the necessary notice thereunder, and 28 U.S.C. § 1346(b).

2. Plaintiff is a resident of Cleveland, Oklahoma.

3. The Defendant, United States of America, through its agency and instrumentality, United States Postal Service, operates the United States Post Office in Sand Springs, Oklahoma ("post office") located at the southeast corner of Second and Roosevelt Streets. The post office building is leased by the United States of America and was neither designed nor constructed by the United States of America. It is the continuing duty and obligation, at all relevant times herein, of the United States of America to properly maintain the building under lease, including the outside stair, walkways, and lighting.

4. The post office building is located below street level and there is a flight of concrete steps ("the steps") leading down from the Second Street level parking area and sidewalk to the main entrance of the post office which is on the north side of the building. The street and sidewalk in front of the post office slope from west to east. The steps are divided into a west section and an east section by a double handrail in the middle. There are also handrails on the east side and west side of the steps. Because of the west to east

slope, the west section of the steps has five risers, or steps, and the east section of the steps has four risers.

5. On August 15, 1987, on the second step from the bottom on the west half of the steps, and immediately adjacent to the middle handrail, there was a spalled area in the cement extending for about ten inches from the vertical handrail support along the edge of the steps and back from three to six inches from the edge of the step. The spalled area was rough and uneven. This spalled area is in substantially the same condition today as it was on August 15, 1987 with the exception that its dimensions have increased slightly.

6. There is a light fixture on a seven foot pole adjacent to and towards the top of the far west side of the steps. The placement of this light fixture confirms that its purpose is to light the steps at night. The preponderance of the evidence shows that this light fixture was not illuminated on August 15, 1987. Plaintiff and Grady Edmondson, Postmaster, so testified. Custodian Samuel Payne testified that at least one of the three light bulbs in this light fixture was burned out on the Monday after the accident. Mr. Payne also testified that the pole lamp was on a timer, but in 1987 they were having problems with the timer, so he was told to leave it on 24 hours per day.

The lights in the lobby of the post office were on August 15, 1987 and through the present day are turned on twenty-four hours a day. There are eleven 3-bulb fixtures in the lobby, for a total of 33 bulbs. When these were inspected at the time of Mr. Paynes deposition, 9 of these had ballast problems and were not working. There are large unshaded glass windows and two unshaded glass entrance doors off of the lobby of the

post office and along the entire length of the north side of the building. There are flood lamps in the eave of the building that illuminate the sign on the north side of the building and flood lamps in the entryway of the building, which the preponderance of evidence shows were not turned on August 15, 1987. Grady Edmondson, who supervised maintenance at the post office, testified he did not know how to turn the flood lamps on at the time of the accident.

There is a street light on the southwest corner of Second and Roosevelt where the post office is located, but its light is blocked by trees between it and the post office.

7. On Saturday, August 15, 1987, at about 6:00 a.m. and while it was still dark, Plaintiff stopped at the post office on her way to work. She had been to the post office six to eight times before August 15, 1987. She parked her car in the parking area on the north side of the post office and proceeded to the west section of the steps. She walked down the steps, holding the handrail with her left hand. Toward the bottom of the steps, she fell. After the fall, Plaintiff recalls that she was resting on the bottom of the steps, but witnesses state that she was sitting on the third step from the bottom with her right leg buckled under her and resting on the second step from the bottom. Plaintiff had never previously had any difficulty negotiating the steps and had never previously observed, and on August 15, 1987 did not observe, the spalled area or any defect in the steps.

8. Another customer of the post office, McQuire Perkins, had just ascended the east section of the steps when he heard Plaintiff groan. He turned and saw her on the steps and summoned help. Mr. Perkins opined that the steps were adequately lighted on that day, but he didn't notice any rough areas on them. Mr. Perkins, is, and was on August

15, 1987, a daily customer at the post office and testified that the steps are well-lighted and in good condition. Mr. Perkins is particularly concerned about the condition of steps because he is disabled and has trouble walking. However, Mr. Perkins usually uses the east section of the steps, as opposed to the west section where the plaintiff fell.

9. Several post office employees immediately came to Plaintiff's aid. A bone was observed protruding from her right ankle and she was bleeding from this area. Wannetta Cloyd, Postal Clerk, called for an ambulance, while Debby Chaudoir, Postal Clerk, applied wet towel compresses to the leg. It took approximately twenty to thirty minutes for the ambulance to arrive. During this period of time, Plaintiff told Debby Chaudoir that she was in a hurry and rushing and told Wannetta Cloyd to "just call me Grace."

10. The ambulance took Plaintiff to Doctor's Hospital in Tulsa, Oklahoma, where she was diagnosed as having an ankle diastasis with medial malleolar open fracture. The Tuesday following Plaintiff's fall, Dr. Terrill Simmons, an orthopedic surgeon, performed surgery on Plaintiff's right ankle, performing an open reduction, internal fixation of the medial malleolus, and put a cast on the ankle, which Plaintiff wore for approximately three months. She wore a walking cast for one month.

11. At the time of the incident Plaintiff was 58 years of age with a work life expectancy to age 65.

12. Just prior to her fall, Plaintiff did not see anything on the steps to make her believe that there was a defect in the steps. About four months later, she returned to the post office, noticed the irregular area in the concrete, and determined that she must have stepped in the irregular area, causing her ankle to turn.

13. On August 15, 1987, Plaintiff was a tool handler at McDonnell-Douglas Corporation in Tulsa, Oklahoma. She was away from her job for approximately four months following her fall on August 15, 1987. Her job required standing for long periods of time, lifting and carrying tools weighing from twenty to fifty pounds, and mounting and descending stairs while carrying these tools. Because of increased pain and trouble walking and climbing stairs, she chose to take early retirement at age 62.

14. Plaintiff saw Paul W. Hathaway, M.D. beginning on March 5, 1979 and continuing to September 1, 1989. Dr. Hathaway specializes in neurology and internal medicine. He diagnosed Plaintiff as suffering from a number of diseases. Prior to August 15, 1987, Dr. Hathaway had been treating Plaintiff for depression, polymyalgia rheumatica, obesity, hypertension, degenerative arthritis of the spine, and painful, burning, tingling feet. In spite of these problems, prior to August 15, 1987, Plaintiff worked regularly at her job at McDonnell-Douglas Corporation and did occasional overtime work.

15. Subsequent to August 15, 1987, Plaintiff was additionally diagnosed by Dr. Hathaway as suffering from peripheral neuropathy. Peripheral neuropathy results in the failure of electrical signals to travel between the spinal cord and other parts of the body, including the muscles and skin. Plaintiff's peripheral neuropathy affects her whole body. Peripheral neuropathy can affect muscle power and sensation to the motor and sensory nerves, reducing normal sensation of foot contact with the ground and proprioception, or position-type sense. Plaintiff's peripheral neuropathy and polymyalgia rheumatica were not caused or aggravated by the broken ankle she suffered in her fall at the post office, but could have caused or contributed to her fall.

16. On September 1, 1989, the last time that Dr. Hathaway saw Plaintiff, she had numerous medical conditions that could have affected her ability to stand for long periods of time and climb and descend stairs while carrying heavy objects, including her weight of 280 pounds, peripheral neuropathy, and degenerative arthritis. According to Plaintiff's daughter, Linda Pearce, Plaintiff was developing neck and finger arthritis prior to the August 15, 1987 accident.

17. Dr. Terrill H. Simmons stated on July 24, 1990 that Plaintiff was totally disabled from August 15, 1987 until December 13, 1987 while she was in a cast.

18. The rate of pay Plaintiff would have received from August 17, 1987 until October 11, 1987 was \$12.49 per hour for a forty-hour work week. The rate of pay she would have received from October 12, 1987 to December 14, 1987 was \$12.62 per hour for a forty-hour work week.

19. Plaintiff started work at McDonnell Douglas Corporation in 1977 and became eligible for retirement after ten years. Her pension is \$23.00 per month per year of service.

20. Edward Ollington Price III, an economist who estimated Plaintiff's economic losses as a result of her fall on August 15, 1987, stated that his figures would not apply if Plaintiff was still capable of working and retired for reasons other than the injury she received in the fall. Plaintiff's ankle injury did not immediately cause her to take early retirement. Rather, Plaintiff's early retirement was caused by Plaintiff's perception of her inability to continue work due to her combination of ailments, including degenerative arthritis, neck and finger arthritis, peripheral neuropathy, and work-related depression.

21. The amount of Plaintiff's lost wages from August 17, 1987 until October 11,

1987 was \$3,996.80. The amount of Plaintiff's lost wages from October 12, 1987 to December 14, 1987 was \$4,038.40. The total amount of lost wages from her fall at the post office was \$8,035.20.

22. Plaintiff incurred \$7,810.70 in medical expenses as a result of her fall at the post office.

23. Plaintiff will incur \$1,000.00 in medical expenses for future orthopedic care resulting from her fall, which will cost \$50.00 per visit to the orthopedist once a year for the next twenty years.

24. Plaintiff will incur \$7,800.00 in expenses as a result of her fall to purchase the drug feldene, at a cost of \$65.00 every two months for the next twenty years.

25. Plaintiff has suffered, and will continue to suffer, pain and suffering as a result of her fall. The amount of \$50,000.00 will compensate her for this pain and suffering.

26. Plaintiff has not lost her ability to do household chores as a result of her fall. The only testimony concerning such a loss was given by Plaintiff herself. She did not testify that she had to pay someone to do her household chores. Her testimony that, being retired, she cannot do domestic chores is not credible, given the medical evidence of her physical capabilities.

27. Plaintiff has been damaged as the result of her fall in the total amount of \$74,645.90.

28. Safety Consultant Denzil Ekey testified that the post office was negligent in

failing to have all lighting around the post office in working condition. He stated that lights should be inspected in the evening. He also testified that the post office was negligent in failing to repair the spalled area, since it had knowledge of the spalling and knew that spalling on the edge of a step is more dangerous than that on a flat surface. He stated that this negligence constituted a failure to exercise ordinary care.

29. The Defendant failed to have all available lighting turned on at the post office on August 15, 1987.

30. The Defendant failed to repair the spalled area on the post office steps, and had longstanding knowledge of this condition.

31. The combination of the existent lighting conditions and spalling of the step was a contributory cause of Plaintiff's fall and injury. Although the spalling of the step was not severe enough to constitute a hazard in broad daylight, it became a hidden danger under the diminished lighting conditions present at the time of the accident.

32. Plaintiff did not pay attention and exercise due care or diligence when she was descending the post office steps which she knew were not well lighted. She had used the stairway several times before. She admitted she was in a hurry at the time she fell. She testified that she fell to the bottom of the steps, but three witnesses, Debby Chaudoir, Wannetta Cloyd, James Singleton, and McQuire Perkins, testified that she landed on the third step. Their testimony is persuasive and consistent with the placement of the spalling. Plaintiff's recollection after the accident is suspect, since she was in severe pain after the fall, by all accounts.

33. Plaintiff's lack of attention was a contributory cause of her fall and injury.

34. In comparing the respective negligence of Plaintiff and Defendant, the court finds that Plaintiff was 50% negligent and Defendant was 50% negligent.

35. Plaintiff's injuries were proximately caused by the combined negligence of Plaintiff and Defendant.

36. Any conclusion of law that is also a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. Any Finding of Fact above that might be properly characterized a Conclusion of Law is incorporated herein.

2. Under the Federal Tort Claims Act, the substantive law of the state where the act or omission occurred applies. 28 U.S.C. § 1346(b); Massachusetts Bonding and Ins. Co. v. United States, 352 U.S. 128, 129 (1956).

3. Plaintiff was a business invitee of the United States at the time Plaintiff fell on the post office steps, as she was impliedly invited to enter the post office for some purpose of interest or advantage to the United States. Foster v. Harding, 426 P.2d 355, 360 (Okla. 1967).

4. Three elements are essential to a prima facie case of negligence: 1) a duty owed by the defendant to protect the plaintiff from injury, 2) a failure to properly exercise or perform that duty and 3) the plaintiff's injuries are proximately caused by defendant's failure to exercise his duty of care. Woods v. Fruehauf Trailer Corp., 765 P.2d 770, 775 (Okla. 1988).

5. A business owner is not an insurer of the safety of its customer, but owes a

duty to its customer, as a business invitee, to exercise reasonable care to keep the premises in reasonably safe and suitable condition so as not to unreasonably expose its customer to a danger. Safeway Stores, Inc. v. Criner, 380 P.2d 712 (Okla. 1963).

6. Defendant had a duty to Plaintiff "to provide reasonably safe means of ingress and egress, and to provide reasonably safe passages to and from . . ." the Post Office. Harrod v. Baggett, 418 P.2d 652, 655 (Okla. 1966). Defendant's duty to keep the premises of the post office reasonably safe applied "only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like, in that such defects or conditions are not known to the invitee and would not be observed by him in the exercise of ordinary care." Id. Plaintiff assumed "all normal or ordinary risks attendant upon the use of the premises," and the Defendant had no duty "to reconstruct or alter the premises so as to obviate known and obvious dangers." Id. Defendant was not liable for an injury to Plaintiff "resulting from a danger that was obvious or should have been observed in the exercise of ordinary care." Id.

7. The spalled area on the second step from the bottom was not a trivial defect or irregularity in that it was in a poorly lighted area, and a person exercising ordinary care might not be aware that it was there. In cases where the Oklahoma court has found defects in sidewalks to be trivial defects, the issue of lighting was not raised. See Evans v. City of Eufaula, 527 P.2d 329, 332 (Okla. 1974) ("Mrs. Evans' view of the sidewalk was clear and unobstructed and it was daylight"); Rider v. City of Norman, 476 P.2d 312, 313 (Okla. 1970) ("plaintiff's view of the sidewalk was clear and unobstructed. . . . It was broad daylight"); City of Woodward v. Mitch, 297 P.2d 557, 558 (Okla. 1956) ("the

sidewalk . . . was well lighted"); Hale v. City of Cushing, 127 P.2d 818 (1942) (accident occurred in daylight); City of Tulsa v. Frye, 25 P.2d 1080, 1082 (Okla. 1933) (plaintiff "was in the same or a better position to see and observe the defect complained of").

8. Under 12 Okla. Stat. § 109, Plaintiff cannot recover damages in tort for any deficiency in the design or construction of the post office steps, as more than ten years have elapsed since the building was substantially completed.

9. Defendant did not have any duty to warn Plaintiff of the poorly lighted condition of the steps, as the danger was readily observable by Plaintiff. Harrod v. Baggett, 418 P.2d at 656.

10. At the time of the accident, the lack of lighting and spalled condition of the step presented a danger that Defendant either knew about or should have known about in the exercise of reasonable care.

11. Under Oklahoma law, if Defendant has a duty to Plaintiff and fails to exercise this duty, then Defendant's fault must be compared with any fault on the part of Plaintiff, and if Plaintiff is found to be contributorily negligent, Plaintiff's recovery must be diminished in proportion to her negligence. 23 O.S. §§ 13, 14.

12. Under Oklahoma law, in all actions brought for negligence resulting in personal injuries, contributory negligence shall not bar a recovery, unless any negligence of the person so injured is of greater degree than any negligence of the person, firm or corporation causing such damage. 23 Okla. Stat. § 13.

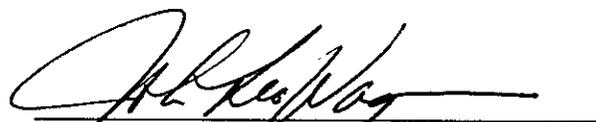
13. Plaintiff has established that the negligence of Defendant caused her injury.

However, Plaintiff substantially contributed by her failure to exercise due care in descending the steps.

14. Plaintiff shall recover from the Defendant one-half of her damages of \$74,645.90, or \$37,322.95 plus costs.

15. For the reasons stated herein, a separate judgment shall be filed contemporaneous with this filing of these Findings of Fact and Conclusions of Law in favor of the Plaintiff and against the Defendant for one-half of her damages in the amount of \$37,322.95 plus costs.

Dated this 2nd day of November, 1992.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

DATE NOV 05 1992

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

FILED

NOV -2 1992

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

BANKERS TRUST COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 LEE KEELING & ASSOCIATES,)
 INC. and LEE A. KEELING,)
)
 Defendants.)

No. 87-C-20-B

AMENDED JUDGMENT¹

In accord with the Verdict entered on May 15, 1992, the Court hereby enters judgment in favor of the Defendant, Lee Keeling & Associates, Inc., and against the Plaintiff, Bankers Trust Company, on the breach of contract claims; and in favor of the Plaintiff, Bankers Trust Company, and against the Defendant, Lee Keeling & Associates, on its negligence and negligent misrepresentation claims, for the amount of \$7,200,000.00, plus preverdict interest pursuant to N.Y. Civ. Prac. L. & R. §§ 5001 and 5004 at the rate of 9% per annum from May 25, 1984 to May 15, 1992, for total damages in the amount of \$12,369,790.08, plus prejudgment interest pursuant to N.Y. Civ. Prac. L. & R. §§ 5002 and 5004 from May 15, 1992 to November 2, 1992, in the amount of \$518,514.48 plus post-judgment interest on the total amount of \$12,888,304.56, from this date until payment at the legal rate of 3.24% per annum or \$1144.06 per diem pursuant to 28 U.S.C. § 1961.

¹This Amended Judgment takes the place of and is in lieu of the Judgment filed herein on May 28, 1992.

Pursuant to the Order of the Court this date sustaining the Fed.R.Civ.P. Rule 50(b) post-judgment motion of Lee A. Keeling, individually, judgment is hereby entered in favor of Lee A. Keeling and against Bankers Trust Company on its negligence and negligent misrepresentation claims. Said claims are hereby dismissed against Lee A. Keeling.

Costs may be awarded the prevailing party upon proper and timely application pursuant Local Rule 6. The parties are to pay their own respective attorneys' fees.

DATED this 2nd day of November, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOV 6 1992
FILED

NOV -2 1992

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

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

BANKERS TRUST COMPANY,
Plaintiff,
vs.
LEE KEELING & ASSOCIATES,
INC. and LEE A. KEELING,
Defendants.

No. 87-C-20-B

ORDER SUSTAINING FED.R.CIV.P. 50(b) MOTION
OF LEE A. KEELING

The Court has for decision the motion of Defendant, Lee A. Keeling, for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b). The relevant part of Fed.R.Civ.P. 50(b) states:

" . . . Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . . If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. . . . "

Pursuant to a jury verdict rendered May 15, 1992, the Court entered judgment against the Defendant, Lee A. Keeling, individually, on theories of negligence and negligent misrepresentation on May 28, 1992. At the close of the Plaintiff's case, and at the conclusion of all of the evidence, Lee A. Keeling moved for a judgment as a matter of law.

In considering a Fed.R.Civ.P. 50(b) motion, the Court must determine whether the evidence presented at trial is sufficient to

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create an issue of fact for the jury. Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 (10th Cir. 1985). A Rule 50(b) motion should be sustained only if the inferences to be drawn from the evidence are so in favor of the moving party that reasonable persons could not differ in their conclusions. McKinney v. Gannett Co., Inc., 817 F.2d 659 (10th Cir. 1987); Federal Deposit Ins. Corp. v. Palermo, 815 F.2d 1329 (10th Cir. 1987), and Simblest v. Maynard, 427 F.2d 1 (2nd Cir. 1970).

In analyzing the evidence presented concerning negligence or negligent misrepresentation by Lee A. Keeling, the Court must determine if factual issues existed establishing Lee A. Keeling supervised preparation of the June 1982 Lee Keeling & Associates, Inc.'s reserve report or that he made specific misrepresentations concerning the report. We're Associates Company v. Cohen, Stracher & Bloom, P.C., 478 N.Y.S. 2d 670 (1984), *aff'd*, 65 N.Y.2d 148, 490 N.Y.S.2d 743 (N.Y. 1985); Paciello v. Patel, 443 N.Y.S.2d 403 (N.Y.App.Div. 1981), and Krouner v. Koplovitz, 572 N.Y.S.2d 959 (N.Y.App.Div. 1991).¹

Section 1505 of the New York Business Corporation law states:

"(a) Each shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation."

¹The Court previously determined in its Order of January 23, 1992, that New York law is applicable herein.

At the conclusion of the Plaintiff's evidence Plaintiff's counsel conceded that alleged negligence and negligent misrepresentation against Lee A. Keeling, individually, must essentially be gleaned from the testimony of witnesses Kenneth Renberg ("Renberg") of Lee Keeling & Associates or Robert Turner ("Turner") of Bankers Trust Company, regarding Lee A. Keeling's involvement with the June 1982 Lee Keeling & Associates reserve report.² It is essentially from these two witnesses' testimony that a factual dispute concerning Lee A. Keeling's alleged negligence or negligent representation submissible to the jury must arise. Plaintiff's answer brief filed June 26, 1992, again recognizes that the testimony of witnesses Renberg and Turner is pivotal to create the factual inference against Lee A. Keeling to submit the issue to the jury. For this reason the Court has reviewed closely the trial testimony of Robert Turner (Tr. 477-569, 572-638, 1694-1718), and of Kenneth Renberg (Tr. 720-763). Renberg's testimony centers in who supervised preparation of the June 1982 report, and the subsequent three semi-annual reports. Turner's testimony centers in the discussions and representations by Lee A. Keeling at the September 1982 meeting attended by Turner and Drew Axtell of Bankers Trust Company's Houston, Texas office as engineering loan officers and by Ehron Ozey and Lee A. Keeling, engineers of Lee Keeling & Associates.

²Concerning the letter of November 5, 1982 (Plaintiff's Exhibit 1383), regarding the June 1982 Lee Keeling & Associates reserve report, Lee A. Keeling was acting in his official capacity as president of Lee Keeling & Associates. (See Court's Order of January 28, 1992, page 5).

At the close of the evidence the Court concluded that the Renberg testimony established that Lee A. Keeling was not involved in supervising preparation of the June 1982 report.³ (Tr. 1323). The fact that Mr. Renberg supervised Ozey in preparation of the June 1982 Lee Keeling & Associates report is confirmed by the testimony of Renberg and Ozey. (Tr. 725-729 and Tr. 771-772).⁴ The Pretrial Order submitted by the parties and filed herein on March 3, 1992, contains the following stipulated fact at page 4, No. 11:

"The June 30, 1982 LKA Report on Scandrill reserves was prepared by Eهران Ozey under the supervision of Kenneth Renberg. In 1982, Mr. Ozey was a graduate engineer but was not registered as a petroleum engineer in either the States of Oklahoma or Texas.

The Affidavit of Lee A. Keeling (Plaintiff's Exhibit 1489) is further confirmation of Renberg's supervision of preparation of the first three reports.

³The Palmco properties owned by Lee A. Keeling and sold to Scandrill were not included in the June 1982 Lee Keeling & Associates reserve report. The evidence established the proposed sale of the Palmco properties by Lee A. Keeling to Scandrill was disclosed to Bankers Trust Company before the subject loan closing in November 1982 and was approved by Bankers Trust as an arm's length transaction supported by proper consideration and presenting no conflict of interest. (Tr. 541-542; Defendant's Exhibit 67, p. 4; Plaintiff's Exhibit 1489).

⁴Kenneth Renberg testified that he supervised preparation of the June 1982, December 1982 and June 1983 reports on behalf of Lee Keeling & Associates, and Lee A. Keeling supervised preparation of the fourth report, prepared in December 1983. The June 1982 report was the subject of the Lee Keeling & Associates November 5, 1982 reliance letter (Plaintiff's Exhibit 1383) addressed to Bankers Trust Company; the December 1983 Lee Keeling & Associates reserve report is not the subject of alleged negligence or negligent misrepresentations herein.

The trial testimony of Robert Turner (by deposition) covered, *inter alia*, the subject matter of the June 1982 report discussed at the September 22, 1982 meeting between Turner, Axtell, Ozey and Lee A. Keeling.⁵ Included was Turner's testimony regarding Lee A. Keeling's statements or input concerning the alleged offending misrepresentation subjects contained in the June 1982 report, i.e., the Wheeler County gas wells, the Richards wells, the mean year shift method of discounting, and the behind the pipe studies. At trial Bankers Trust contended that the Scandrill Wheeler County gas property reserves were overstated in the June 1982 report by misclassification as "proved developed producing." (Tr. 113). Bankers Trust further asserted that Lee Keeling & Associates used a method of discounting in the June 1982 report on Scandrill properties that did not conform to industry practice. (Tr. 113). At trial Bankers Trust asserted that Lee Keeling & Associates misclassified certain wells referred to as the Richards wells, overestimating the value of the Richards wells reserves. (Tr. 112, 228-230, 239). Bankers Trust further contended that Lee Keeling & Associates was negligent with respect to the "behind the pipe" study in the December 1982 Lee Keeling & Associates report. (Tr. 241).

The pertinent testimony of Robert Turner relating to the September 22, 1982 meeting is as follows:

⁵Axtell and Lee A. Keeling did not provide testimony orally or by way of deposition at trial.

1. Relative to Lee A. Keeling's participation in the meeting:

Q. And this was a discussion in which what individuals were present in addition to yourself?

A. Well, Mr. Axtell from Bankers Trust and Erhan Ozey and Mr. Keeling, and I don't recall, there may have been one other Keeling personnel that was in and out, perhaps to make points in specific areas, perhaps to retrieve documents.

Q. Can you differentiate what Mr. Keeling told you in connection with the 6/30/82 report and what Mr. Ozey told you?

A. No, that would be impossible to go back and say Mr. Keeling presented this particular area and Mr. Ozey this particular area. I can't, I don't think there's any possibility that they would do that. (Tr. 559)

2. Relative to the engineering loan officer analysis approach of Turner and Axtell:

Q. Do you recall what base data you looked at? By this I'm just getting at what, what base data means in this context.

A. Yes, after we received the midyear 1982 report, Mr. Axtell and myself went to Tulsa, to the offices of Lee Keeling & Associates and met with Mr. Keeling and Mr. Erhan Ozey, O-z-e-y. We reviewed the top 80 percent or thereabouts of the properties based on their dollar value, and in looking at these properties we reviewed their files which contained logs, sub-surface maps, well data, and held discussions with Mr. Keeling and Ozey concerning the information contained

--

Q. Did you make any inquiries regarding the techniques that Lee Keeling & Associates used in preparing its midyear 1982 report?

A. Yes, we did.

Q. Do you recall what questions you asked?

A. No, I'm sorry. It's -- too much time has passed.

Q. Do you recall whether you were satisfied with the techniques used?

A. Yes, we were satisfied.

3. Concerning the Wheeler County gas wells, Mr. Turner testified as follows:

Q. Do you recall specifically discussing the Wheeler County, Texas reserve estimates and revenue estimates with Mr. Keeling at your September 22nd, 1982 meeting, Mr. Turner?

A. Yes, I recall discussing the Wheeler County properties. I don't just recall the exact discussion, but I do recall having discussed them at some length. (Tr. 517)

* * *

Q. Did you look at logs for Wheeler County wells at your September 22nd meeting?

A. Yes, we did.

Q. Did you form an opinion as to whether the logs that you looked at supported the forecasts made by Lee Keeling & Associates in their June 30th, '82 report?

A. Yes, we did.

Q. What was that opinion, sir?

A. We felt that they were substantively correct in their substance that they used.

Q. Did you form any other opinions regarding the accuracy or inaccuracy of the forecast?

- A. I don't recall any.
- Q. Did you decide what weight, if any, could be attached to a forecast of \$62,643,000 for present value of future net revenue from Wheeler County wells? I am reading that correctly?
- A. Yes. Oh, I'm certain that we did.
- Q. What, what weight did you decide to attach to that forecast, if you can remember?
- A. I don't recall. We'd have to refer back to the writing somewhere to get an exact number, but I recall that we were satisfied that the, that the methods and data were sufficient for giving a consulting engineering report.
- Q. Do you recall having any serious objection to the \$62,643,000 value assigned future net revenue in the June 30th, '82 report as shown by Defendant's Exhibit 137, and, again, we're just talking about the Wheeler County wells.
- A. We would have dealt more with whether we felt that the 16.2 billion cubic feet was accurate. I don't recall what we used for pricing to arrive at a future net revenue, and that would simply have been a mechanical application of them, of the price onto the available gas.
- Q. What about the accuracy, then, of the 16.268 billion cubic feet of gas assigned by Keeling to Wheeler County wells at June 30th, '82?
- A. I don't recall us taking an exception to that figure. (Tr. 519-520)
- * * *
- Q. All the wells we have looked at under the heading of Wheeler County have been assigned the reserve category of proved developed producing. Is that correct, sir?

A. Yes, they have.

Q. Do you recall discussing whether it was appropriate to assign the category proved developed producing to Wheeler County wells with the Keeling representatives at the meeting described as having taken place on September 22nd?

A. I recall the facts surrounding such a discussion. The exact words of the discussion I can't recall.

Q. What do you recall, generally, sir?

A. The Wheeler County wells, as gas wells, were under a letter of intent with a contract to follow from, I believe, Lone Star Gas, the gas system in the Texas Panhandle.

Q. Would that be the purchaser that would have taken the gas?

A. Correct, It was stated to me, and I can't remember whether it was at this meeting or at a meeting with Scandrill management, that a pipeline was to be laid to gather gas from these several wells in Wheeler County. The letter of intent showed a price, I believe it was \$4.00 or \$4.50, somewhere in that range. We could look.

Q. Are you referring to a page in Defendant's Exhibit No. 50 now, sir?

A. I would have to do some calculations, but I believe it is in the \$4.00 or \$4.50 range. The contract was to follow the letter of intent. I can't remember the timing.

Q. Do you recall being told that certain wells would be producing August 1st, 1982 after reviewing the document that is Defendant's Exhibit No. 49?

A. Yes. The company fully expected these wells to be producing and selling gas to either One Star or some other system in

that area by that date. Subsequently that didn't occur. The pipeline company was a great deal later in getting started. I don't recall with any clarity, but I believe that a portion of that line, or gathering system, was laid and they never utilized it. (Tr. 521-523).

(Mr. Turner stated he recalled no discussion concerning open flow potential, or greater, relative to the Wheeler County gas wells. (Tr. 576-580)).

4. Discussion concerning the "mean year shift" method of discounting, Mr. Turner testified:

Q. Okay. In connection with your September 22nd, 1982 meeting in Tulsa with Mr. Keeling and Mr. Ozey, was it part of your objective to determine the mathematical method that Keeling used in calculating cash flow analysis?

A. It would have been discussed, but I can't recall the discussion.

Q. Was there anything out of that discussion that you recall that you can now tell us was out of the ordinary or out of the norm?

A. I don't remember the discussion. (Tr. 565).

* * *

Q. Did anyone at Keeling & Associates disclose to you that they were using a mathematical formula that caused values to get larger at the 14 percent level as opposed to small?

A. I don't recall such a discussion.

Q. Okay.

A. But I don't discount that there couldn't have been a discussion.

Q. Is that under the anything is possible category?

A. Well, if we didn't discuss it, I'm sure an explanation would have been given, but I don't recall a specific discussion on that.

Q. And do you recall any explanation? You said you couldn't rule out any discussion or explanation, but I'm asking you now if you recall an explanation?

A. I'm going to go back to a discussion of a question that we had earlier concerning mean years. I believe that was mentioned previously in testimony. I recall something on the discussion of mean years, and as I stated previously, I didn't recall whether it was the corporate people at Scandrill or whether it was with the consultants of Keeling & Associates. I recall the discussion of mean year and this looks as if it could have been a movement of mean years on some properties perhaps, and there again I recall the discussions but I just don't recall the detail or who those discussions were with. I know that's not very helpful, but that's all that comes to my mind. (Tr. 575-576).

* * *

Q. So there is a little bump there for the 14 percent rate?

A. That's correct.

Q. Do you recall whether you noticed that hump or bump when you were reviewing the mid-year 1982 Keeling report prior to the decision by BTC to make a loan to Scandrill back in the fall of 1982?

A. I don't recall with clarity that the conversation surrounding that. I certainly would have noticed it and, in fact, that discount at 14 percent is predicated, I believe, on an accelerated production profile on this particular well, while the others are predicated on

a production profile that was more normally expected.

Q. What do you mean by "accelerated profile," Mr. Turner?

A. The assumptions made under the 14 percent discount, and I don't have as clear a recall as I would need to discuss it in depth, but I believe that they had viewed a program to extract the gas at a higher rate for the purposes of management. Their intent, as I recall, was to take a look at the faster rate of production to see what it would do for the company. Again, I'm going back so many years, I don't recall the circumstances or the reasons surrounding it.

Q. When you say they, do you mean Lee Keeling & Associates?

A. No, this was Mr. Lycke and Mr. Slaton, as I recall. (Tr. 1697).

5. Robert Turner's testimony presented at trial makes no mention of any representation or misrepresentation by Lee A. Keeling concerning the Richards wells. (Tr. 477-569; 572-638; 1694-1718).

6. There was no discussion of the "behind the pipe study" at the September 22, 1982 meeting because it was not a part of the June 1982 report, as it was referred to in the later December 1982 report.

In conclusion, there is insufficient probative evidence of Lee A. Keeling's involvement in the negligent preparation or negligent representations concerning the June 1982, December 1982 or June 1983 Lee Keeling & Associates reports. There is no allegation of negligence or negligent misrepresentation regarding the December 1983 report which was supervised by Lee A. Keeling in its preparation. Thus, a finding of negligence or negligent

misrepresentation on the part of Lee A. Keeling by the jury required speculation and conjecture because the necessary predicate evidence creating an inference of negligence is not present in the record. Detone v. Bullit Courier Service, Inc., 140 A.D.2d 278, 528 N.Y.S.2d 575, 576 (N.Y. App. Div. 1988), *appeal denied*, 73 N.Y.2d 702, 537 N.Y.S.2d 490 (N.Y. 1988) ("It is well established that 'where an inference of a defendant's freedom from negligence is equally as probable as an inference of his negligence, a plaintiff may not prevail.'" MacKendrick v. Newport News Shipbuilding and Dry Dock Co., 40 A.D.2d 798, 338 N.Y.S.2d 41 (N.Y. App. Div. 1972), *aff'd*, 35 N.Y.2d 681, 361 N.Y.S.2d 158 (N.Y. 1974), quoting Johnson v. Tschiember, 7 A.D.2d 1029, 184 N.Y.S.2d 787 (N.Y.App.Div. 1959)); McCready v. United Iron and Steel Company, 272 F.2d 700, 702 (10th Cir. 1959); *cf.* Evans v. S. J. Groves & Sons, 315 F.2d 335, 342-343 (2nd Cir. 1963).

For the reasons aforesaid, Lee A. Keeling is entitled to a judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(b), regarding Bankers Trust Company's claims herein of negligence and negligent misrepresentation. The judgment entered herein in favor of the Plaintiff, Bankers Trust Company, and against Lee A. Keeling on May 28, 1992, in the amount of \$7,200,000.00 plus interest is hereby set aside. A separate Amended Judgment will be entered contemporaneously herewith.

DATED this 2nd day of November, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOV 6 5 1992
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

BANKERS TRUST COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 LEE KEELING & ASSOCIATES,)
 INC. and LEE A. KEELING,)
)
 Defendants.)

No. 87-C-20-B ✓

ORDER

Before the Court for decision are the Motions for Summary Judgment pursuant to Fed.R.Civ.P. 56 of the Plaintiff and Defendants concerning the issue of nonparty legal entities Savannah Investment Company (Limited Partnership), Columbia Development Corporation and Palmco Management Company as alter egos of the Defendant, Lee A. Keeling, individually. (Plaintiff's fifth claim for relief in the Second Amended Complaint).¹

Regarding the alter ego claim, Bankers Trust Company (BTC) seeks the following relief:

"Declaration that the entities described as Palmco Management Company, Savannah Investment Company, and Columbia Development Company, have no separate legal existence or consequence independent of Defendant Lee Keeling." Second Amended Complaint filed July 15, 1987 at 21.

Particularly pertinent to the alter ego claim analysis is the fact that Savannah Investment Company, Columbia Development

¹It might be argued Plaintiff's alter ego claim is moot in light of the Court's Order of this date sustaining the Fed.R.Civ.P. 50(b) post-judgment motion of Defendant Lee A. Keeling, individually.

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Corporation and Palmco Management Company are not parties to this action. Neither is there any assertion said three entities were involved in Plaintiff's allegations of negligence or negligent misrepresentation concerning the 1982 Scandrill reserve report and analysis prepared by the Defendant, Lee A. Keeling & Associates, the gravamen of Plaintiff's damage claim. A claim of alter ego control should relate to the 1982-84 time frame but no such claim is made against the three nonparty entities. *See*, 1 Fletcher § 43.10 at 758-759.

Plaintiff's claim is essentially one to trace and sequester assets in aid of collecting a judgment against the individual Defendant, Lee A. Keeling. In its present posture, Plaintiff's claim is procedurally and substantively premature.

The alter ego doctrine allows the Plaintiff "to reach a second corporation or individual upon a cause of action that otherwise would have existed only against the first corporation." 1 Fletcher, Cyclopedia of the Law of Private Corporations §41.28 at 658 n. 10 (1990). In the classic pattern of an alter ego claim the plaintiff attempts to pierce the corporate veil of a defendant. The objective is to reach the assets of the shareholder(s) of a corporate defendant. *See*, Home-Stake Production Company v. Talon Petroleum, C.A., 907 F.2d 1012, 1018 (10th Cir. 1990); Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 178 Okla. 15, 61 P.2d 645 (1936); and Tara Petroleum Corp. v. Hughey, 630 P.2d 1269, 1275 n. 20 (Okla. 1981). Since Savannah, Columbia and Palmco are not defendants herein, and were not alleged as tortfeasors in BTC's

principal action, the Court is without subject matter jurisdiction to proceed with BTC's alter ego claim.

BTC's alter ego claim is similar to that urged in the case of Cascade Energy and Metal Corporation v. Banks, 896 F.2d 1557 (10th Cir. 1990). In Banks, the Tenth Circuit reversed a trial court holding that it described as a "variant" of the "reverse piercing" theory. 896 F.2d at 1577. In its opinion, the Tenth Circuit criticized the "peculiar result of holding the corporation liable for the debts or torts of its controlling shareholder rather than the other way around." 896 F.2d at 1575 n. 17. The Tenth Circuit stated the "reverse piercing theory presents many problems." The Banks court discussed three problems in particular. The court said reverse piercing "bypasses normal judgment-collection procedures." *Id.* The court further stated when normal procedures are followed, "judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets." *Id.* Next, the court commented that reverse piercing prejudices the interests of other nonculpable shareholders if the corporation's assets are to be attached directly. Banks, 896 F.2d at 1577. Lastly, the court commented the "reverse piercing" theory is novel and unconventional. In conclusion, the Banks court held that

"[a]bsent a clear statement by the Supreme Court of Utah that it has adopted the variant reverse piercing theory urged upon us here, we are inclined to conclude that more traditional theories of conversion, fraudulent conveyance of assets, respondeat superior and agency law are adequate to deal with situations where one seeks to recover from a corporation for the wrongful conduct committed by a controlling

stockholder without the necessity to invent a new theory of liability."

896 F.2d at 1557. Research indicates that the Supreme Court of Oklahoma has not adopted a version of "reverse piercing" of the corporate veil, so it could be concluded the Tenth Circuit would not recognize such a claim under Oklahoma law and require the Plaintiff to use more conventional theories to collect its judgment. Oklahoma law is applicable in analyzing Plaintiff's alter ego claim.

For the reasons stated above, Defendants' motion for summary judgment is SUSTAINED because the Court is without subject matter jurisdiction, and Plaintiff's motion for summary judgment is hereby OVERRULED. Plaintiff's motion to re-open discovery is OVERRULED. If a final judgment is ever awarded herein against Lee A. Keeling, individually, Plaintiff will be permitted to proceed with appropriate collection procedures and theories.

DATED this 2nd day of November, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOV 05 1992
FILED

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

NOV -2 1992

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

BANKERS TRUST COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 LEE KEELING & ASSOCIATES,)
 INC. and LEE A. KEELING,)
)
 Defendants.)

Case No. 87-C-20-13 ✓

O R D E R

Before the Court for consideration is the Plaintiff's Motion to Reconsider Plaintiff's Motion for Rule 54(b) Final Judgment.

The trial of this case was bifurcated with the Plaintiff's negligence and negligent misrepresentation claims being tried to a jury and its alter ego claim being set for non-jury trial. The Plaintiff's first four claims for relief were tried to a jury, which returned a verdict on May 15, 1992, in favor of the plaintiff and against both defendants for the amount of \$7,200,000.00.¹ On May 28, 1992, the Court entered a judgment in accord with this verdict. Plaintiff requested that this Court enter final judgment in the case as to the first four claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

In an Order filed July 10, 1992, the Court denied the Plaintiff's motion to enter final judgment and set the alter ego

¹ The Court Order of November 2, 1992, sustains the Fed.R.Civ. P. 50(b) post-trial motion of Lee A. Keeling, individually.

1043

issue for trial September 16, 1992.² Plaintiff now asks the Court to reconsider its motion for Rule 54(b) final judgment.

The Court does not find sufficient cause to permit this case to proceed in a piecemeal fashion, Page v. Gulf Oil Corp., 775 F.2d 1311 (5th Cir. 1985), and concludes that a final judgment should be entered on all claims simultaneously. For this reason, Plaintiff's motion for Rule 54(b) final judgment is DENIED.

IT IS SO ORDERED THIS 2nd DAY OF NOVEMBER, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

² The trial date was subsequently reset for October 14, 1992, and then reset again for November 4, 1992. The Court's ruling on the Defendant's Rule 50(b) motion filed on this date obviates the need for a trial on this claim.

blc

OBA #14397

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

STEVEN EUGENE HANES and ANNA)
 HANES, Husband and Wife,)
)
 Plaintiffs,)
)
 -vs-)
)
 PATRICK ALLEN NICHOLS,)
)
 Defendant/Third)
 Party Plaintiff,)
)
 -vs-)
)
 LOUIS W. SULLIVAN, M.D., Secretary)
 of the United States Department)
 of Health and Human Services,)
)
 Third Party)
 Defendant.)

FILED ON DOCKET
DATE NOV 5 1992

No. 92-C-144-E

FILED

Richard M. Lawrence
U.S. District Court
Northern District of Oklahoma

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW on this 4th day of November, 1992,
the above styled and numbered cause comes on for hearing before the
Court upon the Motion of defendant, Patrick Allen Nichols for
dismissal without prejudice of his third party petition against
third party defendant, Louis W. Sullivan, M.D. The Court, after
being advised in the premises, finds that said Motion should be
granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court
that the Third Party Petition of the defendant, Patrick Allen
Nichols against third party defendant, Louis W. Sullivan, M.D., be,
and hereby is dismissed without prejudice.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

CLOSED

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

ENTERED ON DOCKET
DATE **NOV 5 1992**

IN RE:)
)
REPUBLIC TRUST & SAVINGS)
COMPANY, an Oklahoma trust)
company, also d/b/a Western)
Trust and Savings Company,)
)
Debtor.)
)
R. DOBIE LANGENKAMP,)
Successor Trustee,)
)
Plaintiff-Appellee,)
)
vs.)
)
RUSSELL E. WINGO and)
MARION JEANETTE WINGO,)
)
Defendant-)
Appellants.)

Case No. 84-01461-W
(Chapter 11)

FILED
1992 NOV 5
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Adversary No. 86-348-C

Dist. Ct. No. 92-C-624-E ✓

ORDER

Comes now before the Court for its consideration the above-styled parties' stipulation to the above appeal pursuant to Rule 41(a)(1)(ii) Fed.R.Civ.Proc. After review and for good cause shown, the Court finds that said stipulation should be granted.

IT IS THEREFORE ORDERED that the parties' Stipulation of Dismissal is hereby GRANTED.

ORDERED this 2^d day of November, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

13

CLOSED

NOV DOCKET
NOV 5 1992

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

IN RE:)
)
 REPUBLIC TRUST & SAVINGS)
 COMPANY, an Oklahoma trust)
 company, also d/b/a Western)
 Trust and Savings Company,)
)
 Debtor.)
)
 R. DOBIE LANGENKAMP,)
 Successor Trustee,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 MARGARET M. MORROW and)
 NATHAN G. MORROW,)
)
 Defendant-)
 Appellants.)

Case No. 84-01461-W
(Chapter 11)

FILED

NOV 4 1992

Richard M. Lawrence
U.S. District Court
Northern District of Oklahoma

Adversary No. 86-510-C

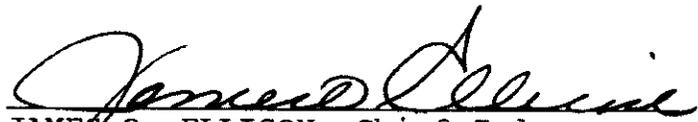
Dist. Ct. No. 92-C-630-E

O R D E R

Comes now before the Court for its consideration the above-styled parties' stipulation to the above appeal pursuant to Rule 41(a)(1)(ii) Fed.R.Civ.Proc. After review and for good cause shown, the Court finds that said stipulation should be granted.

IT IS THEREFORE ORDERED that the parties' Stipulation of Dismissal is hereby GRANTED.

ORDERED this 3^d day of November, 1992.


 JAMES O. ELLISON, Chief Judge
 UNITED STATES DISTRICT COURT

13

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

NOV 05 1992
FILED

NOV 4 1992

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

RHONDA L. WALLER, et al,)
)
)
)
)
Plaintiff(s),)
)
vs.)
)
)
PULLMAN LEASING DIVISION of)
SIGNAL CAPITAL CORP., et al)
)
)
Defendant(s).)

No. 89-C-473-B

JUDGMENT DISMISSING ACTION
BY REASON OF SETTLEMENT

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

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

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

IT IS SO ORDERED this 4th day of November, 1992.



THOMAS R. BRETT



ENTERED ON DOCKET
DATE 11/4/92

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

ENTERED

BRENT CARROLL,

Plaintiff,

vs.

HOWARD & WIDDOWS, P.C., an
Oklahoma Professional Corporation,
and JOHN W. HUNT,

Defendants.

Case No. 91-C-132-B ✓

F I L E D

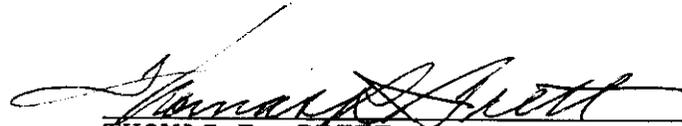
OCT 30 1992

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

A M E N D E D J U D G M E N T

In accordance with the jury verdict rendered September 23, 1992, Judgment is hereby entered in favor of Plaintiff, Brent Carroll, and against the Defendant, Howard & Widdows, P.C., an Oklahoma Professional Corporation in the amount of One Dollar (\$1.00) for actual damages and Seven Thousand Five Hundred Dollars (\$7,500.00) for punitive damages, plus post-judgment interest on both such sums from September 24, 1992, until paid at the rate of 3.13% per annum and Judgment is entered in favor of Plaintiff and against Howard & Widdows, P.C. for reasonable attorneys fees in the amount of \$11,676.93 plus interest from October 29, 1992, at the rate of 3.24% per annum and the costs previously awarded by the Clerk. Further, in keeping with the Court's Order of this date, Judgment is entered in favor of the Defendant John Hunt and against the Plaintiff Brent Carroll and said action is hereby dismissed.

DATED this 29th day of October, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 11/4/92

ENTERED

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

BRENT CARROLL,

Plaintiff,

vs.

GENE C. HOWARD and GAE WIDDOWS;
HOWARD & WIDDOWS, P.C., an
Oklahoma Professional Corporation,
and JOHN W. HUNT,

Defendants.

Case No. 91-C-132-B ✓

FILED

OCT 30 1992

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

ORDER

This matter comes on for consideration of various post trial motions filed by both Plaintiff and Defendants, as follows: Plaintiff's Application For Attorney Fees; ^{[74-1]+[75-1]} Hunt's Post-Trial Motion For Judgment As A Matter Of Law, And In the Alternative For New Trial Or Remittitur ^{[75-1][76-1]}; Howard & Widdows, P.C.'s Post-Trial Motion For Judgment As A Matter Of Law, And In the Alternative For New Trial Or Remittitur ^{[78-1]+[79-1]}; Defendants' Motion For Remittitur ^{[80-1]+[80-1]}; and Gene Howard and Gae Widdows', as individuals, Application For Attorneys Fees ^{[83-1]+[84-1]}.

The Court first considers Defendants' F.R.Civ.P. Rule 50 Motions.

Prior to submitting the matter to the jury both Plaintiff and Defendants made oral Motions for Directed Verdict which the Court denied. Defendants also filed written Motions for Directed Verdict which the Court denied orally.

The Defendants jointly move for judgment as a matter of law

based upon the alleged failure of the evidence to show, by a preponderance of the evidence, that Defendants, Howard & Widdows, P.C., and John Hunt, willfully and intentionally and under false pretenses obtained a credit report on the Plaintiff, Brent Carroll. The Court, after hearing the evidence at trial, concludes otherwise although the court is of the view the statutory violation laying predicate for the jury verdict was essentially a technical violation for the reasons hereinafter explained. These Defendants also urge that all inferences to be drawn from the evidence are so in favor of the moving parties that reasonable persons could not differ in their conclusions. Defendants further argue that Plaintiff failed to substantiate his claim for damages as alleged in his complaint. The Court, having heard the evidence, disagrees with these arguments in light of case law interpretations.

Defendant Howard & Widdows, P.C. adopted Defendant Hunt's Post-Trial Motion For Judgment As A Matter Of Law, And In the Alternative For New Trial Or Remittitur. In such Motion Defendants cite eight reasons or errors in support of the Motion. The first and third, error by the Court in overruling Hunt's separate Motion for Directed Verdict at the close of Plaintiff's case in chief and at the close of Defendants' case, respectively, on the claim he was not a "user", will be discussed, *infra*, and determined favorably to Hunt. The Court denies Defendants' second and fourth reasons, that the evidence failed to show knowing and willful conduct on the part of Hunt in obtaining Carroll's credit report, made by directed verdict motion at the conclusion of Plaintiff's evidence and at the

conclusion of Defendants' evidence, respectively. The Court concludes the evidence supports the jury's verdict that Hunt's actions were knowing and willful, notwithstanding the determination by the Court, *infra* that Hunt, as a "non-user" employee of Howard & Widdows, P.C., is not personally liable under the Act.

Defendants' assigned error five a. through d. relate to the Court's failure to give instructions requested by Hunt, is moot in light of the Court's ruling herein, *infra*.

Defendants' assigned error five e. charges the evidence did not support a finding of willfulness to justify instructing the jury on allowance of punitive damages, with which the Court disagrees.

At the close of all the evidence the Court considered all requested instructions by both Plaintiff and Defendants, and objections by the parties as to the Court's proposed instructions, and made rulings thereon. The Court reaffirms such rulings, concluding that Defendants have failed to set forth any persuasive argument or citation which would impel the Court to grant judgment in Defendant Howard & Widdows, P.C.'s favor or grant a new trial.

In assigned errors six and seven Defendants complain the Court erred by giving retrospective application of the language "legitimate business needs" found in §1681b, thereby expanding previous interpretations under the Act. Defendants argue that because of the unsettled nature of the case law with respect to "legitimate business needs" it would have been legally impossible for Defendants to have knowingly and willfully under false

pretenses violated the Act. The Court has painstakingly examined the case authority relative to this issue and, without genuine fondness for the results reached in some cases, concluded the "use" of the credit report under these facts, was not a legitimate business need as interpreted by these cases.¹ The Court therefore denies Defendants' Motions as to errors six and seven.

Defendants' eighth assignment of error, alleged prejudice, passion and bias instilled in the jury by inflammatory remarks made by Plaintiff's counsel during closing, is without merit. It is the Court's recollection that neither of the Defendants objected to such remarks at the time. Defendants' Motion on this issue is denied.

Therefore, the Court reaffirms its denial of Defendant Howard & Widdows, P.C.'s Motion for Directed Verdict, denies Howard & Widdows, P.C.'s Rule 50 and Rule 59 Motions but grants Defendant Hunt's F.R.Civ.P. Rule 50 Motion as explained hereinafter.

Defendant Hunt seeks judgment as a matter of law on the issue that he, as an employee acting within the scope of his employment, was not a "user" under the Fair Credit Reporting Act, citing Austin v. BankAmerica Service Corporation, 419 F.Supp. 730 (N.D.Ga.1974) and Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir. 1987). At the conclusion of trial the Court initially concluded that Hunt's position was not well taken and

¹ The Court thinks attorney Hunt's interpretation of the language of §1681b(3)(E) not unreasonable but case authority is to the contrary and supports a jury's factual issue regarding wilfulness.

denied Hunt's Motion For Directed Verdict. After careful reconsideration, the Court concludes Hunt's status as an employee of Howard & Widdows, P.C., differentiates him from the status of the firm. The Court further concludes that Hunt was a "non-user" under the Act while acting as a firm employee. The parties have stipulated Hunt was a firm employee acting in the scope of his employment for the firm. Hunt's Motion For Judgment As A Matter Of Law should be and the same is hereby granted. Austin v. BankAmerica Service Corporation, *supra*.

In Austin, employees of a bank, who were carrying out their responsibilities within the scope of their employment, were deemed "non users" under the Act and therefore exempt from any liability thereunder. In Yohay, an attorney employed by a credit union had caused a credit report to be ordered through the credit union on her ex-husband with whom she had a custody battle in progress. The Court, recognizing Austin as sound reasoning, found the attorney a user under the Act because she obtained the report not for her employer's purposes but instead for her independent pursuits.

Hunt argues he ordered the report acting only as an employee of Howard and Widdows, Inc., and therefore has no exposure under the Act. The evidence established that Hunt worked on a fee-splitting arrangement with the defendant firm; that on legal matters assigned him by the firm, after expenses, 60% of the legal fee went to the firm while he received 40%; that on matters where he developed the client, the reverse was true. The Carroll matter was assigned Hunt by the firm as a firm client. It was stipulated

between the parties that John Hunt was an employee of Howard and Widdows, P.C. and was acting within the scope of his employment when he directed the firm paralegal to order the credit report on Plaintiff.

Case precedent establishes that transactions under §1681b(3)(E) involve commercial consumer type transactions. Austin v. BankAmerica Service Corporation, supra; Yohay v. City of Alexandria Employees Credit Union, Inc., supra, Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir.1988). The Carroll representation was not a consumer type transaction. Carroll hired the Howard & Widdows firm to obtain for her funds she alleged were rightfully due her under an ERISA² trust that had been wrongfully paid to other beneficiaries, the Plaintiff herein being one such payee. Concerning obtaining a credit report, 15 U.S.C. §1681b(3)(E) lists permissible reasons for a credit agency to release credit reports:

(3) To a person which it has reason to believe:

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

§1681a defines the term consumer, as follows:

(c) The term "consumer" means an individual.

Thus interpreted broadly, such a report could be obtained where there was a legitimate business need in connection with a business transaction involving an individual. Under such an interpretation it seems reasonable to conclude the Carroll

² Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*

representation would qualify because the business transaction was the alleged wrongful payment of ERISA trust funds to an individual.

But Congressional intent has been more narrowly construed by the above cited cases to involve basically consumer credit transactions. The bottom line is the Court is required to follow the case law interpretations but is not pleased in doing so because the Court does not think attorney Hunt's interpretation of the language of §1681b(3)(E) to be unreasonable. Thus, in the Court's view, the \$7500.00 punitive damage award is questionable and permitted to stand only because of the above case authority and the jury's verdict.

The Court therefore concludes the Defendant Howard & Widdows, P.C.'s Rule 50 (b) Motion is denied and that Defendant Hunt's Rule 50 (b) Motion is hereby granted. The Court concludes Howard & Widdows, P.C. does have exposure under the Act, i.e. it is a "user", through the actions of its employee John Hunt and the paralegal who actually ordered the credit report.

The Court next considers the Motion For Remittitur filed by Howard & Widdows, P.C. jointly with Hunt. Howard & Widdows, P.C. argues Plaintiff's counsel went outside the record, indulged in inflammatory language and that such argument was not in retaliation for other improper argument by opposing counsel. Defendant claims this is misconduct requiring reversal.

The Court, having read a transcript of Plaintiff's counsel's closing argument, notes that Defendants failed to object to same on the grounds stated or any grounds. The Court at the time considered

the language used strong but not inflammatory, not requiring *sua sponte* intervention by the Court. The Court concludes its initial judgment was correct and denies remittitur on these grounds. The Court further concludes counsel's closing argument did not amount to fundamental error requiring correction by the Court.

Lastly, Defendant argues that the punitive damage award (\$7500) is disproportionately large compared to the actual damage award (\$1.00). However, Defendants cite no authority to the Court that disproportionate awards serve as a basis for remittitur. Further, the Court concludes the punitive damage award was not the result of improper closing argument by Plaintiff's counsel. Defendants Motion for Remittitur should be and the same is denied.

The Court next considers the Application For Attorney's Fees filed by individual Defendants Gene C. Howard and Gae Widdows. Howard and Widdows argue attorneys fees are appropriate under Rule 11, F.R.Civ.P., and Local Rule 6, because they are prevailing parties on the issue of shareholder liability of individual attorneys in a professional corporation.

Local Rule 6 does not provide a basis for attorney fee recovery that does not already exist, as seen from the following:

G. Any party *entitled to* and requesting attorney fees shall file within fifteen (15) day of the entry of judgment of(sic) decree an application for such, * * *" emphasis supplied by the Court. Local Rule 6 G.

Defendants Howard and Widdows argue that had Plaintiff's counsel carefully read the statute cited in Plaintiff's Complaint he would have known §1681b was not relevant to these individual defendants

because it pertains only to consumer reporting agencies, not to a subscriber of a consumer reporting agency's services. The Court reminds the parties that, in its Order of October 11, 1991, it cited Ippolito v. WNS, Inc., *supra*, (cited by neither party) for the proposition that §1681b only limits the dissemination of consumer reports by consumer reporting agencies and does not, by its plain terms, place any duty upon persons to refrain from requesting consumer reports from individuals for purposes not authorized by FCRA.

Secondly, Howard and Widdows argue that including them as Defendants amounted to a frivolous and baseless action warranting Rule 11 sanctions.

The Court concludes Plaintiff's inclusion of Howard and Widdows as individual Defendants was not frivolous nor baseless despite adverse rulings against Plaintiff as to the individual Defendants. The Court further concludes Rule 11 sanctions for attorneys fees in favor of Howard and Widdows, individually, should be assessed only in extraordinary circumstances, not present here. Defendants' Application should be and the same is hereby denied.

The Court next considers Plaintiff's Motion To Strike Bill Of Costs and Motion To Strike Application For Attorney fees (both made on behalf of the individual Defendants Howard and Widdows). Plaintiff's Motions are now moot. The Clerk of the Court denied, on October 22, 1992, individual Defendants Howard and Widdows' Bill of Costs on the ground they were not the prevailing parties herein. Further, the Court herein has concluded individual Defendants

Howard and Widdows' Application For Attorney Fees should be denied.

Next, the Court concludes Defendants', Howard & Widdows, P.C., and John W. Hunt, Application For Stay Of Proceedings To Enforce A Judgment, pending the filing and disposition of post-judgment motions, should be denied as moot.

The Court last considers Plaintiff's Application For Attorney Fees.

This matter was tried to a jury on September 21, 22 and 23, 1992, which returned a verdict in favor of Plaintiffs of \$1.00 actual damages and \$7,500.00 punitive damages. Plaintiff seeks attorneys fees in the amount of \$23,353.87 (lodestar) plus an additional \$10,000, the latter based upon Defendants, earlier on, accusing Plaintiff of filing this action without justification and requesting a sanction in that amount. The Court rejects out of hand the additional \$10,000 attorney fee request by Plaintiff. Further, the Court is seriously concerned with the amount of research time specified by Plaintiff's counsel, in the approximate range of 40 to 60 hours. The Court clearly recalls statements from Plaintiff's counsel, while questioning the principal defendants, that electronic research sufficient to enlighten Defendants would have taken only a matter of seconds; that Plaintiff's counsel himself utilized electronic research to obtain the needed research in a short period of time and that therefore Defendants could have and should have done the same. Plaintiff's counsel continued this theme in his closing argument, as follows:

"I went to great pains to show how fast in this modern day you can find law. I can sit down at a computer

that has its data base in Dayton, Ohio, and I can search millions of pages before I blink my eye and come up with hundreds and hundreds of cases, and narrow it down, consistently narrow it down to the exact thing I want to do in a matter of seconds, which used to take me days. The old way we used to have to do is go to the library and walk around and look in dozens of indexes and find cases that might say what you wanted it to say, but now it's so simple, you just type in the words and it's there."

The Court concludes Plaintiff's counsel's research hours and his in-court statements regarding the ease of legal research are in substantial conflict.

15 U.S.C. §1681n (3) provides a party may recover:

"in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court."

Defendants oppose Plaintiff's Application on several, in the Court's view, salient grounds, among them: 1. Erroneous entries on billing statement; 2. Time on billing statement attributable to causes of action against the individual defendants, Gene Howard and Gae Widdows, who successfully defended the charges against them; 3. Tasks billed as attorney time which were overhead or clerk tasks; and 4. Minimum billing increments of .25 rather than .10, alleged by Defendants to be the standard in the community.

Plaintiff's counsel's billing indicates one hour of research on January 21, 1991, notwithstanding that Plaintiff testified in his deposition he only became aware, on February 25, 1991, that his credit report had been pulled. Also, several billing items obviously relate to the professional corporate shareholder liability issue, concluded in favor of individual Defendants Howard

and Widdows. In addition, clerk and non-attorney items appear in the billing: 3/5/91 \$150 to file the complaint; 5/8/91 \$37.50 to mail an Order to Defendant(s); 10/22/91 \$75.00 to file at courthouse; over 30 telephone conferences at \$37.50 each (each billed at .25 of an hour).

Defendants also argue, and the Court agrees, that 17 hours preparation time for trial, on three of the immediate four days prior to trial, is probably excessive in view of the simple, direct issues in this case, the Court having found in advance of trial a technical violation of the "use" issue.

The Court concludes Plaintiff's Application for attorneys fees should be granted in the amount of \$11,676.93.

In summary, the Court grants Plaintiff's Application For Attorney Fees but limits same to the amount of \$11,676.93 as a reasonable fee under FCRA. Next, the Court denies Defendant Howard & Widdows, P.C.'s Motion For Judgment As A Matter of Law Or In The Alternative, A Motion For New Trial. The Court grants Defendant Hunt's individual Motion For Judgment As A Matter of Law. Further, the Court denies Motions For Remittitur filed by Howard & Widdows, P.C. jointly with Hunt and Hunt individually. Also, the Court denies individual Defendants Gene Howard and Gae Widdows Application For Attorneys Fees. Plaintiff's Motions To Strike Bill of Costs and To Strike Application For Attorney Fees are denied as moot. An Amended Judgment in conformance with the Court's Order will be simultaneously entered herein.

IT IS SO ORDERED this 29th day of October, 1992.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CLOSED

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

ENTERED ON DOCKET
DATE NOV 4 1992

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
SEVEN THOUSAND DOLLARS)
(\$7,000.00) IN UNITED)
STATES CURRENCY,)
)
Defendant.)

CIVIL ACTION NO. 92-C-829-E

FILED

NOV 05 1992

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

JUDGMENT OF FORFEITURE

IT NOW APPEARS that the forfeiture proceeding herein has been fully settled. Such settlement more fully appears by the written Stipulation for Forfeiture entered into by and between Edward M. O'Neil and the United States of America on the 16th day of September 1992 and filed herein, to which Stipulation for Forfeiture reference is hereby made and is incorporated herein.

It further appearing that the owner of the defendant currency has, by Stipulation, consented to the forfeiture of the defendant currency, and that the plaintiff, United States of America, has consented to the return of the claim and cost bond posted in the administrative proceeding, in the sum of One Thousand Four Dollars (\$1,004.00), to the Claimant, Edward M. O'Neil.

It further appearing that no other claims to said property have been filed since such property was seized, and that

no other person has any right, title, or interest in the defendant property.

It further appearing to the Court that the amount of currency seized from Claimant Edward M. O'Neil on the 27th day of June 1991, was the sum of Ten Thousand Forty-four Dollars (\$10,044.00), and that prior to institution of this civil forfeiture proceeding the sum of Three Thousand Forty-four Dollars (\$3,044.00) of the amount seized was returned to Claimant O'Neil by the Federal Bureau of Investigation.

NOW, THEREFORE, on motion of Catherine J. Depew, Assistant United States Attorney for the Northern District of Oklahoma, and with the consent of Edward M. O'Neil, it is

ORDERED that the claim of Edward M. O'Neil in the administrative proceeding be, and the same hereby is, dismissed with prejudice, and it is

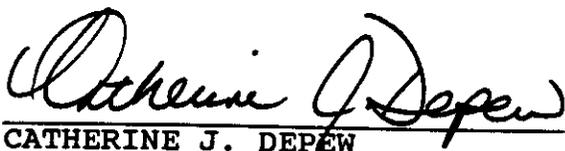
FURTHER ORDERED AND DECREED that the defendant currency, in the sum of Seven Thousand Dollars (\$7,000.00), be, and hereby is, condemned as forfeited to the United States of America and shall remain in the custody of the United States Marshal for disposition according to law, and that the cost and claim bond posted in the administrative proceeding, in the amount of One Thousand Four Dollars (\$1,004.00), shall be returned to

Thousand Four Dollars (\$1,004.00), shall be returned to Claimant,
Edward M. O'Neil, by the United States Marshals Service.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



CATHERINE J. DEPEW
Assistant United States Attorney

CJD/ch
N:\UDD\CHOOK\FC\ONEIL\02198

ENTERED ON DOCKET
NOV 4 1992
DATE

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

WESTLAND EXPLORATION COMPANY,)
INC.,)
)
Plaintiff,)
)
vs.)
)
ARKLA, INC., et al.,)
)
Defendants.)

No. 91-C-61-E

FILED

NOV 03 1992

ORDER

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

The Court has for consideration the cross motions of the parties on the issue of Arkla's affirmative defenses (see, Plaintiff's Motion at docket #10; Defendant's Motion at docket #13) and the cross motions of the parties on certain damage issues (See, Plaintiff's Motion at docket #22); Defendant's Motion at docket #24). the issues will be considered ad seriatem.

Arkla's Affirmative Defenses

Arkla does not deny its liability to take or pay but asserts two affirmative defenses (the Samson release defense and the dedication clause defense are no longer at issue): 1) a quality defense and 2) a statute of limitation defense.

1. Quality defense. The quality defense is raised in connection with three Oklahoma wells and six Arkansas wells. Arkla contractual non-conformity and failure to meet industry standards. Westland rejoins that it received no notice of the quality allegation until suit was filed. The record reflects that Arkla never

seasonably noticed nor rejected the alleged substandard gas; therefore, under well-settled U.C.C. rules its quality defense will not lie.

2. Statute of limitations. The limitation of actions pertains to a mere segment of the suit: claims accruing from contract year ending October, 1983. On this issue the Court finds Arkla's argument compelling and therefore grants its Motion for Summary Judgment as to those claims.

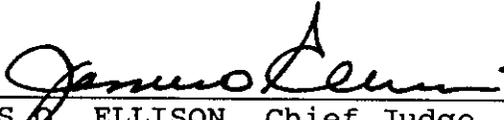
Damages

1. Measure of recovery. The Court has considered the arguments of the parties and finds that U.C.C. §2-708(1) determines the proper measure of damages in this case.
2. Mitigation. The court further finds pursuant to the terms of the contract and U.C.C. §§2-208; 2-706 and 2-709 Arkla is only entitled to a credit for the money. Westland could recoup on the sale of gas to third parties.
3. Assignments. The Court further finds that Westland assigned its interests in certain wells to other parties between August and October in 1991 and, therefore, cannot claim interests in those wells.
4. Price. The price for deregulated gas does not escalate but, pursuant to contract, continues to be the regulated price.
5. Davenport Well. The record indicates that no wells in

Pittsburg County are covered; therefore the Davenport Well is not covered.

IT IS THEREFORE ORDERED that the parties' cross motions for Summary Judgment are granted in part; denied in part. The remaining pending motions are denied as moot.

ORDERED this 3rd day of November, 1992.



JAMES D. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE 11/4/92

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

FILED

NOV 3 1992

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

Case No. 91-C-501-B ✓

LORETTA A. GARRISON,)
)
Plaintiff,)
)
vs.)
)
LOUIS W. SULLIVAN, M.D.)
Secretary of Health and)
Human Services,)
)
Defendant.)

ORDER

Before the Court for consideration is Plaintiff Loretta A. Garrison's ("Garrison") objection to the Report and Recommendation ("R&R") of the U.S. Magistrate Judge affirming the Administrative Law Judge's ("ALJ") denial of Social Security Disability Benefits and Supplemental Security Income Disability.

Garrison's initial application for Social Security disability benefits was denied by the Secretary of Health and Human Services. Garrison then requested a hearing before an ALJ who also denied her application. Garrison appealed the ALJ's ruling to the Social Security Appeals Council, which denied review. Garrison brings the instant action pursuant to 42 U.S.C. § 405(g) to challenge the denial of Social Security disability benefits. The U.S. Magistrate Judge recommends affirmation of the denial decisions.

Garrison was injured in a boating accident in August, 1988. She was taken to a hospital where she was diagnosed with muscle spasms and released the same day. Shortly thereafter, Garrison's

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treating physician, Dr. Tom F. Russell, D.O., noted muscle spasms and tenderness in the cervical and thoracic spine and diagnosed her as suffering from back and shoulder muscle strain. Garrison continued to visit Dr. Russell who in July and August, 1989, reported that muscle relaxants and treatments were not working, and it would be months before Garrison was physically or emotionally ready to go back to work.

Garrison also began visiting with Dr. Herbert A. Yates, D.O., in July, 1989. In August, 1989, consultative examiner, Dr. Richard Cooper, D.O., diagnosed Garrison with muscle spasms and tremors. Garrison began biofeedback treatments during which her pain diminished considerably. At various points during Garrison's treatments, Dr. Russell's and Dr. Yates' findings both indicated that her pain could be caused by emotional problems. In July 1990, Dr. Yates and Dr. Russell gave greatly differing diagnoses of Garrison's condition. Dr. Yates stated that Garrison's body impairment was 100% and that she would not be able to engage in any work at any time in the foreseeable future. Dr. Russell stated that Garrison could return to work if her symptoms improved.

Garrison's objection to the U.S. Magistrate Judge's R&R contends that:

- 1) the findings of the Secretary of Health and Human Services are not based on substantial evidence, and
- 2) the ALJ's denial decision was erroneously based on improper hypothetical questions asked by the ALJ to the vocational expert witness.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

Under the Social Security Act the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. *See* Campbell v. Bowen, 822 F.2d 1518, 1521

(10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

"is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 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 C.F.R. § 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 in the process the Secretary find that a person is disabled or 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 ALJ reached the fourth step of the review and found that Garrison could perform her past work as a self-employed beautician. Garrison appealed this finding alleging that severe constant pain and hand tremors prevent her from being a beautician. As discussed above, the undersigned's role is not to reweigh the evidence or substitute the court's judgment for that of the Secretary. It is to determine whether the Secretary's decision is supported by substantial evidence.

The record indicates that consideration was given to Garrison's complaints of pain; the nature, onset, duration, frequency, radiation, and intensity of Garrison's pain; the medical findings, physical as well as psychological, of her doctors; and the measures taken to treat the pain. Facing conflicting diagnoses from Garrison's doctors, the ALJ ultimately decided in favor of Dr.

Russell's diagnosis. Furthermore, the ALJ's decision to disregard Dr. Yates' assessment was supported by specific and legitimate reasons. After a thorough review of the record, the Court finds there is substantial evidence to support the ALJ's finding that Garrison is not disabled. The Court further incorporates by reference the R&R of the Magistrate Judge setting forth the testimony and medical evidence relied upon by the ALJ.

Garrison's second objection to the Magistrate Judge's R&R is that the hypothetical questions posed to the vocational expert were inadequate. Garrison contends that the hypothetical questions improperly excluded her alleged hand tremors. Hypothetical questions posed to vocational experts must sufficiently relate the claimant's particular physical and mental impairments. Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir.1991). Otherwise, a response to an inadequate hypothetical is not substantial evidence sufficient to support the ALJ's decision. Id. The Tenth Circuit has found, however, that the ALJ need only set forth those physical and mental impairments accepted as true by the ALJ, and the question will be improper only if it was clearly deficient. Brown v. Brown, 801 F.2d 361, 363 (10th Cir.1986). Here, the alleged hand tremors were diagnosed by only one of the three doctors involved, the doctor who visited with Garrison on only one occasion.

This Court finds that the hypothetical question specifically and correctly stated Garrison's condition. Furthermore, the answer to the hypothetical question posed by the ALJ was only part of the

evidence relied upon by the ALJ in making his ruling. A combination of four types of evidence, all of which have been presented in this case, may satisfy the substantial evidence requirement: 1) objective medical facts; 2) medical opinions; 3) subjective evidence of pain and disability; 4) and the claimant's age, education and work experience. Ward v. Harris, 515 F.Supp. 859 (W.D.Okla.1981).

For the aforementioned reasons, this Court agrees with and adopts the R&R of the Magistrate Judge. The ALJ's denial of Social Security Disability Benefits and Supplemental Security Income Disability is hereby AFFIRMED.

IT IS SO ORDERED THIS 2nd DAY OF NOVEMBER, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

DOCKET
NOV 3 1992

FILED

STEVEN EUGENE HANES and)
ANNA HANES, husband and wife,)
Plaintiffs,)

vs.)

PATRICK ALLEN NICHOLS,)
Defendant/Third)
Party Plaintiff,)

vs.)

LOUIS W. SULLIVAN, M.D.,)
Secretary of the United)
States Department of Health)
and Human Services,)

Third Party)
Defendant.)

No. 92-C-144-E

NOV 11 1992

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

FILED

NOV 10 1992

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

ORDER

This matter came before the Court this 30 day of October, 1992 upon the Plaintiffs' Motion to dismiss without prejudice.

The Court being duly advised, finds that the plaintiff is no longer desirous of continuing with this cause of action and wishes to dismiss the same without prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion should be and hereby is sustained and the plaintiffs' cause of action is hereby dismissed without prejudice.

S/ JAMES O. ELLISON
HONORABLE JAMES O. ELLISON
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CLOSED

FILED

SEP 21 1992

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

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

FILED

SEP 25 1992 *RB*

IN RE:)
MELVIN T. GAINES,)
Debtor.)

Case No. 92-01574 - *Richard M. Lawrence, Clerk*
Chapter 7 U.S. DISTRICT COURT

Dist. Ct. No. 92-C-796-E ✓

DISMISSAL

COME NOW the Debtor, MELVIN T. GAINES, pro se, and hereby dismisses the appeal in the above noted cause of action.

FILED

Oct 30, 1992

*It is so ordered:
Joseph Q. Adam,
US J*

M. T. Gaines

MELVIN T. GAINES
Debtor
5969 South Birmingham
Tulsa, OK 74105

NOV 02 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ON DOCKET

NOV 3 1992

CERTIFICATE OF MAILING

I, MELVIN T. GAINES, hereby certify that on the 21st day of September, 1992, I mailed a true and correct copy of the above and foregoing DISMISSAL to Joseph Q. Adam, Trustee, 640 South Cherokee, P.O. Box 1620, Catoosa, OK 74015, Frederick L. Boss, Jr., attorney at law, 3223 East 31st, Tulsa, OK 74103 and Katherine Vance, Assistance U.S. Trustee, 111 West 5th, Suite 900, Grantson Building, Tulsa, OK 74103 with proper postage thereon fully prepaid.

M. T. Gaines
MELVIN T. GAINES

8

ON APPLICATION OF:

SNEED, LANG, ADAMS & BARNETT
James C. Lang
G. Steven Stidham
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-3145

Attorneys for Plaintiffs,
Stateside Travel, Inc.,
Jerry Hamel and Earle Cohn

and

JOYCE & POLLARD
Dwayne C. Pollard, Esq.
515 S. Main Mall, Suite 300
Tulsa, Oklahoma 74103
(918) 585-2751

Attorneys for Defendants,
Commercial Landmark Corporation and
Commercial Bank & Trust Co.,
Tulsa, Oklahoma

ENTERED ON DOCKET

11/3/92

FILED

NOV 2 1992

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

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

GLIN DAIL EDEN and
SHARON ELAINE EDEN,

Plaintiffs,

vs.

RUSK, INC.,

Defendant.

No. 91-C-931-B

ORDER

ON this 2nd day of Nov., 1992, upon the written application of the Plaintiffs, Glin Dail Eden and Sharon Elaine Eden, and the Defendant, Rusk, Inc., for a dismissal with prejudice of the Complaint of Eden v. Rusk, and all causes of action therein, the Court having examined said Application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action. The Court being fully advised in the premises finds that said settlement is to the best interest of the Plaintiffs.

The Court further finds that said Complaint in Eden v. Rusk, should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiffs, Glin Dail Eden and Sharon Elaine Eden, against the Defendant, Rusk, Inc., be and the same hereby are dismissed with prejudice to any future action.

9/ THOMAS R. BRETT,

JUDGE OF THE U.S. DISTRICT COURT

APPROVALS AS TO FORM AND CONTENT:

M. DAVID RIGGS

M. David Riggs
Attorney for Plaintiffs

BRUCE N. POWERS

Bruce N. Powers
Attorney for Defendant

NOV 03 1992

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

NOV -2 1992

[Handwritten signature]

DENNIS C. ENLOE,)
)
 Plaintiff,)
)
 v.)
)
 GOLDEN RULE INSURANCE COMPANY,)
)
 Defendant.)

RICHARD J. COVANCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

91-C-614-B ✓

ORDER

This order pertains to defendant Golden Rule Insurance Company's ("Golden Rule") Motion for Total Summary Judgment (Docket #27)¹ and plaintiff's Response to Defendant's Motion for Summary Judgment (#36). Defendant's Reply to Plaintiff's Response was filed out-of-time and without permission of the court, as required by Rules 14B and 15A of the Local Rules of the District Court for the Northern District of Oklahoma, and will not be considered.

Plaintiff contends that Golden Rule has breached a health insurance contract entered into by the parties on November 1, 1990, and refused in bad faith to pay a claim made under that policy. Defendant seeks summary judgment based on the contract's terms barring recovery from material misstatements made by plaintiff when he applied for the health coverage.

On August 29, 1990, plaintiff applied for health coverage with Golden Rule, with his wife as a proposed covered dependent. On the reverse page of the insurance application, plaintiff and his wife signed their respective names under a statement in bold

¹ "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.

print saying that they had personally completed the application and that the "statements on this application are true, complete, and correctly recorded to the best of my knowledge". (Exhibit 1 to defendant Golden Rule's Memorandum in Support of its Motion for Total Summary Judgment ("Exhibits")). Plaintiff and his wife further represented they "UNDERSTAND AND AGREE that ... (2) any incorrect or incomplete information on this application may result in loss of coverage or claim denial; ... (4) the agent or broker: is only authorized to submit the application and initial premium; may not change any application, policy, or receipt; and cannot waive any right or requirement...." (Exhibit 1 of Exhibits).

On September 24, 1990, a Golden Rule Underwriter/Communicator telephoned and asked plaintiff to verify that he had once had a non-malignant cyst and his wife had once had a skin disorder. (Exhibit 2 of Exhibits). On October 18, 1990, a Golden Rule Underwriter/Communicator talked to plaintiff concerning a non-malignant growth he had on his right hand. (Exhibit 3 of Exhibits). In neither the September 24, 1990, nor the October 18, 1990, conversations did plaintiff mention he had sought and obtained treatment for any other ailments.

On November 1, 1990, Golden Rule wrote a letter to plaintiff advising that his insurance application had been accepted, but that his wife Lola would not be covered under the policy. (Exhibit 4 of Exhibits). On December 11, 1990, Golden Rule sent a letter to plaintiff explaining that his wife was not covered because her prior medical history excluded her. (Exhibit 5 to Exhibits).

Based upon the information in plaintiff's August 29, 1990, application and subsequent telephone conversations with him, Golden Rule issued plaintiff a health insurance policy, No. 053253295, effective September 10, 1990, for injuries and September 24, 1990, for illnesses. (Exhibit 6 of Exhibits).

The policy's cover page included a bold-faced warning to "CHECK THE ATTACHED APPLICATION", advising plaintiff that "An incorrect application may cause your coverage to be voided or a claim to be reduced or denied." (Exhibit 6 of Exhibits).

The application submitted by plaintiff and his wife on August 29, 1990, contained numerous misrepresentations concerning plaintiff's medical history:

1) Question 15(a) asked the applicants if, within the last 10 years, they had any indication, diagnosis, or treatment of: "(a) any disorder of the heart or circulatory system, including high blood pressure, anemia, heart attack, heart murmur, chest pain, irregular heartbeat, varicose veins, phlebitis, or stroke?" Plaintiff responded "Yes", but only as to his wife, not as to himself. (Exhibit 1 of Exhibits).

2) Question 15(e) asked if plaintiff, within the last 10 years, had any indication, diagnosis, or treatment of: "any disorder of the digestive system (including ulcer, gastritis, intestinal disorders, colitis, gall stones, hemorrhoids, bloody stools, or hernia)" Plaintiff responded "No". (Exhibit 1 of Exhibits).

3) Question 15(g) asked if plaintiff, within the last 10 years, had any indication, diagnosis, or treatment of: "any disorder of the muscular or skeletal systems including ... knee, back, or spine disorders?" Plaintiff responded "No". (Exhibit 1 of Exhibits).

4) Question 15(h) asked if plaintiff, within the last 10 years, had any indication, diagnosis, or treatment of: "any disorder of the lungs or respiratory system, including allergies, asthma, bronchitis, tuberculosis, or emphysema?" Plaintiff responded "No". (Exhibit 1 of Exhibits).

5) Question 15(i) asked if plaintiff, within the last 10 years, had any indication, diagnosis, or treatment of: "any disorder of the genito-urinary system, including ... prostatitis, bladder infections, or blood in the urine?" Plaintiff did not respond to this question.

6) Question 15(j) asked if plaintiff, within the last 10 years, had any indication, diagnosis, or treatment of: "any disorder of the male or female reproductive organs, prostate problems ...?" Plaintiff responded "No". (Exhibit 1 of Exhibits).

7) Question 20 asked plaintiff to name all doctors consulted in the past five years. Plaintiff responded by listing Dr. Krismunthie. (Exhibit 1 of Exhibits).

8) Question 21 asked plaintiff to provide details, including symptoms, conditions, treatments, advice given, results, and other details, of the doctor visits disclosed in response to Question 20. Plaintiff's only disclosed affliction was a cyst. (Exhibit 1 of Exhibits).

9) Question 12 asked plaintiff "Has any life or health insurance application or policy on any person named in #1 ever been voided, declined, canceled, postponed, or modified as to plan, amount or rate?" Plaintiff responded "No". (Exhibit 1 of Exhibits).

On February 14, 1991, plaintiff sought medical attention from Dr. Richard Felmlee at Ranch Acres Internal Medicine in Tulsa, Oklahoma, for chronic congestion in the lungs.

He was then seen by Dr. Seebass, who in turn referred him to Dr. Steven Buck, who saw him on February 22, 1991. (Exhibits 8 and 9 of Exhibits). Plaintiff presented Golden Rule with the bills from these medical providers and his past and present medical records were obtained by Golden Rule as a result. (Exhibits 8, 9, 10, 11, and 12 of Exhibits).

These medical records obtained from Oklahoma State University Clinic, Dr. Wittenberg, Dr. Sutherland, Dr. Cosmann, Dr. Wolfe, Dr. Felmler, Dr. Denton, Dr. Baker, Ranch Acres Internal Medicine, and Tulsa Regional Medical Center provided the following information:

On December 2, 1982 plaintiff was seen by Dr. Wittenberg and they discussed repeating blood tests for connective tissue disorders. (Exhibit 9 of Exhibits). On January 5, 1983, plaintiff saw Dr. Wittenberg complaining of "feet cold" and the doctor noted several raw areas on both of his feet. (Exhibit 9 of Exhibits). On March 5, 1985, plaintiff visited Dr. Wittenberg for repeat blood tests and the results of the ANA test were abnormal. (Exhibit 9 of Exhibits). On March 25, 1985, plaintiff saw Dr. Wittenberg and Dr. Cosmann, who reviewed his blood work and performed a chest x-ray. Dr. Cosmann's impression was "chronic obstructive pulmonary disease". (Exhibits 9 and 11 of Exhibits).

Dr. Wittenberg's records include a letter from Dr. Sutherland containing a diagnosis of systemic lupus erythematosus, a connective tissue disease, and Raynaud's Syndrome, a circulatory system disease. (Exhibit 9 of Exhibits).

On February 16, 1987, plaintiff saw Dr. Denton, complaining of rectal discomfort of undetermined etiology. (Exhibit 10 of Exhibits). On February 17, 1987, Dr. Denton discussed plaintiff's perineal pain and arranged for a flexible sigmoidoscopy by Dr. Yoder

two days later. Dr. Denton noted that plaintiff had complained of colon trouble for five to six months. (Exhibit 10 of Exhibits). On February 19, 1987, Dr. Baker saw plaintiff and diagnosed mild prostatic hypertrophy. (Exhibit 10 of Exhibits). Again on March 5, 1987, Dr. Baker noted that plaintiff was seen with prostatitis/mild balanitis. (Exhibit 10 of Exhibits). On March 20, 1987, and April 6, 1987, Dr. Pickard treated plaintiff's prostatitis/balanitis.

On January 19, 1990, Dr. Denton reported plaintiff still suffered recurrent prostatitis. (Exhibit 10 of Exhibits). On March 5, 1990, Dr. Felmlee examined plaintiff for complaints of a sebaceous cyst and internal hemorrhoids. Plaintiff advised the doctor of low back pain, which had existed since the prostate problem. (Exhibit 10 of Exhibits).

None of this medical attention was reported by plaintiff on the Golden Rule Insurance application in response to question 15 (a), (e), (g), (h), (i), and (j) and questions 20 and 21, and Drs. Wittenberg, Cosmann, Denton, Baker, and Pickard were not disclosed in response to questions 20 and 21.

Plaintiff also did not reveal to Golden Rule that, on January 23, 1989, he applied for health insurance with Blue Cross and Blue Shield of Oklahoma. (Exhibit 13 of Exhibits). On his Blue Cross and Blue Shield application, he disclosed his history of Raynaud's Syndrome in response to a question requesting information on "ANY DISEASE OR DISORDER OF THE HEART OR THE CIRCULATORY SYSTEM". (Exhibit 13 of Exhibits). He also disclosed a "prostate exam in March 1987" in response to a question requesting information on "ANY DISORDER OF THE BREASTS OR OF THE MALE OR FEMALE GENITAL AND/OR URINARY SYSTEMS". (Exhibit 13 of Exhibits).

Plaintiff disclosed a colon exam in March 1987 in response to a question requesting information concerning "HAVE YOU OR ANY DEPENDENTS LISTED HEREIN CONSULTED A PHYSICIAN OR PRACTITIONER, FOR ANY REASON IN THE PAST 3 YEARS". (Exhibit 13 of Exhibits). Blue Cross and Blue Shield of Oklahoma declined to offer plaintiff health insurance based on the information provided in this application. (Exhibit 13 of Exhibits).

Plaintiff also failed to disclose to Golden Rule that, on May 18, 1990, he submitted a second health insurance application to Blue Cross and Blue Shield of Oklahoma. (Exhibit 14 of Exhibits). On this application, he chose not to disclose his Raynaud's Syndrome or prostate exam, but did list "proctitis" in March of 1986. (Exhibit 14 of Exhibits). He first listed his colon exam, but apparently changed his mind and crossed it out. (Exhibit 14 of Exhibits). He responded "No" to the question requesting "ANY DISEASE OR DISORDER OF THE HEART OR THE CIRCULATORY SYSTEM, HIGH BLOOD PRESSURE, HEART ATTACK, PHLEBITIS?", even though he had responded "Yes" to an almost identical question on his January 23, 1989, application with Blue Cross and Blue Shield of Oklahoma. (Exhibits 13 and 14 of Exhibits). The insurance company again declined to offer plaintiff health insurance based on the information provided in the May 18, 1990, application.

The affidavit of Dave Mitchell ("Mitchell"), an underwriter of Golden Rule, states that, if plaintiff's true and complete medical and insurance application history had been shown on the insurance application, Golden Rule's underwriters would have been unable to issue him a policy. (Exhibit 15 of Exhibits). Mitchell states that the medical and insurance application information omitted from the Enloes' August 29, 1990, application

was material to the risk to be assumed by Golden Rule and the hazard ultimately assumed by Golden Rule. (Exhibit 15 of Exhibits).

After obtaining the information noted above, Golden Rule notified plaintiff by letter dated May 8, 1991, that it was voiding the policy and refunding his premiums because of material misstatements made on his August 29, 1990, application. (Exhibit 16 of Exhibits). Plaintiff filed this action on August 14, 1991, alleging bad faith breach of contract. He no longer is alleging bad faith.

"[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).

Under Oklahoma law, Okla.Stat. tit. 36, § 3609², misrepresentations, omissions, concealed facts, and incorrect statements prevent a recovery under an insurance policy if they are fraudulent, material to the acceptance of the risk or the hazard assumed, or the insurer would not have provided the coverage if the true facts had been known. The Oklahoma courts have found that if any of these conditions is satisfied, the insurer may avoid liability under the policy. Dennis v. William Penn Life Assur. Co. of America, 714 F.Supp. 1580, 1582 (W.D.Okla. 1989). The applicant's good faith or his intent in answering a question on an application for insurance is not relevant to the insurer's ability to avoid the policy. Id. Thus a misrepresentation by the insured, if material to the acceptance of the risk, need not be made with actual intent to defraud to be a basis for

² Okla.Stat. tit. 36, § 3609 states:

All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy unless:

1. Fraudulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

rescission of a policy by an insurer. Id. It is sufficient if the insured either knows, or should know, that he made an untrue statement. Id. A misrepresented fact is material if a reasonable insurance company in determining its course of action would attach importance to the fact misrepresented. Id. at 1583. Materiality can be decided as a matter of law if reasonable minds cannot differ on the question. Id.

Plaintiff claims that he did not fail to disclose the names of certain doctors who had treated him in the previous five years, but that those doctors were included in information he provided that he had seen "various doctors at Oklahoma State University's Clinic". He argues that there has been no verification by himself, his wife or Blue Cross and Blue Shield of Oklahoma that the applications defendant has submitted are genuine. He contends that he had not been treated for Raynaud's Syndrome or lupus within the five years previous to his application with Golden Rule, so he was not required to reveal that he suffered these ailments. He claims that his complaint of cold feet was not proof of circulatory problems and that the existence of hemorrhoids or lower back pain would be insufficient cause to decline insurance coverage of him. He claims he was unaware he had chronic obstructive pulmonary disease, but only knew he had trouble breathing at times and assumed it was due to smoking for fifty years. He argues that his failure to answer the question concerning disorders of the genito-urinary system cannot be assumed to have been answered yes or no, and no omission occurred.

There is no genuine issue of fact as to whether plaintiff knowingly misrepresented facts in his insurance application and whether such misrepresentations were material to defendant's acceptance of the risk. Under the evidence presented, a reasonable jury could

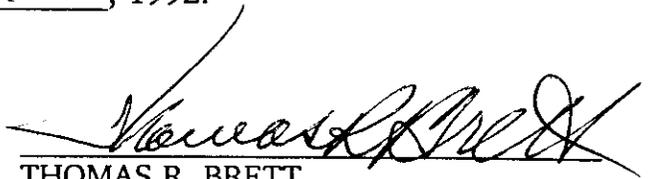
not find that plaintiff did not knowingly misrepresent facts on his application or that these misrepresentations were not material to defendant's decision to issue coverage. The misrepresentations have been discussed.

Undoubtedly a reasonable insurer would attach importance to the fact that a medical insurance applicant had been treated for a connective tissue disorder, such as lupus, obstructive pulmonary disease, Raynaud's Syndrome, rectal discomfort, prostatitis, hemorrhoids, and chronic low back pain in deciding whether to issue a policy. The application itself attests to the fact that defendant attached importance to an applicant's medical history in these areas. Any one of these would probably lead to a rider refusing coverage for that medical complaint and, taken in combination, they would justify denial of medical coverage. Plaintiff's argument that he made no intentional misrepresentations is irrelevant.

Under Oklahoma law, an insurer has a right to rescind a medical insurance policy procured with an application containing a single material misrepresentation knowingly made. Plaintiff's application contains not one, but numerous such misrepresentations. The sheer number of these occurrences, together with the lack of evidence by plaintiff that the misrepresentations were neither made with knowledge of their falsity nor material, precludes a finding by reasonable persons that defendant wrongfully denied plaintiff's claim.

Defendant's Motion for Total Summary Judgment is granted.

Dated this 2nd day of Nov., 1992.

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

THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

CLOSED

FILED

NOV -2 1992

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

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

BORG (U.S.A.) INTERNATIONAL,
INC.,

Plaintiff,

vs.

ARAB BANKING CORPORATION,

Defendant.

Case No. 92-C-039-E

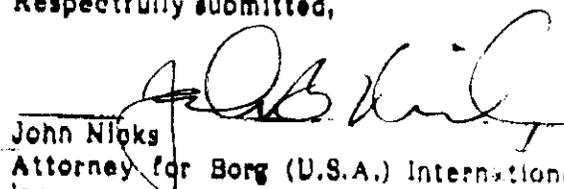
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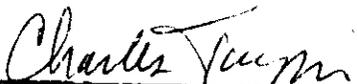
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Borg (U.S.A.) International, Inc., and Defendant, Arab Banking Corporation, pursuant to Rule 41 of the Federal Rules of Civil Procedure, hereby stipulate to dismissal of all claims and causes of action asserted by the Plaintiff herein. This Joint Dismissal with Prejudice is entered into pursuant to the terms of a Settlement Agreement entered into between the parties, pursuant to which each party is to bear their own costs and attorney fees.

Respectfully submitted,

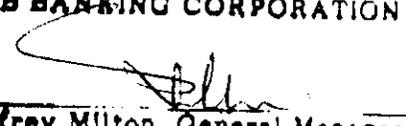

John Nicks
Attorney for Borg (U.S.A.) International,
Inc.

BORG (U.S.A.) INTERNATIONAL, INC.

By 
Charles Turpin, Managing Director


James W. Risher
Attorney for Arab Banking Corporation

ARAB BANKING CORPORATION

By 
Geoffrey Milton, General Manager

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into on the ____ day of September, 1992, by and among Borg (U.S.A.) International, Inc. ("Borg"), and Arab Banking Corporation ("ABC").

WHEREAS, on or about January 22, 1990, Rafidain Bank issued Letter of Credit No. 34884 ("Letter of Credit") for the benefit of Borg.

WHEREAS, on or about January 22, 1990, ABC issued a Notification of Irrevocable Documentary Credit, advising Borg of the issuance of the Letter of Credit.

WHEREAS, in the first part of May of 1990, Borg submitted to ABC documentary drafts seeking to collect the sum of \$998,072.50 under the Letter of Credit.

WHEREAS, ABC advanced \$936,077.41 to Borg.

WHEREAS, Borg has filed suit against ABC to recover the difference between the amount of the sight drafts and the amount advanced by ABC.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Payment by ABC: ABC agrees to pay the sum of \$30,000 to Borg.
2. Release: Borg does hereby release all rights, claims, demands and causes of action that Borg has or may have against ABC under the Letter of Credit, the drafts submitted thereunder and the payments made by ABC against the drafts.
3. Dismissal of Lawsuit: The parties hereto shall jointly file a Joint Stipulation of Dismissal with Prejudice.
4. Admission of Liability: This Settlement Agreement should not be interpreted as an admission of liability by ABC of any of the claims asserted by Borg in the above-referenced lawsuit, and is made as a compromise to avoid expense and finally settle all controversies between the parties.

5. Confidentiality: The terms of this Settlement Agreement, and any all information herein concerning the Settlement Agreement, is confidential and will not be disclosed to any third parties.

6. Entirety and Amendments: This Settlement Agreement embodies the entire contract by and among ABC and Borg. No variations, modifications, changes or amendments to this Settlement Agreement shall be binding on any party unless in writing.

7. Execution in Counterparts: This Settlement Agreement may be executed in multiple counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

8. Governing Law: This Settlement Agreement shall be governed by, interpreted, and construed in accordance with the laws of the State of Oklahoma.

WHEREFORE, the parties have executed this Settlement Agreement as of the day and year first above written.

BORG (U.S.A.) INTERNATIONAL, INC.

By Charles Turpin
Charles Turpin, Managing Director

APPROVED:

John Nicks
John Nicks
Attorney for Borg

ARAB BANKING CORPORATION

By Geoffrey Milton
Geoffrey Milton, General Manager

APPROVED:

James W. Risher
James W. Risher
Attorney for ABC

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

HOMEWARD BOUND, INC.
et al.,

Plaintiffs,

v.

THE HISSOM MEMORIAL CENTER,
et. al.,

Defendants.

ON DOCKET
NOV 3 1992

Case No. 85-C-437-E

FILED

OCT 29 1992

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

ORDER

Plaintiffs' counsel, Bullock & Bullock, have filed a Quarterly Application on October 5, 1992 for an award of attorney fees and expenses in accordance with the December 23, 1989 Order of the Court and stipulation of the parties.

The Court has reviewed the application for fees and approves the Stipulation of the parties.

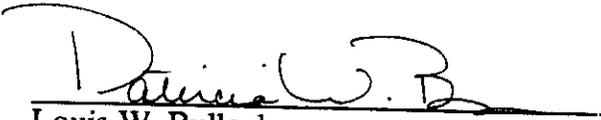
The Court hereby award the firm Bullock & Bullock uncontested attorney fees in the amount of \$48,990.00 and out-of-pocket expenses in the amount of \$ 2,937.76.

IT IS THEREFORE ORDERED that the Department of Human Services shall pay Plaintiffs' counsel, Bullock & Bullock, attorney fees in the amount of \$48,990.00, plus expenses in the amount of \$2,937.76, pursuant to the Judgment entered this day.

233

ORDERED this 29th day of October, 1992.


JAMES O. ELLISON
United States District Court


Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston
Suite 718
Tulsa, Oklahoma 74103-3708
(918) 584-2001

Frank Laski
Judith Gran
**PUBLIC INTEREST LAW CENTER OF
PHILADELPHIA**
125 South Ninth Street
Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7000

ATTORNEYS FOR PLAINTIFFS


Robert Anthony
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
Suite 550, 430 West Main Street
Oklahoma City, Oklahoma 73102
(405) 521-4274

ATTORNEY FOR DEFENDANTS

(HB-ORDER.FEE)

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

MARY JAYNE McDANIEL,)
)
 Plaintiff,)
)
 vs.)
)
 HOWMET CORPORATION,)
 a Delaware Corporation,)
)
 Defendant.)

OCT 30 1992

RECORDED & INDEXED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

No. 92-C-168 E

DOCKET
NOV 3 1992

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.Proc. 41(a)(1)(ii), the Plaintiff, Mary Jayne McDaniel, and the Defendant, Howmet Corporation, stipulate to the dismissal with prejudice of all claims against Howmet Corporation in the above-referenced suit.

Each side is to bear its own costs.

Dated this 29th day of October, 1992.

Respectfully submitted,

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

HOWARD AND WIDDOWS, P.C.

BY: Jacqueline O. Haglund
JOHN R. WOODARD, III, OBA #9853
JACQUELINE O'NEIL HAGLUND,
OBA #6786
525 S. MAIN, SUITE 1400
TULSA, OKLAHOMA 74103-4409
(918) 583-7129

By: Sharon Womack Doty
SHARON WOMACK DOTY
OBA #14462
2021 S. Lewis
Suite 470
Tulsa, OK 74104
(918) 744-7440

ATTORNEYS FOR DEFENDANT
HOWMET CORPORATION

ATTORNEYS FOR PLAINTIFF
MARY JAYNE McDANIEL

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

HOMeward BOUND, INC.
et al.,

Plaintiffs,

v.

THE HISSOM MEMORIAL CENTER,
et. al.,

Defendants.

FILED

OCT 29 1992

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

Case No. 85-C-437-E

BULLOCK & BULLOCK
NOV 3 1992

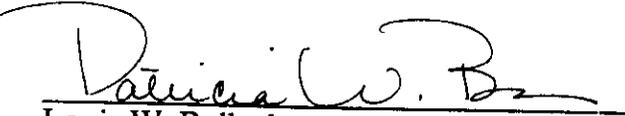
JUDGMENT

In accordance with the Stipulation as to the October 5, 1992 Application for Attorney Fees, and the Order entered on this 29th day of Oct., 1992, awarding Plaintiffs' counsel, Bullock & Bullock, interim attorney fees and expenses, the Court hereby enters judgment in favor of Plaintiffs' counsel, Bullock & Bullock, in the amount of \$ 48,990.00 for uncontested fees and \$ 2,937.76 for expenses.

ORDERED this 29th day of October, 1992.

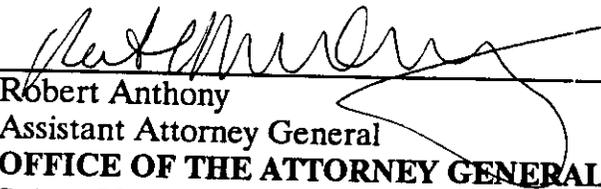

JAMES O. ELLISON
United States District Court

1234


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Frank Laski
Judith Gran
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ATTORNEYS FOR PLAINTIFFS


Robert Anthony
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
Suite 550, 420 West Main Street
Oklahoma City, Oklahoma 73102
(405) 521-4274

ATTORNEY FOR DEFENDANTS

CLOSED

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

FILED

ALEXANDER J. STONE,)
)
 Plaintiff,)
)
 v.)
)
 PROFESSIONAL CREDIT)
 COLLECTIONS,)
)
 Defendant.)

OCT 30 1992

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

92-C-709-B

EOD 11/2/92

ORDER

This order pertains to Plaintiff's Complaint (Docket #1)¹, Defendant's Motion to Dismiss (Docket #2), Plaintiff's Response to Defendant's Motion to Dismiss (Docket #4), and Defendant's Reply Brief in Support of Motion to Dismiss (Docket #7).

Plaintiff has alleged that "Defendant acting as a credit report user willfully and knowingly obtained a credit report of the Plaintiff for an impermissible purpose (15 U.S.C.S. §§ 1681b, 1681n, and 1681q)." Defendant claims that the complaint is insufficient to state a claim for relief.

Plaintiff has alleged a claim under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. Under the Act, the only civil liability that a "user" of a credit report can have is found in 15 U.S.C. § 1681q: "Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than \$5,000.00 or imprisoned not more than one year, or both." If this statute is violated, there is civil liability under 15 U.S.C. § 1681n. The other sections of the Act,

¹ "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

particularly 15 U.S.C. § 1681b², pertain to the potential liability of a consumer reporting agency, and violation of these sections will not give rise to liability by a "user" of a consumer report.

The Tenth Circuit Court of Appeals has found that "[t]o be held civilly liable under the [Fair Credit Reporting] Act, it must be alleged and shown that a person willfully . . . or negligently, . . . failed to comply with a requirement of the Act." Heath v. Credit Bureau of Sheridan, 618 F.2d 693, 697 (10th Cir. 1980) (citations omitted). The court found that the only requirement that the Act places on a credit report user is found in § 1681q and

² Title 15, U.S.C. § 1681b, states:

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

- (1) In response to the order of a court having jurisdiction to issue such an order.
- (2) In accordance with the written instructions of the consumer to whom it relates.
- (3) To a person which it has reason to believe -
 - (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
 - (B) intends to use the information for employment purposes; or
 - (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
 - (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
 - (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

that violation of that section is the basis for civil liability under § 1681n "because it 'requires' a person not to willfully obtain information by false pretenses." Id. Significantly, the court dismissed the complaint against the individual defendants because it did not allege that they employed false pretenses to secure the information from the credit bureau. Id.

Plaintiff's complaint fails to allege that the Defendant employed false pretenses to secure the information from the credit bureau. The act of deceit is a prerequisite to liability. Defendant's Motion to Dismiss (Docket #2) is granted.

Dated this 30 day of Oct, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 29 1992

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

WILMA LAIDLEY,
Plaintiff,
v.
LANTZ MCCLAIN,
Defendant.

Case No. 87-C-418-E

NOV 3 1992

ORDER GRANTING DEFENDANT'S COSTS

Now on this 28th day of October, 1992, this Court does enter the following Order for Defendant's Costs pursuant to an amount agreed upon by both parties. As judgment has been entered in the above entitled action on November 6, 1991, against Wilma Laidley, Plaintiff, the Plaintiff shall be taxed for costs in the amount of \$1,157.43.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DATE ~~NOV 2 1992~~

CLOSED

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

FILED

MISTY DAWN COOPER, by and)
through her parent and next)
friend, DAVID COOPER, and)
DAVID COOPER, individually,)
Plaintiffs,)

OCT 30 1992

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

vs.)
DANIEL W. BOWLES,)
Defendant.)

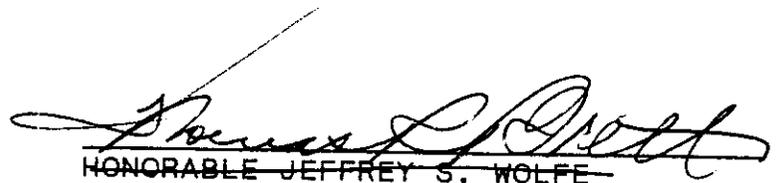
Case No.92-C-338 B

ORDER OF DISMISSAL

NOW on this 29 day of Oct., 1992, the Court has for its consideration the Stipulation for Dismissal jointly filed in the above-styled and numbered caused by Plaintiffs and Defendant. Based upon the representations and requests of the parties, as set forth in the foregoing Stipulation, it is hereby

ORDERED that Plaintiffs' Complaint and claims for relief against the Defendant be and the same are hereby dismissed with prejudice.

The parties here to shall each bear their respective costs and attorneys' fees.


HONORABLE JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

CLOSED

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

JOE R. CANFIELD,)
)
Plaintiff,)
)
v.)
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

DOCKET
NOV 2 1992

FILED
85-C-777-E

OCT 30 1992

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

ORDER

The court has for consideration the Findings and Recommendations of the Magistrate Judge filed September 30, 1992, in which the Magistrate Judge recommended that the final decision of the ALJ be reversed and Plaintiff be found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. §§ 416(i) and 423, and that this case be remanded to the Secretary for computation and payment of benefits. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is therefore Ordered that the final decision of the ALJ is reversed and Plaintiff is found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. §§ 416(i) and 423. This case is remanded to the Secretary for computation and payment of benefits.

Dated this 30th day of October, 1992.



JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
NOV 2 1992
FILED

REX McCracken and CARL OWENS,)
)
 Plaintiffs,)
)
 v.)
)
 JOHN MEIER and MID-STATES)
 ADJUSTMENT, INC., a corporation,)
)
 Defendants.)

OCT 30 1992

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

92-C-728-B

ORDER

This order pertains to Plaintiffs' Petition for Fraud, Breach of Contract, Promissory Estoppel and Conversion (Docket #1)¹, Defendants' Motion to Dismiss Plaintiffs' First, Second, and Third Causes of Action (Docket #8), and Plaintiffs' Response to Motion to Dismiss Plaintiffs' First, Second, and Third Causes of Action (Docket #9). Defendants claim that Plaintiffs have not set forth even minimal allegations required to state a claim for breach of contract, because the elements of formation and consideration have not been alleged. They argue that Plaintiffs' claim for fraud has not been stated with sufficient particularity and that Plaintiffs' claim for promissory estoppel does not set out that the promisors intended or expected to induce reliance or that the promisees relied on the statements made to them.

The rule for reviewing the sufficiency of any complaint is that the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".

¹ "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.

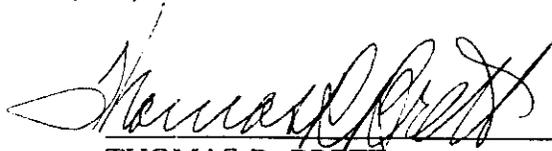
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Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved". Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Defendants' Motion to Dismiss Plaintiffs' First, Second, and Third Causes of Action (#8) is denied. It does not appear beyond a doubt that Plaintiffs cannot prove their claims. While unartfully drawn, Plaintiffs' claim for breach of contract involves employment contracts allegedly entered into on June 18, 1992 and June 26, 1992, in which Plaintiffs agreed to move to Salina, Kansas to work in the offices of Mid-States Adjustment, Inc. in return for salary and other benefits. These contracts were allegedly breached by Defendants on July 13, 1992, when Plaintiffs were terminated. Plaintiffs' claim for fraud identifies Defendant John Meier as the person with whom Plaintiffs dealt and presents the alleged misrepresentations he made to them concerning future jobs in Salina, Kansas. It suggests that Plaintiffs relied on the statements and have been damaged as a result. Plaintiffs' claim for promissory estoppel identifies the promises made to them concerning employment in Salina, Kansas, and suggests their action taken in reliance on those promises.

On October 16, 1992, Plaintiffs' Motion to File Amended Complaint was granted. Plaintiffs represented to the court in that motion that they intend to amend their counts for breach of contract, fraud, and promissory estoppel. Such amendment will clarify the claims which Defendants must answer. Defendants filed an answer to Plaintiffs', Rex McCracken, Count Four of the petition on September 28, 1992.

Dated this 30 day of Oct, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE NOV 2 1992
ENTERED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD HOLMAN; ROCHELLE
HOLMAN; COUNTY TREASURER,
Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

OCT 30 1992

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

CIVIL ACTION NO. 92-C-59-B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 29 day of Oct, 1992.

S/ THOMAS R. BRETT

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

WDB/esr

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

CLOSED

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA NOV 3 1992

[Handwritten signature]

Richard M. [unclear] Clerk
U.S. DISTRICT COURT
Northern District of Oklahoma

ALFRED RAY CARTER)
)
 Plaintiff,)
)
 v.)
)
 JACK COWLEY, et al.,)
)
 Defendants.)

Case No. 92-C-08-E

SECRET

NOV 2 1992

ORDER

Now before this Court is Alfred Ray Carter's Petition For Writ Of Habeas Corpus. The issue is whether this Court should examine a state court's application of its own habitual offender sentencing laws. For the reasons discussed below, such an examination is not proper in a federal habeas proceeding.

The facts are summarized below. Petitioner was convicted of several crimes in 1977. Okla. Stat. Tit. 21 § 51A, as interpreted by the Oklahoma Court of Criminal Appeals, provides that a sentence may be enhanced if a person commits a new crime within 10 years after the completion of a sentence. See, Coats v. State, 589 P.2d 693 (Okl.Cr. 1978).

In the instant case, Petitioner discharged his time for the 1977 convictions on January 19, 1979. However, before 10 years had expired after the completion of those sentences, police arrested Petitioner for robbing a person and stealing an automobile. Petitioner was not actually convicted for these crimes until May 3, 1989 when he pled

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guilty pursuant to a plea agreement.¹ Petitioner received a 35-year sentence as a part of the plea bargain.

According to state court documents, Carter did not file a direct appeal. He did, however, file an Application For Post-Conviction Relief. Of the three issues then raised, two focused on whether the trial court improperly used Carter's prior convictions to enhance his current sentence pursuant to Title 21 O.S. § 51A. The court found Carter's argument to be without merit, and the Oklahoma Court of Criminal Appeals affirmed. It wrote:

Section 51A directs that "no person shall be sentenced as a second and subsequent offender under section 51 of Title 21, or any other of the Oklahoma statutes, when a period of ten (10) years has elapsed since the completion of the sentence imposed on the former conviction..." We interpreted this statutory language in Coats v. State, 589 P.2d 693 (Okl.Cr. 1978), and determined that if a person commits a crime prior to the complete running of the ten year statutory period which results in a conviction which does not fall within the statutory period, the effective date of the conviction will relate back to the date of the commission of the crime. See *Order Affirming Denial Of Post-Conviction Relief, December 23, 1991, page 2.*

Carter subsequently filed the instant habeas petition on January 9, 1992. He raises the following three claims:

1. That the District Court's Interpretation of the Oklahoma Statute, 21 O.S. 1981 51A limitation is/was in violation of the plain words(language) in the statute.
2. The Tulsa District Court was without jurisdiction to impose an enhanced sentence (AFCF) upon me...because of the authority under 21..§51A
3. The Court of Criminal Appeals failed to reach the merits of the factual dispute as it relates to the legislature's intent and the plain language in the statute. *See, Writ Of Habeas Corpus.*

¹ He entered a guilty on May 3, 1989 to the following: Robbery with a Firearm; Larceny of an Automobile; First-Degree Burglary and an additional eight counts of Robbery With A Firearm After Former Conviction of Two or More Felonies.

The basis of Carter's argument is that, since he was not convicted of the crimes prior to January 19, 1989 -- 10 years from the expiration of his previous sentence -- §51A prevented the state from enhancing his 1989 sentence. Respondents, however, argue that this Court should not examine Carter's claims because he raises no valid federal habeas claim.

The Supreme Court has held that a state prisoner is entitled to habeas corpus relief only if he is held "in custody in violation of the Constitution or laws or treaties of the United States." *Engle v. Issac*, 456 U.S. 107, 119, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

In this case, Carter seeks federal habeas relief because he believes the Oklahoma Court of Criminal Appeals misinterpreted §51 A. However, as Respondents point out, the well-settled rule is that a federal court has no authority to review a state's application of its own laws. *Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990); *also, see Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989).²

Carter makes no mention of any federal violation in his Petition. However, once Respondents raised the issue, Carter briefly argues that the state court's application of § 51A violated his due process rights. However, aside from mentioning the words "due process", Carter offers little, if any, argument in support of his allegation that his constitutional rights were violated.

The question thus becomes whether the state's interpretation of §51A, which enhances sentences for repeat offenders, is a violation of due process. This Court finds an Eighth Circuit case persuasive on this question.

²See, also, *Bond v. State of Oklahoma*, 546 F.2d 1369 (10th Cir. 1976). (The interpretation of State statute presented no federal constitutional questions for a habeas case.)

In *Layton v. State of South Dakota*³, the Petitioner contended that the trial court improperly invoked the habitual offender statute because "under that statute the prior offense for which he was then serving his sentence could not be included." The South Dakota Supreme Court rejected the Petitioner's interpretation of the state statute, and the Eighth Circuit held that it could not "second-guess that court's construction of State law."

In this case, the Oklahoma Court of Criminal Appeals interpreted §51 A to allow the trial court to enhance Carter's sentence. Absent any due process or other constitutional violation, not otherwise in the record, no constitutional question is raised by reason of the state's interpretation of its own laws. This Court should not re-examine the state court's interpretation.

Therefore, since no "violation of the Constitution or laws or treaties of the United States" is sufficiently raised by Petitioner, the habeas petition is DENIED.

SO ORDERED this 29th day of October, 1992.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

³ 918 F.2d 739, 743 (8th Cir. 1990).

CLOSED

ENTERED ON DOCKET
DATE **NOV 2 1992**

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

MELVIN EARL WHITE,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 91-C-806-B ✓

FILED

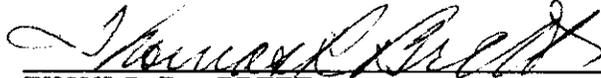
OCT 30 1992

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

J U D G M E N T

In keeping with the order sustaining Defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56 entered this date, Judgment is hereby entered in favor of the Defendants, Stanley Glanz, County Sheriff John Doe and County Deputy, and against the Plaintiff, Melvin Earl White, and Plaintiff's action is hereby dismissed. Court costs, if timely applied for pursuant to Local Rule 6, are hereby awarded in favor of the Defendants and against the Plaintiff.

DATED this 29 day of October, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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CLOSED

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

FILED

OCT 30 1992

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

DIANA K. PADGETT,)
)
 Plaintiff,)
)
 v.)
)
 LOUIS W. SULLIVAN, M.D.,)
)
 Defendant.)

91-C-748-E

NOV 2 1992

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 6, 1992 in which the Magistrate Judge recommended that the case be remanded and the ALJ should, at the very least, take testimony from Dr. McKay and Dr. Underhill. Then, the ALJ should be specific in his handling of the treating physicians' evidence, consistent with the Magistrate Judge's Report and Recommendation and applicable case law.

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

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

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

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SO ORDERED THIS 29th day of October, 1992.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
NOV 2 1992
DATE

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

MELVIN EARL WHITE,)
)
 Plaintiff,)
)
 v.)
)
 STANLEY GLANZ, et al,)
)
 Defendants.)

91-C-806-B

FILED

OCT 30 1992

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

ORDER

Now before this Court is Defendants' Motion To Dismiss Or, In The Alternative, Motion For Summary Judgment (docket #20).¹ Plaintiff's 42 U.S.C. §1983 Complaint alleges that Defendants took a scarf from his head, which violated his First Amendment right to freedom of religion. He also contends that one of the Defendants poked him in the eye and struck him during an altercation. Defendants argue that the Plaintiff has failed to state a cause of action under §1983. In the alternative, they request this Court to grant summary judgment.²

I. Summary of Facts/Procedural History

Plaintiff Melvin Earl White entered the Tulsa City-County Jail after he was arrested

¹ On September 16, 1992, the Magistrate Judge filed an Order Requiring Supplemental Response, which essentially included the same facts and legal analysis included here.

² On July 9, 1992, pursuant to a request from the Plaintiff, this Court stated that the Plaintiff would have to confess the Defendants' summary judgment motion if he did not respond by July 27, 1992. Plaintiff did not respond until August 14, 1992. However, Plaintiff apparently had difficulty mailing his response to the Court Clerk. See, Envelopes Attached To Cover Of Court File. Therefore, the undersigned will examine the case on its merits.

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for outstanding bench warrants.³ The facts surrounding this lawsuit took place on August 6, 1991 while White was still in the jail. The parties, however, offer different versions of what took place that day.

The Defendants assert the following: A "disturbance" broke out in the "T-Tank" where White was jailed. Jailers began moving some of the inmates to other cells to help quell the disturbance. White was then moved to a new holding cell.

Deputy Mark Penley says he noticed that White was wearing a scarf on his head. Jail regulations prohibit the wearing of scarfs on the head, and Penley says he asked White to remove the scarf. According to Penley, White said: "Fuck you". White also told Penley his religious beliefs required him to wear the scarf. By this time, other deputies -- believing White might hit Penley -- grabbed the Plaintiff. Penley then removed the scarf. Deputies then handcuffed White and took him to another cell. The deputies involved said White was neither struck nor injured. *Special Report, pages 1-4 (docket #16)*.

White disagrees with Defendant's version of the facts. He describes the following events: Lt. Red Wakefield of the Tulsa County Sheriff's Office woke White and several other prisoners up the morning of August 6, 1991. Wakefield told them they were being transferred to the "S-Tank" for destroying state property. Wakefield and the other deputies began moving White and the other prisoners to another location. White said he was wearing a Kufi (an Islamic Religious Head Covering) at the time.

³ *White was charged with the following felonies: Obtaining Property By Trick After Former Conviction of Felonies; Conspiracy to Obtain Property by Trick AFCF; Fugitive From Justice in Arkansas where he was wanted for rape; Grand Larceny AFCF. See, Brief In Support Of Motion To Dismiss, footnote No. 1 (docket #20).*

After the deputies moved White to a new holding cell, White said he asked to go to the bathroom. He said Deputy Eric Bennett escorted him to the restroom. White explains what then happened:

As Deputy Bennett and I was returning to the holding cell, Deputy Mark PENLEY said, "Give me that funny looking Iranian shit for a hat off of your head. I was offended by his remark. I told...Penley.. that this on my head was not shit but a part of my Religious garb...Penley then attacked me, at the same time...Bennett grabbed me from behind...Penley struck me in the face several times while other officers held me securely in their arms...Penley choked me and stuck his fingers in my eyes, the man was going crazy on me. That's when Deputy Derrick Alexander grabbed...Penley with the help of other officers. I don't know why but I was then handcuffed and placed in a chair. *Plaintiff Opposition To Defendant's Motion To Dismiss (docket #25).*

White does not say whether he sought medical treatment. However, jail records show that White was not treated for any of the injuries he described.⁴

More than two months after the alleged incident, White filed a Civil Rights Complaint Pursuant to 42 U.S.C. §1983 in this Court on October 23, 1991 (*docket #3*). White claims that the taking of his scarf violated his First Amendment right of freedom of religion. He also says the Defendants violated his Fourteenth Amendment Rights by using excessive force. *See Complaint (docket #3).*

II. Legal Analysis: The Defendants' Summary Judgment Motion

Fed.R.Civ.P. 56 states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

⁴ According to medical records provided by the Defendant, White visited the doctor on August 4, 1991 for an irritation in his penis. He visited the doctor twice more in August with complaints of back pain. These visits took place on August 20th and August 27th. *See Special Report, Exhibit 5 (docket #16).*

party is entitled to judgment as a matter of law."⁵

Under Rule 56, the moving party must first inform the court of the basis for the motion. It then must identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Once the moving party meets its initial burden, the non-moving party must set forth forth evidence, raising genuine issues of material fact per Rule 56(c). The court must accept as true the non-moving party's evidence and must draw all legitimate inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

However, Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who bears the burden of proof at trial if it "fails to make a showing sufficient to establish the existence of an element essential to that party's case". A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id. at 2512*. Rule 56(e) also states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

⁵ *White is proceeding pro se. Pro se pleadings are to be liberally construed. Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). As a result, pro se motions and complaints are held to less stringent requirements.

White, although given two opportunities, has not adequately responded to Defendants' summary judgment motion. He, instead, has apparently chosen to rest on his pleadings. Consequently, his claims will be discussed in that context.

White's First Amendment claim is analyzed applying the four factors discussed in *Turner v. Safely*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2262, 96 L.Ed.2d 282 (1987):

First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it...A second factor...is whether there are alternative means of exercising the right that remains open to prison inmates...A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally...Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

In this case, Defendants, as the non-moving party, have met their Rule 56 burden by submitting a Special Report and an affidavit from a Tulsa County Jail administrator. This evidence shows that deputies secured White and took his scarf from his head pursuant to the policies of the Tulsa County Jail. According to the affidavit, the policy prevents the wearing of scarfs or other head garb because prisoners may sneak contraband, including weapons, into the jail. This meets the criteria set forth in *Turner*, and, as a result, the Defendants motion is hereby granted on White's First Amendment claim.⁶

White's Fourteenth Amendment claim also is without merit. The issue is whether Defendants used excessive force that amounted to punishment. See, *Culver v. Town Of Torrington, Wyo.*, 930 F.2d 1456, 1459 (10th Cir.1991). Defendants' evidence indicates that White was subdued only long enough to take the scarf from his head. Defendants also

⁶ *Keeping weapons and other contraband away from inmates is a legitimate governmental interest. There is a valid and rational connection between that interest and a policy forbidding the wearing of head garb. Also, based on the evidence submitted by Defendants, eliminating the policy would tax jail resources because security would be threatened. Furthermore, the policy is reasonable.*

submit medical records that show that White did not seek any type of medical treatment for his alleged injuries. White presents no evidence to the contrary. Therefore, Defendants' Motion For Summary Judgment is GRANTED.

SO ORDERED THIS 29 day of Oct, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE