

DATE 5/10/93

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MICHAEL GREG WALLACE a/k/a )  
 MIKE WALLACE; CARLA DIANA )  
 WALLACE a/k/a CARLA WALLACE )  
 a/k/a CARLA D. WALLACE; GREEN )  
 COUNTRY FEDERAL SAVINGS AND )  
 LOAN ASSOCIATION; COUNTY )  
 TREASURER, Ottawa County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Ottawa County, )  
 Oklahoma, )  
 )  
 Defendants. )

CIVIL ACTION NO. 93-C-0114-B

**FILED**  
MAY 6 1993  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6<sup>th</sup> day  
of May, 1993. The Plaintiff appears by F.L. Dunn,  
III, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, Assistant United States  
Attorney; the Defendants, County Treasurer and Board of County  
Commissioners, Ottawa County, Oklahoma, appear by Wesley E.  
Combs, Assistant District Attorney, Ottawa County, Oklahoma; the  
Defendant, Green Country Federal Savings and Loan Association,  
appear not, having previously filed a Disclaimer, disclaiming any  
interest in the subject property; and the Defendants, Michael  
Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a  
Carla Wallace a/k/a Carla D. Wallace, appear not, but make  
default.

The Court, being fully advised and having examined the  
court file, finds that the Defendant, Michael Greg Wallace a/k/a  
Mike Wallace, was served with Summons and Complaint on March 11,

1993; that the Defendant, Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, was served with Summons and Complaint on March 11, 1993; and that the Defendant, Green Country Federal Savings and Loan Association, acknowledged receipt of Summons and Complaint on February 9, 1993.

It appears that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer on February 11, 1993 and their Amended Answer on February 18, 1993; that the Defendant, Green Country Federal Savings and Loan Association, filed its Disclaimer on February 18, 1993, disclaiming any right, title or interest in the subject property; and that the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lots 7, 8, 9 and 10 in Block 17 in the City of Miami, Ottawa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on March 22, 1985, the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as

Secretary of Veterans Affairs, their mortgage note in the amount of \$18,700.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated March 22, 1985, covering the above-described property. Said mortgage was recorded on March 22, 1985, in Book 440, Page 08, in the records of Ottawa County, Oklahoma.

The Court further finds that the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, are indebted to the Plaintiff in the principal sum of \$16,475.02, plus interest at the rate of 12.5 percent per annum from April 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$37.52 (\$29.52 fee for service of Summons and Complaint, and an \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$51.58, plus penalties and interest, for the year of 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Green Country Federal Savings and Loan Association, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, are in default and have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, in the principal sum of \$16,475.02, plus interest at the rate of 12.5 percent per annum from April 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum until paid, plus the costs of this action in the amount of \$37.52 (\$29.52 fees for service of Summons and Complaint and an \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, have and recover judgment in the amount of \$51.58 for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Green Country Federal Savings and Loan Association, disclaims any right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Michael Greg Wallace a/k/a Mike Wallace and Carla Diana Wallace a/k/a Carla Wallace a/k/a Carla D. Wallace, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of Defendant, County Treasurer and  
Board of County Commissioners, Ottawa County,  
Oklahoma, in the amount of \$51.58 for 1992  
personal property taxes which are currently  
due and owing.

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

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

property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III  
United States Attorney

PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

*Wesley E. Combs*

---

WESLEY E. COMBS, OBA #13026  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Ottawa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 93-C-114-B

PB/esr



**FILED**

MAY 7 1993

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

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

THRIFTY RENT-A-CAR SYSTEM, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
RONALD W. HOUCK, )  
 )  
Defendant. )

Case No. 92-C-863-B ✓

ADMINISTRATIVE CLOSING ORDER

The defendant Ronald W. Houck having filed his petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within sixty (60) days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 7th day of May, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5/10/93

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

**FILED**

MAY 6 1993

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

JUDI E. BEAUMONT,

Plaintiff,

v.

GENERAL MOTORS ACCEPTANCE,

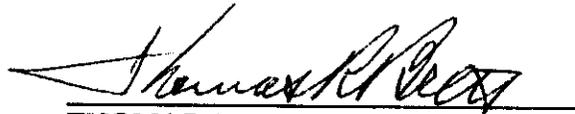
Defendant.

91-C-0866-B ✓

ORDER

The parties were to notify this Court as to the status of the case by February 15, 1993. Neither party has responded. Therefore, given the fact that no activity has taken place since March 4, 1992, the undersigned orders that the case be administratively closed.

SO ORDERED THIS 6<sup>th</sup> day of May, 1993.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5/10/93

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

THE  
**FILED**

MAY 6 1993

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

EMJ CORPORATION,  
  
Plaintiff,  
  
vs.  
  
JIM WAGGONER, d/b/a J&W  
Construction,  
  
Defendant.

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)

Case No. 92-C-854-B ✓

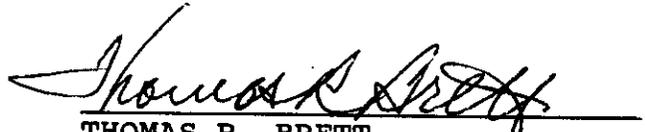
**JUDGMENT DISMISSING ACTION  
BY REASON OF SETTLEMENT**

The Court has been advised by counsel for Plaintiff on 1-8-93 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 6<sup>th</sup> day of May, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

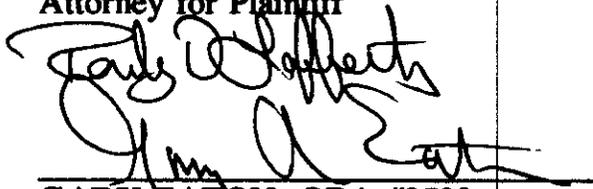
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**TONY M. GRAHAM**  
United States Attorney



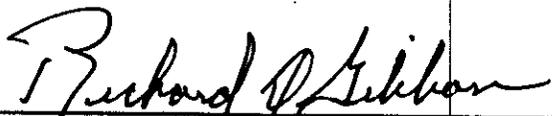
**PHIL PINNELL, OBA #7169**  
ASSISTANT U.S. ATTORNEY  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463  
Attorney for Plaintiff



**GARY EATON, OBA #2598**  
Attorney at Law  
1717 East 15th Street  
Tulsa, OK 74104  
(918) 743-8781  
Attorney for Plaintiff

Randal Dean Lafferty v. United States of America, et al.  
Case No. 92-C-53-E  
Order of Dismissal

SIGNATURE PAGE



**RICHARD GIBBON, OBA #3340**

Attorney at Law

1611 South Harvard

Tulsa, OK 74112

Attorney for Third-Party Defendant

Atterberry Painting and Construction Company

ENTERED ON DOCKET  
DATE MAY 7 1993

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

JODI L. WOODRUFF, a/k/a GWENDA  
WOODRUFF, individually and as  
Administratrix of the Estate  
of Donald Woodruff and as  
Guardian ad litem of Dustin  
Woodruff; and MICHELLE  
BOUDREAUX,

Plaintiffs,

v.

JIMMY RAY TURNER, an individual;  
IRENE FENT, an individual;  
FENT TRUCKING, INC.;  
JAMES R. SWEENEY, an individual;  
JAMES R. SWEENEY, d/b/a CATOOSA  
PORT OF TOWN TRUCKING; and  
NORTHLAND INSURANCE COMPANY,

Defendants.

**FILED**

MAY 6 1993

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

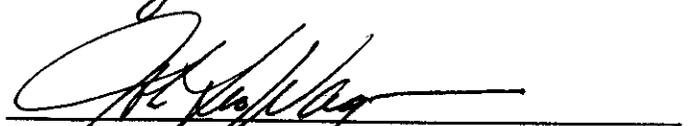
Case No. 92-C-912-C

ORDER GRANTING PLAINTIFFS' APPLICATION FOR  
DISMISSAL WITH PREJUDICE

Upon Plaintiffs' Application for Dismissal with Prejudice, the  
Court being fully advised in the premises and for good cause shown,  
finds it should be granted.

IT IS ORDERED that the above-styled cause of action be and is  
hereby dismissed with prejudice, with each party to bear  
her/his/its owns costs and attorney fees.

ORDERED, this 6<sup>th</sup> day of May, 1993.

  
UNITED STATES MAGISTRATE JUDGE

19

ENTERED ON DOCKET  
DATE **MAY 7 1993**

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

**FILED**

MAY - 5 1993

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

SELCO INDUSTRIES CORP., )  
)  
Plaintiff, )  
)  
v. )  
)  
FLOYD D. SCHULMEIER, and )  
VIOLA S. SMITH, WESLEY HINES, )  
both individually and )  
d/b/a S&S INDUSTRIES, and )  
MARKPEAK LTD., )  
)  
Defendants. )

Case No. 92-C-910-C ✓

ORDER

Before the Court is the motion of the defendants, with the exception of Markpeak Ltd., to dismiss (Docket #13)<sup>1</sup>. The Court has carefully reviewed this motion, along with the objection of the plaintiff, Selco Industries Corp., to S&S Defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) (Docket #15), and the Reply Brief in Support of S&S Defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b) (Docket #19).

This action began with the filing of a Complaint on October 7, 1992 alleging seven causes of action: Count One -- Lanham Act, 15 U.S.C. §1125(a) (false description or representation regarding trademark); Count Two -- Trademark Infringement; Count Three - - Deceptive Trade Practices, 78 O.S. §§51-55; Count Four -- Unfair Competition; Count Five -- Trade Secret Misappropriation -- 78 O.S. §§ 85-95; Count Six -- Breach of Fiduciary Duty; Count Seven -- Tortious Interference with Contract. Settlement has been achieved as to the first four counts, and plaintiff filed a notice of dismissal as to those counts on

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

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February 2, 1993. The pending motion asks the Court to dismiss Counts 5-7, on the basis that supplemental jurisdiction should not be exercised over these non-diverse defendants. Plaintiff objects. Default was entered as to defendant Markpeak Ltd. on January 20, 1993 and that defendant is not a movant.

The parties do not dispute that this Court had original jurisdiction over this action only because of such statutes as 15 U.S.C. §1121 and 28 U.S.C. §1338(b), statutes which are not implicated by the remaining causes of action. The Court therefore turns to 28 U.S.C. §1367(c)(3), which provides that a district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction. This lawsuit began in state court and was refiled in federal court, according to plaintiff, only because the state forum could not provide a prompt hearing on plaintiff's request for a temporary restraining order. The jurisdictional issue before the Court was timely raised by defendants, the pending motion having been filed on November 13, 1992, and some of the delay in ruling resulted from plaintiff's assertion that the settlement agreement, then in draft form, would expressly provide that this Court was to retain jurisdiction. Apparently, this provision was removed in the drafting process, as the notice of dismissal ultimately filed by plaintiff contains no such statement. The Court mentions the issue to form a basis for the conclusion that the fact that this Order is issued relatively late in the litigation does not militate against dismissal under these facts. The dismissal is without prejudice and no statute of limitation problem exists because of §1367(d). Further, the parties may use whatever discovery has been accomplished in this lawsuit in their state court action. This Court believes that, absent

countervailing considerations, it is best for state law claims to be litigated in state court.

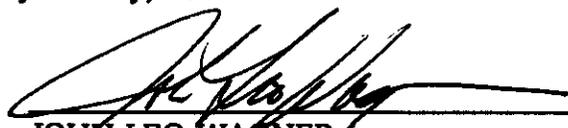
Further justification for this conclusion is provided by the undisputed fact that plaintiff intends to present arguments in pursuing its claims requiring construction of the Uniform Trade Secrets Act, 78 O.S. §§85-95, an Act as yet not interpreted by any appellate court in Oklahoma, so far as this Court is aware. 28 U.S.C. §1367(c)(1) provides that another basis for declining supplemental jurisdiction, in a district court's discretion, is if the claim raises a novel or complex issue of State law.

Finally, the Court notes that this matter has been set for jury trial on June 29, 1993. Due to the exhaustion of funds for payment of jurors, this Court will be unable to proceed with the jury trial as set, and will remain unable to proceed until Congress passes a supplemental appropriation. Given the age of this case, it is unfair to the parties to keep them in federal court without the prospect of a timely jury trial, when no federal issues remain, and a jury trial is available in state court.

In sum, the Court has considered all the factors of judicial economy, convenience, fairness and comity, see Sullivan v. Scoular Grain Co. of Utah, 930 F.2d 798, 803 (10th Cir. 1991), and has concluded that its discretion is best exercised in declining to exercise supplemental jurisdiction.

It is the Order of the Court that the motion of the defendants to dismiss is hereby granted. Counts 5-7 of the Complaint are hereby dismissed without prejudice.

IT IS SO ORDERED this 5<sup>th</sup> day of May, 1993.

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

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

JODI L. WOODRUFF, a/k/a GWENDA  
WOODRUFF, individually and as  
Administratrix of the Estate  
of Donald Woodruff and as  
Guardian ad litem of Dustin  
Woodruff; and MICHELLE  
BOUDREAUX,

Plaintiffs,

v.

JIMMY RAY TURNER, an individual;  
IRENE FENT, an individual;  
FENT TRUCKING, INC.;  
JAMES R. SWEENEY, an individual;  
JAMES R. SWEENEY, d/b/a CATOOSA  
PORT OF TOWN TRUCKING; and  
NORTHLAND INSURANCE COMPANY,

Defendants.

**FILED**

MAY 6 1993

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

Case No. 92-C-912-C

ORDER APPROVING SETTLEMENT  
AND DISTRIBUTION OF MINORS' CLAIMS

NOW on this 6<sup>th</sup> day of May, 1993, the above-  
styled and numbered action comes on for hearing on the joint motion  
of the parties for the Court to approve the settlement agreement  
reached among the parties at the Settlement Conference on April 13,  
1993. The Court, after hearing the evidence presented by the  
parties, the testimony of the Plaintiff, Jodi L. Woodruff, and  
reviewing the terms of the Settlement Agreement and Release of All  
Claims ("Settlement Agreement"), finds that the Settlement  
Agreement entered into by the parties is fair, reasonable and in  
the best interests of Dustin E. H. Woodruff, Donald L. Woodruff,  
Jr. and Nicole D. Woodruff, the minor children of Jodi L. Woodruff  
and Donald Woodruff, deceased, and said settlement should be  
approved. The Court finds that the Plaintiffs are aware that this

is a compromise settlement and that it is a full, final and complete resolution of all claims that each of the Plaintiffs have or may have in the future arising out of the incidents alleged in the Complaint herein. The Court finds that Plaintiffs are aware that by settling, they are giving up the right to present this dispute to a jury at a trial in which case the jury might award either a greater or lesser amount of damages than those received in the settlement.

The Court further finds that Jodi L. Woodruff, the natural mother of the above-named minor children and Administratrix of the Estate of Donald Woodruff, deceased, understands that the children may require future counselling treatment and that by settling this case on behalf of the children, she is giving up the rights of the children to present their claims to a jury at a trial and that the jury might award more or less than the settlement amounts referred to herein. The Court finds that Jodi L. Woodruff understands that her children will receive no further compensation beyond the amounts referred to herein, now or in the future, from the Defendants for any claims arising out the matters alleged in this lawsuit and, considering all of the above, the Court finds that Jodi L. Woodruff believes this settlement on behalf of her minor children to be fair, reasonable and in the best interests of the children.

The Court further finds that the terms of the Settlement Agreement provide that the total settlement paid by the Defendants to the Plaintiffs is Six Hundred Twelve Thousand Five Hundred

Dollars (\$612,500.00) and of that sum, One Hundred Twenty Thousand Six Hundred Forty-five and 10/100 Dollars (\$120,645.10) shall be paid to Jodi L. Woodruff in her individual capacity, out of which she will be responsible for and will pay all medical, pharmaceutical and/or counselling bills and satisfy all liens or subrogation claims incurred to date by any of the Plaintiffs to date in connection with this lawsuit. Additionally, the Defendants shall pay the sum of One Hundred Ninety Thousand, Nine Hundred and Seventy-seven and 90/100 Dollars (\$190,977.90) for the purchase of annuity policies for future periodic payments in the following amounts with the following persons as recipients:

1. Family Medical/Health Fund. Two Thousand Four Hundred Dollars (\$2,400.00) per year, for ten (10) years to Jodi L. Woodruff with the first payment on January 1, 1994 and on the first day of each year thereafter through January 1, 2003, all payments fully guaranteed, the total of said guaranteed payments to be Twenty-four Thousand Dollars (\$24,000.00).
2. Family Living Expenses Fund. Graded monthly payments to Jodi L. Woodruff in the amount of One Thousand One Hundred Dollars (\$1,100.00) per month paid beginning on June 6, 1993 through September 6, 1998; then One Thousand Three Hundred Dollars (\$1,300.00) per month payable beginning on October 6, 1998 through January 6, 2000; then One Thousand Four Hundred Dollars (\$1,400.00) per month payable beginning on February 6, 2000 through April 6, 2004, all payments fully guaranteed, the total of all such guaranteed payments to be One Hundred Sixty-two Thousand Six Hundred Dollars (\$162,600.00).
3. Periodic lump sum guaranteed payments to Donald L. Woodruff, Jr. in the following amounts on the following dates:
  - \$5,000 paid August 1, 2001
  - \$5,000 paid August 1, 2002
  - \$5,000 paid August 1, 2003
  - \$5,000 paid August 1, 2004
  - \$5,000 paid August 1, 2005

4. Periodic lump sum guaranteed payments to Dustin E. H. Woodruff in the following amounts on the following dates:

\$5,000 paid August 1, 2002  
\$5,000 paid August 1, 2003  
\$5,000 paid August 1, 2004  
\$5,000 paid August 1, 2005  
\$5,000 paid August 1, 2006

5. Single lump sum guaranteed payment to Dustin E. H. Woodruff in the amount of Twenty-two Thousand Five Hundred Ninety Dollars (\$22,590.00) paid on May 6, 2004.

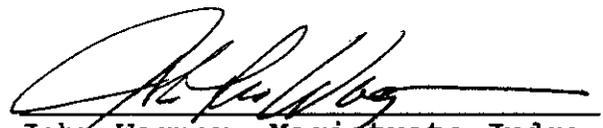
6. Period lump sum guaranteed payments to Nicole D. Woodruff in the following amounts on the following dates:

\$5,000 paid August 1, 2004  
\$5,000 paid August 1, 2005  
\$5,000 paid August 1, 2006  
\$5,000 paid August 1, 2007  
\$5,000 paid August 1, 2008.

The Court further finds that the following amounts shall be paid by Defendants to the adult children of Donald Woodruff, deceased: Twenty-seven Thousand Five Hundred Dollars (\$27,500.00) shall be paid to Michelle Boudreaux; Seven Thousand Five Hundred Dollars (\$7,500.00) shall be paid to Stephanie Ann McElderry; Seven Thousand Five Hundred Dollars (\$7,500.00) shall be paid to Ronald L. Woodruff; and Seven Thousand Five Hundred Dollars (\$7,500.00) shall be paid to Jeffrey S. Woodruff. The Court further finds that Nine Thousand Eight Hundred Seventy-seven Dollars (\$9,877.00) shall be paid to Rodney G. Nitz and Lipe, Green, Paschal, Trump & Gourley, P.C., attorneys for Plaintiffs, to reimburse them for expenses incurred in the handling of this matter and the sum of Two Hundred Forty-one Thousand Dollars (\$241,000.00) shall be paid to said attorneys for their attorney fee in the handling of this matter. The Court specifically finds that the attorney fees and

expenses are reasonable in this matter. The Court further finds that the structured settlements in favor of the minor children described above are fair, reasonable and should be and are hereby approved by the Court pursuant to 12 O.S. § 83.

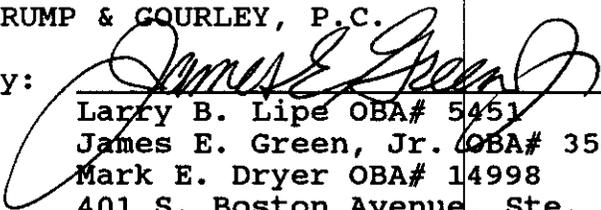
NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Settlement Agreement of the parties is approved as fair and reasonable and that the parties and their assignees are hereby ordered to fully perform said Settlement Agreement.

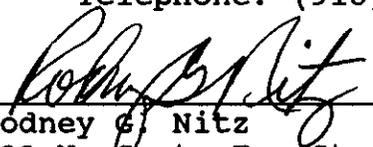
  
John Wagner, Magistrate Judge

Approved as to form:

LIPE, GREEN, PASCHAL,  
TRUMP & GOURLEY, P.C.

By:

  
Larry B. Lipe OBA# 5451  
James E. Green, Jr. OBA# 3582  
Mark E. Dryer OBA# 14998  
401 S. Boston Avenue, Ste. 2100  
Tulsa, OK 74103-4015  
Telephone: (918) 599-9400

  
Rodney G. Nitz  
122 N. Santa Fe, Ste. B  
Box 2813  
Salina, KS 67402-2813  
Telephone (913) 823-7291

ATTORNEYS FOR PLAINTIFFS

[SIGNATURES CONTINUED ON NEXT PAGE]

*Jodi L. Woodruff*

Jodi L. Woodruff, individually, and as Administratrix of the Estate of Donald Woodruff, deceased, and as natural mother and next friend of Donald L. Woodruff, Jr., Dustin E. H. Woodruff, and Nicole D. Woodruff, minor children

*Michelle Boudreaux*

Michelle Boudreaux

*Stephanie Ann McElderry*

Stephanie Ann McElderry

*Ronald L. Woodruff*

Ronald L. Woodruff

*Jeffrey S. Woodruff*

Jeffrey S. Woodruff

MCKINNEY, STRINGER & WEBSTER, P.C.

By:

*Victor F. Albert*  
Kenneth R. Webster  
Victor F. Albert  
101 North Broadway  
Oklahoma City, OK 73102  
Telephone (405)239-644

ATTORNEYS FOR DEFENDANTS

DM049360

DATE MAY 06 1993

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

TILLER S. WATSON, JR.,  
Plaintiff,  
vs.  
AMERICAN BEAUTY PRODUCTS  
COMPANY, INC., an Oklahoma  
corporation, et al.,  
Defendants.

Case No. 92-C-330-B

FILED

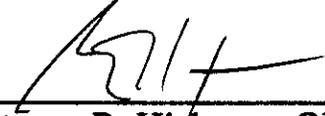
MAY 5 1993

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

**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW Plaintiff, Tiller S. Watson, Jr., and Defendants, American Products Company, Inc., an Oklahoma corporation, and Chapman R. Cannon, Jr., and hereby stipulate to the dismissal with prejudice of all claims raised in the above styled and numbered cause.

Respectfully submitted,  
FRASIER & FRASIER

BY:   
Steven R. Hickman OBA#4172  
Attorneys for Plaintiff  
1700 Southwest Blvd, Suite 100  
P. O. Box 799  
Tulsa, OK 74101  
918/584-4724

23

**ROSENSTEIN, FIST & RINGOLD**

BY:



---

**John E. Howland OBA#4416  
Attorneys for Defendants  
525 S. Main, Suite 300  
Tulsa, OK 74103  
918/585-9211**

DATE MAY 06 1993

FILED

MAY 5 1993

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

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

JOEL STEVEN CASTLEBERRY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BURLINGTON NORTHERN RAILROAD )  
 COMPANY, A Corporation, )  
 )  
 Defendant. )

No. 92-C-856-B

STIPULATION OF DISMISSAL

The Plaintiff, Joel Steven Castleberry by and through his attorneys William P. Hopkins/Gregory K. Frizzell, and the defendant, Burlington Northern Railroad Company, by and through its attorney, A. Camp Bonds, Jr., hereby stipulate and agree that the parties hereto have resolved all differences existing between them; that this case has been settled to the satisfaction of the plaintiff and the defendant; and that this cause of action should be dismissed with prejudice to the filing of a future action.

Dated this 5<sup>th</sup> day of May, 1993.

Gregory K. Frizzell OBA # 11087  
HUBBELL, SAWYER, PEAK & O'NEAL  
25TH FLOOR  
106 WEST 14TH STREET  
KANSAS CITY, MISSOURI 64105

A. Camp Bonds, Jr.  
A. CAMP BONDS, JR. OBA # 944  
BONDS, MATTHEWS, BONDS & HAYES  
P. O. BOX 1906  
MUSKOGEE, OK 74402-1906  
(918) 683-2911

JONES, GIVENS, GOTCHER,  
BOGAN & HILBORNE  
3800 FIRST NATIONAL TOWER  
TULSA, OK 74103

SECRET  
MAY 06 1993  
DATE

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

JACQUI STARR, an individual,

Plaintiff,

vs.

PEARLE VISION, INC.  
d/b/a/ PEARLE VISION EXPRESS,  
a corporation,

Defendant.

No. 92-C-463-B

**FILED**

MAY 3 1993

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

J U D G M E N T

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

Dated, this 3<sup>rd</sup> day of May, 1993.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

SECRET  
DATE MAY 06 1993

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

**FILED**  
APR - 2 1993

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

DON AUSTIN, an individual,  
BARBARA WILLIS, an individual,  
DOROTHY COOKS, an individual, and  
KAREN SNAP, an individual, and  
other JOHN DOE or JANE DOE  
Plaintiffs as they become known,

Plaintiffs,

vs.

Case No. 92-C-258-B ✓

SUN REFINING AND MARKETING  
COMPANY,

Defendant.

**FILED**

MAY 3 1993

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

ORDER

This matter is before the Court on the Application of the  
Plaintiffs' Request to Dismiss the Following Plaintiff, Karen Snap.  
The Court having reviewed the Application, being fully advised in  
the premises, finds that the Application should be sustained.

IT IS THEREFORE ORDERED BY THE COURT that the Plaintiff shall  
be dismissed without prejudice.

*Thomas Brett*  
\_\_\_\_\_  
JUDGE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Date: May 3rd '93

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elmon  
51

DATE MAY 06 1993

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

**FILED**

MAY 3 1993

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

DOREEN L. LUNCEFORD, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 LOUIS W. SULLIVAN, M.D., )  
 )  
 Defendant. )

Case No. 92-C-134-B ✓

ORDER AND OPINION

Doreen Lunceford appeals the Secretary's decision to deny her disability benefits. Lunceford, who was 34 at the time of the hearing before the Administrative Law Judge ("ALJ"), has past relevant work experience as a light housekeeper and as a telemarketer. She alleges that she has been unable to work since August 26, 1989 because of "nerves" and an injured back.

The Secretary found that Ms. Lunceford could return to her past relevant work as a telemarketer and, therefore, was not disabled. Lunceford, however, challenges that decision, raising the following issues: (1) The ALJ failed to fully develop the record for an unrepresented claimant; (2) The ALJ ignored the findings of the treating physicians; (3) The ALJ/Secretary mischaracterized the Plaintiff's non-exertional mental impairment and pain; and (4) The Plaintiff cannot work on a sustained, regular basis. For the reasons discussed below, the case is hereby remanded.

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## I. Standard Of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g).<sup>1</sup> The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th Cir. 1989).<sup>2</sup>

The claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If he shows that his disability precludes returning to his prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

## II. Summary of Evidence

Ms. Lunceford has been treated for intravenous drug abuse. She was in an automobile accident in 1985 which resulted in the amputation of the distal end of the middle finger of the right hand. She also had a fracture of the L4 and a fracture of her left tibia. In 1984, Lunceford had a right blow-out fracture of her right eye. *Id. at 271.*

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<sup>1</sup> Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

<sup>2</sup> Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. *Trimiar v. Sullivan*, No. 90-5249, slip op. at 6 (10th Cir. April 23, 1989).

In addition, Lunceford has a history of mental problems. In the late 1970s, she was admitted to Eastern State Hospital. On January 5, 1987, Lunceford was discharged from the St. John Medical Center psychiatric unit after treatment for "low self-esteem", "severe withdrawal" and "periodic self destructive thoughts." Dr. W. R. Reid stated on her discharge summary that Ms. Lunceford "needs continued treatment on an outpatient basis" and said "the overall prognosis is extremely guarded." *Id. at 230.*

She was admitted again on May 11, 1987 and discharged nine days later. *Id. at 242.* Dr. Reid stated at that time that Lunceford "definitely needs inpatient treatment consisting of psychotherapy, chemotherapy...and further psychiatric evaluation." *Id. at 244.*

Ms. Lunceford was again admitted to Eastern State Hospital on August 31, 1989 for a 30-day stay. Upon her release, doctors diagnosed her with major depression describing her condition as "severe with mood congruent psychotic features and suicide attempt." They also had the following prognosis:

**Immediate guarded. long-term. If patient follows through with her idea to work and seek more education and continues attending the outpatient clinic, her condition might stabilize and depressive features will resolve. Potential problem - resentful of authority figures, unable to structure her life." *Id. at 284.***

On February 23, 1990, Ms. Lunceford was treated at a local mental health clinic where she was diagnosed with borderline depression disorder. On April 12, 1990, a therapist at the same clinic stated that Lunceford needed to attend therapy on a long-term basis, and that she could "gradually assume work-related responsibilities on a limited basis."

*Id.* at 335. On April 18, 1990, a similar diagnosis was made. *Id.* at 332.<sup>3</sup>

After examining the evidence, the ALJ found that Ms. Lunceford could return to her past relevant work. In making that determination, the ALJ relied, in part, on the testimony of a vocational expert ("V.E.") who stated that Ms. Lunceford -- despite limitations related to her mental problems -- could work as a telemarketer.

## II. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;<sup>4</sup> (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). If the Secretary finds the claimant disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found that Ms. Lunceford could return to her past relevant work.

The first issue raised is whether the ALJ adequately developed the record. Ms. Lunceford was not represented by counsel. The ALJ has a "basic duty of inquiry to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts. *Dixon v. Heckler*, 811 F.2d 506, 510 (10th Cir. 1987). That duty of inquiry takes on

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<sup>3</sup>The record indicates other treatment of Lunceford's mental problems. For example, one report discusses Lunceford's past psychiatric history. It reads: "She states that she began drinking alcohol when she was nine years of age in the form of Vodka and later graduated to inhalants using glue and subsequently paint ... Sexual abuse includes three episodes of having been raped at sixteen, seventeen and twenty-six years of age. She became pregnant at the age of twenty-six following the rape by a Black male." *Id.* at 285.

<sup>4</sup>Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).

special urgency when the claimant has little education and is unrepresented by counsel. *Id.* Also, see *Baker v. Bowen*, 886 F.2d 289 (10th Cir.1989).

In this case, the ALJ failed in his basic duty of inquiry, especially given that Ms. Lunceford was unrepresented by counsel. While much of the hearing focused on Ms. Lunceford's physical problems, the ALJ asked her few meaningful questions concerning her mental condition.

Furthermore, the ALJ sought no psychiatric expert to assist him in developing the record, notwithstanding an abundance of medical evidence indicating on-going and severe psychological problems. Instead, he apparently relied on his own opinion and that of a vocational expert. Given the fact that the record does, in fact, document Ms. Lunceford's mental problems, the ALJ had a duty to develop a more extensive record on this issue before reaching a decision. Therefore, the case should be remanded to the ALJ for this purpose.<sup>5</sup>

This finding is further buttressed by a recent Tenth Circuit decision. In *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045 (10th Cir. 1993), the Court held that an ALJ must make every reasonable effort to ensure that a qualified psychologist or psychiatrist completes the residual functional capacity assessment.<sup>6</sup> The Court further wrote:

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<sup>5</sup> On remand, the ALJ should also allow Ms. Lunceford to supplement the record concerning her back problems. Doctors examining Lunceford found that she could not do bending at the waist and that bending and lifting aggravated her back pain. Record at 211-214, 304,305. However, the ALJ -- for reasons not given -- stated that he could "find no evidence of any postural or other restrictions placed upon claimant other than those of her emotional condition." Id. at 24. This decision is clearly contra the medical evidence in the record.

<sup>6</sup> The court cited to 42 U.S.C. §421(h), which states: "an initial determination...that an individual is not under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment."

There is no evidence in the record that a qualified psychiatrist or psychologist assessed claimant's residual functional capacity. Likewise, there is no evidence that the ALJ made any effort to ensure that a qualified psychiatrist or psychologist completed the appropriate reports and residual functional capacity assessment. Instead, as allowed by the regulations, the ALJ appears to have completed the standard document, including the residual functional capacity assessment, without the assistance of a medical consultant. *Id.*

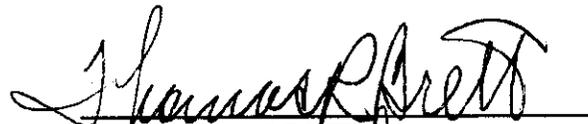
In this case, like in *Andrade*, the record indicates the ALJ filled out the residual functional capacity assessment without the assistance of a medical consultant. *Record at 27.* The undersigned finds that the ALJ, given the circumstances of this case, erred.

### III. Conclusion

Two factors dictate a remand. First, the ALJ failed to adequately develop the record, especially more extensive findings concerning Lunceford's longstanding mental problems. Specifically, further record must be developed vis-a-vis the claimant's back problems and mental condition. As stated above, the ALJ has a special duty to unrepresented claimants such as Lunceford.

The second factor dictating remand is failure on the part of the ALJ to seek the assistance of a qualified psychiatrist or psychologist before making his decision. He did not do so. Therefore, the case is **REMANDED** so that the ALJ can further examine Ms. Lunceford's alleged mental impairments and re-evaluate her allegations concerning her back, all in accord with this opinion.

SO ORDERED THIS 3<sup>rd</sup> day of May, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE MAY 06 1993

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

**FILED**

**MAY 3 1993**

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

EVERETT L. STEPHENS,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D.,

Defendant.

Case No. 92-C-151-B

ORDER

Everett L. Stephens appeals the Secretary's decision to deny him disability benefits. The Secretary found that, while Stephens was unable to return to his past relevant work, he could work in "medium level" assembly jobs and also as a "light level" simple auto mechanic.

Stephens, however, raises the following issues on appeal: (1) Substantial evidence does not support the ALJ's finding that Plaintiff can perform medium work, especially given the Plaintiff's advanced age (56); and (2) The hypothetical question by the ALJ to the vocational expert was improper. For the reasons discussed below, the Secretary's decision is affirmed.

**I. Procedural History**

At the time of the Secretary's final decision, Stephens was 56 years old. He has a 7th grade education and past relevant work experience as an aircraft assembly worker, a rental car service manager, a mobile home service man and a route salesman. He worked

for McDonnell Douglas for 16 years.

Stephens applied for disability on February 14, 1990, alleging inability to work since March 7, 1987 due to back, knee and arm injuries. He suffers from severe back pain and *carpel tunnel syndrome* in his right wrist.

In an April 12, 1991 decision, the Administrative Law Judge ("ALJ") found that Stephens could not return to his past relevant work. The ALJ concluded, however, that Stephens could work in "medium level" assembly jobs and in "light level" automobile mechanic jobs. *Record at 19.* The ALJ also found that Stephens' testimony was "exaggerated", "self-serving", "evasive", and not credible. *Id. at 18.*

## II. Standard Of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g).<sup>1</sup> The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th Cir. 1989).<sup>2</sup>

The claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If he shows that his disability

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<sup>1</sup> Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow..." "...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

<sup>2</sup> Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. *Trimmar v. Sullivan*, No. 90-5249, slip op. at 6 (10th Cir. April 23, 1989).

precludes returning to his prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

### III. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;<sup>3</sup> (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). If the Secretary finds the claimant disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

The first issue raised by Stephens is whether substantial evidence supports the ALJ's findings.<sup>4</sup> Stephens points to the evidence submitted by Dr. Stephen R. Gilliland, M.D., who wrote:

**It is my opinion that as a result of this accident Mr. Stephens suffered a musculoskeletal injury to his lumbar spine with associated injury to lumbar nerve roots and elements which comprise the left sciatic nerve...As a result of the right carpal tunnel syndrome which developed as a result of his employment with McDonald Douglas [sic] and causes permanent and continuing pain, weakness, loss in range of motion, loss of sensation, and loss of use in the right hand, he now has a permanent partial...impairment to his right hand of 34%. Of this total, 18% is attributed to loss in range of motion of the right wrist, and 16% is attributed injury to sensory and motor**

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<sup>3</sup> Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).

<sup>4</sup> Stephens argues that the medical evidence and testimony does not support the ALJ's finding that Plaintiff can perform medium work.

branches of the right median nerve. *Id.* at 184.<sup>5</sup>

Dr. Gilliland stopped short of concluding that Stephens could not work. In addition, evidence from several other doctors indicated Stephens could perform medium work.<sup>6</sup> Furthermore, the ALJ found Stephens' testimony to not be credible. *Id.* at 13-14. Substantial evidence does support the Secretary's finding that Stephens could return to medium work.<sup>7</sup>

The second issue is whether the ALJ's hypothetical question to the vocational expert was improper. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Ekeland v. Bowen*, 899 F. 2d 719, 724 (8th Cir. 1990).

Stephens asserts the ALJ asked the vocational expert to assume that he could perform medium work. However, on page 63 of the Record, the ALJ told the vocational expert the following. "Let's assume further that the Administrative Law Judge would find that claimant has in general the physical capacity to perform -- and I'd like you to consider medium, light and sedentary. Consider all three levels of work."

The ALJ then asked a series of hypothetical questions, which, upon review, did relate with precision to the evidence in the record. Of particular importance is the fact that

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<sup>5</sup> Drs. Laurence H. Altshuler (Record at 214) and Jimmy C. Martin (Record at 190) made similar findings. However, Dr. David L. Bell noted in June of 1989 that Stephens' grip strength with the right hand was 100 pounds and that ranges of motion of the right wrist were only slightly limited. *Id.* at 185.

<sup>6</sup> A bone scan of Stephens indicated he was within normal limits. Record at 125. On page 127 of the Record, Dr. G. K. Kamp found Stephens to a "normal study" with the exception of a "slight narrowing of the right L5-S1 nerve root foramen." Dr. Carolyn Steele, D.O., found that Stephens did have a chronic lumbar strain with "some mild radicular symptoms". Dr. Steele also diagnosed Stephens with Carpal tunnel syndrome and found "diffuse degenerative arthritic changes." *Id.* at 1994. Also, see Record at pages 199-201. The ALJ's discussion of the medical evidence is also incorporated into the record. *Id.* at 11-17.

<sup>7</sup> Since Stephens can perform medium work, 20 C.F.R. §404.1563(d) does not apply here.

the ALJ did include Stephens' weakness of the right arm to the vocational expert. Stephens appears to argue that the ALJ should include all of his alleged impairments. Such is not, necessarily required. *See, Talley v. Sullivan*, 908 F.2d 585 (10th Cir. 1990). Therefore, the ALJ did not err on this matter.

**III. Conclusion**

After a careful review of the record, this Court finds that substantial evidence does support the Secretary's decision that Stephens could return to work. While the records submitted by the various doctors are, in part, conflicting, it is the ALJ's duty to weigh the evidence and make credibility determinations. Furthermore, this Court finds that the ALJ did not err in his hypothetical question to the vocational expert. As a result, the Secretary's decision is **AFFIRMED**.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
5-2-93

SECRET  
MAY 0 6 1993

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ROBERT L. KERR a/k/a ROBERT )  
 LEE KERR; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**

MAY 3 1993

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

CIVIL ACTION NO. 93-C-250-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day  
of May, 1993. The Plaintiff appears by F.L. Dunn,  
III, United States Attorney for the Northern District of  
Oklahoma, through Kathleen Bliss Adams, Assistant United States  
Attorney; the Defendants, County Treasurer, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma, appear not, having previously disclaimed any right,  
title or interest in the subject property; and the Defendant,  
Robert L. Kerr a/k/a Robert Lee Kerr, appears not, but makes  
default.

The Court, being fully advised and having examined the  
court file, finds that the Defendant, Robert L. Kerr a/k/a Robert  
Lee Kerr, acknowledged receipt of Summons and Complaint on  
April 4, 1993; that Defendant, County Treasurer, Tulsa County,  
Oklahoma, acknowledged receipt of Summons and Complaint on  
March 25, 1993; and that Defendant, Board of County  
Commissioners, Tulsa County, Oklahoma, acknowledged receipt of  
Summons and Complaint on March 25, 1993.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on April 23, 1993, disclaiming any right, title or interest in the subject property; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on April 23, 1993, disclaiming any right, title or interest in the subject property; and that the Defendant, Robert L. Kerr a/k/a Robert Lee Kerr, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that on December 16, 1991, Robert Lee Kerr filed his voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-4501-C, and the Order Dismissing Case was filed on May 12, 1992.

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

Lot Seventeen (17), Block Four (4),  
Woodstock, an Addition to the City of Broken  
Arrow, Tulsa County, State of Oklahoma,  
according to the recorded plat thereof.

The Court further finds that on December 5, 1990, the Defendant, Robert L. Kerr, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$59,985.00, payable in monthly

installments, with interest thereon at the rate of 7.5 percent (7.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Robert L. Kerr, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated December 5, 1990, covering the above-described property. Said mortgage was recorded on December 6, 1990, in Book 5292, Page 1143, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Robert L. Kerr a/k/a Robert Lee Kerr, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Robert L. Kerr a/k/a Robert Lee Kerr, is indebted to the Plaintiff in the principal sum of \$59,985.00, plus interest at the rate of 7.5 percent per annum from January 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

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

The Court further finds that the Defendant, Robert L. Kerr a/k/a Robert Lee Kerr, is in default and has no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendant, Robert L. Kerr a/k/a Robert Lee Kerr, in the principal sum of \$59,985.00, plus interest at the rate of 7.5 percent per annum from January 1, 1991 until judgment, plus interest thereafter at the current legal rate of 3.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Robert L. Kerr a/k/a Robert Lee Kerr, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

**First:**

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of  
said real property;

**Second:**

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

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

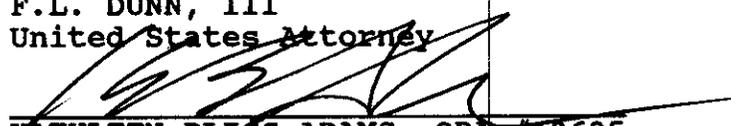
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from  
and after the sale of the above-described real property, under  
and by virtue of this judgment and decree, all of the Defendants  
and all persons claiming under them since the filing of the  
Complaint, be and they are forever barred and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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III  
United States Attorney

  
KATHLEEN BLISS ADAMS, OBA #13625  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Judgment of Foreclosure  
Civil Action No. 93-C-250-B

KBA/esr

DATE MAY 06 1993

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

**FILED**

**MAY 3 1993**

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

STEPHEN WAYNE THOMPSON,  
MITCHELL WAYNE THOMPSON,  
and SALLY THOMPSON,

Plaintiffs,

vs.

CHRISTIAN FIDELITY LIFE  
INSURANCE COMPANY, a  
corporation,

Defendant.

No. 91-C-722-B

**ORDER**

Before the Court for decision are the following post-trial motions of Plaintiff:

- (1) Plaintiff's motion to alter or amend judgment (docket #78), asserting:
  - (a) Plaintiff is entitled to interest on the benefits due until paid in the amount of \$1,953.74, pursuant to Okla. Stat. tit. 36, § 1219(B); and
  - (b) Pre-judgment interest at the rate of 9.58% per annum from the date of filing, September 17, 1991, to the date of verdict, December 23, 1992, on \$72,100.00, which is \$8,742.78, pursuant to Okla. Stat. tit. 12, § 727(A)(2).
- (2) Application for Attorney's Fee (docket #81) (Plaintiff appealed from the Clerk's ruling on costs, relative to the attorney's fee issue only, because the Clerk did not rule on the attorney's fee application).

The Plaintiff's claim for \$1,953.74 interest on benefits due until paid, pursuant to Okla. Stat. tit. 36, §1219(B), is denied because the parties previously settled the subject claim and such was not litigated herein. (See Exhibit A to Defendant's Brief in Opposition to Plaintiffs' Motion filed January 8, 1993).

The Plaintiff is entitled to recover pre-judgment interest at the rate of 9.58% from the date of filing of this case, September 17, 1991, to the date of verdict, December 23, 1992, on the sum of \$72,100.00, of the judgment pursuant to Okla.Stat. tit. 12, § 727(A)(2). Section 727(A)(2) provides the prevailing party is entitled to pre-judgment interest when there is a verdict for damages awarded "by reason of personal injuries or injury to personal rights." A portion of the \$75,000.00 actual damage award herein related to the mental pain and suffering arising from the bad faith claim and the pre-judgment interest award is supported by Timmons v. Royal Globe Ins. Co., 713 P.2d 589, 590 (Okla. 1985).

Next the Court has for decision Plaintiff's application for attorney's fee pursuant to Local Rule 6(G). Accompanying the application are affidavits itemizing charges in support of the request for attorney's fee. The Defendant responds, asserting there is no entitlement to an attorney's fee, and in the alternative, Plaintiff's claim therefor is excessive.

In the case of Thompson v. Shelter Mut. Ins., 875 F.2d 1460, 1463 (10th Cir. 1989), the Tenth Circuit Court of Appeals concluded that an attorney's fee is recoverable for such a bad faith claim under Okla.Stat. tit. 36, § 3629(B). In the case of Adair State

Bank v. American v. American Casualty Co. of Reading, Pennsylvania, 949 F.2d 1067 (10th Cir. 1991), the Court of Appeals concluded the Oklahoma legislature intended to lodge discretion with the trial judge in awarding attorney fees. The Court concludes the Plaintiff, as the prevailing party herein, is entitled to the award of a reasonable attorney's fee.

Guiding the Court in determining a reasonable attorney's fee are the factors set forth in the cases of Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); State ex rel. Burk v. City of Oklahoma City, 598 P.2d 649 (Okla. 1979); and Oliver's Sport Center v. National Standard Insurance Company, 615 P.2d 291 (Okla. 1980).

The Court concludes the rate of \$120.00 per hour claimed by Plaintiff's counsel is reasonable. However, following a thorough review of counsel's itemized billing, the Court concludes the specific hourly charges totaling 628.65 hours are excessive by 218.60 hours as a result of duplicative time of counsel and time spent on unnecessary functions as well as excessive time thereon. The Court further finds the reasonable time of 27 hours was spent by paralegals at the reasonable rate of \$65.00 per hour.

The parties concur that the Defendant offered Plaintiff the sum of \$75,000.00 pre-trial, on July 1, 1992, to settle the bad faith claim herein. The jury awarded \$75,000.00, for the bad faith claim and an additional \$25,000.00, for alleged punitive damages. Following July 1, 1992, Plaintiff's counsel expended 466.80 claimed hours to recover \$25,000.00 more than the settlement offer of

\$75,000.00. Thus, Plaintiff met with limited success.

Following a consideration of all factors supported by the above case authority, the Court concludes an attorney's fee totaling \$33,695.00, is reasonable herein and the same is hereby awarded. Such is based upon the following calculation:

1)	\$120.00 per hour x 162 (pre 7-1-92 hours)=	\$19,440.00
2)	1/2 of \$25,000.00 (amount recovered over 7-1-92 offer)=	\$12,500.00
3)	Paralegal charges	<u>\$ 1,755.00</u>
	TOTAL	\$33,695.00

The Plaintiff's motion to alter or amend judgment is therefore overruled and sustained as aforesaid, and Plaintiff's application for attorney fee as the prevailing party is granted as aforesaid pursuant to Okla.Stat. tit. 36, § 3629(B).

The Court's judgment entered on the docket of December 28, 1992, is therefore amended according to the above and is filed contemporaneously herewith.

DATED this 3<sup>rd</sup> day of May, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

DATE MAY 06 1993

**FILED**

MAY 3 1993

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

STEPHEN WAYNE THOMPSON,  
MITCHELL WAYNE THOMPSON,  
and SALLY THOMPSON,

Plaintiffs,

vs.

CHRISTIAN FIDELITY LIFE  
INSURANCE COMPANY, a  
corporation,

Defendant.

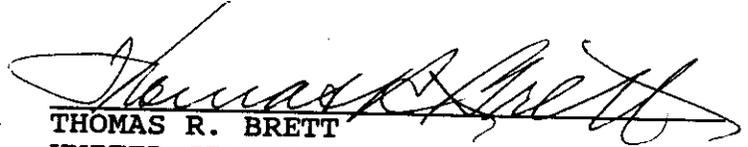
No. 91-C-722-B

AMENDED JUDGMENT

In accordance with the jury verdict rendered December 23, 1992, Judgment is hereby entered in favor of Plaintiff, Mitchell Wayne Thompson, and against the Defendant, Christian Fidelity Life Insurance Company, in the sum of \$75,000.00 as actual damages and \$25,000.00 as punitive damages with post-judgment interest thereon at the rate of 3.72% annually (28 U.S.C. § 1961) from the date of this judgment, and the costs of this action as previously awarded by the Clerk of the court.

Further, Plaintiff is awarded pre-judgment interest on the sum of \$72,100.00 of said actual damage award at the rate of 9.58% per annum from September 17, 1991 until December 23, 1992, in the sum of \$8,742.78 (Okla.Stat. tit. 12, § 727(A)(2)). Plaintiff is also awarded judgment as and for attorney's fees as the prevailing party in the sum of \$33,695.00; and the post-judgment interest rate of 3.72% annually (28 U.S.C. § 1961) applies to the total judgment sums awarded herein.

DATED this 3<sup>rd</sup> day of May, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE MAY 6 1993

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

**FILED**

MAY 3 1993

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

LEE WINN and JUSTIN W. )  
DAVENPORT, )

Plaintiffs, )

vs. )

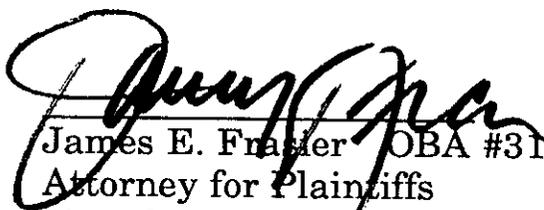
Case No. 92-C-789-B

MID-WEST NATIONAL LIFE )  
INSURANCE COMPANY OF )  
TENNESSEE, a foreign )  
corporation, )

Defendants. )

STIPULATION OF DISMISSAL

COMES NOW the parties and herewith stipulate that this matter may be dismissed without prejudice to the filing of a new action.

  
James E. Frazier OBA #3108  
Attorney for Plaintiffs  
1700 Southwest Blvd, Suite 100  
P. O. Box 799  
Tulsa, Oklahoma 74101  
918/584-4724

*Michael D. Coleman*

Michael D. Coleman OBA#13145  
Kerr, Irvin, Rhodes & Ables  
Attorney for Defendant  
201 Robert S. Kerr Ave.  
600 Bank of Oklahoma Plaza  
Oklahoma City, Oklahoma 73102  
405/272-9221

ENTERED ON DOCKET

DATE 5-6-93

IN THE UNITED STATES DISTRICT COURT **F I L E D**  
FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MAY 6 1993

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

Farm Electric Company, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Consolidated Freightways Corp., )  
 )  
Defendant. )

Case No. 91-C-511-E

O R D E R

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

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

In the action herein, notice pursuant to Rule 35(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on March 29, 1993. No action has been taken in the case within thirty (30) days of the date of the notice.

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

Dated this 5<sup>th</sup> day of May, 1993.

  
United States District Judge

ENTERED ON DOCKET

DATE **FILED** 5 1993

MAY 5 1993

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

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

GAS ENERGY DEVELOPMENT  
COMPANY, )  
)  
)  
Plaintiff, )  
)  
)  
vs. )  
)  
)  
INDUSTRIAL ENERGY )  
APPLICATIONS, INC., )  
)  
)  
Defendant. )

Case Number 92-C-884-C

ORDER OF DISMISSAL

Gas Energy Development Company, the plaintiff, and Industrial Energy Applications, Inc., the defendant, being all of the parties herein, have submitted a Joint Motion for Dismissal requesting that this Order of Dismissal be entered by the Court. Being fully advised in the premises, the Court determines that the relief jointly requested by the parties should be granted.

IT IS, THEREFORE, ORDERED by the Court that all claims asserted in this action by the plaintiff Gas Energy Development Company, by way of its Complaint or otherwise, are dismissed with prejudice, and that all claims asserted in this action by defendant Industrial Energy Applications, Inc., by way of its Amended Counterclaim or otherwise, are dismissed with prejudice, with each party to bear its respective costs in connection with this lawsuit.

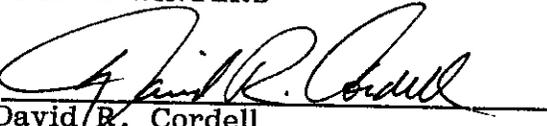
Dated this \_\_\_\_ day of April, 1993.

s/H. DALE COOK

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

APPROVED:

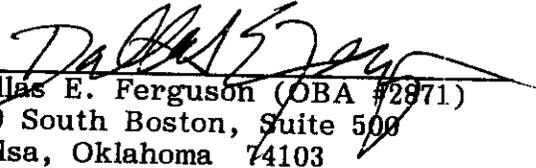
CONNER & WINTERS

By: 

David R. Cordell  
2400 First National Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4391  
(918) 586-5711

Attorneys for the Plaintiffs,  
Gas Energy Development Company

DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON

By: 

Dallas E. Ferguson (OBA #2871)  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for the Defendant,  
Industrial Energy Applications, Inc.

ENTERED IN BOOKET  
DATE MAY 0 5 1993

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

JEFFERY TOLLADAY,  
  
Plaintiff,

v

BARTLESVILLE POLICE DEPARTMENT,  
CITY OF BARTLESVILLE, COUNTY OF  
WASHINGTON, CHIEF TOM HOLLAND,  
SGT. EMERY, and LT. SILVERS,  
  
Defendants.

Case No. 93 C 280B ✓

**FILED**

MAY 4 - 1993

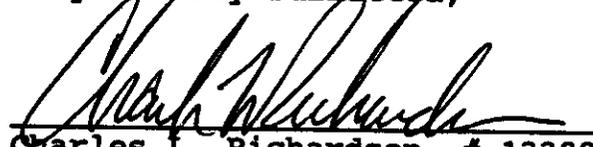
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

*Notice of*

**DISMISSAL WITHOUT PREJUDICE**

COMES NOW Plaintiff, Jeffery Tolladay, by and through his attorneys of record, Richardson & Stoops, and hereby dismisses without prejudice Defendant County of Washington.

Respectfully Submitted,



Charles L. Richardson, # 13388  
6846 S. Canton, Suite 200  
Tulsa, Oklahoma 74136  
(918) 492-7674

6

CERTIFICATE OF MAILING

I, Charles L. Richardson, do hereby certify that on this 3rd day of May, 1993, a true and correct copy of the foregoing document was sent with sufficient postage thereon to the following:

Washington County Court Clerk  
420 South Johnstone  
Bartlesville, Oklahoma 74006

CLL

ENTERED ON DOCKET

DATE 5-5-93

**FILED**

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

**MAY 5 1993**

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

BETTY BROYLES, D/B/A	)
BISCUITS PLUS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
THE TRAVELERS INSURANCE	)
COMPANY, A/K/A THE TRAVELERS,	)
a foreign corporation,	)
	)
Defendant.	)

Case No. 92-C-676-E

**ORDER**

Based upon the Application for Dismissal with Prejudice, this case is dismissed with prejudice to further filing.

S/ JAMES O. ELLISON

\_\_\_\_\_  
U.S. DISTRICT COURT JUDGE

5-5-93

FILED

MAY 4 1993

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

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

NATHANIEL C. CARLIS, JR. )

Plaintiff, )

vs. )

SEARS ROEBUCK & COMPANY, )

Defendant. )

Case No. 90-C-240-E

JUDGMENT

Pursuant to Rule 58, Federal Rules of Civil Procedure, Judgment is hereby entered in favor of Defendant Sears Roebuck & Company and against the Plaintiff Nathaniel C. Carlis, Jr. on all of his claims against Defendant. Plaintiff shall take nothing of his claims, and the claims are hereby dismissed.

DATED this 3 day of ~~April~~ <sup>May</sup>, 1993.

S/ JAMES O. ELLISON

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

APPROVED AS TO FORM: ~~AND CONTINUED~~



Earl Wolfe  
16 East 16th Street, Suite 404  
Tulsa, Oklahoma 74119-4447  
(918) 582-3168  
Attorney for Plaintiff,  
Nathaniel C. Carlis

*Michael C Redman*

Michael C. Redman  
Doerner, Stuart, Saunders,  
Daniel & Anderson  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103-3725  
(918) 582-1211  
Attorneys for Defendant,  
Sears Roebuck & Company



County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 11, 1993.

It appears that the Defendants, County Treasurer, County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on January 28, 1993, disclaiming any right, title or interest in the subject property; that the Defendant, Jim L. Herron, filed his Answer and Cross-Petition on March 15, 1993; and that the Defendants, Vaunda Bussey and Kylia Sue Bussey, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Three (3), Block Twenty-three (23),  
VALLEY VIEW ACRES ADDITION to the City of  
Tulsa, County of Tulsa, State of Oklahoma,  
according to the recorded plat thereof.

The Court further finds that on April 4, 1980, the Defendant, Jim L. Herron, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$15,661.25, payable in monthly installments, with interest thereon at the rate of 13 percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Jim L.

Herron, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated April 4, 1980, covering the above-described property. Said mortgage was recorded on April 28, 1980, in Book 4472, Page 390, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Jim L. Herron, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Jim L. Herron, are indebted to the Plaintiff in the principal sum of \$14,466.81, plus interest at the rate of 13 percent per annum from March 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

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

The Court further finds that the Defendants, Vaunda Bussey and Kyla Sue Bussey, are in default and have no right, title or interest in the subject real property.

The Court further finds that the rights of Defendant, Jim L. Herron, in his Cross-Petition against Defendants, Vaunda Bussey and Kyla Sue Bussey, are reserved. Any rights that Defendant, Jim L. Herron, may claim are inferior to the rights of the Plaintiff.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendant, Jim L. Herron, in the principal sum of \$14,466.81, plus interest at the rate of 13 percent per annum from March 1, 1992 until judgment, plus interest thereafter at the current legal rate of 2.25 <sup>1</sup>/<sub>10</sub> percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Vaunda Bussey, Kyliia Sue Bussey, and the County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Jim L. Herron has a claim against Vaunda Bussey and Kyliia Sue Bussey in the amount of \$14,466.81, together with interest thereon at the rate of 13% interest per annum from March 1, 1992, until paid, the costs of maintaining and preserving the property, together with abstracting costs, a reasonable attorneys' fee and the costs of this action, all as may be awarded to the Plaintiff against Jim L. Herron by reason of the failure of Vaunda Bussey and Kyliia Sue Bussey to assume and pay the Note and Mortgage, and for such other and further relief as to which the Court may deem Jim L. Herron to be entitled in consideration of the premises.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the rights of Defendant, Jim L. Herron, in his Cross-Petition against Defendants, Vaunda Bussey and Kyla Sue Bussey, are reserved. Any rights that Defendant, Jim L. Herron, may claim are inferior to the rights of the Plaintiff.

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

**First:**

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

**Second:**

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

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

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

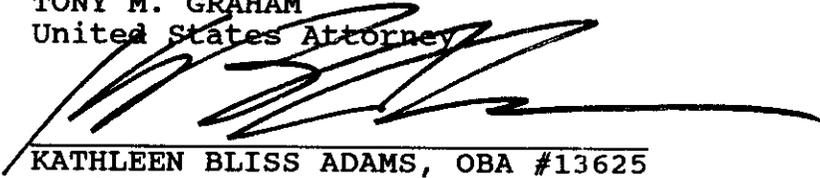
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

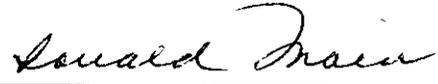
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



RONALD MAIN, OBA #5634  
Attorney for Jim L. Herron

Judgment of Foreclosure  
Civil Action No. 93-C-17-E

KBA/esr

ENTERED ON DOCKET

DATE 5-4-93

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 RICK E. BLONDEAU; )  
 DIANA J. BLONDEAU; )  
 WELLS FARGO CREDIT CORPORATION, )  
 a California Corporation; )  
 CITY OF BROKEN ARROW, OKLAHOMA, )  
 a municipal corporation; )  
 COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )  
 )  
 Defendants. )

Case No. 92-C-592-E

**FILED**

MAY 3 1993

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 day of April, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, Wells Fargo Credit Corporation appears by Kenneth G. Miles; the defendant City of Broken Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney; the defendants Tulsa County Treasurer and Board of Tulsa County Commissioners appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants Rick E. Blondeau and Diane J. Blondeau appear not, but make default.

The Court, being fully advised and having examined the file, finds as follows:

1. The defendant Rick E. Blondeau acknowledged receipt of Summons and Complaint on July 15, 1992. The defendant Diana J. Blondeau acknowledged receipt of Summons and Complaint on July 16, 1992. Both of such defendants have failed to answer or otherwise plead and are therefore currently in default. All other defendants in this lawsuit filed timely answers.

2. This is a lawsuit based upon a note which was secured by a mortgage covering land located with the Northern Judicial District of Oklahoma.

3. On October 26, 1977, Rebecca Anne Lopez and Barbara C. Harkrader executed and delivered to Harry Mortgage Co. a promissory note in the amount of \$28,350.00, payable in monthly installments, with interest thereon at the rate of eight and one-half (8.5%) percent per annum.

4. As security for the payment of the above described note Rebecca Anne Lopez and Barbara C. Harkrader executed and delivered to Harry Mortgage Co. a real estate mortgage dated October 26, 1977, covering the following described property:

Lot Eleven (11), Block Three (3), MELINDA PARK, an addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Such tract is referred to below as "the Property." This mortgage was recorded with the Tulsa County Clerk October 31, 1977, in book 4292 at page 798. The mortgage tax due was paid and the Tulsa County Treasurer's receipt therefore is endorsed upon the face of such mortgage.

5. (a) On November 23, 1977, Harry Mortgage Co. assigned such promissory note and the mortgage securing it to Pulaski Bank and Trust Company of Little Rock, Arkansas, by an instrument recorded with the Tulsa County Clerk December 5, 1977, in book 4298 at page 597.

(b) On November 1, 1984, Pulaski Bank and Trust Company assigned such promissory note and the mortgage securing it to Simmons First National Bank of Pine Bluff, Arkansas, by instrument recorded with the Tulsa County Clerk June 3, 1985, in book 4866 at page 2018.

(c) On February 16, 1989, Simmons First National Bank of Pine Bluff assigned such promissory note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns by instrument recorded with the Tulsa County Clerk February 23, 1989, in book 5168 at page 1095. A copy of such assignment is attached as Exhibit "E" and incorporated herein.

6. Rick E. Blondeau and Diana J. Blondeau currently hold the fee simple title to the Property via mesne conveyances and are the current assumptors of the subject indebtedness.

7. On March 1, 1989, the defendants Rick E. Blondeau and Diana J. Blondeau, husband and wife, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose. A super-

seding agreement was reached between these same parties on September 1, 1990.

8. The defendants Rick E. Blondeau and Diana J. Blondeau have defaulted under the terms of the note, mortgage and forbearance agreements due to their failure to pay installments when due and due to their abandonment of the Property. Because of such default the defendants Rick E. Blondeau and Diana J. Blondeau are indebted to the plaintiff in the amount of \$32,757.48, plus interest at the rate of eight and one-half (8.5%) percent from April 15, 1993, to the date of judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of \$249.00 for abstracting and \$8.00 for recording the Notice of Lis Pendens.

9. On April 15, 1991, the personal liability of the defendants Rick E. Blondeau and Diana J. Blondeau on the debt represented by the subject note and mortgage was discharged in U.S. Bankruptcy Court for the Northern District of Oklahoma Case No. 90-03384-C, a chapter 7 bankruptcy.

10. The defendant Wells Fargo Credit Corporation has on October 9, 1992, disclaimed any interest in and to the Property.

11. The defendant, City of Broken Arrow, Oklahoma; claims an interest in and to the Property by virtue of certain easements contained in the plat of the subdivision,

some of which impact the Property; but otherwise disclaim any interest in and to the Property.

12. The defendant, County Treasurer, Tulsa County, Oklahoma, claims a lien upon the Property by virtue of unpaid personal property taxes payable from the defendants, Rick E. Blondeau and Diana J. Blondeau, pursuant to the 1991 tax year in the amount of \$28.00, plus accruing costs and interest. This lien was perfected on June 26, 1992, and therefore is subsequent and inferior to the lien of the plaintiff but is superior to any later filed liens.

13. The defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in and to the Property.

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment against the defendants Rick E. Blondeau and Diana J. Blondeau, in the principal sum of \$32,757.48, plus interest at the rate of twelve percent per annum from April 15, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of \$257.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED** that the defendant, Tulsa County Treasurer, have and recover judgment in the amount of \$28.00, plus penalties and interest.

IT IS FURTHER ORDERED that the defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the Property except insofar as it is the holder of certain easements across the Property as shown on the duly recorded plat of MELINDA PARK addition.

IT IS FURTHER ORDERED that the defendants Wells Fargo Credit Corporation and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title, or interest in or to the Property.

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

**First:**

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the defendant County Treasurer, Tulsa County, Oklahoma.

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

**IT IS FURTHER ORDERED** that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

**67 JAMES O. ELISON**

**UNITED STATES DISTRICT JUDGE**

APPROVED:

F. L. Dunn, III  
United States Attorney



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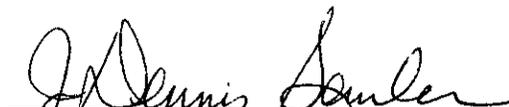
Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

---

Kenneth G. Miles  
Attorney for defendant  
Wells Fargo Credit Corporation

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Michael R. Vanderburg  
City Attorney  
Attorney for defendant  
City of Broken Arrow, Oklahoma



---

J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

APPROVED:

F. L. Dunn, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
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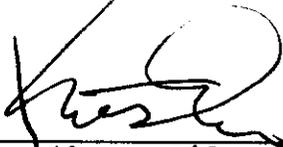
J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

APPROVED:

F. L. Dunn, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
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City Attorney  
Attorney for defendant  
City of Broken Arrow, Oklahoma

J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners



ENTERED ON DOCKET

DATE: 403-93

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

CHARLOTTE M. BILLEY, as Personal )  
 Representative of the Estate of )  
 CHARLES D. BILLEY, deceased; and )  
 CHARLOTTE M. BILLEY, individually, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONALD L. NESS and )  
 CANAL INSURANCE COMPANY, )  
 )  
 Defendants. )

**FILED**

APR 30 1993

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

NO. 92-C-570 E

ORDER

The Court, for good cause shown, and upon the parties' Application for a Dismissal With Prejudice, the above captioned litigation having been fully compromised and settled between the parties, the Court finds that the cause should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED that the above captioned cause be and is hereby dismissed with prejudice.

S/ JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-3-93

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

**FILED**

APR 30 1993

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

CATHERYN W. COX,	)
	)
Plaintiff,	)
	)
v.	)
	)
LOUIS W. SULLIVAN, M.D.,	)
	)
Defendant.	)

Case. No. 91-C-895-E

ORDER AND OPINION

Now before this Court is Catheryn W. Cox's appeal of the Secretary's decision to deny her disability and widow benefits. Ms. Cox, who was 57 years old at the time of the Administrative Law Judge ("ALJ") hearing, alleges she has been unable to work because of back pain. She has worked as a spool winder, machine operator, and drill press operator.

The ALJ found that Ms. Cox could return to her past relevant work as a spool winder and drill press operator. However, Ms. Cox disputes that finding. She raises three issues on appeal: 1) Does substantial evidence support the Secretary's decision?; 2) Did the ALJ err in its application of 20 C.F.R. §404.1563(d)?; and 3) Did the ALJ properly analyze her complaints of pain?

I. Standard Of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. §

405(g).<sup>1</sup> The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th Cir. 1989).<sup>2</sup>

The claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If he shows that his disability precludes returning to his prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

## II. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;<sup>3</sup> (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any

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<sup>1</sup> Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

<sup>2</sup> Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. *Trimiar v. Sullivan*, No. 90-5249, slip op. at 6 (10th Cir. April 23, 1989).

<sup>3</sup> Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).

work. 20 C.F.R. § 404.1520(b)-(f) (1991). If the Secretary finds the claimant disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found that Cox could return to her past relevant work.

The first issue raised is whether the ALJ properly analyzed Cox's complaints of pain. The rule on evaluating complaints of pain is examined in *Luna v. Bowen*.<sup>4</sup> The court must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the court must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id. at 163-164*.

In *Luna*, the Tenth Circuit also set forth the factors to determine a claimant's credibility regarding subjective complaints of pain as (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; (2) regular use of crutches or a cane; (3) regular contact with a doctor; (4) possibility that psychological disorders combine with physical problems; (5) claimant's daily activities; and (6) dosage, effectiveness and side effects of medication. These factors, however, are not an exhaustive list. *Id. at 165*.

On pages 12 and 13 of the Record, the ALJ discussed Cox's allegations of pain. He noted that many of her allegations were not substantiated by medical evidence. He also wrote:

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<sup>4</sup> 834 F.2d 161 (10th Cir. 1987).

The claimant testifies that she can lift 5 pounds and walk 1 block. She has driven to Claremore, approximately a 30-mile trip. She testifies that she cannot stand more than 30 to 35 minutes. Her daily activities indicate that she is able to take care of her home and personal needs. She also rests 45 minutes in the afternoon which relieves her discomfort. She also does her own shopping and some of her housework. She visits her family, although not often; however, most of the time the claimant's children visit her. She has no hobbies.

The ALJ then continues:

The Administrative Law Judge finds that claimant's testimony is inconsistent with the medical evidence and inconsistent with the claimant's ability to perform work. Her activities about her house indicate that she can and fully does take care of herself with only minor help on housework. Her activities being inconsistent with her claim of total disability, her testimony is, therefore, found to be not credible. Further, the Administrative Law Judge finds that claimant's pain is only mild and does not impact her performance on work-related activities or her concentration. *Record at 13.*

After analyzing the record, the undersigned finds that the ALJ has not followed the *Luna* criteria. It is unclear whether the ALJ made a specific finding as to whether he believed Ms. Cox had established a pain-producing impairment by objective medical evidence. It is also unclear as to whether a "loose nexus" occurred between the impairment and Ms. Cox's subjective allegations of pain. In essence, the ALJ simply found Ms. Cox's testimony to be not credible, and, as a result, discounted her complaints of pain.

In addition, the undersigned questions the reasoning used by the ALJ in his credibility determination. It appears that the ALJ found that Ms. Cox could return to her past relevant work because she could do routine housework.<sup>5</sup> While such credibility determinations are within the province of the ALJ, a more specific basis for making that determination must be given. As a result, the case is **remanded** so the ALJ can re-evaluate

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<sup>5</sup>The ALJ may not rely on minimal daily activities as substantial evidence that a claimant does not suffer disabling pain. *Frey at 16 F.2d 508, 516 (10th Cir. 1987).*

Ms. Cox's pain complaints, in accord with the requirements of *Luna v. Bowen*.

The second issue is whether the ALJ should have followed 20 C.F.R. § 404.1563(d), which states:

We consider that advanced age (55 or over) is the point where age significantly affects a person's ability to do substantial gainful activity. If you are severely impaired and of advanced age and you cannot do medium work...you may not be able to work unless you have skills that can be" transferred to "less demanding jobs which exist in significant numbers in the national economy.

The undersigned finds that §404.1563(d) does not apply in this case. According to 20 C.F.R. § 404.1560(b), age should not be considered where the Secretary finds a claimant can return to past relevant work. In this case, the ALJ found Cox could return to her past relevant work.<sup>6</sup>

### III. Conclusion

Based on the foregoing, the undersigned finds that the ALJ did not properly analyze Cox's subjective complaints of pain. As a result, the case is **remanded** for that purpose. If, on remand, the ALJ concludes that Cox cannot return to her past relevant work, he should proceed to step 5 -- which includes an analysis of §404.1563(d), above.

IT IS SO ORDERED THIS 29<sup>th</sup> day of April, 1993.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

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<sup>6</sup> On remand, if the ALJ finds that Cox cannot return to her past relevant work, he would then go to step five of the sequential evaluation. At that point, this regulation would come into play and would require testimony from a vocational expert.

ENTERED ON DOCKET

DATE 5-3-93

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ONE PARCEL OF REAL PROPEERTY )  
 KNOWN AS: 6663 SOUTH )  
 VICTOR, #114, TULSA, )  
 TULSA COUNTY, OKLAHOMA, )  
 AND ALL BUILDINGS, )  
 APPURTENANCES, AND IMPROVE- )  
 MENTS THEREON, AND THEIR )  
 CONTENTS, )  
 )  
 Defendant. )

CIVIL ACTION NO. 93-C-0032-E

**FILED**

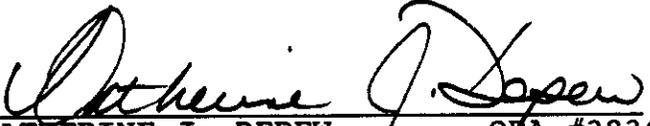
APR 30 1993

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

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure the plaintiff, United States of America, by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, and the Claimant, Sue M. Wyly, hereby stipulate to dismissal of this action, with prejudice and without costs.

F. L. DUNN, III  
United States Attorney

  
 CATHERINE J. DEPEW, OBA #3836  
 Assistant United States Attorney  
 3600 United States Courthouse  
 333 West Fourth Street  
 Tulsa, Oklahoma 74104  
 (918) 581-7463

Executed at Tulsa,  
Oklahoma, April  
29, 1993.

Executed at Tahlequah,  
Oklahoma, April 14, 1993

  
ROBERT PARK MEDEARIS, JR.  
Attorney for Sue M. Wyly

CJD/ch

N:\UDD\CHOOK\FC\WYLY\02939

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

W. DAVID HOLLOWAY, M.D., et al.,

Plaintiffs,

v.

PEAT, MARWICK, MITCHELL & CO.,  
et al.,

Defendants.

KPMG PEAT MARWICK,

Third-Party Plaintiff,

v.

CHARLES SCHUSTERMAN, individually;  
WILLIAM W. RAMSEY, individually;  
ALTUS E. WILDER, III, individually;  
CHARLES G. WRAY, individually;  
ANSIL LUDWICK, JR., individually;  
PAUL W. ANDERSON, individually;  
G. RICHARD DEGEN, individually;  
RICHARD G. BELL, individually;  
BOB C. LAMIRAND, individually;  
RODNEY MILLER, individually;  
DAN W. ALLRED, individually;  
DWIGHT A. PILGRIM, individually;  
MARTHA J. CRAVENS, individually;  
WILMA WOOD, individually;  
WESLEY R. MCKINNEY, individually;  
THE ESTATE OF BROWN J. AKIN, JR.;  
BRADLEY C. JOHNSON, individually;  
REPUBLIC BANCORPORATION, INC.;  
REPUBLIC FINANCIAL CORPORATION; and  
REPUBLIC TRUST & SAVINGS,

Third-Party Defendants.

Case No. 84-C-814  
(Conway)

**FILED**

APR 30 1993

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

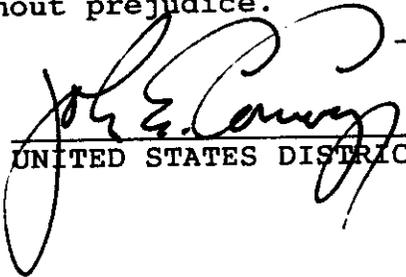
EOD 5/3/93

ORDER OF DISMISSAL WITHOUT PREJUDICE

On this 26<sup>th</sup> day of April, 1993, upon motion of the Defendant  
and Third-Party Plaintiff KPMG Peat Marwick, its third-party claims  
against Charles Schusterman, individually; William W. Ramsey,  
individually; Altus E. Wilder, III, individually; Charles G. Wray,

747

individually; Ansil Ludwick, Jr., individually; Paul W. Anderson, individually; G. Richard Degen, individually; Richard G. Bell, individually; Bob C. Lamirand, individually; Rodney Miller, individually; Dan W. Allred, individually; Dwight A. Pilgrim, individually; Martha J. Cravens, individually; Wilma Wood, individually; Wesley R. McKinney, individually; The Estate of Brown J. Akin, Jr.; Bradley C. Johnson, individually; Republic Bancorporation, Inc.; Republic Financial Corporation; and Republic Trust & Savings, are dismissed without prejudice.

  
UNITED STATES DISTRICT JUDGE

DATE MAY 3 1993

**FILED**

APR 29 1993

RICHARD M. LAWRENCE  
CLERK  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OK

No. 92-C-920-C

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

**DIANNA LYN ANDERSON, a minor,  
by and through JACQUE ANDERSON  
and BILL W. ANDERSON, her  
parents, guardians and next  
friends,**

Plaintiffs,

v.

**TACO TICO OF OKLAHOMA, INC.,  
MIKE WAGANER and MARK BEALE,**

Defendants.

ORDER

Before the Court are the motions of defendant Taco Tico of Oklahoma, Inc., and Mike Waganer to dismiss and the motion of the plaintiffs to dismiss these same defendants without prejudice. Plaintiffs commenced this action by Complaint filed on October 9, 1992, alleging sexual harassment on the part of the defendants Taco Tico of Oklahoma, Inc., Mike Waganer and Mark Beale while plaintiff was an employee at the Taco Tico restaurant located in Miami, Oklahoma. A second cause of action, paternity, was brought solely against defendant Beale.

Taco Tico of Oklahoma, Inc., has filed a motion to dismiss, asserting that it was not an employer under Title VII. Specifically, it contends that Taco Tico, Inc., a separate corporation, is the owner of the real property upon which the restaurant sits in Miami and that Taco Tico, Inc., leases the land to SEK, Inc., a Kansas corporation. SEK apparently operates the restaurant as a Taco Tico.

Defendant Waganer has also filed a motion to dismiss, asserting that SEK, of which he is president and a member of the

37

board of directors, is the employer of defendant Beale. Therefore, Wagoner asserts, he has no personal liability as to plaintiffs' sexual harassment cause of action.

In response, plaintiffs have filed motions to dismiss Taco Tico of Oklahoma, Inc., and Wagoner without prejudice, stating that they do not wish to foreclose the possibility that discovery will provide a factual basis for liability in the future. Plaintiffs' attorney has attached affidavits attempting to demonstrate her good faith attempt to check with the Secretary of State's office to determine the proper corporation to be sued. Further, plaintiffs' counsel argues that plaintiff Dianna Anderson is not familiar with the niceties of corporate law, and simply knew defendant Wagoner as her supervisor, thus making it logical to sue him.

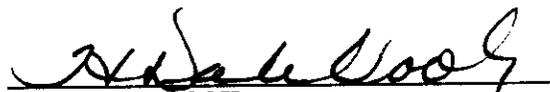
The two moving defendants object to dismissal without prejudice, unless they are awarded costs and attorney fees. They assert that they do not question the good faith of plaintiffs' counsel, but that they seek their award under 42 U.S.C. §2000e--5(k). That section essentially provides that the court may, in its discretion, award the prevailing party in a Title VII proceeding a reasonable attorney's fee. The applicable standard is that such fees should not be awarded unless a court finds that plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

Upon review of the record, the Court does not conclude that this standard has been met. From the allegations of the Complaint, which are all that are before the Court, plaintiff has stated a

non-frivolous claim of sexual harassment. Plaintiff's counsel made a diligent attempt to make her way through the labyrinth of corporate creatures, but nevertheless has apparently named two defendants who should not have been named. Naming Taco Tico of Oklahoma, Inc., instead of Taco Tico, Inc., hardly demonstrates an indifferent attitude on counsel's part, and apparently defendant Waganer was in fact plaintiff's supervisor at the restaurant, as already stated. Fees have been awarded when a plaintiff knowingly named the wrong defendant. See Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911 (11th Cir.1982). No such knowledge on the part of plaintiff or her counsel is present in this record. No other arguments have been made.

It is the Order of the Court that the motions to dismiss of defendants Taco Tico of Oklahoma, Inc., and Mike Waganer are hereby denied. The motions of the plaintiffs to dismiss Taco Tico of Oklahoma, Inc. and Mike Waganer without prejudice are hereby granted. The requests for awards of attorney's fees are denied.

IT IS SO ORDERED this 29<sup>th</sup> day of April, 1993.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE