

OCT 29 1993

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

FILED

OCT 27 1993

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

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr., and CROSS AND COMPANY,

Plaintiffs,

vs.

ROBERT S. TRIPPET; H. L. FITZGERALD; FRANK SIMS; John Doe, Personal Representative of the Estate of JOHN T. LENOIR, Deceased; H. R. SMITH; THOMAS A. LANDRITH, Jr.; E. M. KUNKEL; Dorothy B. Barton, Executrix of the Estate of JACKSON BARTON, Deceased; MARVIN R. BARNETT; J. D. METCALFE; Elizabeth Cothran Gutelius, Personal Representative of the Estate of H. B. GUTELIUS, Deceased; CARL A. CLAY; WILLIAM E. MURRAY; MURRAY, PATTERSON & SHARPE, or the successors thereof; DRYFOOS & COMPANY, or the successors thereof; McAFEE & TAFT, INC., a professional corporation, successor to McAfee, Taft, Mark, Bond, Rucks & Woodruff; K&E, INC., a professional corporation, successor to Kothe & Eagleton, Inc., and its predecessor firm Kothe & Eagleton, Inc.; SIMPSON, THACHER & BARTLETT; HARRY HELLER; WILLIAM BLUM; RICHARD GANONG; WILLIAM LEWIS; LEWIS & GANONG; RICHARD A. GANONG, INC.; KENT KLINEMAN; F. CONRAD GREER; RECOVERY RESOURCES CORPORATION; HOME-STAKE PRODUCTION COMPANY; 1969 HOME-STAKE PROGRAM OPERATING CORPORATION; 1970 HOME-STAKE PROGRAM OPERATING CORPORATION; 1971 HOME-STAKE PROGRAM OPERATING CORPORATION; 1972 HOME-STAKE PROGRAM OPERATING CORPORATION; THOMAS THORNER, 1969 Class Representative; WILLIAM GROHNE, 1970 Class Representative; BEATRICE B. WARREN, Personal Representative of the Estate of Beverly Warren, 1971 Class Representative; and JOSEPH C. BENNETT, 1972 Class Representative,

Defendants.

Case No. 90-C-978 E

ORDER OF DISMISSAL

The Court has reviewed and considered the Stipulation of Dismissal filed by the parties

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and being fully advised in the premises, it is therefore

ORDERED that this action is dismissed with prejudice, each party to bear its own costs.

Dated: 10-27-93

for 
James O. Ellison
United States District Judge

OCT 29 1993

FILED

OCT 28 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

EAST CENTRAL OKLAHOMA ELECTRIC)
COOPERATIVE,)
)
Creditor,)
)
v.)
)
CREEK COUNTY WELL)
SERVICE, INC.,)
)
Debtor in possession.)

Case No. 93-C-819-E ✓

JUDGMENT

This matter came on for jury trial before the Honorable Jeffrey S. Wolfe, Magistrate for the Northern District of Oklahoma, on the 12th day of October, 1993. The evidence being heard, and after deliberation by the jury, the jury returned the following verdict on the 15th day of October, 1993:

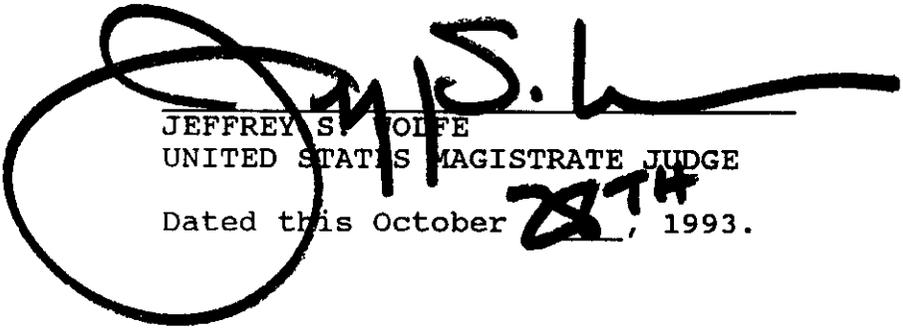
We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find as follows:

1. East Central Oklahoma Electric Cooperative's degree of negligence is 25%.
2. Creek County Well Services, Inc.'s degree of negligence is 75%.

The Verdict was accepted by the Honorable Court, over the objection of Creek County Well Service, Inc., and the jury was thereafter released.

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment be entered and the apportionment of liability against each party be as found by the jury verdict rendered herein on the 15th day of October.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE
Dated this October 28TH, 1993.

Approved:


Richard Dan Wagner, Attorney
I. Michele Drummond, Attorney
East Central Oklahoma Electric Cooperative


Joseph F. Glass, Attorney
Marthanda J. Beckworth, Attorney
Creek County Well Services, Inc.

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

FILED

OCT 28 1993

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

STATE FARM FIRE & CASUALTY)
COMPANY,)
)
Plaintiff,)
)
vs.)
)
THOMAS DUVALL, JANIE DOE, a)
minor, by and through her next)
friend, JANE DOE, and JANE DOE)
individually,)
)
Defendants.)

Case No. 93-C-259-B

O R D E R

Now before the Court, for its consideration, is the Plaintiff State Farm Fire & Casualty Company's (State Farm) Motion for Summary Judgment (Docket #9) filed on August 5, 1993.

I. Undisputed Facts

The Does, a mother and her daughter, filed a civil lawsuit against Thomas Duvall (Duvall) in Tulsa County District Court (state court action) on September 25, 1992, arising out of an alleged series of sexual encounters between Duvall and Janie Doe, a minor child. In the state court action, the Does allege that Duvall "did intentionally sexually molest and abuse" Janie Doe. The four causes of action alleged against Duvall in the state court action are: 1) Negligent Infliction of Emotional Distress; 2) Tort of Outrage (Intentional Infliction of Emotional Distress); 3) Negligence; and, 4) Assault.

At the time of the alleged instances of sexual abuse, Duvall was insured by the Plaintiff, State Farm, through a homeowner's

C. M. Lawrence

insurance policy (the policy). State Farm has filed the above-styled action seeking a declaratory judgment regarding State Farm's obligations under the policy with respect to the state court action. The policy insures Duvall against bodily injury or property damage caused by an occurrence as defined by the policy. The policy also contains an "intentional acts exclusion". The pertinent provisions of the policy are as follows:

SECTION II - LIABILITY COVERAGE

COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:

1. pay up to our limit of liability for the damage for which the insured is legally liable; and
2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the occurrence, equals our limit of liability.

* * *

SECTION II - EXCLUSIONS

1. Coverage L and Coverage M do not apply to:
 - a. bodily injury or property damage;
 - (1) which is either expected or intended by an insured; or

(2) to any person or property which is the result of willful and malicious act of an insured;

Duvall sought coverage under Section II Coverage L upon being sued in state court by the Does. State Farm sent letters to Duvall dated July 21, 1992 and August 25, 1992. These letters discussed various issues regarding the allegations in the state court action and each letter contained the following reservation:

For these reasons and for other reasons which may become known the investigation of this incident by State Farm Fire and Casualty Company on your behalf is not to be considered a waiver of such policy defense or of any policy defense which may be involved in this case.

State Farm also sent a letter dated October 2, 1992. This letter also discussed various issues involved in the case but did not contain the above quoted language. Instead, this letter stated:

We wish to call your attention to the fact that we specifically reserve our right to deny coverage to you (and anyone claiming coverage under the policy), for the following reasons:

1. It is questionable whether the bodily injury was caused by an occurrence as defined in the policy.
2. It is questionable whether the bodily injury was either expected or intended by an insured or whether there was bodily injury to any person which was the result of willful and malicious acts of an Insured.

The Plaintiff filed the instant declaratory judgment action, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201,

in this Court on March 24, 1993. The Plaintiff seeks a declaration from this Court that the policy does not provide coverage for any of the claims asserted by Janie Doe and Jane Doe against Thomas Duvall in the state court action. The Plaintiff further seeks a declaration that it has no duty to provide a defense to Duvall in the state court action.

II. The Standard of Fed.R.Civ.P. 56 Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable

doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative." . . .

A movant is not required to provide evidence negating an opponent's claim . . . Rather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). Id. at 1521.

III. Legal Analysis and Conclusion

Plaintiff alleges that the policy does not extend coverage to Duvall because of the Section II Exclusion which provides that personal liability coverage "does not apply to: bodily injury or property damage which is either expected or intended by an insured."

"In order for an intentional acts exclusion to result in a denial of coverage in Oklahoma, two elements must be shown: 1) the insured must have intended to commit the act and 2) the insured must intend to commit the injury or harm which resulted." Allstate

Ins. Co. v. Thomas, 684 F.Supp. 1056, 1058 (W.D.Okl. 1988), citing, Lumbermens Mutual Ins. v. Blackburn, 477 P.2d 62 (Okl. 1970). In Thomas, the court granted summary judgment and declared that the insurer was not obligated to defend or indemnify its insured in a personal injury action arising out of the insured's sexual molestation of a child. The Thomas court concluded as a matter of law that an allegation of child molestation satisfies both elements necessary for denial of coverage pursuant to the intentional acts exclusion. Id. at 1060.

The four causes of action against Duvall in the state court action arise out of the alleged intentional molestation of Janie Doe. The Section II Exclusions provision of the policy provides that the coverage does not apply to "bodily injury or property damage: 1) which is either expected or intended by an insured; or 2) to any person or property which is the result of willful and malicious acts of an insured." As mentioned above, in order for this intentional act exclusion to apply the insured must have intended to commit the act and must intend to commit the injury or harm which resulted. These conditions are satisfied as a matter of law in the instant case because the state court action arises out of an alleged child molestation. Id. The Court finds the Thomas analysis persuasive and concludes the Section II Exclusion for intentional acts applies to the state court child molestation claims and therefore Plaintiff has no duty to indemnify Duvall or to provide him a defense in the state court action.

Defendant Duvall contends that the intentional acts exclusion

does not relieve State Farm of its duty to defend him in the state action. He relies on the general rule as stated by Linebaugh v. Berdish, 376 N.W.2d 400 (Mich. App. 1985), as follows:

The duty of the insurer to defend the insured depends upon the allegations and the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. In case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. (citations omitted) Id. at 405-6.

All of the causes of action against Duvall arise out of the alleged sexual molestation of Janie Doe. As determined above, sexual molestation of a child satisfies the intentional acts exclusion in the subject policy. Therefore, there are no theories of recovery that "even arguably come within the policy coverage" and thus the Plaintiff does not have a duty to defend Duvall.

Duvall also contends that State Farm has a duty to defend because the policy does not clearly state that the intentional acts exclusion applies to the duty to defend. In Conner v. Transamerica Ins. Co., 496 P.2d 770 (Okl. 1972), the Oklahoma Supreme Court stated that if an insurer wishes to protect itself from a duty to

defend against a claim for which, according to an exclusion in the policy, it would have no duty to indemnify, it should clearly state that the exclusion clause applies to both the duty to defend and the duty to pay. See also, Gray v. Zurich Ins. Co., 65 Cal.2d 263, 419 P.2d 168, 54 Cal.Rptr. 104 (Cal. 1966).

In the instant case, the policy clearly sets forth the Plaintiff's duties and the applicability of the intentional acts exclusion to these duties. The duty to defend is set forth in Section II Coverage L of the policy. The intentional acts exclusion specifically provides that "Coverage L & Coverage M do not apply to: bodily injury or property damage: 1) which is either expected or intended by an insured." The Court concludes the intentional acts exclusion "clearly" applies to the Plaintiff's duty to defend.

Duvall also contends the sufficiency of Plaintiff's reservation of rights as to its duty to defend is an unresolved factual issue. The Plaintiff in its July 21, 1992, and August 25, 1992, letters stated that "the continued investigation of this incident by State Farm Fire and Casualty Company on your behalf is not to be considered a waiver of such policy defense or of any policy defense which may be involved in this case." Duvall points out, however, that the October 2, 1992, letter contained no such provision.

The Court finds that State Farm did not waive its reservation of rights simply because it did not include this general reservation provision in the October 2, 1993, letter. The previous

letters clearly allow for future denial of payment and defense. It is also clear from the previous letters that the continued investigation by State Farm was not intended to constitute a waiver. More importantly, the October 2, 1992, letter specifically states that by initiating the defense of its insured, State Farm does not waive that policy defense.¹ As a result, the Court finds that State Farm did not waive its right to withhold coverage and defense of Duvall in the state court action.

In response to the Plaintiff's motion for summary judgment, the Does contend that any characterization of their claims against Duvall in the state court action are premature. There is no dispute in this case concerning the "character" of the Does' claims against Duvall. The claims and alternative theories of recovery all arise out of the alleged intentional sexual molestation of a minor by Duvall. In fact, the Does' specifically allege in their response brief that "Duvall clearly intended to sexually molest Defendant

¹ The October 2, 1992, letter states:

We wish to call your attention to the fact that we specifically reserve our right to deny coverage to you (and anyone claiming coverage under the policy), for the following reasons:

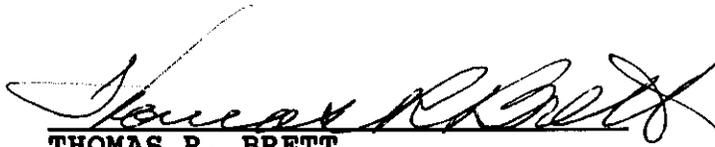
1. It is questionable whether the bodily injury was caused by an occurrence as defined in the policy.
2. It is questionable whether the bodily injury was either expected or intended by an insured or whether there was bodily injury to any person which was the result of willful and malicious acts of an Insured.

Janie Doe." Consequently, pursuant to Thomas, the intentional acts exclusion in the policy applies to all of the state court claims. Therefore, it is not premature for this court to issue a declaratory judgment.

The Does attempt to distinguish Thomas on the grounds that the insured in Thomas was convicted of child molestation and the insured in this case has not been criminally charged. However, the Court finds this to be a distinction without a difference. In Thomas, as in the instant case, the insured sought coverage for damages resulting from alleged sexual molestation of a third party by the insured. The character of the allegations and the language of the policy are unaffected by the existence or result of criminal charges against the insured.

For the above stated reasons, the Plaintiff's Motion for Summary Judgment should be and is hereby GRANTED and a judgment will be entered simultaneously herewith.

IT IS SO ORDERED THIS 28th DAY OF OCTOBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE OCT 29 1993

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

FILED

OCT 28 1993

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

STATE FARM FIRE & CASUALTY)
COMPANY,)
)
Plaintiff,)
)
vs.)
)
THOMAS DUVALL, JANIE DOE, a)
minor, by and through her next)
friend, JANE DOE, and JANE DOE)
individually,)
)
Defendants.)

Case No. 93-C-259-B

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, State Farm Fire & Casualty Company, and against the Defendants, Thomas Duvall, Janie Doe and Jane Doe. The Court declares that State Farm Fire and Casualty has no duty pursuant to its contract of insurance (Policy No. 36-13-0360-9) with Thomas Duvall to provide coverage for any of the claims asserted by Janie Doe and Jane Doe against Thomas Duvall in the state court action filed September 25, 1992, in Tulsa County District Court (Case No. CJ-92-04560) and further that State Farm Fire & Casualty has no duty to provide a defense to Thomas Duvall in that action. Costs are assessed against the Defendant if timely applied for pursuant to Local Rule 6 and each party is to pay its own respective attorneys' fees.

CLM

Dated, this 28th day of October, 1993.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 28 1993

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

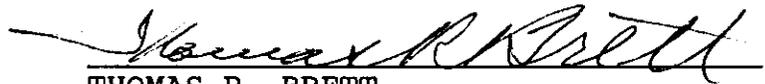
NANCY L. TRENERRY,)
)
Plaintiff,)
)
vs.)
)
INTERNAL REVENUE SERVICE,)
)
Defendant.)

Case No. 90-C-444-B

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiff's Cross-Motion for Partial Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, Nancy Trenerry, and against the Defendant, Internal Revenue Service, for the amount of \$16.35. Costs are assessed against the Defendant if timely applied for pursuant to Local Rule 6 and each party is to pay its own respective attorneys' fees.

DATED this 28th day of October, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

clm

OCT 29 1993
FILED

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

OCT 28 1993

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

NANCY L. TRENERRY,)
)
 Plaintiff,)
)
 vs.)
)
 INTERNAL REVENUE SERVICE,)
)
 Defendant.)

Case No. 90-C-444-B

O R D E R

Now before the Court are the following motions: Defendant's Motion for Summary Judgment on Remand¹ (Docket #41), Plaintiff's Cross Motion for Partial Summary Judgment With Respect To Her Tenth Cause of Action (Docket #62), Plaintiff's Motion for Leave to Supplement Plaintiff's Complaint and to Seal the Records in this Case (Docket #65), Plaintiff's Motion for Leave to File First Amended Supplement to Plaintiff's Complaint and to Seal the Records in this Case (Docket #68) and Plaintiff's Cross-Motion for Partial Summary Judgment on Remand for Refund of Improper Charges; Costs of Litigation and Production of Documents Responsive to Plaintiff's Third Cause of Action (Docket #54). The Court held hearings on the pending motions August 12, 1993, and September 10, 1993. Both parties were subsequently permitted to file supplemental briefs on the issues remaining in dispute.

Plaintiff's Tenth Request

The parties agreed at the August 12, 1993, hearing that the only claim still in dispute from Plaintiff's original complaint was

¹ The Tenth Circuit Court of Appeals remanded this case by Order and Judgment filed in this Court March 25, 1993.

Claw

her tenth FOIA request. Both parties seek summary judgment on this claim/request.

Plaintiff's tenth request refers to her April 16, 1990, request to the Internal Revenue Service Center in Austin, Texas in which she sought, for years 1981 through 1988, copies of the records of assessment pursuant to 26 U.S.C. §6203, the summary records of assessment signed by an assessment officer with the supporting records pursuant to 26 C.F.R. §301.6203-1, and the delegations and redelegations of authority with respect to assessment records. The IRS responded to Plaintiff's request by providing her with Forms 4340, Certificates of Assessment and Payments for tax years 1981 and 1982, RACS Report-006 (the computer generated version of Form 23C), Delegation Orders AUSC 49 and 59 relating to preparation of these forms and an Individual Master Tax File for tax years 1981 through 1988.

This Court's Order of January 7, 1992, (Docket #26) concluded that the documents produced by the IRS satisfied the Plaintiff's request and granted the Defendant's Motion for Summary Judgment. The Circuit Court of Appeals concluded that the declaration of Gerard Gallick, attached to Defendant's motion, was conclusory and not sufficiently detailed to permit the Court to determine whether the documents generally satisfied Plaintiff's request. On this basis, the Circuit Court of Appeals remanded the matter for further proceedings.

Upon remand from the Circuit Court of Appeals, the Defendant filed a new motion for summary judgment and attached the

Declaration of Peter K. Reilly ("Reilly"). The Defendant also attached copies of the documents it had provided the Plaintiff in response to her request. (See exhibits to Reilly's declaration). Reilly's declaration details the search the IRS undertook in response to the Plaintiff's request as well as the source and contents of each of the documents discovered (Reilly declaration p. 22-26). Reilly also states that all responsive documents uncovered by the Defendant's search have been provided to the Plaintiff.

Plaintiff continues to assert that the IRS has failed to conduct a "reasonable" search for responsive records and has failed to provide the "supporting records" required by Treasury Regulation 301.6203-1.

The Circuit Court of Appeals stated the law regarding an agency's burden in seeking summary judgment in a FOIA case as follows:

Summary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and inferences to be drawn from them are construed in the light most favorable to the FOIA requester. Weisberg v. U.S. Department of Justice, 705 F.2d 1344, 1350 (D.C.Cir. 1983). In order to discharge this burden, the agency "must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." National Cable Television Ass'n, Inc. v. Federal Communications Comm'n, 479 F.2d 183, 186 (D.C.Cir. 1973). The adequacy of an agency's search for requested documents is judged by a standard of reasonableness, i.e., "the agency must show beyond material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg, 705 F.2d at 1351. But

the search need only be reasonable; it does not have to be exhaustive. See, e.g., Shaw v. U.S. Department of State, 559 F.Supp. 1053,1057 (D.D.C. 1983). An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith. Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C.Cir. 1978) cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980).

Trenergy v. Department of Treasury, No. 92-5053, p.5 (10th Cir., February 5, 1993) (quoting Miller v. United States Dep't of State, 779 F.2d 1378,1382-83 (8th Cir. 1985)).

After examining the facts in a light most favorable to the Plaintiff, the Court concludes the Defendant has fully discharged its duty under FOIA by conducting a reasonable search for records responsive to Plaintiff's request and producing all relevant "supporting records" that were discovered. The Certificates of Assessments and Payments and the "source documents" provided to the Plaintiff provide all the specific information required by I.R.C. §6203 and Treasury Regulation §301.6203-1, and in combination with the other records produced by the Defendant, satisfy Plaintiff's tenth request. For these reasons, Defendant's Motion for Summary Judgment on Remand (Docket #41) is hereby GRANTED and Plaintiff's Cross Motion for Partial Summary Judgment With Respect To Her Tenth Cause of Action (Docket #62) is hereby DENIED.

Motions to Dismiss and to Seal the Records

Plaintiff seeks to amend her complaint to add an eleventh cause of action for "wrongful disclosure" pursuant to 26 U.S.C. §§6103 and 7431. Plaintiff asserts that the Defendant has made

"unauthorized disclosures of plaintiff's return information" by referring to the Plaintiff in various pleadings as a "tax protestor." Plaintiff also contends her records are being coded to identify her as an "illegal tax protestor."² Plaintiff seeks actual and punitive damages for these disclosures. Further, based on the fact that these alleged "unauthorized disclosures" are contained in pleadings which are public record, Plaintiff seeks to have this case sealed.

The decision to grant or deny leave to file a supplemental pleading is a matter left to the discretion of the district court. Gillihan v. Shillinger, 872 F.2d 935 (10th Cir. 1989). In the instant case, Plaintiff's motion to amend the pleadings is untimely,³ seeks to add a new unrelated cause of action and appears on its face to be frivolous. If Plaintiff insists on pressing this claim, it should more properly be brought in a separate action against the United States.

The pleadings containing the alleged "unauthorized disclosures" were filed, and thus made public record, on various dates from May 22, 1991, through August 25, 1993. The Court concludes Plaintiff has failed to establish sufficient prejudice to warrant sealing these pleadings after they have been part of the public record for a considerable period of time.

For these reasons, Plaintiff's Motion for Leave to Supplement

² Plaintiff points out that her Individual Master File is coded "TC 148 HOLD IS P."

³ The first alleged "unauthorized disclosure" was contained in a pleading filed May 22, 1991.

Plaintiff's Complaint and to Seal the Records in this Case (Docket #65) and Plaintiff's Motion for Leave to File First Amended Supplement to Plaintiff's Complaint and to Seal the Records in this Case (Docket #68) are hereby DENIED.

Plaintiff's Cross-Motion for Partial Summary Judgment

The Court has for decision Plaintiff's Cross-Motion for Partial Summary Judgment on Remand for Refund of Improper Charges; Costs of Litigation and Production of Documents Responsive to Plaintiff's Third Cause of Action (Docket #54).

Plaintiff first contends she is entitled to partial summary judgment on her claim for a refund of \$50.35 for charges she alleged were improperly made by the Defendant, in regard to Plaintiff's first cause of action. The Court concludes Plaintiff is entitled to a refund of \$16.35, rather than the \$50.35 sought by Plaintiff.

Plaintiff also seeks summary judgment on her claim for a refund of \$53.00 for charges she alleges were improperly made by the Defendant, in regard to Plaintiff's Tenth Cause of Action. The Court concludes the non-refundable \$53.00 charge for copying and providing documents responsive to Plaintiff's tenth request was reasonable and not contrary to I.R.S. regulations. (OMB Fee Guidelines, 52 Fed.Reg. at 10,017 (1987)). The Court further concludes these charges were not arbitrary and capricious. 5 U.S.C. §706 (1988) and Media Access Project v. FCC, 883 F.2d 1063, 1071 (D.C.Cir. 1989).

Plaintiff further asserts she is entitled to summary judgment

on her claim to recover "the litigation costs of this action." Plaintiff's claim for litigation costs pursuant to 5 U.S.C. §552(a)(4)(E) is hereby DENIED. While Plaintiff may be considered eligible for reimbursement of costs, no such entitlement is appropriate herein.

Plaintiff's FOIA requests were basically personal to her regarding her own self interest and were of no general public interest. Aviation Data Service v. Federal Aviation Administration, 687 F.2d 1319, 1321 (10th Cir. 1982); Polynesian Cultural Center, Inc. v. NLRB, 600 F.2d 1327, 1330 (9th Cir. 1979); Chamberlain v. Kurtz, 589 F.2d 827, 842-843 (5th Cir. 1979) and Tax Analysts v. United States Dep't. of Justice, 965 F.2d 1092 (D.C.Cir. 1992). Further, Plaintiff has not itemized her alleged costs. While apparently no attorney fee is being claimed, as a *pro se* litigant there is no entitlement to such. Burke v. Department of Justice, 432 F.Supp. 251, 253 (D.Kan. 1976), aff'd, 559 F.2d 1182 (10th Cir. 1977).

Plaintiff's motion also sought an order directing the Defendant to release the remaining documents responsive to her Third Cause of Action. The parties agreed at the August 12, 1993, hearing that this issue had been resolved and thus to this extent, Plaintiff's motion is moot.

In summary, Defendant's Motion for Summary Judgment on Remand (Docket #41) is hereby GRANTED; Plaintiff's Cross Motion for Partial Summary Judgment With Respect To Her Tenth Cause of Action (Docket #62) is hereby DENIED; Plaintiff's Motion for Leave to

Supplement Plaintiff's Complaint and to Seal the Records in this Case (Docket #65) is hereby DENIED; Plaintiff's Motion for Leave to File First Amended Supplement to Plaintiff's Complaint and to Seal the Records in this Case (Docket #68) is hereby DENIED; and Plaintiff's Cross-Motion for Partial Summary Judgment on Remand for Refund of Improper Charges; Costs of Litigation and Production of Documents Responsive to Plaintiff's Third Cause of Action (Docket #54) is hereby GRANTED in part and DENIED in part as set out herein.

IT IS SO ORDERED THIS 28th DAY OF OCTOBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE OCT 29 1993

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

FRANKLIN McELWEE,
Petitioner,
vs.
JACK COWLEY,
Respondent.

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)
)
)
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No. 92-C-1068-B ✓

FILED
OCT 28 1993

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

ORDER

Before the Court is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Five days before trial, Petitioner's counsel orally moved to determine Petitioner's competency. At a pre-hearing, Petitioner testified he understood the nature of the charges. He also denied committing the offenses and understanding why the charges were filed against him. During argument, counsel stressed that Petitioner could not remember "the incident that gave rise to the charges brought against him." The trial court denied Petitioner's request for evaluation, concluding Petitioner had introduced insufficient evidence to raise a doubt as to his competency. (Competency hrg. tr. at 2, 4, 6-8, 12-15, 17-18.) The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction for Rape and Incest, finding there was competent evidence to support the trial court's holding as to Petitioner's competency.

In May 1992, Petitioner filed an application for post-conviction relief in the state district court. He reasserted that the competency hearing violated Okla. Stat. tit. 22, § 1175.3 and

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was insufficient to properly determine his competency. Petitioner raised for the first time (1) that the prosecutor's closing argument was prejudicial because it stressed the necessity of punishment and argued for a sentence which exceeded Petitioner's life expectancy; and (2) Petitioner's trial and appellate counsels rendered ineffective assistance by respectively failing to object to the prosecutor's closing argument and by failing to raise the issues on direct appeal. The state district court denied Petitioner's application and held that Petitioner had failed to show that he had inadequately raised his competency to stand trial on direct appeal, and that he had a good reason for failing to previously raise his claims regarding the closing argument and the effective assistance of his trial counsel. The court also held that Petitioner's trial and appellate counsel provided effective assistance of counsel. The Oklahoma Court of Criminal Appeals affirmed on the basis of a state procedural default.

In the present petition, Petitioner reasserts his claims regarding his competency hearing (ground I), the prosecutor's closing argument (grounds III and IV), and the ineffective assistance of his trial and appellate counsel (grounds V(A) and V(B)). Petitioner also argues that his appellate counsel's ineffective assistance presents sufficient cause to excuse his procedural default (ground II).

Respondent argues that the trial court did not abuse its discretion in failing to order a mental examination or to hold a post-examination hearing because Petitioner did not present

sufficient evidence to raise a doubt as to his competency. Respondent further argues that Petitioner's grounds Three, Four, and Five (A) are procedurally barred, and that his appellate counsel provided effective assistance. Petitioner responds that a state procedural bar does not apply to fundamental errors such as the ones in the prosecutor's closing argument. As to his incompetency claim, Petitioner argues that the trial court failed to properly interrogate him.

DISCUSSION

A. Incompetency

Okla. Stat. Ann. tit. 22, § 1175.2(A) (West 1986) provides that the defense attorney may raise the competency of an accused by filing an application for determination of competency. In addition to an allegation of incompetency, the application "shall state facts sufficient to raise a doubt as to the competency of the person." Id. If the court finds there is no doubt as to the competency of the person, following a hearing, the court "shall order the criminal proceedings to resume." Okla. Stat. Ann. tit. 22, § 1175.3(C) (West 1986). On the other hand, should the court conclude there is a doubt as to the competency of the person, "it shall order the person to be examined by doctors or appropriate technicians." Okla. Stat. Ann. tit. 22, § 1175.3(D).

This Court must presume the state court's factual findings correct under 28 U.S.C. § 2254(d). See Sumner v. Mata, 449 U.S. 539, 549 (1981). Petitioner did not file a written application for competency hearing with the proper allegations as required by

section 1175.2(A). Nor did he present sufficient evidence to raise a doubt as to his competency. The evidence indicated that Petitioner could consult with his lawyer with a reasonable degree of understanding, and that he had rational as well as factual understanding of the proceedings against him. See Campbell v. State, 636 P.2d 352, 355 (Okla. Crim. App. 1981), cert. denied, 460 U.S. 1011 (1983). Accordingly, the Court concludes that Petitioner was not entitled to an evaluation or a post-examination hearing on the issue of his competency.

B. Procedural Bar and Ineffective-Assistance Claim

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a

petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991).

Petitioner does not dispute that he did not raise grounds Three, Four, and Five (A) on direct appeal and that the decision of the Oklahoma Court of Criminal Appeals rested upon a state procedural default. Petitioner argues that his appellate counsel's failure to raise grounds Three, Four, and Five (A) on direct appeal constitutes sufficient cause to excuse his default. To establish cause based on ineffective assistance, a petitioner must show that counsel performed deficiently, and that counsel's deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687 (1984). Deficient performance requires a petitioner to establish that counsel performed below the level expected from a reasonably competent attorney. Id. at 687-88. A court must "judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The prejudice component requires a petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 113 S. Ct. 838, 842-44 (1993) (holding counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

Even if Petitioner's appellate counsel performed deficiently in failing to raise Petitioner's claims, the Court concludes that Petitioner would not be prejudiced. Petitioner's claims lack merit. The prosecutor's closing argument was not objectionable. The prosecutor properly mentioned different terms of years as possible sentencing options and directed the jury to base its assessment of punishment on an examination of the evidence. (Trial tr. Vol. II at 159-60.) Accordingly, Petitioner has not established ineffective assistance of appellate counsel or cause and prejudice to excuse his procedural default. Nor does this case present one of those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey, 111 S. Ct. at 1470.

ACCORDINGLY, the petition for a writ of habeas corpus [docket #1] is hereby **denied** and the above captioned case is **dismissed**.

SO ORDERED THIS 27 day of Oct, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

OCT 28 1993

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

K&E, INC.,
Plaintiff,

vs.

HOME-STAKE PRODUCTION COMPANY an Oklahoma Corporation; RECOVERY RESOURCES CORPORATION, an Oklahoma Corporation (successor to Home-Stake Production Company); HOME-STAKE 1971 PROGRAM OPERATING CORPORATION an Oklahoma Corporation; ROBERT S. TRIPPET; FRANK E. SIMS; JOHN DOE, Executor or Representative of the Estate of JOHN T. LENOIR, deceased; THOMAS A. LANDRITH; J. D. METCALFE; ELIZABETH COTHRAN GUTELIUS, Representative of the Estate of H. B. GUTELIUS, deceased; CARL A. CLAY; RICHARD A. GANONG; WILLIAM D. LEWIS; LEWIS & GANONG, a partnership; WILLIAM E. MURRAY; McAFEE & TAFT, an Oklahoma Corporation; McAFEE, TAFT, MARK, BOND, RUCKS & WOODRUFF, a Partnership; SIMPSON THACHER & BARTLETT; HELLER; WILLIAM BLUM; WYNEMA ANNA CROSS, Executrix of the Estate of NORMAN C. CROSS, JR.; KENT KLINEMAN; and DRYFOOS & COMPANY,

Defendants.

FILED
OCT 27 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 90-C-976 E

ORDER OF DISMISSAL

The Court having reviewed and considered the Stipulation of Dismissal filed by the parties, now therefore,

IT IS ORDERED that this action is dismissed with prejudice, each party to bear its own costs.

Dated: 10-27-93

James O. Ellison
for James O. Ellison
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LAHOMA J. KUYKENDALL; AMOS
BURRIS, Tenant; AMY BURRIS,
Tenant; LARRY FUGATE, Tenant;
JANET DAVIS FUGATE, Tenant;
TOMMY BARGES, Tenant; PHYLLIS
BARGES, Tenant; COUNTY
TREASURER, Washington County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Washington
County, Oklahoma,

Defendants.

FILED

OCT 27 1993

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

CIVIL ACTION NO. 92-C-804-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 27 day
of October, 1993, upon the Motion of the Plaintiff, United
States of America, acting through the Small Business
Administration, for leave to enter a Deficiency Judgment. The
Plaintiff appears by Stephen C. Lewis, United States Attorney for
the Northern District of Oklahoma, through Peter Bernhardt,
Assistant United States Attorney, and the Defendant, **Lahoma J.
Kuykendall**, appears neither in person nor by counsel.

The Court being fully advised and having examined the
court file finds that copies of Plaintiff's Motion and Declaration
were mailed by first-class mail to Lahoma J. Kuykendall, c/o Lynne
Downing, Attorney-in-Fact, Route 1, Box 306, Wagoner, Oklahoma
74467.

The Court further finds that the amount of the Judgment rendered on April 13, 1993, in favor of the Plaintiff United States of America, and against the Defendant, **Lahoma J. Kuykendall**, with interest and costs to date of sale is \$182,857.76.

The Court further finds that the appraised value of the real property at the time of sale was \$75,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered April 13, 1993, for the sum of \$50,000.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 6th day of October, 1993.

The Court further finds that the Plaintiff, United States of America acting through the Small Business Administration, is accordingly entitled to a deficiency judgment against Defendant, **Lahoma J. Kuykendall**, as follows:

Principal Balance Plus Pre-Judgment Interest as of 04/13/93	\$180,613.64
Interest From Date of Judgment to Sale	1,767.64
Abstracting	105.00
Publication Fees of Notice of Sale	146.48
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$182,857.76
Less Credit of Appraised Value	- <u>75,000.00</u>
DEFICIENCY	\$107,857.76

plus interest on said deficiency judgment at the legal rate of 3.38 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America acting through the Small Business Administration have and recover from Defendant, **Lahoma J. Kuykendall**, a deficiency judgment in the amount of **\$107,857.76**, plus interest at the legal rate of 3.38 percent per annum on said deficiency judgment from date of judgment until paid.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

PB/css

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

DATE: 10/27/93

ATLANTIC RICHFIELD COMPANY,
Plaintiff,
vs.
AMERICAN AIRLINES, INC., et al.,
Defendants.

Case Nos. 89-C-868 B;
89-C-869 B;
90-C-859 B
(Consolidated)

AND CONSOLIDATED ACTIONS

AMERICAN AIRLINES, INC.; et al.,
Third-Party Plaintiffs,
vs.
BIG CABIN TRUCK PLAZA, INC., f/k/a
CHEROKEE TRUCK TERMINAL, INC., et al.
Third-Party Defendants.

FILED

OCT 27 1993

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

NOTICE OF DISMISSAL WITHOUT PREJUDICE
OF THIRD-PARTY DEFENDANT PRECISION IMPORTS, INC.

The Group I Defendants/Third-Party Plaintiffs American Airlines, Inc., et al., pursuant to and in accordance with Federal Rule of Civil Procedure 41(a) (1) hereby dismiss, without prejudice, their Third-Party Complaint against Third-Party Defendant Precision Imports, Inc.

CHARLES W. SHIPLEY, OBA No. 8182
DOUGLAS L. INHOFE, OBA No. 4550
MARK B. JENNINGS, OBA No. 10082

SHIPLEY, INHOFE & STRECKER
3600 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 582-1720

By 

Attorneys for Third-Party
Plaintiffs (GROUP I)

CERTIFICATE OF MAILING

I do hereby certify that on the 27th day of October, 1993, I deposited the above and foregoing instrument in the United States mail, first class, postage pre-paid to the following:

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Tulsa University
College of Law
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Tulsa, OK 74104

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Briggs, Patterson & Eaton
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Tulsa, OK 74104

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Sidley & Austin
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Michael D. Graves, Esq.
Claire V. Eagan, Esq.
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Tulsa, OK 74103

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David M. Thompson, Esq.
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Robert F. Morgan, Jr.
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Oklahoma City, OK 73118

James Hodgens
301 W. Main
Stroud, OK 74079

James L. Hargrove
P. O. Box 31
El Dorado, KS 67042-0031



FILED
OCT 28 1993
NICHOLAS LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLA.

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

KENNETH TATHAM)
)
)
Plaintiff,)
)
vs.)
)
UNITED STATES POSTAL SERVICE,)
NATIONAL RURAL LETTER CARRIERS)
ASSOCIATION, and OKLAHOMA RURAL)
LETTER CARRIERS ASSOCIATION,)
)
Defendants.)

No. 92-C-1151-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants Motions for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, United States Postal Service, National Rural Letter Carriers Association, and Oklahoma Rural Letter Carriers Association, and against the Plaintiff, Kenneth Tatham. Plaintiff shall take nothing of his 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 28th day of October, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
OCT 28 93

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

KENNETH TATHAM)
)
)
 Plaintiff,)
)
)
 vs.)
)
)
 UNITED STATES POSTAL SERVICE,)
)
)
 NATIONAL RURAL LETTER CARRIERS)
)
)
 ASSOCIATION, and OKLAHOMA RURAL)
)
)
 LETTER CARRIERS ASSOCIATION,)
)
)
 Defendants.)

Case No. 92-C-1151-B

O R D E R

Now before the Court is the motion for summary judgment (docket #31) of Defendant United States Postal Service and the joint motion to dismiss, or in the alternative, motion for summary judgment (docket #28) of Defendants National Rural Letter Carriers Association and Oklahoma Rural Letter Carriers Association.

Undisputed Facts

Plaintiff Kenneth Tatham (Tatham) a rural letter carrier, was an employee with the United States Postal Service (Postal Service) when he was involved in an altercation with another employee, Randy Hornsby (Hornsby), a city letter carrier, on August 13, 1991. Plaintiff was not the aggressor in the altercation, but hit Hornsby several times, resulting in a facial fracture, cut lip and abrasions. Both Tatham and Hornsby were terminated as a result of the altercation.

Plaintiff was represented for the purposes of collective bargaining by the National Rural Letter Carriers' Association

(Rural Carriers).¹ Hornsby was represented for purposes of collective bargaining by the National Association of Letter Carriers, AFL-CIO (NALC). Both Rural Carriers and NALC have collective bargaining agreements with the Postal Service which provide for a multi-step grievance procedure which culminates in binding arbitration. Both Rural Carriers and NALC filed grievances on behalf of their respective members challenging the discharges.

Tatham's grievance was settled by Rural Carriers prior to binding arbitration, resulting in Tatham being reinstated to his former position, but not receiving back pay. This resulted in a seven month suspension without pay. The settlement was made without the knowledge or consent of Tatham. The settlement, while made prior to Hornsby's arbitration, was not "unsealed" until after Hornsby's arbitration.

Hornsby's grievance was pursued through arbitration. Arbitrator Irvin Sobel determined that the Postal Service had not proved that, on the day in question, Hornsby was potentially dangerous to himself or others, and therefore termination was inappropriate. He was reinstated to his former position, and received back pay for the entire time he was off work. Hornsby was then given a 90 day suspension without pay for his role in the altercation.

¹ Plaintiff contends that Oklahoma Rural Letter Carriers Association (Oklahoma Rural Carriers) is the agent for the Rural Carriers and is a proper defendant in this case. Defendants contend that Oklahoma Rural Carriers is not a party to the collective bargaining agreement and is not a proper party to the litigation. It is unnecessary to reach this issue because of the Court's disposition of the motions for summary judgment.

Tatham claims that the Defendant unions breached their duty of fair representation by settling his grievance without notice and waiving his right to back pay for the seven months he was off work after his termination. Plaintiff further claims that the Defendant unions breached their duty of fair representation by settling his grievance on terms that were less favorable than the terms of the decision of the arbitrator in the Hornsby grievance. He also claims that, by terminating him, the Postal Service violated the collective bargaining agreement.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

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

Defendants move for summary judgment, claiming that Plaintiff cannot meet his burden of proving that the unions breached their duty of fair representation. In bringing a direct judicial action to enforce the provisions of a collective bargaining agreement, the plaintiff must prove both that the union has breached its duty of fair representation to him in handling his grievance, and that his employer breached the collective bargaining agreement. DelCostello v. Teamsters, 462 U.S. 151, 163-65 (1983), Mock v. TG&Y Stores Co., 971 F.2d 522 (10th Cir. 1992).

An employee does not have an absolute right to insist upon having his grievance taken to arbitration. Vaca v. Sipes, 386 U.S. 171, 191 (1966). Thus, failure to take a grievance through arbitration is not enough, by itself to prove that the union breached its duty of fair representation. Id. at 192-193. Rather, the duty of fair representation is breached if the union's actions were either "arbitrary, discriminatory, or in bad faith." Id. at 190. The representation, in order to be a breach of the union's duty, must be so "far outside a wide range of reasonableness, that it is wholly 'irrational' or 'arbitrary.'" Air Line Pilots Association, International v. O'Neill, 111 S.Ct 1127, 1136 (1991) (citations omitted). Requiring that the representation be within "a wide range of reasonableness" takes into account the "strong policy favoring peaceful settlements of labor disputes" and "the importance of evaluating the rationality of a union's decision in the light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." Id.

Moreover, this test recognizes that a settlement is "not irrational simply because it turns out in retrospect to have been a bad settlement." Id.

The inquiry, then, is whether the settlement of Tatham's grievance was "within a wide range of reasonableness." Plaintiff submits that it was not, because it was made on terms less favorable than the disposition of Hornsby's claim, and because it was made without notice to him. Plaintiff's first contention is without merit. Hornsby's grievance was arbitrated after the settlement of Plaintiff's grievance. Moreover, there is no evidence that Hornsby struck any person in the altercation, whereas it is undisputed that Tatham struck Hornsby, causing substantial injury. In light of the different roles played by Tatham and Hornsby in the altercation, and the fact the union representative for Tatham did not have the results of the Hornsby arbitration when he settled Tatham's grievance, the Court concludes the fact the settlement resulted in Tatham receiving a more stringent punishment than Hornsby, does not mean the actions of the union were not within the "wide range of reasonableness."

The fact that Tatham was not consulted in this settlement does not affect this conclusion. Plaintiff provides no authority for his assertion that settlement of his claim without notice to him constitutes a breach of the duty of fair representation, and the court finds no legal support for that assertion. The Court concludes that it is not necessary to give notice to the employee in order for the representation to be reasonable, rational, and in

good faith.

The only evidence before the court is that the settlement was entered into out of concern that Plaintiff's role in the altercation could result in an arbitrator upholding the termination. The union representative reasoned that any settlement in which Tatham was reinstated would be in his best interest. In essence, the union representative made a judgment call with which Tatham disagrees. Mere disagreement with the result is not sufficient to find a breach of the duty of fair representation. O'Neill, 111 S.Ct. at 1136. The Court concludes there is no genuine dispute as to the fairness and reasonableness of the representation and therefore summary judgment is appropriate.

Accordingly, the motions for summary judgment of the Postal Service (docket #31) and the Rural Carriers and the Oklahoma Carriers (docket #28) should be and hereby are GRANTED.

IT IS SO ORDERED THIS 28th DAY OF OCTOBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 27 1993

OCT 26 1993

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

WILTEL, INC., a Delaware Corporation,

Plaintiff,

v.

NARCONON INTERNATIONAL,
a California Corporation,

Defendant.

Case No. 93-C-604-B

JUDGMENT

On this 26th day of October, 1993, this matter comes on before the Court for decision. The Court, having reviewed the pleadings and being fully advised in the premises, FINDS:

1. This Court has jurisdiction over the parties and the subject matter hereof.

2. Defendant, Narconon International, is liable to Plaintiff, WilTel, Inc., in the amount of \$69,297.64 for telecommunications services rendered.

3. By stipulation and pursuant to a settlement agreement, the parties have agreed to the entry of a Judgment in favor of WilTel, Inc. and against Narconon International in the amount of \$69,297.64 with post-judgment interest at the rate of 10% per annum until fully satisfied.

JUDGMENT IS HEREBY ENTERED in favor of WilTel, Inc. and against Narconon International in the amount of \$69,297.64, plus post-judgment interest from and after the date hereof at the rate of ten percent (10%) per annum until satisfied. Each party shall bear its own costs and attorneys' fees.

DATED this 26 day of ~~September~~ ^{October}, 1993.

S/ THOMAS R. BRETT

THOMAS R. BRETT,
United States District Judge

APPROVED AS TO FORM AND CONTENT:

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

By: Barbara L. Woltz
Barbara L. Woltz, OBA #12535
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172

ATTORNEYS FOR PLAINTIFF, WILTEL, INC.

CROWE & DUNLEVY

By: Harry A. Woods, Jr.
Harry A. Woods, Jr.
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102

ATTORNEYS FOR DEFENDANT, NARCONON
INTERNATIONAL

ENTERED ON DOCKET
OCT 27 1993
DATE

FILED

OCT 25 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

IN RE:)
)
VERN ODEAN LAING, M.D.,)
)
Debtor.)
)
VERN O. LAING,)
)
Appellant,)
)
v.)
)
LAWRENCE A. G. JOHNSON and)
DON BRADSHAW,)
)
Appellees.)

Bky. No. 92-00612-C

Adversary No. 92-0056-C

Case No. 92-C-997-B

ORDER

This order pertains to the appeal of the debtor, Vern O. Laing ("debtor") from the Order and Memorandum Opinion filed October 22, 1992 by the United States Bankruptcy Court for the Northern District of Oklahoma, granting the Motion for Summary Judgment filed by Lawrence A.G. Johnson and Don Bradshaw ("appellees") and denying the debtor's Counter-Motion for Summary Judgment after finding that the claim of the appellees was a nondischargeable debt.

Debtor filed petitions for four separate bankruptcy cases. In the first, a Chapter 7 filed in 1984, he was granted a discharge. In the second, a Chapter 13 filed in 1988, he dismissed the petition and no discharge was granted. His third bankruptcy was a Chapter 11 filed in 1988, and a plan was confirmed in the case providing that he "shall not be discharged of any of his pre-petition debts." The case was converted to Chapter 7 in February 1992 and remains open. No discharge will be granted, because the 1988 Chapter

clm

11 was filed within six years of debtor's 1984 discharge and because debtor's confirmed plan waived discharge. His fourth bankruptcy case is at issue here, a Chapter 7 filed on December 11, 1991, in Dallas, Texas, which was transferred to this venue on February 19, 1992. He will be granted a discharge in this case because it was filed more than six years after his previous 1984 discharge and no objections to discharge have been filed. The only question on appeal is whether the debt owed to appellees is nondischargeable and excepted from discharge.

The dispute between the parties and the debt owed to appellees arose in connection with their co-ownership interests in an airplane. During debtor's 1988 Chapter 11 case, the bankruptcy court determined that the amount of appellees' claim was \$29,666.00. The district court affirmed this decision, but the Tenth Circuit Court of Appeals reversed and determined the amount of appellees' claim to be \$65,550.42. On September 27, 1989, the bankruptcy court held a hearing on debtor's Fourth Amended Chapter 11 Plan. The appellees objected to confirmation of the plan because of the treatment of their claim. At that time, debtor agreed in open court that, if the appellees would accept the plan, he would agree that appellees' debt was nondischargeable at the present time and in any future Chapter 7. Based on this agreement, the appellees withdrew their objections to the plan. Debtor filed his Fifth Amended Chapter 11 Plan on September 28, 1989, which dealt with appellees' claim as follows:

As to the claim of (appellees), in open court the said creditors offered to withdraw all objections to the plan provided the Debtor waive a discharge as to the claim of (appellees) in any future bankruptcy pursuant to 11 U.S.C. § 727(a)(10). The Court fully advised the Debtor that he had an unqualified right to file a Chapter 7 bankruptcy when eligible and further advised the Debtor as to the consequences of waiving the discharge of said debt and his

95LL-181 (XV) 581-7756
 (918) 581-7796

NORTHERN DISTRICT OF OKLAHOMA

RICHARD M. LAWRENCE
 CLERK

UNITED STATES DISTRICT COURT
 OFFICE OF THE CLERK

agreement in open court not to seek the discharge of said debt in any future bankruptcy, notwithstanding the pending appeal by (appellees) regarding the partial denial of their claim, the Court, in approving said plan, makes the specific finding that the Debtor agreed in open court that said debt, in whatsoever amount to be [sic] ultimately be determined by the appeals court, is not a dischargeable debt, and the Debtor specifically waives any discharge as to the same, and the court specifically finds that said agreement and waiver was a conscious and informed judgment by the Debtor who was fully informed of the consequences of waiver of discharge of the (appellees') debt in any future bankruptcy that may be filed by the Debtor, and said debt, in the present amount of \$29,666.00 or as may be ultimately determined by the appellate courts, is hereby declared to be non-dischargeable.

In the Order Confirming Plan, the bankruptcy court determined that the Fifth Amended Chapter 11 Plan complied with § 1129(a) of the Bankruptcy Code and should be confirmed. The Order stated as follows regarding appellees' claim:

[I]f the Debtor does file for relief under Chapter 7 of the Bankruptcy Code prior to the completion of all payments set out in the Debtor's Fifth Amended Plan and prior to the payment in full of the finally allowed claim of [appellees], any remaining claim of [appellees] is hereby declared to be nondischargeable all pursuant to the specific terms set out in the Debtor's Fifth Amended Plan.

Following confirmation, Debtor was unable to follow his plan when the Tenth Circuit increased the amount of appellees' claim to \$65,550.00 and a divorce decree was entered in state court requiring him to pay a large sum of monthly alimony. His Chapter 11 case was therefore converted to a Chapter 7 case. On March 2, 1992, the appellees filed an adversary complaint requesting that the debt owed to them be declared nondischargeable under § 523(a)(4) and (6) of the Bankruptcy Code, and/or on the basis of judicial estoppel, collateral estoppel, res judicata, accord and satisfaction, compromise and settlement, and waiver, due to debtor's treatment of their claim in the confirmed

Chapter 11 Plan expressly declaring the appellees' debt to be nondischargeable and waiving

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its discharge in any subsequent bankruptcy.

This court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate view of bankruptcy rulings with respect to findings of fact. In re Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

The real issue before the court is whether the provisions of the Chapter 11 Plan and Order Confirming Plan in regard to the nondischargeability of appellees' debt are binding on debtor in a subsequent bankruptcy. This question requires the court to consider the effect of a confirmed plan.

Title 11 of the United States Code, § 1141, is entitled "Effect of confirmation."¹ The effect of confirmation under the plain language of § 1141(a) is to bind all parties to the terms of the plan. It binds not only creditors, but debtors as well. As noted by the bankruptcy court, a confirmed plan is a binding contract and is res judicata as to all issues decided. Stoll v. Gottlieb, 305 U.S. 165, 170-71, reh'g denied, 305 U.S. 675 (1938); Paul

¹ Section 1141(a) of Title 11 of the United States Code reads:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

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v. Monts, 906 F.2d 1468, 1472 (10th Cir. 1990). This is true even if the plan is not consummated, and the Chapter 11 is converted to Chapter 7. In re Blanton Smith Corp., 81 Bankr. 440 (M.D. Tenn. 1987). Numerous courts have held that once a plan is confirmed, a debtor or creditor may not assert rights that are inconsistent with its provisions. Republic Supply Company v. Shoaf, 815 F.2d 1046, 1050 (5th Cir. 1987) (regardless of whether provisions are inconsistent with bankruptcy laws or within the authority of the bankruptcy court, if they are "nonetheless included in the Plan, which was confirmed by the bankruptcy court without objection and was not appealed", they have binding effect); In re Stratford of Texas, Inc., 635 F.2d 365 (5th Cir. 1981); Miller v. Meinhard-Commercial Corp., 462 F.2d 358, 360 (5th Cir. 1972)("[a]n arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court, and any attempt by the parties or those in privity with them to relitigate any of the matters that were raised or could have been raised therein is barred under the doctrine res judicata").

Section 1141(d)(1) of the Bankruptcy Code provides that a confirmed Chapter 11 Plan works to discharge a debtor from all pre-confirmation debts "[e]xcept as otherwise provided in . . . the plan, or in the order confirming the plan" This section expressly contemplates that a Chapter 11 Plan may provide for special treatment of a claim relative to its dischargeability by insertion of a specific provision in the plan. Debtor's Fifth Plan specifically stated that the appellees' claim "is not a dischargeable debt, and Debtor specifically waives any discharge as to the same[.]" The plan was confirmed only after

debtor was fully informed of the consequences of inserting such a provision and expressly

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agreed to its inclusion. The Bankruptcy Code provides that both a debtor and his creditors are bound by the provisions of a confirmed plan, even in a subsequent bankruptcy, regardless of whether they create a harsh result. The bankruptcy court concluded that debtor expressly agreed to the terms of the plan which was confirmed and was bound by those terms and did not address the appellees' arguments based on res judicata, judicial or collateral estoppel, or waiver because § 1141 of the Bankruptcy Code in effect codifies these principles.

The bankruptcy court noted that there was no merit to debtor's assertion that § 727(a)(10) of the Bankruptcy Code, referred to in the paragraph of the confirmed plan dealing with the nondischargeability of appellees' debt, was inappropriate and rendered the entire paragraph void and unenforceable. While recognizing that § 727(a)(10) did not apply in a Chapter 11 or to the discharge of an individual debt, the bankruptcy court found that it was clear from the terms of the Plan that debtor intended to declare appellees' debt nondischargeable and the improper reference to § 727(a)(10) did not render the provisions concerning nondischargeability unenforceable.

The bankruptcy court also discussed debtor's argument that he could not agree to waive a discharge in a subsequent bankruptcy. The bankruptcy court found that the plan in this case did much more than waive a discharge in the future by providing that the appellees' debt "is not a dischargeable debt." Based on the express language in § 1141 of the Bankruptcy Code, the bankruptcy court rejected debtor's argument that no adversary proceeding was filed requesting a determination that the debt was nondischargeable. For

to be held nondischargeable, a creditor must file an adversary proceeding and prove
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the debt nondischargeable under § 523 of the Bankruptcy Code, but § 1142(d) contemplates that a plan may provide an alternative arrangement. The bankruptcy court noted that debtor had agreed that the appellees' debt was nondischargeable explicitly in the plan, so there was no reason for the appellees to file an adversary complaint to determine the nondischargeability of their claim.

Appellees ask this court to dismiss debtor's appeal because the issues were settled by "an offer to settle . . . by the payment of \$100,000 payable at \$1,000 per month and the dismissal of the appeal." (Brief In Support Of Motion To Dismiss Appeal, Dkt. #3). However, at the hearing on this appeal held on August 2, 1993, appellees' attorney admitted that the motion should be denied, because the affidavits submitted by debtor (attachments to Response to Motion to Dismiss Appeal, Dkt. #5) create a close factual dispute as to whether such a settlement was consummated and no written document was executed evidencing such a settlement. In Kennedy v. Hyde, 682 S.W.2d 525, 528 (Tex. 1984), the court found that Rule 11 of the Texas Rules of Civil Procedure provides that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing . . ." Appellees' Motion to Dismiss Appeal (Docket #2) is denied.

The court now turns to the merits of debtor's appeal. Ordinarily, this examination of whether the order approving debtor's fifth amended Chapter 11 Plan should be given preclusive effect under the doctrines of collateral estoppel or res judicata requires a determination on the merits. However, here the bankruptcy judge went through an extensive rights and obligation interrogation of debtor on the record before entering the

consent order confirming the Plan. The parties clearly agreed to the order knowingly and

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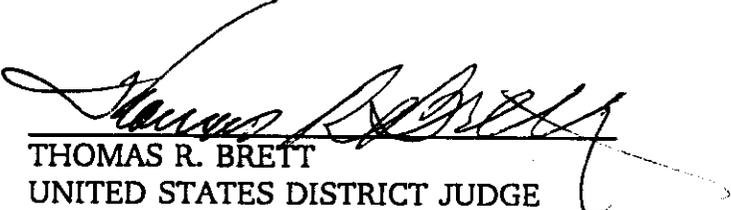
RICHARD M. LAWRENCE
CLERK

willingly. This court concurs with appellees' contention that the public policy denying preclusive effect to state court consent determinations of nondischargeability should not apply in a bankruptcy context, where a bankruptcy court has approved nondischargeability by agreement in approving a Chapter 11 Plan. While the court in In re Minor, 115 Bankr. 690, 693 (D. Colo. 1990), found that a debtor, pre-bankruptcy, cannot contract away the right to discharge a debt pursuant to a settlement in a state court proceeding, that case can be distinguished from the case at bar. Here the bankruptcy court approved the settlement, with all creditors appearing, while a state court action would not necessarily involve all of them.

The public policy with regard to the provision of a "fresh start" for debtors following bankruptcy cannot be precluded by a state court judgment, but is inapplicable to an agreement consented to by all parties in the context of a bankruptcy. The behavior of the appellees during this bankruptcy action has been based on debtor's agreement in the prior bankruptcy action that the debt at issue "is not a dischargeable debt."

The decision of the bankruptcy court in the Order and Memorandum Opinion filed October 22, 1992 is affirmed.

Dated this 25th day of Oct., 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 10-27-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 22 1993

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOWARD M. BOOS,

Defendant.

Case No. 93-C-832-B

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered of even date, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby

ORDERED, ADJUDGED and DECREED that Judgment be entered in favor of the plaintiff United States of America and against defendant Howard M. Boos as follows:

1. The UCC financing statements and "UCC-4 Non-Negotiable 'True Bill' Private Agreements" filed by defendant, Howard M. Boos, against Lonnie Hartline and Glen Phipps are declared to be invalid and null and void.

2. The defendant, Howard M. Boos, and pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, his officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are permanently enjoined from filing any additional liens of any nature or similar documents with the Oklahoma County Clerk's office or any state authority or from filing any other frivolous or vexatious pleadings or other documents of any nature whose purpose is to frustrate and

intimidate the Internal Revenue Service or its employees in carrying out their lawful activities.

3. The defendant, Howard M. Boos, is and, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, his officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise, are otherwise permanently enjoined from using the United States mails to send any documents intended to interfere with or otherwise hinder the effective enforcement of the internal revenue laws of the United States.

4. All costs of this action are assessed against defendant, Howard M. Boos, if timely applied for pursuant to Local Rule 6.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

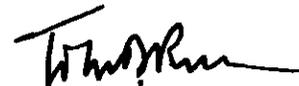
APPROVED AS TO FORM:

JOHN D. RUSSELL
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
(202) 514-8220

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PROPOSED JUDGMENT was served by United States mail, postage prepaid upon the following this 20th day of October, 1993:

Howard M. Boos
8937 South Garnett
Broken Arrow, OK 74012



JOHN D. RUSSELL

ENTERED ON DOCKET

DATE 10-27-93

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OCT 26 93

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK
Case No. 92-C-197-B ✓

COLUMBIAN CHEMICALS COMPANY)
)
Plaintiff,)
)
vs.)
)
OXY OIL AND GAS USA INC.,)
and CANADIANOXY OFFSHORE)
PRODUCTION CO., and)
OCCIDENTAL PETROLEUM CORPORATION,)
)
Defendants.)

ORDER

Now before the Court, for its consideration, is the Defendant's motion for summary judgment (Docket #35). Defendant requests summary judgment on each of Plaintiff's claims, arguing that Plaintiff's libel is barred because Defendants' statements are privileged, and that plaintiff's other claims are barred by the statute of limitations and a release executed in 1990. Also before the Court are the responses of both parties to this Court's Order of September 15, 1993, regarding federal subject matter jurisdiction.

Undisputed Facts

In 1980, Cities Service Company (Cities) formed and transferred certain assets (Transfer Transaction) to a subsidiary named Columbian Chemicals Company (CCC). CCC was sold to Consolidated Mining & Industries (Consolidated) (which later became CCC through a series of mergers) by a Stock Purchase Agreement

executed April 26, 1983. Occidental Petroleum Corporation (Occidental) guaranteed the obligations of Cities in the sale of CCC with a separate agreement dated April 26, 1983. Oxy Oil and Gas USA (OXY) and CanadianOxy Offshore Production Co. (CanadianOxy) are the successors to Cities. In August, 1988, CCC sued OXY and CanadianOxy for breach of warranties in the Stock Purchase Agreement and Occidental for breach of its guarantee. That matter was settled in 1990, and a settlement agreement was entered into by all parties. As a result of the settlement, a Waiver, Release, and Indemnification Agreement was also entered into by all parties.

In July, 1991, OXY received notice from the Environmental Protection Agency (EPA) that it had been determined to be a potentially responsible party (PRP) for the Skinner Landfill in Ohio. OXY was further notified that the EPA, pursuant to §104(e) of CERCLA, would pursue the PRPs for all costs expended by the EPA for investigating and remediating the Skinner Landfill. OXY was required to provide information regarding the Frederick H. Levey Company (Levey) and to inform the EPA whether OXY was the successor to Levey's liabilities. OXY responded in November, 1991, that Levey had been part of Cities' Columbia division and that certain Levey assets, including the Ohio facility, had been sold to Borden, Inc., in January, 1974. OXY further stated that "the liabilities of the Columbia Division (including those of Levey operations) were expressly assumed by Columbian Carbon [sic] Company in 1980." In January, 1992, the EPA notified CCC that it was a PRP for the Skinner Landfill.

In December, 1988, the New Jersey Department of Environmental Protection and Energy (NJDEPE) issued a Second Supplemental Directive determining that CCC was responsible for the discharge of certain hazardous substances at the JIS Industrial Service Company Landfill in New Jersey (JIS site). In December, 1989, NJDEPE issued a Directive II, again identifying CCC as a respondent for the JIS site. CCC responded in February, 1990 that it was not a PRP for the JIS site because it was not legally responsible for any environmental matters resulting from the activities of Levey or the Columbian division of Cities. In June, 1990, NJDEPE rejected CCC's contention that it was not a PRP for the JIS site. CanadianOxy, in December, 1991, sent a letter to a deputy Attorney General for New Jersey and stated that there was a dispute between CanadianOxy and CCC as to who should bear the responsibility and liability for the JIS site, and that it was CanadianOxy's position that CCC must bear the responsibility and liability for the site.

On February 13, 1992, CCC brought an action in state court for libel, injunctive relief on the libel claim, declaratory judgment on the rights of the parties under the Transfer Transaction, and breach of warranties and declaratory judgment on the Stock Purchase Agreement. The factual basis for Plaintiff's claims was Defendants' statements to the EPA and NJDEPE, although Plaintiff also alleges there is potential liability in a state environmental cleanup action in Louisiana, and an asbestos injury claim in Louisiana. Defendant removed the state court action, alleging that CCC's claims were founded on a right "arising under the laws of the

United States." This Court denied CCC's Motion to Remand, because CCC's "right to relief necessarily depends on resolution" of the contractual transfer of CERCLA liability, "a substantial question of federal law." While OXY and CanadianOxy's motion for summary judgment was under advisement, this court raised the additional jurisdictional question of whether the claim involving a "substantial question of federal law" was premature at this time in light of 42 U.S.C. §9613(h).

Legal Analysis

Before turning to Defendant's motion for summary judgment the Court must first determine whether it has subject matter jurisdiction over Plaintiff's claims. "[A] court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." Penteco Corporation v. Union Gas System, 929 F.2d 1519, 1521 (10th Cir. 1991) (citations omitted).

In the present case, Plaintiff's claims are for libel, injunctive relief, declaratory judgment, and breach of warranty. This court denied the Plaintiff's motion to remand because each of the claims had, as part of their factual basis, the allegation that Cities had not transferred any liability for the Levey operation to CCC in the Transfer Transaction or in the Stock Purchase Agreement with Consolidated, and therefore had not transferred liability for claims under CERCLA at the Skinner site.¹ This Court concluded

¹ Plaintiff's claims also relate to environmental sites in New Jersey and Louisiana, which are not governed by CERCLA, and to asbestos exposure in Louisiana.

Columbian's "right to relief necessarily depends on resolution" of the contractual transfer of CERCLA liability, "a substantial question of federal law." Order at p. 4.

Subsequently, the Court ordered the parties to respond to a question regarding the presence of subject matter jurisdiction in light of 42 U.S.C. §9613(h) and Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380 (8th Cir. 1989). Both parties argued that §9613(h) and Voluntary Purchasing Groups are distinguishable from this case.

Section 9613(h) provides as follows:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

- (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- (3) An action for reimbursement under section 9606(b)(2) of this title.
- (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

The question is whether CCC's claim insofar as it relates to the

Skinner site is a "challenge[] to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title..." Neither party alleges, nor does the court conclude, that this case constitutes any one of the five actions which are allowed by §9613(h). Further, the Court concludes that the application of §9613(h) as well as the recent Tenth Circuit opinion of U.S. v. Hardage, 985 F.2d 1427, 1435 (10th Cir. 1993) require dismissal of Plaintiff's claim, insofar as it relates to the Skinner site, and therefore to CERCLA, as premature.

Georgoulis v. Allied Products Corp., 796 F. Supp. 986 (N. D. Tex. 1991) gives guidance as to what type of cases fall under the provisions of §9613(h) and further holds that §9613(h) is applicable to claims between private parties. In determining the scope of §9613, the Georgoulis court relied on the following statement of Senator Strom Thurmond:

The timing of the review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the response actions performed by the EPA.... The section also covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities set forth in the section.... [T]here is no jurisdiction to review a response action through a citizen suit except as provided in the timing of review section. Citizens, including potentially responsible parties, cannot seek review of the response action *or their potential liability for a response action*--other than in an action for contribution--unless the suit falls within one of the categories provided in [section 113]. (Emphasis added).

Id. at 990 (quoting 132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986)). Clearly, the Plaintiff is seeking review of its potential

liability for a response action by asking this court to construe the Transfer Transaction and the Stock Purchase Agreement to find that it never assumed liability for the Levey operations.

The remaining question is whether §9613(h) applies to suits between private parties. Defendants maintain that it does not, relying on several cases where applicability of §9613 was not discussed. The Georgoulis court stated:

Allowing PRP's to sue one another in the piecemeal fashion attempted by Plaintiffs would seriously undermine CERCLA's stated objectives. First, resources that should be directed toward cleanup would instead be allocated to litigation. Second, parties that would normally enter into settlements with the EPA, designed to accelerate the cleanup process, would be discouraged to do so for fear of being sued by PRP's in declaratory judgment actions. Third, piecemeal lawsuits between PRP's would frustrate CERCLA's objective of speedy cleanup of hazardous waste sites. Finally, piecemeal declaratory judgments involving the same circumstances would consume valuable judicial resources and lay the basis for inconsistent adjudications of liability.

Id. at 989-990. These reasons are particularly compelling in light of the recent Tenth Circuit decision in Hardage, wherein the court construed CERCLA §107(e)(1) on which the court based federal jurisdiction. This section provides:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

The Hardage court stated "[t]he plain meaning of this language is that, although responsible parties may not altogether transfer their CERCLA liability, they have the right to obtain indemnification for that liability." Id. at 1433. Since the only

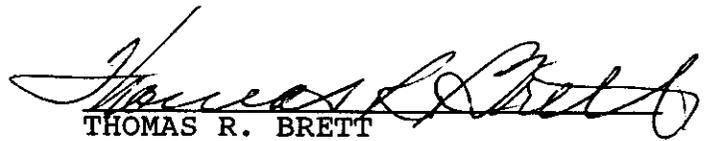
action CCC has for its claim on the site affected by CERCLA is one for indemnity, to allow this action at this time, before there is any liability on anyone's part under CERCLA, would defeat the intent of CERCLA in prohibiting piecemeal or unnecessary litigation.

The Hardage court's rejection of a transfer of liability under CERCLA provides an additional reason for dismissal. Under Hardage, the only claim that CCC has with respect to the Skinner site is for indemnity. This claim is premature when there is no certainty that one party will have to make any payment, or what those payments may be. In Re American Commercial Lines, Inc. 781 F.2d 114 (8th Cir. 1985). Declaratory relief is appropriate if the judgment would "(1) clarify and settle the legal relations in issue and (2) terminate or afford relief from the uncertainty giving rise to the proceeding." Kunkel v Continental Casualty Company, 866 F.2d 1269 (10th Cir. 1989). In the present case, any declaration would not clarify or settle the legal relations at issue given that both parties could still be PRPs under CERCLA, and both parties could still be proper parties to any action for recovery of response or remedial costs. Although the contingent nature of a right does not preclude declaratory relief when the "circumstances reveal a need for present adjudication," the circumstances in this case do not reveal such a need. Id. at p. 1274. In fact, the circumstances of

this case, potential CERCLA liability, reveal a need for delaying determination until remedial or removal action is taken. In Re Combustion Equipment Associates, Inc. 835 F.2d 35,37 (2nd Cir. 1988) ("To foster rapid cleanup, Congress embraced a policy of delaying litigation about cleanup costs until after the cleanup. Thus, under CERCLA, liability is not assessed until after the EPA has investigated a site, decided what remedial measures are necessary, and determined which PRPs will bear the costs.").

Accordingly, this court finds that Plaintiff's claims, as they relate to the Skinner site, should be and are DISMISSED as premature. Plaintiff's claims that relate to the JIS site are REMANDED to state court as there is no basis for this court to retain jurisdiction over them. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

IT IS SO ORDERED THIS 26th DAY OF OCTOBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

GEORGE ROWE,)
)
 Plaintiff,)
)
 v.)
)
 NATIONAL EDUCATION CENTERS,)
 INC., d/b/a SPARTAN SCHOOL)
 OF AERONAUTICS,)
)
 Defendants.)

FILED

OCT 26 1993

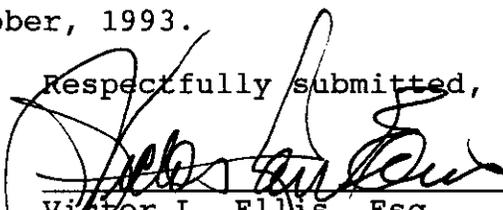
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

No. 93-C-0020 B

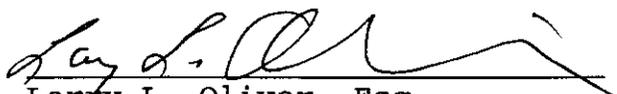
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, George Rowe, and the Defendant, National Education Centers, Inc. d/b/a Spartan School of Aeronautics, pursuant to Rule 41(a)(1) of the Federal Rule of Civil Procedure, and hereby stipulate and agree that all claims, whether or not asserted, against National Education Centers, Inc., d/b/a Spartan School of Aeronautics be dismissed by the Plaintiff with prejudice to the refileing of the same. All parties to bear their own costs and attorneys fees.

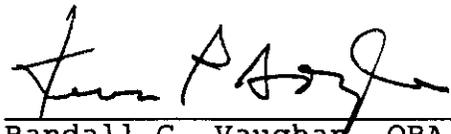
DATED this 26th day of October, 1993.

Respectfully submitted,


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Larry L. Oliver, Esq.
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WILLIAMSON & MARLAR
900 Oneok Plaza
Tulsa, Oklahoma 74013
(918) 581-5500
ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET
OCT 26 1993
DATE

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

F I L E D

OCT 25 1993

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

FRED MARVEL, ET AL)
)
 Plaintiffs,)
)
 vs.)
)
 AMERICAN GENERAL FINANCIAL)
 CENTER THRIFT CO., ET AL)
)
 Defendants)

92-C-0206-B

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
REGARDING PLAINTIFFS' MOTIONS TO PROCEED AS CLASS IN THEIR THIRD, SIXTH
AND SEVENTH CAUSES OF ACTION**

This report and recommendation addresses the following motions brought by
Plaintiffs:

1. Plaintiffs' Motion to Proceed as a Class As To Third and Second Causes of Action (docket #98); and
2. Plaintiffs' Motion to Proceed as a Class As To Sixth and Seventh Causes of Action (docket #99).

Each Motion is addressed below.

1. Plaintiffs' Motion to Proceed as a Class As To Third and Second Causes of Action

This report and recommendation will only address Plaintiffs' Motion to Proceed as a Class As To Third and Second Causes of Action insofar as the "Third Cause of Action" is concerned. The Motion will be addressed in a separate report and recommendation insofar as Plaintiffs' "Second Cause of Action" is concerned.

59

Plaintiffs' "Third Cause of Action" asks for relief against American General Financial Center Thrift Company ("AGFCTC") for "tortious breach of contract", alleging that "[t]he issuance instead, of a 5-year TIC¹...was a deliberate, designed and intentional breach of their contract, and a tort occurred when the said 5-year TIC was canceled." First Amended Complaint, at ¶ (e.), p. 15.)

In *Rodgers v. Tecumseh Bank*, 756 P.2d 1223 (Okla. 1988) the Oklahoma Supreme Court refused to extend the concept of tortious breach of contract to commercial contracts other than insurance contracts. The contract at issue here is not an insurance contract, hence is not subject to the cause of action pled.

As set forth in the Report and Recommendation issued October 1, 1993, there is no dispute of fact regarding the actual nature of the instrumentality purchased, or, the Defendant's subsequent handling of that instrument.² This was not an insurance agreement, but rather, an agreement to accept monies at a stated rate. The dispute between the parties centers on the alleged misrepresentation made regarding the nature of the instrument (*i.e.*, a "CD" or "TIC") and whether in providing a TIC, and then redeeming the instrument before the expiration of five (5) years, Defendant breached an alleged contract to provide a CD, or a rate of interest, in effect, guaranteed for five (5) years?

Thus, it was the recommendation of the United States Magistrate Judge that judgment be granted Defendant as to Plaintiffs' "Third Cause of Action" as a matter of law.

¹ *Instead of a Certificate of Deposit ("CD") as is alleged to have been promised or represented.*

² *Approximately a year later, AGFCTC redeemed the TIC and returned Plaintiffs' funds to them.*

This being the recommendation, the undersigned finds here that Plaintiffs' Motion to Proceed as a Class As To Third Cause of Action is moot and should be denied as such.

2. *Plaintiffs' Motion to Proceed as a Class As To Sixth and Seventh Causes of Action*

Plaintiffs' Sixth and Seventh "Causes of Action" arising under 15 U.S.C. §1125 *et seq.* the "Lanham Act") were subject of the Report and Recommendation entered by the undersigned on October 22, 1993, recommending that same be dismissed as a matter of law, Defendant arguing that Plaintiff is not among the class of plaintiffs entitled to bring suit under the Act. Accordingly, it is the recommendation of the United States Magistrate Judge here that Plaintiffs' Motion to Proceed as a Class as to Sixth and Seventh Causes of Action should also be denied as moot. Brief analysis in support of this finding is set forth below.

While Defendant states that "overwhelming case law...makes it clear that the Lanham Act afford[s] remedies only for commercial plaintiffs...and not to consumer purchasers", there is an opposing body of case law to the contrary. The issue is framed by the recent decision voiced in *Shonac Corp. v. AMKO International*, 763 F.Supp. 919, 929 (S.D. Ohio 1991), where the court directly addressed the question of standing. Noting that the court in *Colligan v. Activities Club of New York*, 442 F.2d 686 (2nd Cir. 1971) held that consumers lack standing to sue under §43(a), the court examined the holding in *Rare Earth, Inc. v. Hoorelbeke*, 401 F.Supp. 26, 39 (S.D.N.Y. 1975). In *Rare Earth* the court explained that "a plaintiff must possess a sufficient nexus with the alleged wrongful conduct in order to have standing under §43(a). The *Shonac* court further noted that five circuits have adopted the "reasonable interest" [to be protected against false advertising]

test set out in *Rare Earth*.

Applying this standard to the instant case would yield a result which allows Plaintiffs to proceed with their Lanham Act claim; Plaintiffs having a "reasonable interest" to be protected against the false advertising they claim was perpetrated by Defendant herein. As consumers, they claim they were misled to believe they were purchasing a "Certificate of Deposit" instead of a "Thrift Investment Certificate", and would not have so acted had they been properly informed. Specifically, Plaintiffs point to the information in *100 Highest Yields* as being the offending consumer-oriented data promoted ("confirmed") by Defendant AGFCTC (who allegedly knew of the categorization by the publication), but who took no corrective steps, continuing, instead, to send weekly rate information to the publication.

Notwithstanding these allegations, the undersigned finds persuasive the holding in *Shonac* to the effect that some form of competition is required in order to invoke standing under the Lanham Act. Specifically, the court points to the Act itself:

The final section of the Lanham Act – in a passage unusual, and extraordinarily helpful, in declaring in so many words the intent of Congress – states that "the intent of this chapter is to regulate commerce within the control of Congress...to protect persons engaged in such commerce against unfair competition.(Emphasis added.) *Shonac* at 763 F.Supp. 932; citing *Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213, 1214-15 (9th Cir. 1987).

Given the persuasive evidence of the purpose of §43(a) as set forth in Congress' unambiguous statement that the Act is meant to "protect persons engaged in...commerce against unfair competition", the undersigned finds that an interpretation of the plain words "unfair competition" which does not require competition is, in fact, inconsistent with the

obvious legislative intention.

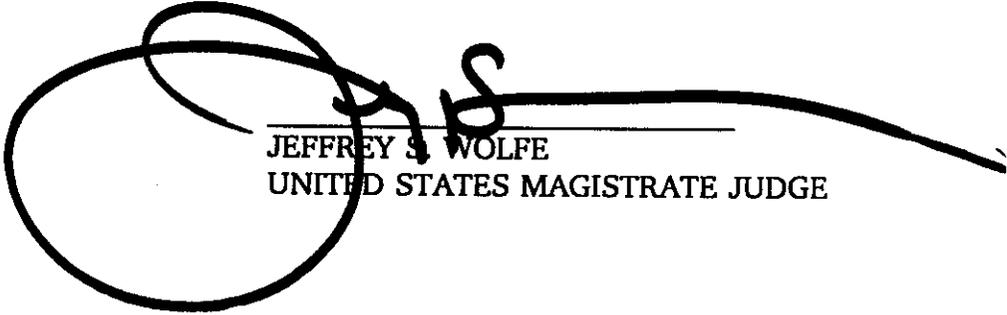
As Plaintiffs are plainly not competitors, they have no standing under the Lanham Act. Accordingly, the undersigned recommends that Plaintiffs Motion to Proceed as a Class As To Sixth and Seventh Causes of Action should be denied as moot as regards the "Sixth and Seventh Causes of Action".³

Conclusion

As the undersigned has earlier entered reports and recommendations recommending that the "Third", "Sixth" and "Seventh" causes of action be dismissed, the undersigned here further recommends that Plaintiffs' Motion to Proceed as a Class as regards these "Causes of Action" also be denied.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁴

Dated this 25th day of Oct, 1993.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

³ Perhaps a different result would ensue would the Plaintiffs be joined by other would-be Oklahoma claimants, who are said to be businesses and even financial institutions. The issue of competition would be far easier to address in that context.

⁴ See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).

ENTERED ON DOCKET

DATE 10-26-93

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

FILED

OCT 25 1993

DAVID B. McDERMOTT,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

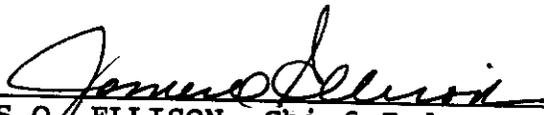
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 93-C-622-E ✓

ORDER OF DISMISSAL

The above-captioned matter is dismissed. Parties to bear their respective costs herein.

ORDERED this 22 day of October, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

5 |
STEVEN L. RAHHAL, Texas Bar #16473990
JOHN MCFALL, Texas Bar #13596000
460 Preston Commons
8117 Preston Road
Dallas, Texas 75225
214-987-3800
ATTORNEYS FOR DEFENDANTS

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

OCT 22 1993
FILED
U.S. District Court
Northern District of Oklahoma

ATLANTIC RICHFIELD COMPANY,)	
)	
Plaintiff,)	Consolidated Case No. 89-805
)	
v.)	89-C-868-B
)	89-C-896-B
AMERICAN AIRLINES, INC., Et.,)	90-C-859-B
Al.,)	
)	
Defendants.)	

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

Now on this ^{7th} ~~11th~~ day of October, 1993, this matter comes on for consideration of the Plaintiff Atlantic Richfield Company's ("ARCO") NOTICE OF MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT (docket no. 656) filed herein on March 4, 1993. The Plaintiff ARCO appears by its attorney, Larry Gutteridge, the Defendants appears by their respective lead counsel, and William Anderson appears as liaison counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises FINDS and ADJUDGES, ORDERS and DECREES:

1. The settlements encompassed by the Notice of Motion and Motion for Determination of Good Faith Settlement (docket no. 656) in the above captioned action between the Plaintiff ARCO and Defendant Howard Crager is found to be in good faith, and a final judgment barring all claims against Howard Crager associated with the Site under state and federal law, except to the extent that such claims are preserved by the settlement, and except for any

claims for arranging for disposal of off-site hazardous substances, should be and is hereby entered.

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

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

4. In accordance with the terms of the Agreement, this Judgment shall be conditioned upon the Agreement being and remaining valid and in effect.

5. Entry into the Agreement by an ineligible entity renders the Agreement null and void. An eligible entity is a generator or transporter, or both, of material to the Site, with a volume of less than or equal to 100,000 gallons.

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

7. In the event that the Agreement is or becomes null and void, this Judgment along with all orders entered in

conjunction with the Agreement shall be vacated nunc pro tunc, the settlement reflected in the Agreement shall be terminated pursuant to its terms and the parties to the vacated Agreement shall be deemed to have reverted to their respective status and position in the Action as of the date immediately prior to the execution of the Agreement.

8. Nothing contained in this Judgment and Order shall be construed to affect the rights of the Plaintiff ARCO or the Defendant Howard Crager with respect to claims which are preserved by the settlements.

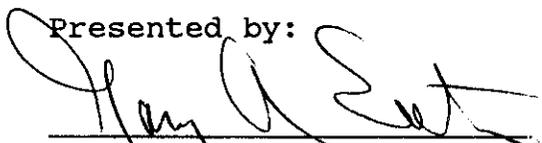
9. There being no just reason to delay the entry of this Judgment, this Court hereby directs entry of a Final Judgment and Order of Dismissal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: Oct. 22nd, 1993

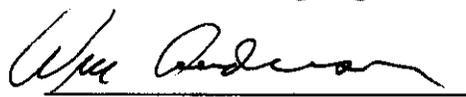
S/ THOMAS R. BRETT

Thomas R. Brett
United States District Court Judge

Presented by:



Gary A. Eaton, Attorney
for Plaintiff, Atlantic
Richfield Company



William Anderson, Esq.
Liaison Counsel

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

FILED

OCT 22 1993

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

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES, INC., Et.,)
Al.,)
)
Defendants.)
_____)

Consolidated Cases Nos

89-C-868-B

89-C-896-B

90-C-859-B

ORDER DETERMINING GOOD FAITH OF SETTLEMENT

Now on this 22nd day of October, 1993, this matter comes on for consideration of the Plaintiff Atlantic Richfield Company's (ARCO'S) NOTICE OF MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT (docket no. 656) filed herein on March 4, 1993. The Plaintiff ARCO appears by its attorney, Larry Gutteridge, the Defendants appears by their respective lead counsel, and William Anderson appears as liaison counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, having reviewed and considered the Magistrate's Report and Recommendation, and being fully advised and informed in the premises FINDS and ORDERS as follows:

1. The Magistrate's Report and Recommendation pertaining the hearing on March 19, 1993, should be and is approved.

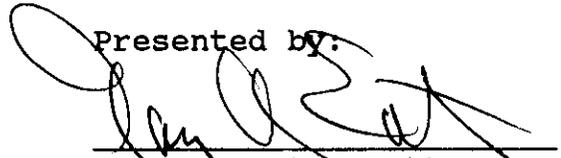
2. The Settlement encompassed by the Notice of Motion and Motion for Determination of Good Faith Settlement (docket no. 656) in the above captioned action between the Plaintiff ARCO and

Defendant Howard Crager is found to have been entered into in good faith, and all claims against Howard Crager for liabilities associated with the Site are barred under state and federal law, except to the extent that such claims are preserved by the Settlements.

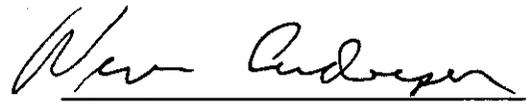
Dated: 10/22/93

BY THOMAS R. BRETT

Thomas R. Brett
United States District Court Judge

Presented by:


Gary A. Eaton, Attorney
for Plaintiff, Atlantic
Richfield Company



William Anderson, Esq.
Liaison Counsel

AXA93D52.SEL

DATE OCT 25 1993

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

FILED

OCT 22 1993

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

LUCIANO COLLAZA VILLAREAL,)
)
 Petitioner,)
)
 vs.)
)
 JACK COWLEY,)
)
 Respondent.)

No. 92-C-1067-B

ORDER

Before the Court is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

In January 1984, Petitioner was sentenced in CRF-83-3792 and CRF-83-3793 on the basis of a guilty plea and a nolo contendere plea. Petitioner did not seek to withdraw his guilty plea or give notice of intent to appeal. He later sought post-conviction relief. The state district court granted Petitioner's application for post-conviction relief in part, and modified his sentence in CRF-83-3793. Petitioner did not properly perfect his appeal to the Oklahoma Court of Criminal Appeals.

In July 1992, Petitioner filed a second application for post-conviction relief, alleging (1) that the Oklahoma Department of Corrections (DOC) did not provide inmates with adequate legal assistance in filing applications for post-conviction relief, citing Bounds v. Smith, 430 U.S. 817 (1977), and (2) that the court should determine whether his plea was involuntarily entered because an inmate law clerk had improperly raised that claim in Petitioner's first application for post-conviction relief. The

state district court denied Petitioner's second application, concluding Petitioner had failed to state a sufficient reason for failing to file a direct appeal and for failing to raise these issues in his first application for post-conviction relief; the court had previously addressed and denied one of Petitioner's claim (unspecified) in his first application; and Petitioner's ineffective-assistance-of-counsel claim lacked merit as it related to the actions of a non-lawyer. The Oklahoma Court of Criminal Appeals affirmed, adopting the grounds relied on by the district court. (Attachments to docket #4.)

In November 1992, Petitioner filed the present application for a writ of habeas corpus, alleging (1) the state court failed to address on the merits the factual disputes raised in his application for post-conviction relief; (2) the state court failed to address on the merits the claim that his plea was not entered voluntarily because an inmate law clerk inadequately raised this claim in Petitioner's prior application; and (3) his rights of access to the court were violated because he received inadequate assistance from an inmate law clerk in filing his first application for post-conviction relief.

Respondent argues that Petitioner's first two claims are procedurally barred. Petitioner could have raised them on direct appeal; the state court rested its decision on the basis of a state procedural default; and Petitioner failed to show cause and prejudice to excuse his default, or that a fundamental miscarriage of justice will otherwise result. Regarding ineffective

assistance, Respondent argues that this claim is frivolous as the inmate law clerk was not an attorney. Petitioner replies that he has stated a sufficient reason to excuse his procedural default: the DOC's legal-assistance program does not provide inmates with adequate access to the courts and effective assistance in filing applications for post-conviction relief.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 111 S. Ct.

1454, 1470 (1991).

Petitioner does not dispute that he failed to file a direct appeal and that the decision of the Oklahoma Court of Criminal Appeals rested upon a state procedural default as to his first two grounds for relief. Petitioner, however, has not offered any facts that would demonstrate cause and prejudice under the Coleman standard to excuse his procedural default. Petitioner's contention that the DOC's legal-assistance program does not provide inmates with adequate access to the courts and effective assistance in filing post-conviction petitions does not constitute sufficient cause. Petitioner relied on the assistance of an inmate law clerk in pursuing his post-conviction relief and not in failing to file a direct appeal. See Coleman, 111 S. Ct. at 2566 (no constitutional right to an attorney in state post-conviction proceedings). Nor does this case present one of those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey, 111 S. Ct. at 1470. Accordingly, the Court concludes that the Petitioner procedurally defaulted his first two grounds for relief.

As to the denial-of-access claim, the Court concludes that the Petitioner is not entitled to habeas corpus relief. This claim relates to the conditions of Petitioner's confinement, not his conviction. See 28 U.S.C. § 2254 (specifically providing that a state prisoner is entitled to relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of

the United States").

ACCORDINGLY, IT IS HEREBY ORDERED that this petition for a writ of habeas corpus is denied.

SO ORDERED THIS 22nd day of Oct., 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 10-25-93

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

FILED

OCT 22 1993

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

DOUG WILDIN and JOHN WILDIN,)
d/b/a DOUG WILDIN &)
ASSOCIATES, Ranch Brokers,)
)
Plaintiffs,)
)
vs.)
)
W. W. WALTON,)
)
Defendant.)

Case No. 91-C-236-E

JUDGMENT ON JURY VERDICT

This action came on for trial on the 4th day of October, 1993, before the Court and a jury, the Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on the 6th day of October, 1993,

IT IS ORDERED AND ADJUDGED that Plaintiffs Doug Wildin and John Wildin take nothing, that the action be dismissed on the merits, and that Defendant W. W. Walton recover of Plaintiffs his costs of action.

Dated at Tulsa, Oklahoma, this 21 day of October, 1993.

S/ JAMES O. ELLISON

JUDGE JAMES O. ELLISON

DATE 10-25-93

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RICHARD UEL COOPER,)
)
 Plaintiff,)
)
 vs.)
)
 MIDWEST MUTUAL INSURANCE)
 COMPANY, an Iowa Corporation)
 and NATIONWIDE MUTUAL)
 INSURANCE COMPANY, an Ohio)
 corporation,)
)
 Defendant.)

Case No. 93-C-0234E

FILED

OCT 22 1993

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

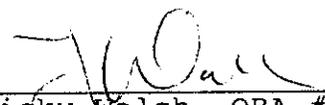
ORDER

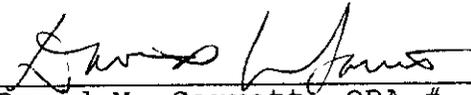
ON this 21 day of October, 1993, comes before the Court the Stipulation for Dismissal that has been signed by both counsel involved. The Court finds that the Plaintiff's cause of action sounding in contract should be dismissed without prejudice as to its refiling. The Court further finds that the cause of action sounding in bad faith is hereby dismissed with prejudice.

IT IS SO ORDERED.

S/ JAMES O. ELISON
Judge of the District Court

APPROVED:


Micky Walsh, OBA #9327
DURBIN LARIMORE & BIALICK
920 North Harvey
Oklahoma City, Oklahoma 73102
(405) 235-9584
Attorneys for Nationwide Mutual
Insurance Company


David M. Garrett, OBA #
Tami D. Mickelson, OBA #
436 Court, P.O. Box 2969
Muskogee, OK 74401
Attorneys for Plaintiff
1262\003-9

ENTERED ON DOCKET

DATE 10-25-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE UNKNOWN HEIRS, EXECUTORS,
ADMINISTRATORS, DEVISEES,
TRUSTEES, SUCCESSORS AND ASSIGNS
OF JOE R. WHITE a/k/a JOE ROBERT
WHITE, Deceased; SHARON GIBSON;
KATHY THOMPSON; ROBERT E. WHITE;
DONALD J. WHITE; THE FIRST STATE
BANK, Fairfax, Oklahoma; COUNTY
TREASURER, Osage County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Osage County, Oklahoma; and STATE
OF OKLAHOMA ex rel. OKLAHOMA TAX
COMMISSION,

Defendants.

FILED

OCT 22 1993

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

CIVIL ACTION NO. 92-C-811-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day
of October, 1993. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Wyn Dee Baker, Assistant United States
Attorney; the Defendants, County Treasurer, Osage County,
Oklahoma, and Board of County Commissioners, Osage County,
Oklahoma, appear by John S. Boggs, Jr., Assistant District
Attorney, Osage County, Oklahoma; that the Defendant, The First
State Bank, Fairfax, Oklahoma, appears by its attorney W. Robert
Wilson; that the Defendant, State of Oklahoma ex rel. Oklahoma
Tax Commission, appears not, having previously filed its
Disclaimer; and the Defendants, The Unknown Heirs, Executors,
Administrators, Devisees, Trustees, Successors and Assigns of

Joe R. White a/k/a Joe Robert White, Deceased; Sharon Gibson; Kathy Thompson; Robert E. White; and Donald J. White, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Sharon Gibson**, acknowledged receipt of Summons and Amended Complaint on December 12, 1992; that the Defendant, **Kathy Thompson**, acknowledged receipt of Summons and Amended Complaint on December 9, 1992; that the Defendant, **Robert E. White**, acknowledged receipt of Summons and Amended Complaint on December 21, 1992; that the Defendant, **Donald J. White**, acknowledged receipt of Summons and Amended Complaint on December 15, 1992; that the Defendant, **The First State Bank, Fairfax, Oklahoma**, acknowledged receipt of Summons and Complaint on September 11, 1992; that the Defendant, **County Treasurer, Osage County, Oklahoma**, acknowledged receipt of Summons and Complaint on September 14, 1992; that the Defendant, **Board of County Commissioners, Osage County, Oklahoma**, acknowledged receipt of Summons and Complaint on September 14, 1992; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, acknowledged receipt of Summons and Second Amended Complaint on May 14, 1993.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Joe R. White a/k/a Joe Robert White, Deceased**, were served by publishing notice of this action in the **Pawhuska Journal-Capital**, a newspaper of general circulation in Osage County, Oklahoma, once a week for six (6) consecutive weeks beginning August 4, 1993, and continuing through September 8,

1993, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Joe R. White a/k/a Joe Robert White, Deceased**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Joe R. White a/k/a Joe Robert White, Deceased**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is

sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer on or about September 16, 1992; that the Defendant, The First State Bank, Fairfax, Oklahoma, filed its Answer and Cross-Claim on or about December 7, 1992; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on or about June 16, 1993; and that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Joe R. White a/k/a Joe Robert White, Deceased; Sharon Gibson; Kathy Thompson; Robert E. White; and Donald J. White, 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 certain promissory notes and for foreclosure of a mortgage securing promissory note on Loan No. 46-05 upon the following described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

A tract of land lying in the SE/4 of the SE/4 of Section 32, Township 24 North, Range 4 East, Osage County, Oklahoma, more particularly described as follows, to-wit: Beginning at the Southwest corner of the SE/4 of Section 32, Township 24 North, Range 4 East, thence North 89 degrees 54 feet East along the South line of the SE/4 for a distance of 1866.47 feet to the true point of beginning; thence North 0 degrees 06 feet West a distance of 250 feet; thence North 89 degrees 54 feet East a distance of 174.0 feet; thence South 0 degrees 06 feet East a distance

of 250.0 feet to a point on the South line of the SE/4; thence South 89 degrees 54 feet West along said South line a distance of 174.0 feet to the point of beginning.

All in Osage County, Oklahoma, subject however to all valid easements, right-of-way, mineral leases, mineral reservations, and mineral conveyances of record. No other subjects.

The Court further finds that this a suit brought for the further purpose of judicially determining the deaths of Joe Robert White and Martha Ethel White, judicially terminating the joint tenancy of Joe R. White and Ethel White, and judicially determining the heirs of Joe R. White a/k/a Joe Robert White.

The Court further finds that Joe R. White a/k/a Joe Robert White and Martha Ethel White a/k/a Ethel White (hereinafter referred to by any of these names) became the record owners of the real property involved in this action by virtue of that certain General Warranty Deed dated September 5, 1978, from Sharon S. Gibson to Joe R. White and Ethel White, husband and wife, as joint tenants, and not as tenants in common, on the death of one the survivor, the heirs and assigns of the survivor, to take the entire fee simple title, which General Warranty Deed was filed of record on October 11, 1978, in Book 544, Page 151, in the records of the County Clerk of Osage County, Oklahoma.

The Court further finds that Martha Ethel White died on December 12, 1989. Upon the death of Martha Ethel White, the subject property vested in her surviving joint tenant, Joe R. White a/k/a Joe Robert White, by operation of law. A copy of a Certificate of Death issued by the Oklahoma State Department of Health certifying Martha Ethel White's death was attached as Exhibit "A" in Plaintiff's Second Amended Complaint and incorporated.

The Court further finds that Joe Robert White died on March 27, 1992. Upon the death of Joe Robert White, the subject property vested in his heirs and assigns, by operation of law. A copy of a Certificate of Death issued by the Oklahoma State Department of Health certifying Joe Robert White's death was attached as Exhibit "B" in Plaintiff's Second Amended Complaint and incorporated.

The Court further finds that Joe R. White and Martha Ethel White a/k/a Ethel White, now deceased, who were then husband and wife, executed and delivered to the United States of America, acting through the Farmers Home Administration, the following promissory notes:

<u>Loan Number</u>	<u>Original Amount</u>	<u>Date</u>	<u>Interest Rate</u>
	\$50,000.00	01/22/75	8.75%
46-05	16,000.00	06/06/79	8.75%
44-06	32,000.00	08/03/79	9.50%
44-07	25,688.70	03/04/80	10.50%
44-10	30,144.56	03/02/82	14.25%
44-11	13,544.44	03/02/82	14.25%
	13,889.75	03/02/82	14.25%

The Court further finds that as security for the payment of Loan No. 46-05, Joe R. White and Martha Ethel White, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated June 6, 1979, covering the above-described property, situated in the State of Oklahoma, Osage County. This mortgage was recorded on June 6, 1979, in Book 563, Page 259, in the records of Osage County, Oklahoma.

The Court further finds that Joe R. White a/k/a Joe Robert White and Martha Ethel White a/k/a Ethel White, now deceased, made default under the terms of the aforesaid notes and

mortgage by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the notes and mortgage, after full credit for all payments made, the principal sum of \$37,167.73, plus accrued interest in the amount of \$22,675.28 as of March 29, 1992, plus interest accruing thereafter at the rate of \$12.279 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$403.05 (\$318.05 publication fees, \$75.00 fee for evidentiary affidavit; \$10.00 fee for recording Notice of Lis Pendens). The foregoing amounts include the balance owed on Loan No. 46-05 secured by the above real estate mortgage, being \$14,660.70, plus accrued interest in the amount of \$2,679.69 as of March 29, 1992, plus interest accruing thereafter at the rate of \$3.5146 per day until judgment, plus interest thereafter at the legal rate until fully paid.

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the deaths of Joe Robert White and Martha Ethel White, to a judicial termination of the joint tenancy of Joe R. White and Ethel White, and to a judicial determination of the heirs of Joe R. White a/k/a Joe Robert White.

The Court further finds that the Defendant, **The First State Bank, Fairfax, Oklahoma**, has a lien on the property which is the subject matter of this action in the amount of \$29,779.41 plus interest accruing thereafter on said sum at the rate of 13.69 percent per annum from December 1, 1992, plus costs and

reasonable attorney fees, by virtue of a mortgage dated December 5, 1984, and recorded on January 3, 1985, in Book 668, Page 163 in the records of Osage County, Oklahoma.

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

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Joe R. White a/k/a Joe Robert White, Deceased; Sharon Gibson; Kathy Thompson; Robert E. White; and Donald J. White**, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Martha Ethel White be and the same hereby is judicially determined to have occurred on December 12, 1989 in the City of Fairfax, Osage County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Joe R. White and Ethel White in the above-described real property be and the same hereby is judicially terminated as of the date of the death of Martha Ethel White on December 12, 1989.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Joe Robert White be and the same hereby is judicially determined to have occurred on March 27, 1992 in the City of Ralston, Osage County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of Joe R. White a/k/a Joe Robert White, Deceased, are Sharon Gibson, Kathy Thompson, Robert E. White, and Donald J. White, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Joe R. White a/k/a Joe Robert White, Deceased, have been discovered and it is hereby judicially determined that Sharon Gibson, Kathy Thompson, Robert E. White, and Donald J. White are the only known heirs of Joe R. White a/k/a Joe Robert White, Deceased, and that Joe R. White a/k/a Joe Robert White, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on September 14, 1993 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment in rem against all named and unnamed Defendants in the principal sum of \$37,167.73, plus accrued interest in the amount of \$22,675.28 as of March 29, 1992, plus interest accruing thereafter at the rate of \$12.279 per day until judgment, plus interest thereafter at the current legal rate of 3.38 percent per annum until fully paid, plus the costs of this action in the amount of \$403.05

(**\$318.05 publication fees, \$75.00 fee for evidentiary affidavit; \$10.00 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. The foregoing amounts include the balance owed on Loan No. 46-05 secured by the above real estate mortgage, being **\$14,660.70**, plus accrued interest in the amount of **\$2,679.69** as of March 29, 1992, plus interest accruing thereafter at the rate of **\$3.5146** per day until judgment, plus interest thereafter at the legal rate until fully paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **The First State Bank, Fairfax, Oklahoma**, have and recover judgment in rem in the amount of **\$29,779.41** plus interest accruing thereafter on said sum at the rate of **13.69 percent per annum** from December 1, 1992, plus costs and reasonable attorney fees, by virtue of a mortgage dated December 5, 1984, and recorded on January 3, 1985, in Book 668, Page 163 in the records of Osage County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Joe R. White a/k/a Joe Robert White, Deceased; Sharon Gibson; Kathy Thompson; Robert E. White; Donald J. White; County Treasurer and Board of County Commissioners, Osage County, Oklahoma; and State of Oklahoma ex rel. Oklahoma Tax Commission**, have no right, title, or interest in the subject real property.

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

First:

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

Second:

In payment of the judgment rendered herein in favor of the Plaintiff in the amount of \$14,660.70, plus accrued interest in the amount of \$2,679.69 as of March 29, 1992, plus interest accruing thereafter at the rate of \$3.5146 per day until judgment, plus interest thereafter at the legal rate until fully paid;

Third:

In payment of the judgment rendered herein in favor of Defendant, The First State Bank, Fairfax, Oklahoma, in the amount of \$29,779.41 plus interest accruing thereafter on said sum at the rate of 13.69 percent per annum from December 1, 1992, plus costs and reasonable attorney fees;

Fourth:

In payment of the judgment rendered herein in favor of the Plaintiff in the amount of \$22,507.03, plus accrued interest in the amount of \$19,995.59 as of March 29, 1992, plus interest accruing thereafter at the rate of \$8.7644 per day until judgment, plus interest thereafter at the legal rate until fully paid.

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

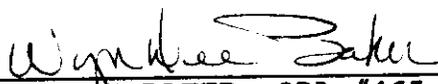
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

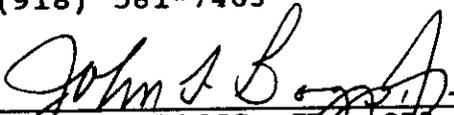
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

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Attorney for Defendant,
The First State Bank, Fairfax, Oklahoma

Judgment of Foreclosure
Civil Action No. 92-C-811-E

FILED ON DOCKET
DATE OCT 25 1993

FILED

OCT 22 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

KATHLEEN LOGAN,)
)
 Plaintiff,)
)
 v.)
)
 AETNA CASUALTY AND SURETY)
 COMPANY, a foreign)
 corporation,)
)
 Defendant.)

Case No. 92-C-730-B

O R D E R

This matter comes on for consideration of Defendant's Motion For Summary Judgment (docket # 34).

Defendant Aetna Casualty and Surety Company (Aetna) sets forth thirteen material facts to which Plaintiff Kathleen Logan (Logan) has failed to dispute or admit¹ in contravention of Local Rule 15 (B). Accordingly, the Court will deem admitted for the purposes of summary judgment these facts.

1. On March 27, 1990, while a passenger in a vehicle driven by Rick E. Barrett, the Plaintiff, Kathleen Logan (hereinafter "Logan"), was injured in an accident with another vehicle driven by Ethyl Lee Norwood (hereinafter "Norwood").

2. The accident described above was due to the negligence of Norwood in making an improper or illegal left turn in front of the vehicle in which Logan was riding.

¹ Plaintiff, in his Objection to Aetna's Summary Judgment Motion, sets forth 33 Undisputed Facts.

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3. Norwood was an underinsured driver at the time of the accident.

4. At the time of the accident, Aetna maintained the policy of insurance on the vehicle in which Logan was riding, including uninsured motorist coverage.

5. On February 26, 1992, Plaintiff's attorney, on behalf of Logan, demanded that Aetna tender \$500,000.00 representing the maximum amount available under the uninsured motorist coverage of the policy insuring the vehicle in which Logan was riding when she was injured.

6. Aetna processed the claim of Logan in good faith and pursuant to proper procedures, customs and practices for adjusting a claim; the actions of Aetna were reasonable, and were not in reckless disregard of the rights of Logan; the actions of Aetna do not suggest any intent to cause harm of any sort to Logan, and were not in bad faith.

7. On July 22, 1992, Logan commenced her action against Aetna by filing her petition with the District Court of Tulsa County, alleging that the accident occurred March 27, 1990; negligence by Norwood was the sole cause of the accident; and Norwood was underinsured at the time.

8. On September 17, 1992, Logan offered to settle her claim for \$650,000.00.

9. On October 6, 1992, Aetna offered Logan \$150,000.00 to settle Logan's claims.

10. On January 7, 1993, Logan offered to settle her claim for

the Aetna policy limits of \$500,000.00 plus lost interest of \$22,400.00.

11. On January 19, 1993, Aetna offered to allow judgment to be taken in the amount of \$250,000.00, pursuant to Fed.R.Civ.P. 68.

12. Logan's claim was submitted to binding arbitration on April 21, 1993, resulting in an evaluation of Logan's claim at \$140,000.00, resulting in an award of \$130,000.00 after subtracting \$10,000.00, the amount paid under the liability policy for Norwood.

13. On May 25, 1993, Logan acknowledged Release and satisfaction of the Arbitration Award and dismissed her first cause of action, her claim for benefits under the uninsured motorist coverage of the Aetna policy on the vehicle in which she was riding at the time of the accident.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Celotex Corp. v. Catrett**, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); **Widon Third Oil and Gas v. Federal Deposit Insurance Corporation**, 805 F.2d 342, 345 (10th Cir. 1986). *cert. den.* 480 U.S. 947 (1987). In **Celotex**, 477 U.S. at 322 (1986), it is stated:

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

In the present case, the question is whether the evidence is such that there remains a material issue of fact that Aetna's failure to pay policy limits constitutes bad faith. In her amended complaint, Logan claims Aetna exhibited bad faith by "failing to pay Plaintiff the benefits to which she is entitled at a time when Defendant knew Plaintiff was entitled to those benefits"; by

"refusing to honor Plaintiff's claim without a legitimate or arguable reason or for a reason lacking support in substantial evidence"; and by "failing to investigate Plaintiff's claim and obtain additional information it should have secured but did not." Aetna moves for summary judgment because the settlement of Logan's claim under the policy, pursuant to a binding arbitration award, negates the possibility of a separate claim for bad faith; because Aetna did not engage in bad faith in adjusting Logan's claim; and because Logan's only remaining claim for actual damages must fail for lack of a supporting claim for actual damages.

In Christian v. American Home Assurance Company, 577 P.2d 899 (Okla. 1978), the court for the first time recognized a cause of action for bad faith refusal to pay a valid claim under an insurance policy. In describing that claim, the court stated:

We recognize that there can be disagreements between the insurer and the insured on a variety of matters such as insurable interest, extent of coverage, cause of loss, amount of loss, or breach of policy conditions. Resort to a judicial forum is not per se bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit. Rather, tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured.

Id. at 905. Subsequent courts have held that a bad faith cause of action does not lie "where there is a legitimate dispute." Manis v. Hartford Fire Insurance Company, 681 P.2d 760, 762 (Okla. 1984), Conti v. Republic Underwriters Insurance Company, 782 P.2d 1357, 1361 (Okla. 1989). Logan attempts to distinguish Christian, Manis, and Conti in an effort to argue that Aetna was in bad faith by not offering the limits of its policy in settlement of Logan's claim.

In Christian, Manis, and Conti the insurer refused to make any payment on the claim, but in Manis and Conti, the court held that the defense to payment was reasonable and supported by the evidence. The Court concludes these latter authorities support defendant's motion for summary judgment.

In McCorkle v. Great Atlantic Insurance Company, 637 P.2d 583 (Okla. 1981), the court extended the Christian bad faith cause of action to instances in which there was a dispute over the amount owed. Id. at 587. Moreover, the McCorkle court made it clear that the primary inquiry is the reasonableness of the insurer's conduct. There is no Oklahoma case which makes any distinction in the law as it applies to cases in which the insurer takes the position that there is no coverage, and to cases in which there is merely a disagreement as to the amount owed.

Thus, if Aetna's evaluation was reasonable, summary judgment is appropriate. A thorough review of the record and the evidence before the court reveals that Aetna's failure to pay the full \$500,000.00 was reasonable. Plaintiff's own physician, Dr. Hendricks, admitted that Plaintiff's disability was not total and that Plaintiff should be able to perform work that does not require heavy lifting. Moreover, the evidence shows that Plaintiff hurt her back in a fall prior to the accident. Plaintiff's medical expenses, taking into account estimated expenses for additional operations are approximately \$32,000.00. In light of this evidence, Aetna's evaluation of that the claim was not worth the \$500,000.00 policy limits was not unreasonable. Thus Aetna's

motion for summary judgment is granted.

In light of the conclusion that the actions of Aetna were reasonable in light of the information it had at the time, the Court will not consider the additional grounds for summary judgment advanced by Aetna. Aetna's motion for summary judgment (docket #34) is granted. The Court also notes that Aetna's motion for judgment on the pleadings (docket #15) is mooted by the filing of Plaintiff's amended complaint.

IT IS SO ORDERED, this 22nd day of October, 1993.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 10-22-93

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

FILED

OCT 22 1993

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

DOUG MARTIN and MARIE MARTIN,)
)
Plaintiffs,)
)
vs.)
)
THE CITY OF SAND SPRINGS, et al.,)
)
Defendants.)

Case Number 92-C-705

ORDER ALLOWING DISMISSAL WITH PREJUDICE

Now on this 21 day of October, 1993, the
above styled and numbered matter comes on before me pursuant to
Joint Stipulation of the Parties for Order of Dismissal with
Prejudice. The Court finds, orders and decrees that the above
entitled cause should be and is hereby dismissed with prejudice to
the bringing of any future action thereon.

S/ JAMES O. ELLISON

The Honorable James O. Ellison
United States District Judge

ENTERED ON DOCKET

DATE 10-22-93

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

FILED

OCT 22 1993

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

IN RE:)
)
 FIRST SECURITY MORTGAGE CO.,)
)
 Debtor.)
)
 PATRICK J. MALLOY, III, TRUSTEE,)
)
 Plaintiff/Appellant,)
)
 v.)
)
 CITIZENS BANK OF SAPULPA,)
)
 Defendant/Appellee.)

Bky. No. 89-03147-W

Adversary No. 92-0073-W

Case No. 92-C-1050-E

ORDER

This order pertains to the appeal of Patrick J. Malloy, III, plaintiff/trustee ("Malloy"), from the Memorandum Opinion and Order on the Issue of "Initial Transferee" filed on October 6, 1992, by the U. S. Bankruptcy Court for the Northern District of Oklahoma, and the final Order entered on November 4, 1992 by that court.

The facts in this case are undisputed. On May 19, 1988, Gary Hobbs ("Hobbs") opened a business checking trust account, No. 0503920, at Citizens Bank of Sapulpa ("Citizens"), in the name "Gary B. Hobbs, Attorney at Law Trust Account". The signature card was signed only by Hobbs, who exercised complete discretion as to disbursements from the account and was entitled to possession of all funds upon demand. Citizens imposed no restrictions on the account and did not supervise Hobbs' disbursements.

Deposit slips, notices of wire transfers, and receipts show monies derived from First Security Mortgage Co. ("First Security") were deposited into this account, but Citizens had no knowledge of any interest First Security might have had in the account. On November

30, 1988, the balance in the account was \$2,552.08. After that date a series of deposits and withdrawals totaling \$55,946.13 occurred. On March 31, 1989, the balance was \$3,402.08. The funds withdrawn were used by Hobbs to pay debts to third parties not related to Citizens.

On October 18, 1989, First Security filed for a Chapter 11 Bankruptcy. Hobbs signed the petition as President. The case was converted to a Chapter 7 and Malloy was appointed trustee. None of the funds in the account was used to pay any obligations of the debtor in bankruptcy to Citizens. On March 13, 1992, the trustee filed an adversary action against Citizens, asserting that all deposits which Hobbs made into the account within the year preceding First Security's bankruptcy were fraudulent transfers, as defined by 11 U.S.C. § 548(a)(2)¹, and therefore voidable and recoverable from Citizens as initial transferee, defined in 11 U.S.C. § 550². The parties stipulated that the amount in dispute equaled withdrawals of \$55,946.13, plus the account balance of \$3,402.08, for a total of

¹ Title 11 of the U. S. Code, § 548(a)(2), states:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

...

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

² Title 11 of the U. S. Code, § 550, states in part:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section ... 548 ... of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

\$59,348.21.

The bankruptcy court concluded that the chief issue to be decided was the identity of the "initial transferee" of the monies. It found that, while a significant part of the \$59,348.21 came from First Security, Citizens borrowed the money in the account from Hobbs as trustee, not from First Security. Therefore, Citizens was obligated to repay the money on demand to Hobbs as trustee, not to First Security. Citizens did not know the terms under which Hobbs came into possession of the trust funds, only that he exercised control over them. The bankruptcy court determined that the money was transferred from First Security to Hobbs before it was transferred from Hobbs to Citizens, so Citizens was not the "initial transferee" but a subsequent transferee. It concluded that it was irrelevant whether Hobbs was a lawful trustee and took the money from First Security under a valid trust or converted it from First Security.

After entering its Memorandum Opinion and Order providing that Citizens had not been the initial transferee, the bankruptcy court scheduled a pretrial conference to consider the remaining issues. However, the parties filed a Joint Stipulation and Motion for Entry of Final Judgment, making it clear that Malloy's sole theory against Citizens was based on the allegation that Citizens was the initial transferee and, given the court's ruling, Citizens was entitled to judgment. The Joint Stipulation provided that Malloy did not agree with the court's conclusion and he was not waiving his right to appeal the final judgment. The bankruptcy court entered its final judgment in favor of Citizens on November 4, 1992, and Malloy appealed.

Malloy argues that the bankruptcy court's decision ignores fundamental principles

of banking law. He contends that the court in Ingram v. Liberty Nat. Bank & Trust Co., 533 P.2d 975, 977 (Okla. 1975), interpreting Okla.Stat. tit. 42, § 32, providing a "bankers lien" on funds on deposit, stated that the term "lien" was not an accurate description of a bank's rights regarding deposits: "The money deposited is no longer the property of the depositor, but becomes the property of the bank and the bank becomes debtor to the depositor. This right of a bank is more accurately a right of set-off for it rests upon, and is co-extensive with, the right to set-off as to mutual demands."

Malloy argues that, therefore, the \$59,348.21 deposited into Hobbs' account at Citizens became the property of Citizens, not Hobbs. As a result, the real transferee of these funds was Citizens, not Hobbs.

Malloy also notes that 11 Am. Jur. 2d 339 and certain California court cases provide that it is a fundamental rule of banking law that the moment money is deposited in a bank, it actually becomes the property of the bank, and the bank and the depositor assume the legal relation of a debtor and a creditor. Therefore, Malloy contends, once the estate's funds were deposited with Citizens, they became the property of Citizens to be used by the bank in whatever manner it deemed appropriate, and Citizens was not a conduit or trustee, but the true owner and initial transferee pursuant to 11 U.S.C. § 550. Malloy states that there was no consideration for the transfer of the debtor's property from Citizens to Hobbs.

Citizens responds that the funds in the account belong to the trust created by Hobbs, who acted as trustee. While some of the funds in the account may have belong to First Security, not all of them did. Given the nature of the account, any funds in which First Security had an interest were first transferred to Hobbs as trustee and he, in turn,

transferred them to Citizens. Citizens was not a creditor of First Security, it was not an insider of First Security or a guarantor in any way of any debt arising from the account, and none of the funds from the account was used to pay debts owed to Citizens. Therefore there was no voidable preference for which Citizens may be held liable.

This court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate view of bankruptcy rulings with respect to findings of fact. In re Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

Courts which have construed the phrase "initial transferee" have held that a bank with no direct relationship with the debtor is not an "initial transferee". In re Columbia Data Products, Inc., 892 F.2d 26, 28 (4th Cir. 1989) ("a party cannot be an initial transferee if he is a mere conduit for the party who had a direct business relationship with the debtor"); In re Chase and Sandborn Corp., 848 F.2d 1196 (11th Cir. 1988); In re Colombian Coffee Co., 75 Bankr. 177 (S.D. Fla. 1987).

In In re Colombian Coffee, the trustee of the estate attempted to recover funds from First Alabama Bank as the initial transferee. The amount in question had moved in three separate wire transfers from Colombian Coffee's bank accounts to the defendant bank for deposit into the account of General Coffee Corporation, which then disbursed the funds

almost immediately. Colombian, General, and the individual who owned and controlled both corporations all filed for bankruptcy. The bankruptcy court found that the trustee could not recover from the bank because nothing in the legislative history indicated that § 550 "was intended to make an innocent link in the commercial chain bear the loss of a fraudulent or preferential transfer that has vanished beyond the trustee's reach." *Id.* at 177-178. The court noted that the bank acquired no beneficial interest from the wire transfers, exhibited no bad faith, and possessed no discretion with respect to the disposition of the funds, but merely followed the debtor's instructions.

Nothing in the legislative history of § 550 indicates that Congress intended to impose liability under these circumstances. Indeed, it would be both problematical and preposterous were courts to adopt the Trustee's position....

Wire transfers are voluminous. The defendant bank receives over 100 a day. Larger banks receive thousands. They involve billions of dollars. They constitute an integral part of today's worldwide banking system.

The wire transfer notice frequently does not identify the originating party.... They are frequently automated and never seen by a human eye. If a bank must at its peril examine the source of the wired funds, determine its solvency and verify the consideration it received before the bank honors the transfer, the wire transfer system would utterly collapse.

The logic of the above is obvious and makes it unnecessary for this Court to further expound on its ruling. In sum, this Court is not persuaded by the Trustee's arguments and refuses to literally apply § 550(a) to the circumstances of this case. To apply this section literally in the present case would clearly work an absurd and inequitable result. *Id.* at 179 (quoting the bankruptcy judge, Judge Britton).

In Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890 (7th Cir. 1988), funds were deposited by the future bankrupt in an individual's account and used by the individual to reduce a personal business loan made to him by the bank. The individual was subsequently convicted of mail fraud and the transfer of the funds was found to be a fraudulent conveyance. The trustee sought to recover that amount from the bank that had transferred the funds. The Bonded court held that the bank in that case was a mere conduit of the funds, not the initial transferee. The court noted that the cost to financial institutions and banks would be staggering if the term "transferee" were used loosely and they were required to inquire into the source and propriety of all checks and wires which they received daily. The court stated: "The Bank acted as a financial intermediary. It received no benefit.... Under the law of contracts, the Bank had to follow the instructions that came with the check.... The Bank therefore was no different from a courier or an intermediary on a wire transfer; it held the check only for the purpose of fulfilling an instruction to make the funds available to someone else." Id. at 893. The court discussed the meaning of "transferee", saying it was: "not a self-defining term; it must mean something different from 'possessor' or 'holder' or 'agent.' To treat 'transferee' as 'anyone who touches the money' and then to escape the absurd results that follow is to introduce useless steps; we slice these off with Occam's razor and leave a more functional rule." Id. at 894.

In In re Robinson Brothers Drilling, Inc., 97 Bankr. 77 (W.D.Okla. 1988), aff'd, 892 F.2d 850 (10th Cir. 1989), the court approved the discussion in dictum in Bonded of policy considerations and equitable powers to define "transferee" under 11 U.S.C. § 550, saying

it was "sound guidance for heeding the clear intent of Congress". In re Robinson, 97 Bankr. at 81. It must be noted that the issues in Robinson were different from those in the case at bar. The district court's decision in Robinson was affirmed in In Re Robinson Brothers Drilling, Inc., 892 F.2d 850 (10th Cir. 1989).

In the case at bar, Citizens did not receive any loan payments connected with Account No. 0503920, as the bank in Bonded received a separate loan payment from the account subject to dispute. Thus Citizens was even more clearly a mere conduit of funds.

The Ingram v. Liberty National case, cited by Malloy as authority for the proposition that money deposited in an account becomes the property of a bank, does not discuss the definition of "initial transferee". In Ingram the debtor's bank exercised the right of setoff to pay a debt owed the bank by taking funds from his checking account. The debtor in bankruptcy demanded payment of the balance of the account and the bank refused, claiming a banker's lien on the debtor's funds. The Oklahoma Supreme Court refused to allow the bank to offset for the debt, because the obligation had been discharged in bankruptcy and an offset would result in its reinstatement and undermine the purpose of the Bankruptcy Code. These facts are clearly distinguishable from the facts in the case at bar. In Ingram the debtor in bankruptcy was the depositor, and the trustee could recover deposits from the bank as the initial transferee. In the case at bar, the account was opened by someone other than the debtor in bankruptcy, so the trustee should not recover the deposits merely because the debtor transferred monies to the third party and the monies were deposited in the bank.

In addition, § 550 provides that, if a transfer is voided under 547, the trustee of the

estate may recover the property transferred or the value of the property from "the initial transferee of such transfer or the entity for whose benefit such transfer was made...." The canons of substantive and procedural law require that "initial transferee" be construed to mean a transferee with respect to whom the transfer was preferential. In re Midwestern Companies, Inc., 96 Bankr. 224, 226 (Bankr. W.D.Mo. 1988), aff'd, 102 Bankr. 169 (W.D. Mo. 1989). The transfer was not preferential as to Citizens and it was not "the entity for whose benefit such transfer was made." The monies which the bank received were not to pay any debt owing to the bank.

The evidence and law support the bankruptcy court's conclusion that some part of the \$59,348.21 at issue came from First Security's coffers and the money became "the bank's money" until it was repaid to the depositor. The bank was therefore a transferee. But it did not receive money directly from the debtor. It borrowed the money from Hobbs as trustee, not from First Security, and it was obligated to repay Hobbs as trustee, not First Security. Citizens did not know who or what Hobbs was "trustee" of, but it knew he exercised control over the funds in the account. Whether he was lawful trustee and undertook a valid trust, or converted the funds from First Security, is irrelevant. In any event, Hobbs the trustee was the initial transferee. While he exercised control over the account, under the law the funds in it did not belong to him individually or to the bankrupt debtor. Instead, the account belonged to Hobbs as trustee, and Citizens became the debtor of Hobbs as trustee. The bank had no right to the funds other than as a conduit. Citizens was a subsequent transferee, and whether it was a subsequent transferee "for value" and/or "in good faith" under 11 U.S.C. § 550(b) is not an issue before this court.

The decision of the bankruptcy judge is affirmed.

Dated this 21st day of October, 1993.



JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

DATE 10-22-93

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

FILED

OCT 22 1993

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

NATALIE JOHNSON, a minor)
who sues by and through)
FRED AND JENNIFER JOHNSON,)
her father and mother,)
as next of friends,)

Plaintiff,)

vs.)

Case No. 92-C-238E

INDEPENDENT SCHOOL DISTRICT)
NO. 4 OF BIXBY, TULSA COUNTY,)
OKLAHOMA; OKLAHOMA STATE)
DEPARTMENT OF EDUCATION,)

Defendants.)

ADMINISTRATIVE CLOSING ORDER

This matter came on for consideration upon the request of Fred and Jennifer Johnson (the "Johnsons"), as the parents and next friends of Natalie Johnson ("Natalie"), and Independent School District No. 4 of Tulsa County, Oklahoma ("Bixby School District") for an administrative closing order. The Court finds as follows:

1. Through a settlement conference with Magistrate Wagner, the parties agreed to settle any and all disputes existing between them as of the date of their settlement agreement, March 8, 1993.

2. One of the agreed provisions of the settlement agreement is the closure of this case through an administrative closing order.

3. The administrative closing order will remain in effect until Natalie ceases to be a school-age resident of the Bixby School District. This Court will have continuing jurisdiction of this matter only as to disputes arising in respect to Sections 1, 2, 3, 4 and 5 of the settlement agreement. Disputes between the Johnsons, Natalie and the Bixby School District not related to those sections of the settlement agreement will proceed through traditional administrative hearing

procedures as a separate action.

WHEREFORE, the Court hereby enters an administrative closing order in the captioned action subject to the terms and conditions stated in this order.

Dated Oct 22, 1993.

S/ JAMES O. ELLISON

Judge of the District Court

ENTERED ON DOCKET

DATE 10-22-93

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

MICHELLE LEA GERKE,)
)
 Plaintiff,)
)
 vs.)
)
 ROGER GAUTIER, AMERICAN STATES)
 INSURANCE COMPANY, and STATE)
 FARM MUTUAL AUTOMOBILE INSURANCE)
 COMPANY,)
)
 Defendants.)

92-C-235-E

FILED

OCT 22 1993

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

STIPULATION OF DISMISSAL

Comes Defendant and Cross Claimant, American States Insurance Company, and stipulates that its cross claim against Roger Gautier is hereby dismissed without prejudice.

GOREE & KING, INC.

JACK Y. GOREE (OBA #3481)

By: Jack Y. Goree
Attorney for Defendant
and Cross Claimant,
American States
Insurance Company

Southern Oaks Office Park
7335 South Lewis, Suite 306
Tulsa, Oklahoma 74136-6888
(918) 496-3366

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 1993, a true and correct copy of the STIPULATION OF DISMISSAL was mailed to W. C. Sellers, Jr., P. O. Box 1404, Sapulpa, Oklahoma 74067-1404, R. J. McAtee, P. O. Box 2619, Tulsa, Oklahoma 74101-2619, John A. Gladd, 2642 East 21 Street, No. 150, Tulsa, Oklahoma 74114 and Paul T. Boudreaux and Cristina Romero, 525 South Main, Suite 1500, Tulsa, Oklahoma 74103; with sufficient postage thereon fully prepaid.



Jack Y. Goree

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

FILED

OCT 21 1993

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

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

Plaintiffs,)

v.)

SUN REFINING AND MARKETING)
COMPANY,)

Defendant.)

Case No. 92-C-258-B

ORDER

This matter comes on for consideration of Defendant Sun Refining and Marketing Company's (Sun) Motion for Summary Judgment¹ (docket #51).

This is a tort action growing out of the accidental release by Sun, on March 19, 1988, of hydrogen fluoride into the atmosphere from its refinery in west Tulsa. This case was removed from Tulsa County District based upon diversity jurisdiction.

Plaintiffs allege claims for personal injury and for medical examinations and treatment, if required. Plaintiffs allege as a basis for Sun's liability: negligence, strict liability, violation of Federal and State statutes and regulations, and intentional

¹ Magistrate John Leo Wagner bifurcated this case into Phase I and Phase II. Phase I relates only to the Mar. 19, 1988 incident while Phase II relates to alleged repeated exposure to hydrogen fluoride (and therefore alleged repeated releases of same by Sun). Although Margaret Spees remains as a plaintiff, she has withdrawn as a plaintiff in Phase I.

concealment of critical and necessary information regarding the need for immediate medical exams, monitoring and treatment. Sun, in its answers to the several amended complaints², denies that the release of hydrogen fluoride on March 19, 1988, caused anything more than temporary distress to the several exposed persons and alleged it encouraged such persons so affected, by newspaper ads, to submit to it any medical bills incurred for any immediate treatment. Sun also raised in its answers the affirmative defense of statute of limitations as a bar to the present action.

Sun presents two propositions for summary judgment: (1) That Plaintiffs' claims are barred by the statute of limitations, and (2) Plaintiffs have failed to show, and cannot show, by competent medical testimony, any causal link between the alleged injuries now suffered by these Plaintiffs and the hydrogen fluoride exposure.

In Sun's statute of limitations defense, it argues that Plaintiffs were fully aware of the alleged negligent event when it first occurred including the distressful but temporary symptoms that were experienced as a result thereof by some of the Plaintiffs, and that as a result thereof any cause of action accrued on or immediately after March 18, 1988. The deposition testimony of the several Plaintiffs supports this as will be seen *infra*.

There is no disagreement that 12 O.S. §95 is applicable herein

² The docket sheet indicates there have been at least 73 individual plaintiffs most of whom have been dismissed without prejudice.

and that such statute provides for a two year period within which to bring an action.

Plaintiffs filed suit herein on March 20, 1992, more than four years after the accidental hydrogen fluoride release, palpably beyond the statutory period. Plaintiffs argue however that Sun's alleged fraudulent concealment of the potential long-range health effects of hydrogen fluoride exposure tolls the running of the statute, citing primarily Williams v. Borden, Inc., 637 F.2d 731 (10th Cir.1980).

The corner stone of Plaintiffs' "fraudulent concealment" issue is, in the Court's view, two-fold: (1) an allegation that Sun did not reveal to the affected public its in-house information and knowledge of the potential or possible long term health effects of exposure to hydrogen fluoride vapors; and (2) Plaintiffs' serious health problems did not surface until at least after March 20, 1990 (i.e. two years prior to the filing of suit). Plaintiffs argue that Sun's failure to reveal such information tolled the running of the statute of limitations until Plaintiffs discovered, through the emergence of latent health problems, that the toxic cloud of March 19, 1988, was the cause of their collective ills.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Widon

Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert. den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

Plaintiffs cannot deny that, individually, each knew the distressful symptoms being experienced immediately on and after

March 19, 1988, were caused by the hydrogen fluoride release. Plaintiff Don Austin: deposition testimony, pp. 94-95; Plaintiff Marjorie Spees: deposition testimony, p. 73-74; Plaintiff Richard Spees: deposition testimony, pp. 43, 78-79, 86, 91-92; Plaintiff Dorothy Cooks: deposition testimony, p. 66; Plaintiff Walter Farmer: deposition testimony, pp. 21-22, 28-30; Plaintiff Gabriele Smith: deposition testimony, p. 34; Plaintiff Vernon Van Horn: deposition testimony, pp. 17, 21-22, 45, 51-52; Plaintiff Barbara Willis: deposition, pp. 51, 68-69. (docket #51 exhibits).

The Court concludes the significance of this early association by Plaintiffs of their immediate distress to the toxic vapors burdened the Plaintiffs with the knowledge that a claim on each Plaintiff's behalf had arisen and must have been pursued within the statutory period or suffer the loss thereof, absent any tolling. The Court believes Williams v. Borden, *supra*, is distinguishable. Williams, a meat cutter exposed to toxic fumes over a long period of time as a result of hot wire cutting of meat wrapped in plastic, had no inkling of a connection between her disease and the meat wrap nor did the meat processing industry generally. Williams v. Borden sets forth the black letter rule "when a reasonable person knew or should have known" determines when the statute of limitations begins to run. Since the state of the meat cutting art did not contain the general information that repeated exposure to hot wire cutting of plastic wrap could have harmful health effects, the statute was tolled. In the present case, all the Plaintiffs associated their immediate symptomatology with the March 19, 1988

hydrogen fluoride vapor. Therefore, any action causally connected to this symptomatology is barred unless tolling has occurred.

Plaintiffs argue that they may show the existence of latent health problems which were caused by the vapors, the potential existence of which were known to Sun but hidden from the Plaintiffs, thus tolling the statute of limitations. The Court views this alternative as a two-prong issue to be met by Plaintiffs: (1) show that Sun had a duty to Plaintiffs, after the hydrogen fluoride release, to inform Plaintiffs of the possible, probable or potential future harm from such exposure (as opposed to Plaintiffs seeking their own medical opinions regarding any long term effects); and (2) show that present health complaints and problems are the result of exposure to the toxic cloud.

Plaintiffs arguably demonstrate Sun's duty to inform by reference to various environmental acts, state and federal, which impose upon chemical handlers such as Sun considerable responsibility to the general public as well as specific members thereof. But the Court need not address that issue because it is the second prong, i.e. causation, that Plaintiffs patently fail to satisfy.

Plaintiffs essentially have a speculative or conjectural case. Their various symptoms, such as asthma, shortness of breath, fatigue, tiredness, etc., are common health problems of known and unknown etiology but which could have been or can be caused by exposure to

a toxic cloud.³ While it is permissible for a Plaintiff to give lay testimony as to causation, expert medical testimony is required to make the actionable nexus between event and injury unless the lay evidence "creates a probability so strong that a jury can form a reasonable belief without the aid of any expert opinion". Scott Case v. Upjohn Company, 1992 WL 259203 (Conn.Super. 1992). The rule in this circuit is the same. "When dealing with an issue of medical causation, a considered medical judgment is necessary, expressed in terms of probability rather than possibility. Higgins v. Martin Marietta Corp., 752 F.2d 492 (10th Cir. 1985), citing Fitzgerald v. Manning, 679 F.2d 341 (4th Cir. 1982) and Bearman v. Prudential Insurance Co., 186 F.2d 662 (10th Cir. 1951). And the rule in Oklahoma is likewise. Franklin v. Shelton, 250 F.2d 92 (10th Cir. 1957), *cert. den.* 355 U.S. 959 (1958). Franklin, a case which arose from the Eastern District of Oklahoma, held that where the injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, they must be proved by the testimony of medical experts. However, this does not preclude lay witness testimony as to physical injuries and conditions which are susceptible to observation by an ordinary person. *Id.* at 97.

Plaintiffs, in resistance to Sun's summary judgment motion,

³ See trial testimony excerpts of expert witnesses Drs. Fred Garfinkel and Woodhall Stopford, in Mattingly and Norwood v. Sun, 90-C-307-E, docket #59A, attached to Plaintiffs' response to Defendant's motion for summary judgment.

offer the testimony of two experts who testified in another case⁴ related to the hydrogen fluoride release of March 19, 1988, to establish the causal link. Dr. Fred Garfinkel, who specializes in lung diseases, testified in that trial that a single exposure to hydrofluoric acid could cause reactive airways disease and that there are sometimes delayed effects on the lungs or respiratory system and that a delay in symptoms is not unusual. Garfinkel also testified that "things that inflame the airways" could be "inhaled dust, it could be inhaled vapors, odors, including perfumes. It could be an infection and that includes a viral or bacterial (sic) infection that irritates the bronchial tubes." Tab B, pp. 17, 40.

Dr. Woodhall Stopford echoes Garfinkel's testimony that "[H]ydrogen fluoride leads to -- can lead to an immediate effect that can result in delayed or persistent injury to various organ systems including the skin, eyes, and respiratory tract. which may be perfectly obvious." Tab C, pp. 288-289. Stopford further opined that if you were not aware that exposures had been present, one may not relate the symptoms to a toxic exposure. Id. at 289.

The experts Garfinkel and Stopford testify as to what could or can happen following an HF exposure but neither these experts nor any medical testimony offered by Plaintiffs provide evidence connecting Plaintiffs' alleged subjective ailments to being caused by the March 19, 1988 toxic cloud release.

Contrawise, Defendant offers the deposition testimony of

⁴ Mattingly and Norwood v. Sun, Case No. 90-C-307-E, where a Defendant's verdict was reached, is currently on appeal.

Plaintiffs themselves to establish that no medical expert has told these Plaintiffs that the following symptoms were caused by exposure to the HF cloud of March 19, 1988:

Dorothy Cooks: alleged vision problems, stomach problems or symptoms of sickness, weakness or nausea. Deposition testimony, p. 66.

Walter Farmer: alleged sinus difficulties, shortness of breath, pneumonia, bronchitis, asthma, dizziness and fatigue. Deposition testimony, p. 31.

Gabriele Smith: alleged sinus problems (Smith was somewhere in Skiatook at the time of the release and only smelled the strong odor in the basement of the Tulsa police department a day or two after the release). Deposition testimony, p. 27, 49-50.

Marjorie Spees: (Sun's summary judgment motion addresses this Plaintiff's Phase I position. It appears Marjorie Spees has withdrawn as a Plaintiff in Phase I, but remains as to Phase II. Spees made no complaint of injury (only the strong odor) from the March 19, 1988 release.)

Richard Spees: alleged shortness of breath and being tired. (Spees sued because he was angry and Sun failed to tell people of the danger of the emission) but sought no medical attention then or now and was told by "various people", none doctors, that "there's nothing that can be done on these hydrofluorides". Deposition testimony, pp. 43, 96-97.

Vernon Van Horn: alleged spots on his retina, a spastic esophagus, a cataract, an ulcer, shortness of breath. Deposition

testimony, pp. 21, 28, 33.

Barbara Willis: alleged bronchitis in 1989.

Plaintiffs argue that one's own causation testimony is sufficient to withstand summary judgment particularly when it is compatible with expert medical testimony as to what could or can happen following HF exposure, citing Orthopedic Clinic v. Hansen, 415 P.2d 991 (Okla. 1966). Orthopedic is distinguishable because the injury therein was an obvious ulcerated ankle condition on the spot where a transducer from a medcolator⁵ was applied. In Orthopedic the Oklahoma Supreme Court held that no expert testimony was in fact required. *A fortiori*, where no expert testimony is required, expert medical testimony that the injury could have resulted from medcolator treatment was found sufficient.

No Plaintiff has countered Defendant's summary judgment evidence that expert medical testimony is lacking to show causation between the March 19, 1988 toxic cloud and any present medical problem. Plaintiffs thus fail: (1) on the statute of limitations issue as a result of no timely filing of the instant action because no latent injury or illness has been causally linked to the toxic vapors by expert medical evidence; and 2) on the causation required to establish an actionable negligence claim, for the same reason.

⁵ The medcolator is a therapy machine designed to produce an artificial stimulation of the muscles of the patient by means of electrical shock. The current flows from a transducer, through the patient, and into a ground pad. The movable transducer is applied to the patient by the operator and the ground pad is placed under the patient's body in the area where the transducer is being applied.

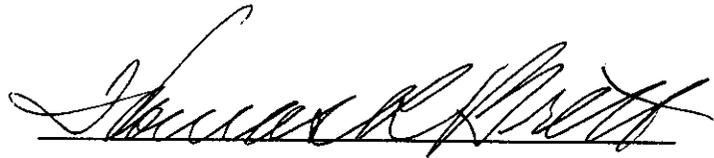
The Court concludes the Celetex-Anderson-Matsushita trilogy requires more.

Based upon the above the Court concludes Defendant's Motion For Summary Judgment (docket # 51), on the Phase I issues, should be and the same is hereby GRANTED.

The matter will proceed on Phase II issues based upon the following schedules:

Jan. 28, 1994	Discovery to be complete.
Feb. 1, 1994	Exchange all witnesses' names and addresses, including experts, in writing. Any witness who appears on the list whose deposition has not been taken, state briefly the subject of that witness' testimony.
Feb. 18, 1994.	Dispositive motions.
Mar. 6, 1994	Responses.
Mar. 16, 1994	Replies.
Mar. 17, 1994	file an agreed Pretrial Order
Mar. 24, 1994	final In Limine Motions
Apr. 1, 1994	Pre-Trial Conference and Hearing on Motions at 9:00 a.m.
May 9, 1994	file requested voir dire, requested instructions and any trial briefs
May 16, 1994	Jury Trial at 9:30 a.m.

IT IS SO ORDERED, this 21ST day of October, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 21 1993

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

UNITED STATES OF AMERICA,)
)
 Plaintiff(s),)
)
 v.)
)
 J. RAIFORD LUKER, et al,)
)
 Defendant(s).)

92-C-1197-B

ORDER

On December 22, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma denied Appellant's request for administrative expense classification of interest on post-petition taxes pursuant to 11 U.S.C. §503 (b)(1)(B), (C). Appellant now challenges that decision. For the reasons listed below that decision is Affirmed.

I. Summary of Facts

On June 15, 1983, J. Raiford Luker Jr. and Yvonne Luker ("Appellees") filed their petition for voluntary relief under Chapter 11 in the United States Bankruptcy Court of the Northern District of Oklahoma. On or about September 24, 1985 the Court appointed Rick Loewenherz as Chapter 11 trustee ("Trustee"). A Request for Payment of Internal Revenue Taxes (Bankruptcy Code Cases--Administrative Expenses), was filed by the Department of the Treasury ("IRS") (Appellant) on November 10, 1986. The IRS made "administrative claims for FICA withholding and FUTA taxes, for the tax period from December 31, 1983 to September 30, 1985, in the amount of \$29,818.67; plus accrued interest as of the date of this request" in the amount of \$5,815.68; plus "accrued penalty as of the date of this

6

request" in the amount of \$8,451.22; for a total of \$44,085.57. On April 20, 1989, the IRS filed its Motion for Order Directing Payment of Administrative Expense Claim, alleging that on May 31, 1989 the claim would total \$65,076.63.

The attorney for Defendant's Trustee, J. Scott McWilliams, filed an Objection to the Motion asserting that the IRS "failed to state any reason why their administrative expense claim should be paid before a distribution to other administrative and secured claimants", and declaring the Trustee's intention to file a Plan pursuant to which the IRS would be paid at the proper time. At a hearing on June 23, 1989, the parties were directed to file briefs on the issue. The IRS filed its brief on June 30, 1989, while the Trustee filed his brief on July 7, 1989. The IRS filed its Response on July 21, 1989.

The Bankruptcy Court then took the matter under advisement, filing an Order on December 12, 1992. In its Order the Court denied IRS' Request for Classification of Interest on Post-Petition Taxes as an Administrative Expense, denying payment of this claim prior to payment of other unsecured claims. The court otherwise continued the claim for disposition in accordance with other unsecured claims. On December 31, 1992 the IRS filed its appeal.

II. Legal Analysis

The sole issue before the Court is whether interest on taxes is entitled to the same priority as the underlying taxes.¹ At issue is proper interpretation of the language of 11 U.S.C. §503(b).

¹ *Taxes are afforded first priority status as administrative expenses of the bankruptcy estate.*

Section 503 provides in part as follows:

- (a) An entity may file a request for payment of administrative expense.
- (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under §502(f) of this title including...
 - (1) (A) the actual necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;
 - (B) any tax...
 - (i) incurred by the estate ...
 - (C) Any fine, a penalty or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph.

A. Legislative History

The Tenth Circuit Court of Appeals has stated, "In determining the scope of a statute, a Court must begin with the language itself." *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir. 1987). The language of Section 503(b) does not expressly identify or exclude interest on post-petition taxes as an administrative expense. Section 503(b) lists allowable administrative expenses following the word "including". By enactment of Title 11 U.S.C. §102(3) Congress has indicated that the words "includes and including" are not limiting. §102(3).

The legislative history of Title 11 U.S.C. §503 reveals the following. The Senate expressly provided for interest as an administrative expense. *See*, S.Rep. No. 95-989, 95th Cong., 2nd Sess. (1978) at p. 66. However, the House version had no such provision. When the final version was enacted, the Senate's express provision for interest as an administrative expense was deleted. The statute does not grant the favored treatment of

interest on post-petition taxes which the IRS seeks. Congress had the opportunity to specify interest as a priority administrative expense, but did not. 11 U.S.C. §726(a)(5).

However, as the statute does not forbid interest as an administrative expense, the Courts are able to create "an extraordinary non-statutory administrative expense," if "the circumstances...warrant". *In re Mid Region Petroleum, Inc.*, 111 B.R. 968, 975 (B.C., N.D.Okl. 1990). A creditor demanding priority payment assumes the burden of showing its entitlement. *Id.* at 971.

A court must consider two main factors in deciding whether to allow an administrative expense. First the expense in question must be shown to have been "actual and necessary". Second, the expense must not have been incurred primarily in the interest of the claimant, and must in fact have benefitted the estate and the creditors as a whole.

In the Matter of Patch Graphics, 58 B.R. 743, 745 (Bkrcty. W.D. Wis. 1986).

The terms "actual" and "necessary" contained in 11 U.S.C. §503(b)(1)(A) must be narrowly construed in order to keep administrative expenses at a minimum and thus preserve the estate for the benefit to all creditors.

In Re O.P.M. Leasing Services, Inc., 23 B.R. 104, 121 (Bkrcty. S.D.N.Y. 1082).

In the instant case, the burden of proving an "extraordinary" non-statutory administrative expense rests on the IRS. Upon review, the Bankruptcy Court determined the IRS failed to make a sufficient showing of that entitlement. This finding is supported by the underlying record.

The IRS proposes that interest should be part of "tax" for purposes of §503(b)(1)(B), citing the pre-Code case, *Bruning v. U.S.*, 375 U.S. 358, 11 L.Ed.2d 772, 84 S.Ct. 906 (1964). Yet the *Bruning* Court purposefully distinguished nondischargeability of debts owed by debtor from the very different situation of payment of claims against the

bankruptcy estate.

The basic reasons for the rule denying post-petition interest as a claim against the bankruptcy estate are the avoidance of unfairness as between competing creditors and the avoidance of administrative inconvenience. These reasons are applicable to an action brought against the debtor personally. In the instant case, collection of post-bankruptcy interest cannot inconvenience administration of the bankruptcy estate, cannot diminish the estate in favor of high interest creditors at the expense of other creditors.

Id., 376 U.S. pp. 362-363, 11 L.Ed.2d pp. 775-776.

The IRS also cites another pre-Code case, *Nicholas v. U.S.*, 384 U.S. 678, 16 L.Ed.2d 853, 86 S.Ct. 1674 (1966). In *Nicholas* a debtor-in-possession under Ch. XXI withheld income, social security and excise taxes, but was displaced by a trustee who did not file returns or pay taxes when they became due. The Court allowed the taxes, but not penalties or interest and the District Court affirmed. The 5th Circuit Court of Appeals reversed, allowing both penalties and interest. The U.S. Supreme Court reversed in part, disallowing the interest.

The *Nicholas* Court divided the circumstances of the case into three periods: 1) the pre-arrangement period, 2) the arrangement period, 3) the liquidating bankruptcy period, *Id. at 686*. The Court stated that the "accumulation of interest on a debt must be suspended once an enterprise enters a period of bankruptcy administration beyond that in which the underlying interest-bearing obligation was incurred". *Id.* Therefore, an estate is only liable for interest accrued during the Chapter XI administration with the debtor-in-possession. In discussing interest-bearing debts the Court stated the equitable principle rests

On an awareness of the inequity that would result if, through the continuing accumulation of interest in the course of subsequent bankruptcy proceedings,

obligations bearing relatively high rates of interest were permitted to absorb the assets of a bankrupt estate whose funds were already inadequate to pay the principal of the debts owed to the estate.

Id. 834 U.S. pp. 683-684, 16 L.Ed.2d p. 859.

The IRS also cites *U.S. v. Friendship College, Inc.*, 737 F.2d 430 (4th Cir. 1984), which held that interest accumulated during Chapter 11 debtor-in-possession was an administrative expense priority. However, this decision is suspect as the Court never discussed any pre-Code law and declined to draw any inference from the deletion of "interest" in the final version of §503 while citing the Senate's version in support of Congressional intent.

The IRS cited yet another problematic case. In *In re Allied Mechanical Services, Inc.*, 885 F.2d 837 (11th Cir. 1989), the Court gave priority administrative expense status to interest on post-petition withholding even though, "[t]here are insufficient funds in the estate to pay all...administrative claims in full", *Id.* p. 838. The policy considerations by the 11th Circuit in support of this ruling were that the reorganization was to be, "financed by the debtor, not the debtor's post-petition creditors", *Id.* at 839. But the error in this reasoning is that it is the other administrative claimants and creditors that would be financing the debt and not the debtor.

In *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988), the Supreme Court denied post-petition interest to unsecured creditors even during the administration of the debtor-in-possession during Chapter 11. The Court stated,

[D]enial of postpetition interest...was part of the conscious allocation of...benefits and losses between...creditors...It was considered unfair to allow

a...creditor to recover interest from the estate's unencumbered assets before [other] creditors had recovered any principal.

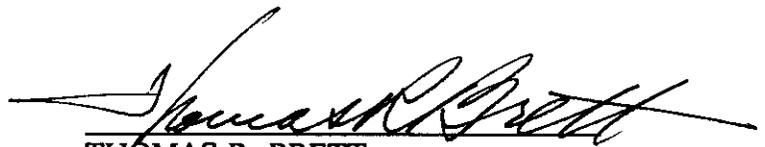
Id. 484 U.S. p. 375, 98 L.Ed.2d pp. 749-750.

The Court in *Timbers* reaffirmed the historical principles of bankruptcy law which emphasize, "equality of distribution among [creditors] of the property of the bankrupt", *Pirie v. Chicago Title & Trust co.*, 182 U.S. 438, 449, 45 L.Ed. 1171, 1178, 21 S.Ct. 906, 909 (1901).

III. Conclusion

It is plain that priority payment of the IRS' claims for interest on post-petition taxes would penalize general unsecured creditors. In such instances the IRS has the heavy burden of showing extraordinary circumstances to justify entitlement. *In the Matter of Patch Graphics*, 58 B.R. 743, 745-746 (Bkrtcy. W.D. Wis. 1986). Upon review, the undersigned finds that the IRS has not made sufficient showing to receive the requested favored treatment. Accordingly, the decision of the Bankruptcy Court is **AFFIRMED**.

SO ORDERED THIS 20th day of Oct., 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

OCT 21 93

JUANITA BUCHANAN,

Plaintiff,

v.

Case No. 92-C-985-C

**PENNY SHERRILL, individually and as
owner of Autex Foods, Inc., a Tennessee
corporation, d/b/a Shoney's Restaurant,
and AUTEX FOODS, INC., a Tennessee
corporation, d/b/a SHONEY'S RESTAURANT,
SHONEY'S, INC., a Tennessee corporation
and the franchiser of Autex Foods, Inc., a
Tennessee corporation, and MIKE GORHAM,
individually and as a manager of Autex Foods,
Inc., d/b/a Shoney's Restaurant, and ED
FISHER, individually and as a manager of
Autex Foods, Inc., d/b/a Shoney's Restaurant,
and TREY GILLETTE, individually and as a
manager of Autex Foods, Inc., d/b/a Shoney's
Restaurant, and STEVE CREED,
individually and as the former President
of Autex foods, Inc., a Tennessee
corporation, d/b/a Shoney's Restaurant,**

Defendants.

STIPULATED DISMISSAL

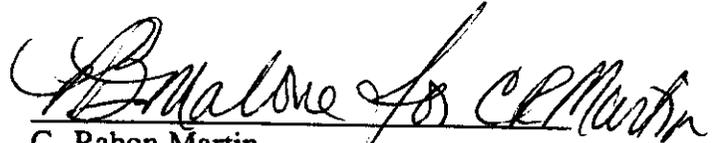
1. Pursuant to an agreement between counsel for the Plaintiff and counsel for the Defendants, Plaintiff seeks to dismiss, without prejudice, all claims against the Defendant, Shoney's, Inc., a Tennessee corporation pursuant to Rule 41, Fed.R.Civ.P.

2. The parties agree that it is in their respective best interests that Plaintiff's claims be dismissed against the Defendant, Shoney's Inc.

3. No promises or consideration other than the agreement recited herein has been made or exchanged for this dismissal.

4. This dismissal is made pursuant to Rule 41, Fed.R.Civ.P. and the parties herein signify their consent to the dismissal by signing below.

Respectfully submitted,



C. Rabon Martin
201 West Fifth Street
Suite 510
Tulsa, Oklahoma 74103
(918) 587-9000
Attorney for the Plaintiff

OF COUNSEL:
MARTIN & ASSOCIATES
201 WEST FIFTH STREET
SUITE 510
TULSA, OKLAHOMA 74103
(918) 587-9000
ATTORNEYS FOR THE PLAINTIFF



Reuben Davis, OBA #2208
Frederic N. Schneider III, OBA #8010
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 567-0000
Attorneys for the Defendant,
Autex Foods, Inc.

OF COUNSEL:
BOONE, SMITH, DAVIS, HURST
& DICKMAN
500 ONEOK PLAZA
100 WEST FIFTH STREET
TULSA, OKLAHOMA 74103
(918) 587-0000
ATTORNEYS FOR THE DEFENDANT,
AUTEX FOODS, INC.

ENTERED ON DOCKET
DATE OCT 21 1993

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

VEARL J. OSBORN,
SSN: 467-82-1301
Plaintiff,

v.

Donna E. Shalala,
Secretary of Health and
Human Services,

Defendant.

Case No. 92-C-491-B

NORTHERN DISTRICT OF OKLAHOMA T K

ORDER

The Court, having considered Petitioner's Application and Motion for Final Order for Attorney Fees Under 28 U.S.C. Section 2412, the Equal Access to Justice Act (EAJA), and having reviewed the arguments and representations of counsel, finds:

1) Petitioner requests attorney fees pursuant to 28 U.S.C. Section 2412, based upon a successful challenge of Defendant's decision denying Plaintiff's Social Security Disability benefits (SSD). The parties have stipulated that \$100.00 per hour for 51.6 hours and \$17.25 costs or \$5,177.25 is a fair and reasonable amount under 28 U.S.C. Section 2412.

2) The Court finds that the Defendant's position was not substantially justified, nor reasonable as to the facts of the case in originally denying the benefits, and that an award under the EAJA is justified, and Defendant agrees with said fee and the Court hereby sustains Petitioner's Motion for attorney fees.

3) No attorney fee award has yet been made by the Defendant to Plaintiff's representative in the administrative proceedings before the Social Security Administration. Petitioner shall advise the Social Security Administration of this award and any request for fees related to the administrative proceedings, if any.

4) If an award of fees for work performed in this court is sought and awarded under 42 U.S.C. Section 406, Petitioner shall return to the Plaintiff the lesser of the Section 406 award or the amount awarded by this Order, pursuant to Weakley vs Bowen, 803 F.2d 575 (10th Cir., 1986).

5) That counsel, Mark E. Buchner, for Plaintiff has expended 51.6 hours in pursuit of the Plaintiff's claim in the United States District Court for the Northern District of Oklahoma and that \$100.00 per hour is a fair and reasonable hourly fee, and that a fee of \$5,160.00 shall be awarded to Mark E. Buchner, Attorney at Law, and costs in the amount of \$17.25. Further, Defendant has filed a statement of no objection and this award should be granted.

IT IS THEREFORE SO ORDERED.

DATED this 20 day of October, 1993.

THOMAS H. BAKER

United States Judge

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

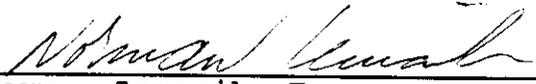
MID-AMERICAN INDEMNITY INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.)
)
A.J.W. ENTERPRISES, INC. d/b/a)
BRONCHO'S and ANGELA SPENCER,)
)
Defendants.)

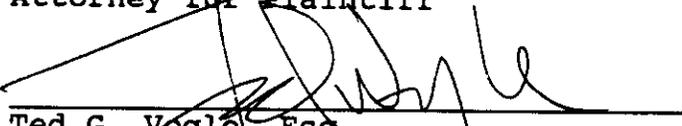
NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-0115-B

STIPULATION ^{OF} FOR DISMISSAL WITHOUT PREJUDICE

COME NOW the attorneys for the Plaintiff and for the Defendant, Angela Spencer, respectively, and hereby stipulate and agree that the above-captioned cause may be dismissed without prejudice to further litigation pertaining to all matters involved herein


Norman Lemonik, Esq.
ABOWITZ & WELCH, P.C.
15 N. Robinson, 10th Floor
Post Office Box 1937
Oklahoma City, Oklahoma 73101
Telephone: (405) 236-4645
Attorney for Plaintiff


Ted G. Vogle, Esq.
406 South Boulder, Suite 640
Tulsa, Oklahoma 74103-3825
Telephone: (918) 587-8500
Attorney for Defendant SPENCER

OCT 21 1993

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CALVIN CALDWELL a/k/a CALVIN)
 G. CALDWELL; PRISCILLA)
 CALDWELL; COUNTY TREASURER,)
 Tulsa County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

CIVIL ACTION NO. 92-C-179-B

FILED
OCT 20 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEFICIENCY JUDGMENT

This matter comes on for consideration this 20 day
of Oct., 1993, upon the Motion of the Plaintiff, United
States of America, acting on behalf of the Secretary of Veterans
Affairs, for leave to enter a Deficiency Judgment. The Plaintiff
appears by Stephen C. Lewis, United States Attorney for the
Northern District of Oklahoma, through Kathleen Bliss Adams,
Assistant United States Attorney.

The Court being fully advised and having examined the
court file finds that a copy of Plaintiff's Motion was mailed by
first-class mail to Calvin Caldwell a/k/a Calvin G. Caldwell and
Priscilla Caldwell, 1804 N. Boston Place, Tulsa, Oklahoma
74106-4132, and to all answering parties and/or counsel of
record.

The Court further finds that on May 14, 1993, a Motion
Against Leave To Enter Deficiency Judgment executed by Priscilla
Caldwell was filed with the Court.

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

The Court further finds that a hearing on the Motion For Leave To Enter Deficiency Judgment was held on September 15, 1993. The Defendants, Calvin Caldwell a/k/a Calvin Caldwell and Priscilla Caldwell, did not appear. Thomas E. Allen, a certified real estate appraiser, testified as to the value of the property which was, in his opinion, approximately \$6,500.00. Mr. Allen prepared the appraisal of the subject property, which was admitted into evidence as Government Exhibit A.

The Court further finds that, based upon the foregoing document and testimony, Plaintiff, United States of America, is accordingly entitled to a deficiency judgment against the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell.

The Court further finds that the amount of the Judgment rendered on June 16, 1992, in favor of the Plaintiff United States of America, and against the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, with interest and costs to date of sale is \$41,644.46.

The Court further finds that the real property involved herein was offered for sale with appraisalment at Marshal's sale on October 5, 1992, but there was no sale due to the lack of a bid of two-thirds of the Court's appraised value of \$12,000.00.

The Court further finds that the real property involved herein was sold without appraisalment at Marshal's sale, pursuant to the Judgment of this Court entered June 16, 1992, for the sum of \$5,780.00 which is less than the market value. The Court

further finds that the Veterans Administration appraised value of the real property at the time of sale was \$6,500.00.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on May 25, 1993.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, as follows:

Principal Balance plus pre-Judgment Interest as of 6-16-92		\$39,261.72
Interest From Date of Judgment to Sale		1,051.06
Late Charges to Date of Judgment		287.28
Appraisal by Agency		500.00
Abstracting		180.00
Publication Fees of Notice of Sale		139.40
Court Appraisers' Fees		<u>225.00</u>
TOTAL	\$	41,644.46
Less Credit of Appraised Value	-	<u>6,500.00</u>
DEFICIENCY	\$	35,144.46

plus interest on said deficiency judgment at the legal rate of 3.38 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans

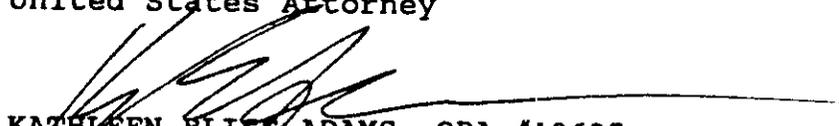
Affairs have and recover from Defendants, Calvin Caldwell a/k/a Calvin G. Caldwell and Priscilla Caldwell, a deficiency judgment in the amount of \$35,144.46, plus interest at the legal rate of 3.38 percent per annum on said deficiency judgment from date of judgment until paid.

S/ THOMAS R. BRETT,

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

KBA/esr

DATE OCT 21 1993

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

FILED

OCT 20 1993

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

DAVID HALEY and NORMA J. HALEY, husband and wife,)

Plaintiffs,)

vs.)

No. 91-C-909 B

STATE FARM FIRE AND CASUALTY COMPANY, a foreign corporation,)

Defendant.)

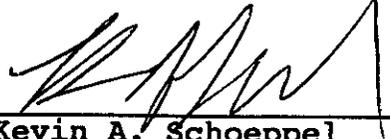
STIPULATION OF DISMISSAL WITH PREJUDICE
BY PLAINTIFF NORMA J. HALEY

COMES NOW the plaintiff, Norma J. Haley, by and through her attorney Kevin A. Schoepel and pursuant to Rule 41 (a) (1), of the Federal Rules of Civil Procedure, stipulates to dismiss with prejudice all claims as against the defendant, State Farm Fire and Casualty Insurance Company.

That Norma J. Haley states that she desires to dismiss this action with prejudice as a result of a settlement agreement had on August 12, 1993.

That the counsel for the Defendant has been notified of this stipulation and by his signature below, has no objection.

Respectfully submitted,



Kevin A. Schoepel
OBA# 10467
1408 South Denver
Tulsa, Oklahoma 74119
(918) 582-5444
Attorney for Plaintiff
Norma Jean Haley

SELMAN & STAUFFER, INC.

BY: 

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601 South Boulder
Tulsa, Oklahoma 74119
(918) 592-7000
Attorney for Defendant