

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY PERRY CATTS, III;
SHERRY LEE CATTS
aka Sherry Lee Striplin;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

OCT 31 1994

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

ENTERED ON DOCKET
OCT 31 1994

CIVIL ACTION NO. 94-C-305-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31st day of Oct., 1994.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, HENRY PERRY CATTS, III, and SHERRY LEE CATTS aka Sherry Lee Striplin, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, HENRY PERRY CATTS, III, was served with process a copy of Summons and Complaint on June 1, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 8, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 31, 1994.

The Court further finds that the Defendant, SHERRY LEE CATTS aka Sherry Lee Striplin, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning August 3, 1994, and continuing through September 7, 1994, 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 Defendant, SHERRY LEE CATTS aka Sherry Lee Striplin, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant 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 address of the Defendant, SHERRY LEE CATTS aka Sherry Lee Striplin. 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 Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. 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 Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 25, 1994; and that the Defendants, HENRY PERRY CATTS, III, and SHERRY LEE CATTS

aka Sherry Lee Striplin, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 4, 1993, HENRY PERRY CATTS, III and SHERRY LEE CATTS aka Sherry Lee Striplin filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-B-1469. On August 26, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtors. The Case was subsequently closed on December 30, 1993.

The Court further finds that the Defendant, SHERRY LEE CATTS, is one and the same person as Sherry Lee Striplin, and will be referred to hereinafter as "SHERRY LEE CATTS."

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

Lot Sixteen (16), Block Eight (8), FORREST CREEK II, an Addition in Tulsa County, City of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on June 26, 1987, the Defendant, HENRY PERRY CATTS, III, executed and delivered to Commonwealth Mortgage Company of America, L.P., his mortgage note in the amount of \$85,635.00, payable in monthly installments, with interest thereon at the rate of Eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, HENRY PERRY CATTS, III, executed and delivered to Commonwealth Mortgage Company of America, L.P., a mortgage dated June 26, 1987, covering the above-described property. Said mortgage was recorded on July 1, 1987, in Book 5036, Page 271, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 10, 1989, Commonwealth Mortgage Company of America, L.P., assigned the above-described mortgage note and mortgage to the Secretary of Housing

and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 11, 1989, in Book 5213, Page 710, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1989, the Defendant, HENRY PERRY CATTS, III, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on June 1, 1990.

The Court further finds that the Defendant, HENRY PERRY CATTS, III, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, HENRY PERRY CATTS, III, is indebted to the Plaintiff in the principal sum of \$117,565.96, plus interest at the rate of Eight percent per annum from December 15, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$319.93 publication fees.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$54.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, HENRY PERRY CATTS, III and SHERRY LEE CATTS, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, HENRY PERRY CATTS, III, in the principal sum of \$117,565.96, plus interest at the rate of Eight percent per annum from December 15, 1993 until judgment, plus interest thereafter at the current legal rate of 6.00 percent per annum until paid, plus the costs of this action in the amount of \$319.93 publication fees, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$54.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, HENRY PERRY CATTS, III, and SHERRY LEE CATTS, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, HENRY PERRY CATTS, III, to satisfy the judgment In Rem 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;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$54.00, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
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(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-305-B

NBK:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
M. LEE OWINGS aka LEE OWINGS aka)
MARSHALL LEE OWINGS aka)
M. L. OWINGS; LOU ANN OWINGS;)
DAVID L. MARTIN; PATRICIA M.)
MARTIN; TULSA CELLULAR)
TELEPHONE CO. dba CELLULAR ONE;)
OSTEOPATHIC HOSPITAL FOUNDERS)
ASSN. dba TULSA REGIONAL MEDICAL)
CENTER, formerly OKLAHOMA)
OSTEOPATHIC HOSPITAL; BENEFICIAL)
OKLAHOMA, INC.; CITY OF BROKEN)
ARROW, Oklahoma; COUNTY)
TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

OCT 31 1994

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

FILED

OCT 24 1994

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

ENTERED FOR RECORD
DATE OCT 31 1994

CIVIL ACTION NO. 94-C 398B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31st day of Oct.,

1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma,** appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **Osteopathic Hospital Founders Association dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital,** appears by its counsel, Daniel M. Webb; the Defendant, **City of Broken Arrow,**

Oklahoma, appears by Michael R. Vanderburg, City Attorney; the Defendant, **Tulsa Cellular Telephone Co.**, appears not having previously filed its Disclaimer; and the Defendants, **M. Lee Owings aka Lee Owings aka Marshall Lee Owings aka M. L. Owings, Lou Ann Owings, David L. Martin, Patricia M. Martin, and Beneficial Oklahoma, Inc.**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **M. Lee Owings aka Lee Owings aka Marshall Lee Owings aka M. L. Owings**, will hereinafter be referred to as ("**M. Lee Owings**"); and that the Defendants, **M. Lee Owings and Lou Ann Owings**, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, **M. Lee Owings and Lou Ann Owings**, waived service of Summons on May 18, 1994, which was filed on May 20, 1994; and that the Defendant, **Beneficial Oklahoma, Inc.**, acknowledged receipt of Summons and Complaint via certified mail on June 8, 1994 and was also served with process on June 8, 1994;

The Court further finds that the Defendants, **David L. Martin and Patricia M. Martin**, were served by publishing notice of this action in the **Tulsa Daily Commerce & Legal News**, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 25, 1994, and continuing through August 29, 1994, 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, **David L. Martin and Patricia M. Martin**, 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 address of the Defendants, **David L. Martin and Patricia M. Martin**. 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 Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, 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 place of residence and/or mailing address. 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, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answer on May 12, 1994; that the Defendant, **Tulsa Cellular Telephone Co. dba Cellular One,** filed its Answer on June 21, 1994, and subsequently filed its Disclaimer on October 5, 1994; that the Defendant, **Osteopathic Hospital Founders Association dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital,** filed its Answer on June 20, 1994; that the Defendant, **City of Broken Arrow, Oklahoma,** filed its Answer on May 12, 1994; and that the Defendants, **M. Lee Owings, Lou Ann Owings, David L. Martin , Patricia M.**

Martin, and Beneficial Oklahoma, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**LOT SEVEN (7), BLOCK TWO (2), LEISURE PARK, AN
ADDITION TO THE CITY OF BROKEN ARROW, TULSA
COUNTY, OKLAHOMA, ACCORDING TO THE
RECORDED PLAT THEREOF.**

The Court further finds that on July 6, 1979, Gershwin D. Mason and Brenda J. Mason, executed and delivered to FIRST CONTINENTAL MORTGAGE CO. their mortgage note in the amount of \$53,550.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Gershwin D. Mason and Brenda J. Mason, husband and wife, executed and delivered to FIRST CONTINENTAL MORTGAGE CO. a mortgage dated July 6, 1979, covering the above-described property. Said mortgage was recorded on July 10, 1979, in Book 4412, Page 592, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 28, 1983, FIRST CONTINENTAL MORTGAGE CO. assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 11, 1983, in Book 4734, Page 1646, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, M. Lee Owings and Lou Ann Owings, currently hold record title to the property by virtue of a Warranty Deed dated September 25, 1981, and recorded on September 25, 1981 in Book 4571, Page 200, in the records of Tulsa County, Oklahoma; and that the Defendants, M. Lee Owings and Lou Ann Owings, are the current assumptors of the subject indebtedness.

The Court further finds that on July 1, 1989, the Defendants, M. Lee Owings and Lou Ann Owings, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, M. Lee Owings and Lou Ann Owings, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, M. Lee Owings and Lou Ann Owings, are indebted to the Plaintiff in the principal sum of \$104,563.54, plus interest at the rate of 10 percent per annum from March 29, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$57.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$58.00 which became a lien as of June 25, 1993; a lien in the amount of \$70.00 which became a lien as of June 26, 1992; a lien in the amount of \$23.00 which became a lien as of July 2, 1990; a lien in the amount of \$26.00

which became a lien as of July 5, 1989; and a lien in the amount of \$29.00 which became a lien as of July 7, 1988. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Osteopathic Hospital Founders Association dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital**, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$1,506.50, which became a lien as of June 26, 1990. Said lien is inferior to the interest of the Plaintiff United States of America.

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

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

The Court further finds that the Defendants, **M. Lee Owings, Lou Ann Owings, David L. Martin, Patricia M. Martin, and Beneficial Oklahoma, Inc.**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Tulsa Cellular Telephone Cop. dba Cellular One**, disclaims any right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and

Urban Development, have and recover judgment against the Defendants, **M. Lee Owings and Lou Ann Owings**, in the principal sum of \$104,563.54, plus interest at the rate of 10 percent per annum from March 29, 1994 until judgment, plus interest thereafter at the current legal rate of 6.00 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$263.00 for personal property taxes for the years 1987-1989 and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Osteopathic Hospital Founders Association dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital**, have and recover judgment in the amount of \$1,506.50, plus penalties and interest, for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title or interest in the subject real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **M. Lee Owings, Lou Ann Owings, David L. Martin, Patricia M. Martin, Beneficial Oklahoma, Inc. and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$55.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, Osteopathic Hospital Founders Association dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, in the amount of \$1,506.50 plus court costs, attorney fees and interest, for a judgment.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County,
Oklahoma, in the amount of \$208.00, personal property taxes
which are currently due and owing.

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

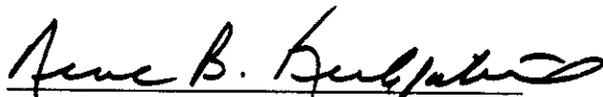
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any
right to possession based upon any right of redemption) in the mortgagor or any other person
subsequent to the foreclosure sale.

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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK

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Attorney for Defendant,
Osteopathic Hospital Founders
Association dba Tulsa Regional
Medical Center formerly Oklahoma
Osteopathic Hospital

Judgment of Foreclosure
Civil Action No. 94-C 398B

NBK:lg

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

FILED

OCT 31 1994

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

BECKI L. TURNER

Plaintiff,

vs.

DAN KELEHER, SR. AND DAN KELEHER,
JR. d/b/a KELEHER OUTDOOR
ADVERTISING.

Defendants.

Case No. 93-C-824-K

ENTERED ON DOCKET

DATE OCT 31 1994

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendants, by and through their respective attorneys, jointly stipulate that all of Plaintiffs' claims herein should be dismissed with prejudice with each side to bear their own costs and attorney fees.

DATED this 31st day of October, 1994.

Respectfully submitted,

Robert I. Briggs

Robert Briggs
Oil Capital Building
507 S. Main, Suite 605
Tulsa, OK 74103

ATTORNEY FOR PLAINTIFF

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

By:

J. Patrick Cremin
J. Patrick Cremin, OBA #2013
Steven A. Broussard, OBA #12582
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
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ATTORNEYS FOR DEFENDANTS

ENTERED ON DOCKET
DATE OCT 31 1994

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

FILED

OCT 28 1994

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

ROBERT C. KISSEE,
Plaintiff,
vs.
NORTHEAST OKLAHOMA
VOCATIONAL TECHNICAL CENTER,
Defendant.

Case No. 94-C-57-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, Robert C. Kisse, and the defendant, Northeast Oklahoma Vocational Technical Center, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), Fed. R. Civ. P., jointly stipulate that the plaintiff's action against the defendant be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 28th day of October, 1994.

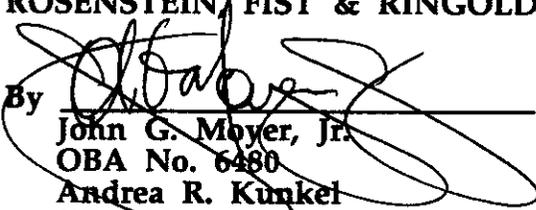
HOWARD & WIDDOWS

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Sharon Womack Doty

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Attorneys for Plaintiff,
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ROSENSTEIN, FIST & RINGOLD

By 

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OBA No. 6480

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(918) 585-9211

**Attorneys for Defendant, Northeast Oklahoma
Vocational Technical Center**

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

FILED

OCT 31 1994

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

JOHN HUDSON, et al.,)
)
 Plaintiff,)
)
 vs.)
)
 INTERNATIONAL BROTHERHOOD)
 OF TEAMSTERS,)
)
 Defendant.)

Case No. 94-C-201-BU ✓

ENTERED ON DOCKET

DATE OCT 31 1994

ORDER

The complaint in this matter was filed on March 7, 1994 by the plaintiff, John Hudson, against the defendant, International Brotherhood of Teamsters. The plaintiff's first amended complaint was filed on June 30, 1994. To date, no service of process has been obtained upon the defendant.

Every court has the inherent power in the exercise of sound discretion to dismiss a cause for want of prosecution. Stanley v. Continental Oil Company, 536 F.2d 914, 917 (10th Cir. 1976); e.g., Link v. Wabash Railroad, 370 U.S. 626 (1962) (inherent power vested in courts to manage own affairs so as to achieve orderly and expeditious disposition of cases). The propriety of such a decision depends on the procedural history of the particular case involved. Petty v. Manpower, Inc., 591 F.2d 615, 617 (10th Cir. 1979).

The procedural history of this case indicates that the failure to perfect service has barred resolution of this case on the merits. The case has been pending since March 7, 1994 and the Court finds that this litigation cannot be prolonged indefinitely

by the plaintiffs' inaction. Because the plaintiff has failed to show good cause for his failure to effect service and the Court has inherent power to clear its calendar of a case that has remained dormant because of lack of prosecution, the Court hereby DISMISSES the plaintiff's complaint against the defendant without prejudice.

ENTERED this 31st day of October, 1994.

A handwritten signature in black ink, appearing to read "Michael Burrage". The signature is written in a cursive, somewhat stylized font. It is positioned above a horizontal line that serves as a separator between the signature and the printed name below.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

QUINN JOHNSON,
Petitioner,
vs.
JACK COWLEY,
Respondent.

No. 92-C-770-B ✓

ENTERED
OCT 31 1994
DATE

ORDER

On September 27, 1993, the Court denied Petitioner's application for a writ of habeas corpus to the extent that he sought habeas relief based solely on the inordinate delay in adjudicating his criminal appeal, and ordered Respondent to Answer Petitioner's non-delay claims in Grounds II and III of the petition pursuant to Rule 5 of the Rules Governing Section 2254 cases. Respondent timely filed a Rule 5 response to which Petitioner has not objected.

Upon further reflection, the Court concludes that it should not review at this time the merits of Petitioner's non-delay claims in Grounds II and III of his petition, but that it should dismiss them without prejudice to their being asserted after Petitioner has had a sufficient time to explore fully all his potential habeas corpus claims, exhaust his state remedies where necessary, and avoid any Rule 9(b) problems.¹

¹Rule 9(b) of the Rules Governing Section 2254 Cases in the U.S. District Court reads as follows:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's non-delay claims in Grounds II and III of the petition are **dismissed without prejudice** to Petitioner filing a separate pro se habeas corpus petition, pursuant to 28 U.S.C. § 2254, to pursue any constitutional claims he might have. The Clerk shall **close** the instant action.

SO ORDERED THIS 27th day of Oct., 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 THE HEIRS, PERSONAL)
 REPRESENTATIVES, EXECUTORS,)
 ADMINISTRATORS, DEVISEES,)
 TRUSTEES, SUCCESSORS AND)
 ASSIGNS, IMMEDIATE AND REMOTE,)
 KNOWN AND UNKNOWN, OF)
 MARION M. ANTHONY, DECEASED;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

CIVIL ACTION NO. 94-C-434-E

FILED

OCT 31 1994

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31 day
of Oct, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having
previously filed a Disclaimer; and the Defendants, THE HEIRS,
PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES,
TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND
UNKNOWN, OF MARION M. ANTHONY, DECEASED, appears not, but make
default.

ENTERED ON DOCKET

DATE 10-31-94

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on May 2, 1994 by Certified Mail.

The Court further finds that the Defendants, THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF MARION M. ANTHONY, DECEASED, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 30, 1994, and continuing through August 4, 1994, 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 HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF MARION M. ANTHONY, 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 HEIRS, PERSONAL REPRESENTATIVES,

EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF MARION M. ANTHONY, 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 Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true names and identities 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, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 19, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on September 30, 1994; and that the Defendants, THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF MARION M. ANTHONY,

DECEASED, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of MARION M. ANTHONY and judicially determining the heirs of MARION M. ANTHONY.

The Court further finds that MARION M. ANTHONY died On February 1, 1992, while seized and possessed of the real property being foreclosed. The Certificate of Death No 4505 was issued by the Oklahoma State Department of Health certifying MARION M. ANTHONY's death.

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

Lot Twenty-seven (27), Block Ten (10), LAKE-VIEW HEIGHTS AMENDED ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that this is a suit brought for the purpose of judicially determining the death of Marion M. Anthony and of judicially determining the heirs of Marion M. Anthony.

The Court further finds that on April 1, 1986, MARION M. ANTHONY, now deceased, executed and delivered to Mercury Mortgage Co., Inc, her mortgage note in the amount of \$25,223.00, payable in monthly installments, with interest

thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, MARION M. ANTHONY, a single person, now deceased, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated April 1, 1986, covering the above-described property. Said mortgage was recorded on April 7, 1986, in Book 4934, Page 730, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 8, 1989, Mercury Mortgage Co., Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on December 11, 1989, in Book 5224, Page 1627, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 1, 1989, MARION M. ANTHONY, now deceased, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on December 1, 1990 and November 1, 1991.

The Court further finds that MARION M. ANTHONY, now deceased, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, and by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, in the principal sum of \$33,087.89, plus interest at the rate of

Nine and One-Half percent per annum from March 1, 1994, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of MARION M. ANTHONY, and to a judicial determination of the heirs of MARION M. ANTHONY.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$7.00 which became a lien on the property as of June 25, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF MARION M. ANTHONY, DECEASED, are in default, and have 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 Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of

redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem in the principal sum of \$33,087.89, plus interest at the rate of Nine and One-Half percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.06 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of MARION M. ANTHONY be and the same is hereby judicially determined to have occurred on February 1, 1992, in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that despite the exercise of due diligence by Plaintiff and its counsel no known heirs of MARION M. ANTHONY, Deceased, have been discovered and it is hereby judicially determined that MARION M. ANTHONY, Deceased, has no known heirs, executors, administrators, devisees, trustees, successors and assigns, and the Court approves the Certificate of Publication filed by Plaintiff regarding said heirs.

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

recover judgment in the amount of \$7.00 for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF MARION M. ANTHONY, DECEASED, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title or interest in the subject property.

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of

\$7.00, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, 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:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-434-E

NBK:flv

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

FILED

WILLIAMS PIPE LINE COMPANY)
)
Plaintiff,)
)
v.)
)
PRAIRIE CONTRACTORS, INC.)
)
Defendant.)

OCT 23 1994

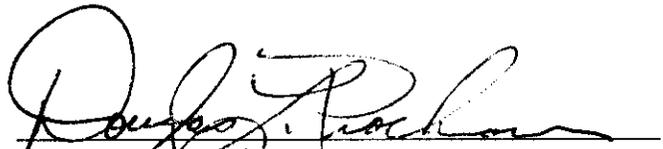
FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No.: 93-C-0469-E

**STIPULATION OF DISMISSAL
WITH PREJUDICE**

COMES NOW the Plaintiff, Williams Pipe Line, by and through its counsel of record, Douglas L. Prochnow and Mark K. Blongewicz, and hereby dismisses its claim and cause of action against Defendant, Prairie Contractors, with prejudice.

Respectfully submitted,



Douglas L. Prochnow
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, Illinois 60606-1229
(312)201-2000

and

ENTERED ON DOCKET
DATE 10-31-94

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

CHARLES CECIL BLAND and
GENEVA B. BLAND,

Plaintiffs,

vs.

CARTERET FEDERAL
SAVINGS BANK,

Defendant.

Civil Action No. 94-C 451-~~AK~~

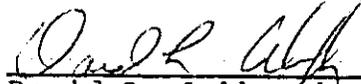
FILED

OCT 28 1994

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

DISMISSAL

COMES NOW the Plaintiff and hereby dismisses the above
entitled action without prejudice.



David L. Ashbaugh, OBA #349
Attorney for Plaintiffs
P.O. Box 786
Claremore, OK 74018
918-341-4648

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of October,
1994, I mailed a true and correct copy of the foregoing
Dismissal to:

Ms. Susan J. Speaker
Attorney for Defendant
15 West 6th St., Suite 1801
Tulsa, OK 74119

ENTERED ON DOCKET
DATE 10-28-94


David L. Ashbaugh

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 THE HEIRS, PERSONAL)
 REPRESENTATIVES, EXECUTORS,)
 ADMINISTRATORS, DEVISEES,)
 TRUSTEES, SUCCESSORS AND ASSIGNS,)
 IMMEDIATE AND REMOTE, KNOWN AND)
 UNKNOWN, OF DONALD DALE BUCKRIDGE)
 DECEASED;)
 NANCY BUCKRIDGE;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER,)
 Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants,)

FILED

OCT 27 1994

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

CIVIL ACTION NO. 94-C-406-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of October, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having previously filed a Disclaimer; and the Defendants, NANCY BUCKRIDGE and THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF DONALD DALE BUCKRIDGE, DECEASED, appear not, but make default.

ENTERED ON DOCKET
DATE 10-28-94

The Court being fully advised and having examined the court file finds that the Defendant, NANCY BUCKRIDGE, signed a Waiver of Summons on May 4, 1994, filed on May 17, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on June 29, 1994 by Certified Mail.

The Court further finds that the Defendants, THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF DONALD DALE BUCKRIDGE, DECEASED, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning August 12, 1994, and continuing through September 16, 1994, 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 HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF DONALD DALE BUCKRIDGE, 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 HEIRS,

PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF DONALD DALE BUCKRIDGE, 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 Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, 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, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 12, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on August 10, 1994; and that the Defendants, NANCY BUCKRIDGE and THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF DONALD DALE BUCKRIDGE, DECEASED, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a

certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT NINE (9), BLOCK FOUR (4), BRIARGLEN CENTER, A RESUBDIVISION OF A PORTION OF THE AMENDED PLAT OF THE RESUBDIVISION OF BLOCKS 2 & 3, BRIARGLEN CENTER ADDITION, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Donald Dale Buckridge and of judicially determining the heirs of Donald Dale Buckridge.

The Court further finds that Donald Dale Buckridge died on April 5, 1991, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 09195 was issued by the Oklahoma State Department of Health certifying Donald Dale Buckridge's death.

The Court further finds that on August 11, 1986, Don Buckridge, now deceased, executed and delivered to Commonwealth Mortgage Corporation, a mortgage note in the amount of \$63,940.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Don Buckridge, a single person, now deceased, executed and delivered to Commonwealth Mortgage Corporation, a mortgage dated August 11, 1986, covering the above-described property. Said mortgage was recorded on

August 29, 1986, in Book 4966, Page 1421, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 12, 1987, Commonwealth Mortgage Corporation of America fka Commonwealth Mortgage Corporation, assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America, L.P. This Assignment of Mortgage was recorded on August 17, 1987, in Book 5045, Page 2131, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 29, 1988, Commonwealth Mortgage Company of America, L.P., assigned the above-described mortgage note and mortgage to The Lomas & Nettleton Company. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1551, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 28, 1988, Lomas Mortgage USA, Inc., fka The Lomas & Nettleton Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on December 9, 1988, in Book 5143, Page 2149, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 1, 1990, Donald Dale Buckridge and the Defendant, NANCY BUCKRIDGE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on May 1, 1990, November 1, 1990 and November 1, 1991.

The Court further finds that Donald Dale Buckridge, now deceased, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$95,199.05, plus interest at the rate of Nine and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Donald Dale Buckridge, and to a judicial determination of the heirs of Donald Dale Buckridge.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$42.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$36.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$35.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF DONALD DALE BUCKRIDGE, DECEASED, and NANCY BUCKRIDGE,

are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the 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 pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem in the principal sum of \$95,199.05, plus interest at the rate of Nine and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.06 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Donald Dale Buckridge be and the same is hereby judicially determined to have occurred on April 5, 1991, in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that despite the exercise of due diligence by Plaintiff and its counsel no known heirs of Donald Dale Buckridge, have been discovered and it is hereby judicially determined that Donald Dale Buckridge, Deceased, has no known heirs, executors, administrators, devisee, trustees, successors and assigns, and the Court approves the Certificate of Publication and Mailing filed by Plaintiff regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$113.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF DONALD DALE BUCKRIDGE, DECEASED, and NANCY BUCKRIDGE, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$113.00, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-406-B

NBK:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 28 1994

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

LARRY L. TROWBRIDGE,

Plaintiff,

vs.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

CASE NO. 94-C-238-E

ORDER

Upon the motion of the defendant, Secretary of Health and Human Services, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Kathleen Bliss, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for further administrative action.

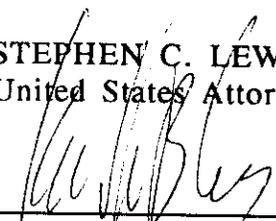
DATED this 28 day of Oct, 1994.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

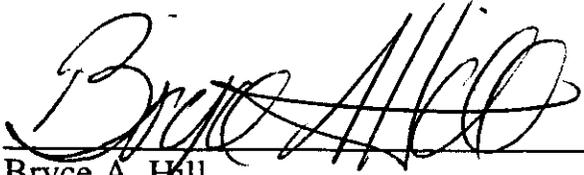

KATHLEEN BLISS, OBA #13625
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

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

ENTERED ON DOCKET

DATE 10-28-94

APPROVED AS FOR FORM AND CONTENT:

A handwritten signature in black ink, appearing to read "Bryce Hill", written over a horizontal line.

Bryce A. Hill
Counsel for Plaintiff

A handwritten signature in black ink, appearing to read "James K. Secrest, II", written over a horizontal line.

James K. Secrest, II
Roger N. Butler, Jr.
Counsel for Defendant

DATE OCT 27 1994

F I L E D

OCT 27 1994 *[Signature]*

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

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

RANDY MARTIN and PATTY MARTIN,)
)
 Plaintiffs,)
)
 v.)
)
 SHELTER GENERAL INSURANCE CO.,)
)
 Defendant.)

93-C-977-W *[Signature]*

ORDER GRANTING MOTION FOR ATTORNEYS FEES

This order pertains to Plaintiffs' Motion for Attorneys Fees, Interest, and Costs (Docket #60)¹. In its order of September 30, 1994, the court deemed the deadline for filing a Bill of Costs pursuant to Local Rule 54.1(A) met by the filing of this unartfully constructed motion, but plaintiffs were ordered to comply with that Rule and complete and file the Bill of Costs form available from the court clerk, so that the clerk could follow the appropriate procedure and initially decide what costs were recoverable. Only issues concerning the reasonableness of the claimed attorneys fees were addressed at a hearing held on October 14, 1994. The court heard testimony from counsel involved in the case and from experts presented by each side.

Mr. Joseph F. Clark, Jr. testified on behalf of the plaintiffs, and was accepted by the court as an expert witness. Mr. Clark has had considerable

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

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experience in defending arson cases. He confirmed that the hourly rate of \$125 per hour for Mr. Schoepel was reasonable for office work, but claimed \$150 per hour was reasonable for court time. Unfortunately, he was saddled with defending a fee application that had not been purged of clearly unrelated and excessive hours; which was calculated at an indefensible across-the-board hourly rate, and which remained unenlightened by good faith discourse and stipulations between counsel. Mr. Clark was given the task of justifying a bloated application which was never slimmed to reasonable proportions. Neither he, nor any other officer of this court could have entirely justified the fee request set forth in Plaintiff's motion.

The defense expert, Mr. Jim F. Gassaway, was also accepted by the court as an expert on attorneys fees. Mr. Gassaway is a well-respected attorney in the community and has forty years of experience. The court found his testimony to be properly researched, well supported, and credible.

In determining an award of a reasonable attorneys fee, the starting point "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). This so-called "lodestar amount" is then reduced by hours that were not "reasonably expended," such as when a case is over staffed and hours are excessive or redundant. Id. The court is also to examine "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Id. at 435. "Reasonably expended" hours would not include

time spent on claims "unrelated" to those on which the plaintiff prevails. Id. at 434-35. The Hensley Court held that a plaintiff cannot receive fees for time spent on "distinctly different claims for relief that are based on different facts and legal theories" and on which the plaintiff does not succeed. Id. at 434-35.

The Tenth Circuit has established the steps to be followed in determining fee awards. In Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), the court said that the first step was to determine the number of hours reasonably spent by counsel for the party seeking the fees, based on time records presented by the attorney. Id. at 553.

In determining what is a reasonable time in which to perform a given task . . . the court should consider that what is reasonable in a particular case can depend upon factors such as the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side.

Id. at 554.

The second step was to set a rate of compensation for the hours expended by determining what lawyers of comparable skill and experience practicing in the area in which litigation occurs would charge. Id. at 555. "[T]he fee rates of the local area should be applied even when the lawyers seeking fees are from another area." Id. The fee award thus determined may be enhanced in cases in which the success achieved by the attorney was exceptional. Id. at 557. Expenses should be allowed as fees only if such expenses are usually charged separately in the area. Id. at 559.

The Oklahoma Supreme Court dealt with the issue of the proper procedure for establishing reasonable attorney fees in State ex rel. Burk v. City of Oklahoma City, 598 P.2d 659 (Okla. 1979). The court stated that the following factors should be considered in arriving at a just compensation for work done by attorneys: time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the "undesirability" of the case, the nature and length of the professional relationship with the client, and awards in similar cases. Id. at 661.

In the recent case of Beard v. Teska, 31 F.3d 942 (10th Cir. 1994), the Tenth Circuit concluded that \$125.00 was a reasonable attorney fee for a very experienced and specialized attorney in Tulsa, in a truly unique and difficult matter.

The court has considered all the factors set out in these cases, and finds that the Plaintiffs obtained a good, if not a spectacular result. With the benefit of 20-20 hindsight, it is easy to see that that result could have been achieved sooner without some of the more unproductive maneuvering of plaintiff's counsel.² However, most of the wasted effort was in reaction to a playing

²For example, the dismissal and refiling of the case in state court, only to have it removed again, and the ancillary, (and unsuccessful) state court lawsuit against Paulk and Yates.

field strewn with the defense's tactical land mines. Once Plaintiffs survived the detonation of the arson and "false statement" defenses, the use of immoderate countermeasures is understandable, if not justifiable.³

Mr. Clark would have the court believe that this was an undesirable case that would serve to preclude other employment, with novel and difficult questions of law and fact that required highly specialized skills to handle. While the court does not conclude that these factors are entirely absent here, the degree to which the case was undesirable, precluded other employment, contained novel issues, and called for special skills was hardly remarkable. Although not every practicing lawyer is equipped to competently handle an insurance fire claim, there are many that could--and do. These cases are common, and there was nothing so special or difficult about this one that its successful completion justifies enhancement of a proper lodestar amount.

The court agrees with Mr. Gassaway's conclusion that \$125.00 is an appropriate rate of compensation for Mr. Schoepfel, \$85.00 is appropriate for counsel assisting him, \$40.00 is appropriate for paralegals, and \$20.00 is an appropriate rate for legal interns who worked on the case. The court also agrees with Mr. Gassaway's analysis of the fees requested and amounts which should be excluded, including the hours involved in the related lawsuit brought against Joe Paulk and Jack Yates, hours spent on the affirmative

³Defendants never formally denied Plaintiffs' claim on the ground of arson. Rather, when it became apparent that the arson defense could not be proven, the claim was denied because Plaintiff Randy Martin indicated on the insurance application that he had never been convicted of a felony. During his examination under oath he admitted to pleading guilty to a Texas charge of Driving Under the Influence of Alcohol or Controlled Dangerous Substance. This was his third such offense, and Texas law allows the third offense to be charged as a felony. Although both counsel for the defendant insurance company (at that time this was Mr. Paulk) and Plaintiffs' counsel, Mr. Schoepfel, left the examination under oath convinced that Mr. Martin had been convicted of a felony, it was later determined that he had only been convicted of a misdemeanor. In the meantime, the Defendant used the alleged "false statement" on the insurance application as the reason to deny the claim.

defense of arson after January 4, 1993, when it became clear this was no longer a defense, duplicated efforts of attorneys, hours spent on the separate (and now moot) declaratory judgment action, and incomprehensible entries on the time sheets submitted.

The court concurs with Mr. Gassaway's computations of the amounts to be awarded to counsel and his staff:

Mr. Schoepel - \$53,300.00 (\$125.00 x 426.4 hours)

Other counsel - \$16,464.50 (\$85.00 x 193.7 hours)

Paralegals - \$1,532.00 (\$40.00 x 38.3 hours)

This totals 755 attorney hours and 853 total hours for an award of \$71,296.50 as the lodestar amount.

The court departs from Mr. Gassaway's recommendation that this amount be reduced by 25%. Mr. Gassaway was not privy to the actual interplay between counsel, as was the court, but worked from cold documents. The court has observed recalcitrance by the defendant insurer, and the jury found it guilty of bad faith. The case was vigorously defended on several fronts. The defense of arson was originally contemplated and the defendant conducted its investigation and hired experts with the view towards proving arson. The arson defense was eventually abandoned once plaintiffs proved, through the use of their own expert, that the fire originated from the stove. The defendant first denied the claim for the reason that Plaintiff Randy Martin made a false statement regarding his criminal history on the insurance application, and after this was shown not to be the case, it belatedly tendered the so-called "unconditional" payments. Counsel for Defendant successfully argued in this lawsuit that the tendered payments did not constitute a

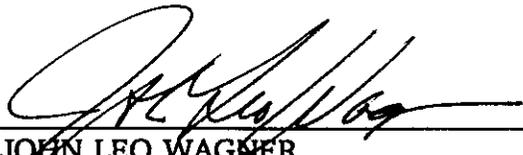
settlement offer, but were truly unconditional. This tactical ploy was designed to cut off entitlement to prejudgment interest as of the time of the tender.⁴ However, in a related declaratory judgment action, the defendant contended that the amounts paid should be considered to be in full satisfaction of all plaintiffs' claims. Thus, the case did include at least one chancy issue that warranted some complicating precautions.

Plaintiffs' contingency fee arrangement with counsel was that he receive 45% of any amount awarded on appeal, 40% of any amount awarded at trial, and 50% of any amount awarded over and above actual damages, including an award of punitive or bad faith damages. Forty-five percent of the \$132,372.45 in actual damages awarded would be \$60,176.25. Fifty percent of the \$10,000.00 in bad faith damages awarded would be \$5,000. These figures total \$65,176.25. The more characteristic 50% contingency fee which this court has often seen in fire claim cases where arson has been asserted as a defense would yield \$71,186.22. In addition, defense counsel reported at the hearing he had expended 755 hours on this case, and this amount multiplied by his hourly rate of \$95.00 amounts to \$71,725.00. These factors further support the proposition that a fee in the amount of the adjusted lodestar of \$71,296.50 is reasonable.

Plaintiffs' Motion for Attorneys Fees, Interest, and Costs (Docket #60) is granted in part and denied in part. Plaintiffs are awarded \$71,296.50. The amount of \$27,941.73 already paid by defendant for attorney fees should be credited toward this amount. Defendant is ordered to pay the amount of \$43,354.77 to plaintiffs within fifteen (15) days of the date of this order.

⁴Although the tendered payments were ultimately deemed to be unconditional, they did not cut off the running of prejudgment interest until that determination was made by the court. See footnote four of the order filed September 30, 1994 (Docket #68).

Dated this 27th day of October, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Marti.ord

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 27 1994

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

UNITED STATES OF AMERICA)
) Plaintiff)
) VS)
))
DARRON TYRONE MCGEE)
))
) Defendant)

Case Number: 91-CR-029-001-E

ENTERED ON DOCKET

DATE 10/27/94

ORDER REVOKING SUPERVISED RELEASE

Now on this 21st day of October, 1994, this cause comes on for sentencing concerning allegations that the defendant violated conditions of supervised release as set out in the Petition on Supervised Release filed on August 31, 1994. The defendant is present in person and represented by counsel, Richard Couch. The Government is represented by Assistant U.S. Attorney Rick Dunn, and the United States Probation Office is represented by Larry Morris.

The defendant was heretofore convicted on his plea of guilty to Count Three of a three-count Indictment which charged him with Possession of Stolen Mail, in violation of 18 U.S.C. § 1708. On September 27, 1991, McGee was committed to the custody of the U. S. Bureau Prisons for a term of ten months. In addition, he was ordered to pay a \$50 Special Monetary Assessment and complete a three year term of supervised release. As a

special condition of supervised release, McGee was ordered to participate in a program approved by the U. S. Probation Office for urinalysis testing and, if necessary, treatment of narcotic addiction or drug dependency.

On October 7, 1994, a revocation hearing was held regarding the allegation noted in the Petition on Supervised Release, filed on August 31, 1994, said allegation being that on August 7, 1994, and August 12, 1994, the defendant submitted urine specimens which tested positive for Cocaine Metabolite. McGee stipulated to the violation at the revocation hearing, and sentencing was set for October 21, 1994.

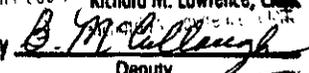
On October 21, 1994, as a result of the sentencing hearing, the Court found that the violation occurred after November 1, 1987, and that Chapter 7 of the U. S. Sentencing Guidelines is applicable. Further, the Court found that the violation of supervised release constituted a Grade C violation in accordance with U.S.S.G. § 7B1.1(a)(3), and that the defendant's original criminal history category of VI was applicable for determining the imprisonment range. In addition, the Court found that a Grade C violation and a criminal history category of VI establish a revocation imprisonment range of eight to fourteen months. In consideration of these findings and pursuant to U.S. vs. Lee, 957 F2d 770 (10th Cir. 1992), in which the Circuit determined that the policy statements in Chapter 7 were not mandatory, but must be considered by the Court, the following was ordered:

The defendant is committed to the custody of the U. S. Bureau of Prisons to be imprisoned

for a term of twelve months and one day. It is recommended that the defendant be placed in an institution offering a substance abuse program.

The defendant is ordered to report to the designated U. S. Bureau of Prisons institution no later than 12:00 p.m. on November 21, 1994.


The Honorable James O. Ellison
United States District Judge

United States District Court)
Northern District of Oklahoma) SS
I hereby certify that the foregoing
is a true copy of the original on file
in this Court. of the original
in this Court. Richard M. Lawrence, Clerk
By 
Deputy

ENTERED ON DOCKET
DATE OCT 27 1994
FILED

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

OCT 27 1994

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

DONALD NEWMAN,)
)
 Plaintiff,)
)
 vs.)
)
 STAR MOTORCARS, INC., an)
 Oklahoma corporation; ROBERT)
 CLARK; and the UNITED STATES OF)
 AMERICA,)
)
 Defendants.)

Case No. 93-C-298-BU

ORDER

This matter came on for trial before the Court sitting without a jury on August 24-25, 1994. Having considered the evidence introduced at trial, including both testimonial and documentary, and having considered the arguments of counsel, the Court enters the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff, Donald Newman ("Newman"), is currently a resident of Tulsa, Oklahoma.
2. The defendant, Star Motorcars, Inc. ("Star Motorcars"), is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. Star Motorcars was originally incorporated under the name Star Automotive, Inc. Any reference herein to Star Motorcars includes Star Automotive, Inc.
3. The defendant, Robert Clark ("Clark"), is currently a resident of Tulsa, Oklahoma. At all times relevant to this action, Clark was general manager of Star Motorcars.

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4. Star Motorcars was in the business of servicing and repairing luxury automobiles. In particular, Star Motorcars specialized in servicing Mercedes-Benz cars. Star Motorcars was also in the business of buying and selling used cars, again specializing in luxury automobiles.

5. In February, 1991, Newman made an unsecured loan to Star Motorcars in the amount of \$100,000.00. An additional \$46,379.00 was loaned to Star Motorcars by Newman prior to July 1, 1991.

6. On July 1, 1991, Newman entered into a Revolving Credit Agreement ("credit agreement") with Star Motorcars and Clark. Under the credit agreement, Newman agreed to extend credit to Star Motorcars in an aggregate amount of \$400,000.00. The initial advance made by Newman of \$146,379.70 constituted the existing indebtedness of Star Motorcars to Newman.

7. Under the credit agreement, Clark personally guaranteed the payment and performance of Star Motorcars.

8. To evidence the obligation of Star Motorcars to Newman, Star Motorcars executed and delivered to Newman a promissory note in the amount of \$400,000.00.

9. To secure the payment of the promissory note, Star Motorcars executed and delivered to Newman a security agreement. Under the security agreement, Star Motorcars granted Newman a security interest in Star Motorcars' assets, including, existing and after-acquired accounts, accounts receivable, contracts, contract rights and intangibles, inventory, equipment, machinery, furniture and other assets of the company.

10. In addition to the security agreement, Star Motorcars executed and delivered to Newman UCC-1 financing statements. The financing statements were filed of record with the Oklahoma County Clerk's office on July 5, 1991.

11. An additional \$59,600.00 was loaned to Star Motorcars by Newman between September, 1992 and December, 1992. This loan has not been repaid by Star Motorcars.

12. After the credit agreement was executed, Newman acquired 50% of the shares of stock of Star Motorcars for \$500.00. No dividends were ever paid on the stock.

13. At the time Star Motorcars granted Newman a security interest, the company had on hand the items listed in Newman's Exhibit No. 5 with the exception of the equipment shown on Newman's Exhibit No. 6 purchased at a cost of \$1,528.44, some Jaguar specialty tools valued at \$1,000.00 and certain Jaguar parts valued at \$2,122.37 that were purchased after November 14, 1992. No furniture, fixtures or major assets were acquired by Star Motorcars after September 30, 1992.

14. Newman's son, Martin Newman, was employed by Star Motorcars after the credit agreement was entered into between Newman, Star Motorcars and Clark. Newman's loan to Star Motorcars was not contingent upon Marty Newman's employment.

15. In mid to late July of 1993, Star Motorcars ceased doing business. Star Motorcars defaulted on the promissory note. At the time it ceased doing business, Star Motorcars had an inventory of car parts. Ninety percent (90%) of the car parts inventory was

acquired prior to September 28, 1992. The remaining ten percent (10%) of the inventory which include fast moving items such as oil filters, spark plugs and brake pads, and which have a value of \$3000.00 was acquired after November 14, 1992. All of the car parts inventory is currently being held in storage.

16. On September 28, 1992, the Internal Revenue Service ("IRS") filed with the Tulsa County Clerk's office a Notice of Federal Tax Lien against Star Motorcars for unpaid federal employment taxes assessed by the IRS for the last three quarters of 1991 and the first quarter of 1992 in the amount of \$145,059.93. A similar Notice of Federal Tax Lien was filed with the Oklahoma County Clerk's office on September 30, 1992.

17. Newman did not have actual knowledge of the filing of the tax lien until approximately October 30, 1992.

18. November 14, 1992 is the 45th day from September 30, 1992, the date the IRS filed its tax lien notice with the Oklahoma County Clerk.

19. On September 16, 1992, Star Motorcars purchased as inventory a 1988 Mercedes-Benz 300E.

20. On October 19, 1992, Star Motorcars purchased as inventory a 1987 Mercedes-Benz 300E.

21. On October 28, 1992, Star Motorcars purchased as inventory a 1990 Acura Legend.

22. On November 4, 1992, Star Motorcars purchased as inventory a 1991 Honda Accord.

23. In February, 1993, Star Motorcars purchased as inventory a 1991 BMW.

24. On February 19, 22 and 26, 1993, the IRS seized eight automobiles belonging to Star Motorcars. The IRS subsequently released three of the vehicles because they were purchased prior to the filing of the Notice of Federal Tax Lien in the Oklahoma County Clerk's office. The five vehicles retained by the IRS were the 1988 Mercedes Benz 300E, the 1987 Mercedes Benz 300E, the 1990 Acura Legend, the 1991 Honda Accord and the 1991 BMW.

25. In accordance with an agreement between the United States of America and Newman (the "collateral agreement"), the United States of America agreed to accept a substitute collateral in the form of a letter of credit in the total amount of \$83,000.00 from Newman in lieu of the vehicles. Under the collateral agreement, the following dollar values have been apportioned to each automobile that was seized by the IRS:

- a. 1988 Mercedes-Benz 300E: \$18,000.00
- b. 1987 Mercedes-Benz 300E: \$16,000.00
- c. 1991 Honda Accord: \$13,000.00
- d. 1990 Acura Legend: \$15,000.00
- e. 1991 BMW: \$21,000.00

26. Based upon the terms of the collateral agreement, the United States of America has drawn down the \$83,000.00 letter of credit posted as substitute collateral by Newman and is currently in possession of the \$83,000.00.

27. From 1957 until 1990, Newman was employed by Newman's, Inc., a family owned and operated industrial valve business. Sometime between 1975 and 1980, Newman became president of Newman's, Inc. He served as president until 1985 or 1986. After relinquishing his position as president, Newman remained an employee of Newman's, Inc. and oversaw the operations of Flo-Bend, Inc., a wholly-owned subsidiary of Newman's, Inc., until Flo-Bend, Inc. and Newman's Inc. were sold in March, 1990.

28. From 1957 until 1989, Newman made eight loans to various business entities and individuals. They included Flo-Bend, Inc., Southwest Tube and Manufacturing Company, Medico Leasing, Inc., Alloy Pipe Specialties, Pro-Mark Company, Mid-West Marketing, Inc., Schultz Metal Service, Inc., and Herbert J. Miller. The loan to Schultz Metal Service of \$2,650,000.00 is still outstanding.

29. Newman derived a portion of his economic livelihood from the interest paid on the loans that he made to the business entities and individuals.

30. Since March of 1990, Newman has been in the business of loaning money to business entities and individuals. He has spent 100% of his time, from an employment standpoint, monitoring loans and deciding whether to make additional loans. Newman has an office which is located at 9 East Fourth Street in Tulsa, Oklahoma.

31. Like the loans made prior to 1990, the loans made since 1990 by Newman have been evidenced by promissory notes. The loans have also been secured by assets of the companies.

32. On August 13, 1993, the Court granted partial summary judgment in favor of Newman against Star Motorcars and Clark.

Conclusions of Law

1. Any finding of fact which may be deemed conclusion of law is incorporated herein.

2. The Court has jurisdiction over this action under 28 U.S.C. § 2410 and 28 U.S.C. § 1444.

3. The Court finds that the United States of America's Exhibit No. 7 is inadmissible. It is not an original nor is it a duplicate of the original. See, Rules 1001 and 1002, Fed. R. Evid. According to Clark's testimony, the original document contained certain signatures. Exhibit No. 7 contains no signatures. The Court therefore has not considered Exhibit No. 7 in reaching its findings of fact and conclusions of law.

4. Based upon the stipulation of the parties, the United States of America's tax lien is valid and superior to any claim or interest of Newman in the 1991 BMW. In addition, Newman's security interest in the 1988 Mercedes-Benz 300E is valid and superior to any claim of the United States of America. Remaining at issue is the priority to be accorded in the 1987 Mercedes-Benz 300E, the 1990 Acura Legend, and the 1991 Honda Accord.

4. Based upon the stipulation of the parties, the United States of America has no right, title or interest in and to the furniture, fixtures, equipment and inventory acquired by Star Motorcars prior to September 30, 1992. Remaining at issue is the

priority accorded to the inventory acquired after September 30, 1992.

5. Federal law governs the priority of a federal tax lien. United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985).

6. Under 26 U.S.C. § 6321, the United States of America is granted a lien for unpaid taxes on "all property and rights to property, whether real or personal" of any taxpayer who neglects or refuses to pay taxes after a demand. The lien arises on the date of assessment. 26 U.S.C. § 6322.

7. A tax lien is not valid against a purchaser or holder of a security interest whose interest becomes choate prior to the filing of the notice of the tax lien. United States v. City of New Britain, 347 U.S. 81, 86 (1954). Under federal law, a lien becomes choate when the "identity of the lienor, the property subject to the lien and the amount of the lien are established." United States v. Pioneer American Insurance Co., 374 U.S. 84, 89 (1963) (quoting City of New Britain, 347 U.S. at 84).

8. On July 5, 1991, Newman had a valid and perfected security interest in the existing and subsequently acquired collateral of Star Motorcars when he filed the financing statement with the Oklahoma County Clerk. Okla. Stat. tit. 12A, §§ 9-203(1), 9-203(1) and 9-303 (1991). Hence, he was subject to the protection of section 6323(a), which provides that the federal tax lien is not valid until notice has been filed. For collateral in existence on

September 30, 1992, Newman's security interest was superior to that of the United States of America.

9. According to section 6323(a), the United States of America has priority over any collateral which came into existence after the filing of the federal tax lien on September 30, 1992. However, section 6323(c)(1) of Title 26 of the United States Code provides an exception to section 6323(a). That section provides that a filed tax lien does not take priority over a security interest in collateral acquired by a debtor within 45 days after the filing of a notice of tax lien, as long as the security interest is (1) in qualified property covered by the terms of a written agreement entered into before tax lien filing; (2) the written agreement constitutes a commercial transactions financing agreement; and (3) the security interest is protected under state law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

10. Under § 6323(c)(2)(B), "qualified property" includes only commercial financing security acquired by the taxpayer before the 46th day after the date of the tax lien filing. Commercial financing security includes account receivables and inventory. 26 U.S.C. § 6323(c)(2)(C).

11. A "commercial transactions financing agreement" is defined in section 6323(c)(2)(A)(i) as an (1) agreement entered into by a person in the course of his trade or business to make loans to the taxpayer; (2) which loans are to be secured by commercial financing security acquired by the taxpayer in the

ordinary course of his trade or business; and (3) relate to a loan to the taxpayer that is made before the 46th day after the tax lien filing or before the lender had actual notice or knowledge of such tax lien.

12. In order to be engaged in the "trade or business" as those terms are used in section 6323(c)(2)(A), a party must be in an activity with regularity and continuity and the party's primary purpose for engaging in the activity is for profit or income. A sporadic activity, a hobby or an amusement diversion does not qualify. Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987). The Court must look at the facts of each case and apply common sense in making a determination of whether an activity constitutes a trade or business. Id.

13. The Court finds that Newman falls within the exception of section 6323(c). Newman's security interest came into existence after the filing of the tax lien and it was in qualified property, i.e. inventory, covered by a security agreement entered into prior to the filing of the tax lien. Additionally, Newman's security interest was protected under Oklahoma law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation. Furthermore, the credit agreement constituted a commercial transaction financing agreement.

14. The Court specifically finds the credit agreement was a commercial transaction financing agreement because it was entered into by Newman in the course of his trade or business of making loans. When Newman made the loan to Star Motorcars in July, 1991,

he was in the business of making loans. The Court concludes that Newman was acting as a commercial lender in loaning the money to Star Motorcars. The Court finds that Newman's activity of loaning money was not sporadic, was not a hobby nor was it an activity undertaken solely for the purposes of amusement. The Court further finds that it was not an activity simply for investment purposes.

14. Because the exception in section 6323(c) applies, the Court finds that Newman's security interest in the 1987 Mercedes-Benz 300E, the 1990 Acura Legend, the 1991 Honda Accord and the inventory acquired within the 45 days of filing of the tax lien is prior to and superior to any tax lien interest of the United States of America in the vehicles and inventory. Under Okla. Stat. tit. 12A, §§ 9-501, 9-503 & 9-504 (1991) and the terms of the security agreement, Newman's security interest in the 1987 Mercedes-Benz 300E, the 1990 Acura Legend, the 1991 Honda Accord and the inventory acquired within the 45 days of the filing of the tax lien should be and is foreclosed and the United States of America is barred from asserting any interest in and to such vehicles and inventory.

15. The Court, however, finds that the United States of America's tax lien is superior to Newman's security interest in the 1991 BMW, the ten percent (10%) of the existing inventory of car parts of Star Motorcars valued at \$3,000.00, the Jaguar tools and parts valued at \$2,122.37, the equipment listed in Exhibit No. 6 valued at \$1,528.44 and that Newman is barred from asserting any interest in and to those items.

16. In accordance with the collateral agreement, the United States of America shall refund to Newman from the \$83,000.00 letter of credit the sum of \$62,000.00. This sum is arrived at by taking the value of the 1988 Mercedes-Benz 300E, the 1987 Mercedes-Benz 300E, the 1990 Acura Legend and the 1991 Honda Accord and subtracting the value of the 1991 BMW.

17. The Court directs Newman's counsel to submit a judgment for the Court's approval no later than October 31, 1994 at 12:00 noon. The judgment shall reflect the Court's ruling herein and the ruling of August 13, 1993 in regard to Star Motorcars and Clark.

ENTERED this 27 day of October, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

SHIRLEY JEAN LIGGINS,
Plaintiff,
vs.
THE CITY OF TULSA, T.E.
LAWSON, Badge No. L 4606,
and R.D. ROLEN, Badge No. R
3852, individually and in
their capacities as City
employees,
Defendants.

No. 92-C-847-E ✓

FILED

OCT 27 1994

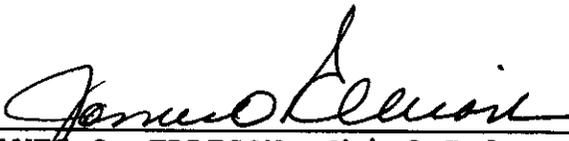
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

NOW BEFOFE THE COURT is the above-styled and numbered case,
which was dismissed by the Court at docket call, on April 18, 1994.

IT IS THEREFORE ORDERED by the Court that Liggins v. The City
of Tulsa, et al., 92-C-847-E, is hereby DISMISSED without
prejudice.

ORDERED this 26th day of October, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 10-27-94

25

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

HORNER'S INC.,
Plaintiff,
vs.
AAA REFRIGERATION AND AIR
CONDITIONING, INC., a Missouri
corporation,
Defendant.

No. 92-C-1112-E ✓

FILED

OCT 27 1994

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

J U D G M E N T

In accord with the Jury Verdict returned on March 23, 1994, in favor of the Defendant, AAA Refrigeration and Air Conditioning, Inc., the Court hereby enters judgment in favor of the Defendant, AAA Refrigeration and Air Conditioning, Inc., and against the Plaintiff, Horner's Inc. Plaintiff shall take nothing of its claim.

ORDERED this 26th day of October, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 10-27-94

62

ENTERED ON DOCKET
OCT 27 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DATE _____

Convault, Inc., Oldcastle, Inc.,)
The Quikset Organization, Inc.,)
Convault Florida, Inc.,)
Convault Mid-Atlantic, Inc.,)
Earth Protection Systems, Inc.)

Plaintiffs,)

v.)

Hi-Tech Vaults, a division)
of Hausner's, Inc.)

Defendant.)

CIVIL ACTION NO. 94-C-316-K
OCT 24 1994

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

CONSENT DECREE

FILED

OCT 27 1994

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

Pursuant to a stipulation between the parties and good cause appearing, a final consent decree is hereby entered as follows:

1. Plaintiffs, Convault, Inc., Oldcastle, Inc., The Quikset Organization, Inc., Convault Florida, Inc., Convault Mid-Atlantic, Inc. and Earth Protection Systems, Inc. (hereinafter "Convault") are entitled to a declaration that the following United States Letters Patents are each valid and enforceable:
 - (a) United States Letters Patent No. 4,826,644 ('644), entitled "Method for Entombment of Tanks in Concrete,"
 - (b) United States Letters Patent No. 4,931,235 ('235), entitled "Method for Making Steel/Concrete Tanks,"
 - (c) United States Letters Patent No. 4,986,436 ('436), entitled "Above Ground Liquid Storage System With Overfill Reservoir,"

2

(d) United States Letters Patent No. 5,157,888 ('888),
entitled "Storage Vault and Method for
Manufacture,"

(e) United States Letters Patent No. 5,174,079 ('079),
entitled "Fluid Containment Vault With Homogeneous
Concrete-Entombed Tank,"

2. All of Defendant, Hi-Tech Vaults', a division of Hausner's, Inc. (Hi-Tech), above ground concrete encased fuel storage tanks manufactured to date infringe one or more claims of each of the following patents: United States Letters Patent Nos. 4,826,644, 5,157,888 and 5,174,079. The parties further stipulate that Hi-Tech's infringement was unintentional and not willful.

3. Defendant, Hi-Tech, its officers, agents, servants, employees, successors in interest and assignees and any other person, corporation or organization in active concert or participation with it who receives notice of this decree are hereby immediately restrained and permanently enjoined from directly infringing, contributorily infringing and/or actively inducing the infringement of any of the claims of United States Letters Patent Nos. 4,826,644, 5,157,888 and 5,174,079.

4. Pursuant to a Settlement Agreement between the parties, Hi-Tech shall cease the manufacture and sale of infringing above ground concrete encased fuel tanks, other than inventory tanks and warranty repairs and replacements as defined in the Settlement Agreement, by October 31, 1994.

5. Each party shall bear its own costs and attorneys fees.

IT IS SO ORDERED.

Dated: October 26, 1994 By Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:

TOWNSEND AND TOWNSEND KHOURIE AND CREW

Dated: Oct. 19, 1994 By George M. Schwab
George M. Schwab
Cal. State Bar No. 058,250
K.T. Cherian
Cal. State Bar No. 133,967
Steuart Street Tower, 20th Floor
One Market Plaza
San Francisco, California 94105
TEL: (415) 543-9600

Attorneys for Plaintiffs,
Convault, Inc. et al.

HEAD & JOHNSON, P.A.

Dated: Oct 21, 1994 By R. Alan Weeks
R. Alan Weeks
Texas State Bar No. 21067650
Moore Manor
228 West 17th Place
Tulsa, Oklahoma 74119-4694
TEL: (918) 587-2000

Attorneys for Defendant,
Hi-Tech Vaults

FILED

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

OCT 27 1994

FORREST TOWRY, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 CASINO CREDIT SERVICES, INC.,)
 a Delaware corporation,)
 d/b/a CRW FINANCIAL, INC.,)
)
 Defendant.)

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

Case No. 94-C-438-BU

ENTERED ON DOCKET

DATE OCT 27 1994

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 27 day of October, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

28

DATE OCT 27 1994

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

OCT 28 1994

GEORGE CRITESER)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA, Dept. Health and)
 Human Services,)
)
 Defendant.)

Case No. 92-C-1109-WOLFE

ORDER

This order addresses Plaintiff's Application for a Final Order and for Attorney's Fees and Expenses Under the Equal Access to Justice Act (docket #25). At issue is Plaintiff's request for attorney fees under the Equal Access to Justice Act (the "EAJA").

In its Response Defendant does not oppose the award of fees of \$3,485.00 and costs of \$21.75.

Following further discussion between the parties, counsel announces that both parties agree:

1. Fees are to be awarded Plaintiff under the EAJA totalling \$4306.00; and
2. Costs are to be awarded Plaintiff under the EAJA totalling \$21.75.

The parties further agree:

3. Plaintiff's demand for "enhancement" under the EAJA for alleged "bad faith" is hereby withdrawn.

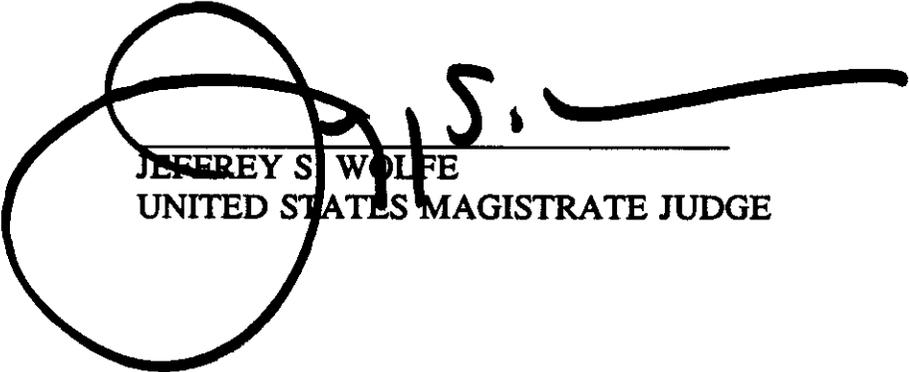
In view of the parties agreement, the court hereby orders that Plaintiff's Application

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for a Final Order and for Attorney's Fees and Expenses Under the Equal Access to Justice Act (docket #25) be granted as follows:

1. Fees are to be awarded to Plaintiff's counsel, Mark E. Buchner, attorney at Law, under the EAJA totalling \$4,306.00;
2. Costs are to be awarded Plaintiff under the EAJA totalling \$21.75.
3. Plaintiff's demand for "enhancement" under the EAJA for alleged "bad faith" is hereby withdrawn.

SO ORDERED THIS 26th day of Oct., 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

APPROVED:


MARK E. BUCHNER, Esq.
Attorney for Plaintiff


PHIL PINNELL, Esq.
Assistant United States Attorney
Attorney for Defendant

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

AMERICAN MANUFACTURERS MUTUAL)
INSURANCE COMPANY, an)
Illinois corporation,)
)
Plaintiff,)
)
v.)
)
STACEY ELAINE WODARSKI,)
et al.,)
)
Defendants.)

ENTERED ON DOCKET
DATE OCT 27 1994

No. 93-C-825-K

FILED

OCT 27 1994

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

Clerk
URT
OKOMA

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the plaintiff and against the defendant. The insurance policy in question does not provide coverage for the judgment obtained by Wodarski against Lloyds in state court action no. CJ-92-389 in Tulsa County District Court.

ORDERED this 26 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

35

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

DATE OCT 27 1994

AMERICAN MANUFACTURERS MUTUAL)
INSURANCE COMPANY, an)
Illinois corporation,)
)
Plaintiff,)
)
v.)
)
STACEY ELAINE WODARSKI,)
et al.,)
)
Defendants.)

No. 93-C-825-K ✓

FILED

OCT 27 1994

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

ORDER

The Court has before it for consideration (1) Plaintiff's Motion for Summary Judgment and (2) Defendant Wodarski's Motion for Summary Judgment.

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and that as a matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. Adickes v. Kress, 90 S.Ct. 1598 (1970). In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court Stated that:

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 at trial.

Id. at 322, 106 S.Ct. at 2552. To survive a motion for summary judgment, non-movant "must establish that there is a genuine issue of material facts..." Non-movant "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 Court has reviewed the pleadings and filings in this action, including the Stipulation of Facts and Suggested Questions of Law submitted to the Court on February 28, 1994, and finds, construing the pleadings liberally in favor of the party opposing summary judgment and considering all factual inferences tending to show triable issues, that material issues of fact do not remain to be litigated.

Undisputed Facts:

American Manufacturers Mutual Insurance Company ("AMM"), the plaintiff, is an Illinois corporation which provided various insurance coverages to its insureds, Lloyds Property Management Corporation and Switlyk Properties & Limited Partnerships. AMM brought this action for a declaratory judgment to determine its liability under a certain comprehensive and commercial liability insurance policy for the period February 27, 1988 to February 27, 1989. The commercial general liability coverage form contained the following pertinent provision whereby AMM would pay on behalf of the insured those sums which the insured became legally obligated to pay as damages because of "bodily injury"¹ to which the insurance applies, during the policy period and which must be

¹"Bodily injury" is defined in Section V, paragraph 3 of form CG 00 01 as bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

caused by an "occurrence."² However, the policy also contained an exclusion providing that the above liability clause did not apply to "bodily injury" expected or intended from the standpoint of the insured [Form CG 00 01, Section I(2)(a)] nor "bodily injury" to an employee of the insured arising out of and in the course of employment by the insured [Form CG 00 01, p.2, Section I-Coverages, paragraph (2)(e)(1)]. The policy further provided coverage for "personal injury" arising out of one or more enumerated offenses.³

The parties have stipulated that Wodarski filed a separate action in the District Court of Tulsa County against Lloyds Property Management Corp. and David Zarecki, Case No. CJ-92-0389. Wodarski alleged that as Property Manager for Madison Avenue Apartments in Tulsa, Oklahoma, she occasionally came in contact with Defendant Zarecki, an executive of Lloyds Property Management Corporation. She further alleges that on two occasions in April, 1988, Zarecki committed assault and battery on her person, and threatened her with termination of her employment if she did not engage in sex with him. Wodarski complied. Wodarski subsequently became pregnant, informed Defendant Zarecki of such, but he refused

²"Occurrence" is defined in Form WK-1271-1, p.2, as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. "Occurrence" is defined in paragraph 9, page 10 of Section V of form CG 00 01 to mean an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

³Form CG 00 01, Section V-Definitions, p.10-11, paragraph (10): "Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
- e. Oral or written publication of material that violates a person's right of privacy.

to acknowledge any responsibility. Later Wodarski was fired, but a few months after the child was born, Wodarski resumed her position as Property Manager. However Wodarski was again fired on June 9, 1989 by Defendants and removed from her manager apartment to a smaller 2-bedroom apartment. After securing a Judgment from Tulsa County District Court establishing the paternity of her child, Wodarski filed the stipulated-to action in Tulsa County District Court. Thereafter, the District Court awarded Wodarski a default judgment against Defendants Lloyds and Zarecki in the amount of \$750,000 for her claims of sexual harassment, assault and battery and intentional infliction of severe emotional distress or outrage, in the sum of \$7,000 for back pay, but denied her claim of front pay and reserved the issue of attorney fees and costs.

The transcript of hearing held September 29, 1992, in the District Court of Tulsa County Case No. CJ-92-389 was, by stipulation, made a part of the record. Wodarski's uncontradicted testimony was that Defendant Zarecki as an agent for Lloyds Property Management Corp. intentionally committed an assault and battery upon Wodarski, inflicting severe emotional and mental distress.

Defendant Wodarski's initial argument is that there appears to be no determinative or controlling definitive precedent governing disposition of the case at bar, and this Court should certify the question to the Supreme Court of Oklahoma. Alternatively, she moves for summary judgment in her favor. In response, pursuant to the terms, conditions, exclusions and other provisions of the

subject policy, AMM contends it affords no coverage nor has any obligation under the subject policy for Wodarski's claims or default judgment later rendered against Zarecki and Lloyds Property. AMM's argument is three-part: (1) the judgment obtained in state court was based upon intentional acts of the insured; (2) Ms. Wodarski did not experience "bodily injury" caused by an "occurrence," or a "personal injury"; (3) the policy does not provide coverage for damages sustained by an employee of the insured.

In Allstate Ins. Co. v. Thomas, 684 F. Supp. 1056 (W.D. Okla.1988), the court stated that in order for an intentional act 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. Id. at 1058. In support of this proposition, the court cited Lumbermens Mutual Ins. Co. v. Blackburn, 477 P.2d 62 (Okla.1970), a case upon which defendant heavily relies. The court in Thomas went on to find the intent to commit injury could be inferred as a matter of law in a case of sexual abuse. Defendant Wodarski argues that Oklahoma has ruled only in cases involving nonconsensual sexual assaults on minors, and that Thomas is so limited.

"Most courts have found sexual molestation to be intentional and excluded from insurance coverage as a matter of law." Commercial Union Ins. Co. v. Sky, 810 F.Supp. 249, 253 (W.D.Ark.1992). To the same effect are Old Republic Ins. Co. v.

Comprehensive Health Care Assoc. Inc., 786 F.Supp. 629 (N.D.Tex.1992) and Sena v. Travelers Ins. Co., 801 F.Supp. 471, 475 (D.N.M.1992). The distinction between molestation of a child and an adult, for which defendant argues, presents a split of authority. See Altena v. United Fire and Casualty Co., 422 N.W.2d 485 (Iowa 1988)(inferred intent applies despite adult victim); Western National Assurance Co. v. Hecker, 719 P.2d 954 (Wash.App.1986)(same). Contra, Aetna Life and Cas. Co. v. Barthelemy, 33 F.3d 189 (3d Cir.1994). The Supreme Court of Oklahoma has not addressed the issue.

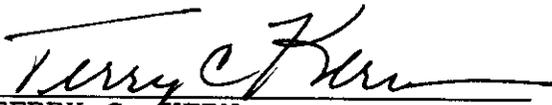
However, in Massachusetts Bay Ins. Co. v. Gordon, 708 F.Supp. 1232, 1233-34 (W.D.Okla.1989), the court further distinguished Blackburn by noting the language in the policy before the Oklahoma Supreme Court did not limit coverage to an "occurrence" or "accident". The court in Gordon went on to conclude that if the insured performs a voluntary act, the natural, usual, and to-be-expected result is not an accident.⁴ This Court finds the acts perpetrated against the defendant Wodarski constitute intentional acts and therefore her injuries were not the result of an "occurrence" and are not covered under the policy. The Court need not certify the question of inferred intent to the Supreme Court of Oklahoma because it is not necessary to this conclusion. Also, another basis exists for finding lack of coverage.

⁴Much of the "overwhelming" Oklahoma authority cited by defendant, such as Lincoln Health & Accident Insurance v. Johnigan, 147 P. 837 (Okla.1926), involves policies which excluded coverage for intentional acts against the insured, not on the part of the insured as in the case at bar.

Plaintiff asserts Wodarski may not recover because she was an employee of the insured when the events took place, and thus the policy's employment exclusion applies. Defendant responds that, because the sexual acts took place after work hours and at Zarecki's house, the injuries sustained by Wodarski did not arise out of and in the course of her employment. Again, the Court agrees with plaintiff. The events in question had the employer-employee relationship as their matrix, which was the essence of Wodarski's testimony in obtaining the default judgment. The situs of the sexual conduct does not alter this conclusion. Cf. Aberdeen Ins. Co. v. Bovee, 777 S.W.2d 442 (Tex.Ct.App.1989); Omark Industries v. Safeco Ins. Co., 590 F.Supp. 114, 120 (D.Or.1984).

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is granted and that Defendant Wodarski's Motion for Summary Judgment is denied. Defendant Wodarski's motion to certify question to the Supreme Court of Oklahoma is denied. Defendant Wodarski's motion to strike plaintiff's response to motion for summary judgment is denied.

So ORDERED this 26 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

CME ASSOCIATES, INC., a
Texas Corporation,

Plaintiff,

v.

CLOYED RAY PASLAY, DONNA F.
PASLAY, HORACE D. PASLAY,
SHIRLEY M. PASLAY, HENRY N.
COOK, and PATRICIA M. COOK,
individuals,

Defendants.

No. 93-C-1068-E ✓

FILED

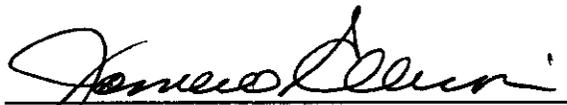
OCT 27 1994

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

ADMINISTRATIVE CLOSING ORDER

IT IS HEREBY ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that further litigation is necessary.

ORDERED this 26TH day of October, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 10-27-94

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

ROBERT E. and KAREN G. PERKINS,
individuals,

Plaintiffs,

v.

SECURITY LIFE INSURANCE
COMPANY OF AMERICA, a foreign
insurance company, and ERNEST E.
HOWELL, an individual,

Defendants.

Case No. 94-C-436-B ✓

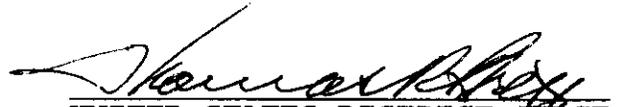
SECRET
DATE 10-27-94

ORDER REMANDING ACTION

Plaintiffs' motion to remand for lack of diversity jurisdiction having come on for consideration, and good cause having been shown for the granting of same,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion is granted, and that this action is hereby remanded to the District Court for Creek County, Bristow Division.

Done this 26 day of Oct, 1994.


UNITED STATES DISTRICT JUDGE

Prepared by
Dale Joseph Gilsinger
320 South Boston Ave.
Suite 1130
Tulsa, OK 74103
(918) 583-3227

FILED

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

OCT 27 1994

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

RICK HOWARD and PAM HOWARD,)
)
 Plaintiffs,)
)
 vs.)
)
 WESTINGHOUSE ELECTRIC CORP.,)
 and TECUMSEH PRODUCTS CO.,)
 and DELORES NEWMAN,)
)
 Defendants.)

Case No. 93-C-361-BU

ENTERED ON DOCKET
DATE OCT 27 1994

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 27 day of October, 1994.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

251

APPROVALS:

DAVID K. ROBERTSON

Attorney for Plaintiff

HARRY A. PARRISH

Harry A. Parrish

Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

NANCY S. WAKEFIELD; ANTHONY C.)
WAKEFIELD; CITY OF BARTLESVILLE,)
Oklahoma; COUNTY TREASURER,)
Washington County, Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Washington County, Oklahoma,)

Defendants.)

CIVIL ACTION NO. 94-C 210B

OCT 26 1994

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26th day
of Oct., 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendant, **City of Bartlesville, Oklahoma**, appears
by its attorney, Jerry M. Maddux; the Defendants, **Nancy S.
Wakefield, County Treasurer, Washington County, Oklahoma, and
Board of County Commissioners, Washington County, Oklahoma**,
appear not, but make default; and the Defendant, **Anthony C.
Wakefield**, should be dismissed.

The Court being fully advised and having examined the
court file finds that the Defendant, **County Treasurer, Washington
County, Oklahoma**, acknowledged receipt of Summons and Complaint
on March 5, 1994; and that Defendant, **Board of County
Commissioners, Washington County, Oklahoma**, acknowledged receipt
of Summons and Complaint on March 10, 1994.

The Court further finds that the Defendant, **Nancy S. Wakefield**, was served by publishing notice of this action in the Examiner-Enterprise, a newspaper of general circulation in Washington County, Oklahoma, once a week for six (6) consecutive weeks beginning June 16, 1994, and continuing through July 21, 1994, 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 Defendant, **Nancy S. Wakefield**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant 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 address of the Defendant, **Nancy S. Wakefield**. 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 Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last

known place of residence and/or mailing address. 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 Defendant served by publication.

It appears that the Defendant, **City of Bartlesville, Oklahoma**, filed its Answer on March 24, 1994; and that the Defendants, **Nancy S. Wakefield, County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Nine (9), in Block Two (2) of Sunset Place Addition to Bartlesville, Washington County, Oklahoma.

The Court further finds that on December 13, 1978, Larry L. Knief and Connie Knief, husband and wife, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION their mortgage note in the amount of \$20,00.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Larry L. Knief and Connie Knief, husband and wife, executed and delivered to WESTERN

PACIFIC FINANCIAL CORPORATION a mortgage dated December 13, 1978, covering the above-described property. Said mortgage was recorded on December 18, 1978, in Book 717, Page 700, in the records of Washington County, Oklahoma.

The Court further finds that on May 1, 1987, SHEARSON LEHMAN MORTGAGE CORPORATION, formerly known as WESTERN PACIFIC FINANCIAL CORPORATION assigned the above-described mortgage note and mortgage to Fireman's Fund Mortgage Corporation. This Assignment of Mortgage was recorded on July 13, 1987, in Book 844, Page 2231, in the records of Washington County, Oklahoma.

The Court further finds that on February 13, 1990, Fireman's Fund Mortgage Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 28, 1990, in Book 856, Page 1988, in the records of Washington County, Oklahoma.

The Court further finds that the Defendant, Nancy S. Wakefield, and Anthony C. Wakefield, then husband and wife, became the record title holders by virtue of a Warranty Deed dated March 3, 1989, and recorded on March 10, 1989 in Book 851, Page 3506, in the records of Washington County, Oklahoma. The Defendant, Nancy S. Wakefield, and Anthony C. Wakefield, are the current assumptor of the subject indebtedness.

The Court further finds that on March 1, 1991, the Defendant, Nancy S. Wakefield, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due

under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, Nancy S. Wakefield, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Nancy S. Wakefield**, is indebted to the Plaintiff in the principal sum of \$26,710.07, plus interest at the rate of 9.5 percent per annum from January 3, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **City of Bartlesville, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of a Notice of Lien for the purpose of cleaning up said property, which was recorded on November 3, 1992, in Book 870, Page 3367, in the records of Washington County, Oklahoma, in the amount of \$105.00.

The Court further finds that the Defendants, **Nancy S. Wakefield, County Treasurer and Board of County Commissioners, Washington County, Oklahoma**, are in default, and have no right, title, or interest in the subject real property.

The Court further finds that Anthony C. Wakefield, is dismissed as a Defendant, by virtue of a Divorce Decree, dated January 2, 1990, Case # JFD-89-257, in Ottawa County District Court, and filed on August 2, 1994, in the records of Washington County, Oklahoma, which properly conveys the subject property to

the Defendant, **Nancy S. Wakefield**, and therefore, Anthony C. Wakefield is no longer a necessary party Defendant.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Nancy S. Wakefield**, in the principal sum of \$26,710.07, plus interest at the rate of 9.5 percent per annum from January 3, 1994 until judgment, plus interest thereafter at the current legal rate of 6.0% percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Bartlesville, Oklahoma**, have and recover judgment in the amount of \$105.00, plus penalties and interest, for the purpose of cleaning up said property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Anthony C. Wakefield, is dismissed as a Defendant, by virtue of his divorce from the Defendant, **Nancy S. Wakefield**, and Anthony C. Wakefield is no longer a necessary party Defendant.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Nancy S. Wakefield, 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 Defendant, City of Bartlesville, Oklahoma, in the amount of \$105.00, for the purpose of cleaning up the subject property.

Second:

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

Third:

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

S/THOMAS F. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK
Assistant United States Attorney
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JERRY M. MADDUX, OBA #5615
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P.O. Drawer Z
Bartlesville, OK 74005

Judgment of Foreclosure
Civil Action No. 94-C 210B
NBK:lg

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

UNITED STATES OF AMERICA,)
ex rel. THE PRECISION COMPANY,)
WILLIAM I. KOCH, and WILLIAM)
A. PRESLEY,)

Plaintiffs,)

v.)

Case No. 91-^{CV}~~SE~~-763-B

KOCH INDUSTRIES, INC.; KOCH)
EXPLORATION CO.; KOCH PIPELINE,)
INC.; KOCH SERVICES, INC.; KOCH)
GATHERING SYSTEMS, INC.;)
MINNESOTA PIPELINE CORP.;)
QUIVERA GAS CO.; KOCH OIL CO.)
OF TEXAS, INC.; GULF CENTRAL)
STORAGE & TERMINAL CO. OF)
NEBRASKA; SOUTHWEST PIPELINE)
CO.; CHAPARRAL PIPELINE (NGL))
CO., GULF CENTRAL PIPELINE CO.;)
KOGAS, INC.,)

Defendants.)

I L E D

26 1994

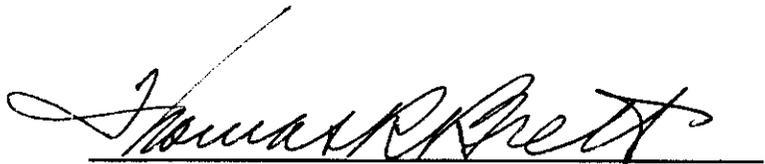
U.S. DISTRICT COURT

ENTERED IN COURT

DATE FILED 10/26/94

ORDER

Pursuant to the Case Management Scheduling Order dated October 5, 1994, relator The Precision Company is dismissed from this action, ^{TRE} and shall no longer be a party in any capacity. The case will proceed with United States of America, ex rel. William I.Koch and William A. Presley as plaintiff.



THOMAS R. BRETT
United States District Judge

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

FILED

OCT 25 1994

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

GEORGE M. HOUSER,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

93-C-0943-E ✓

ORDER

Plaintiff George Houser applied for Social Security disability benefits, alleging he is disabled because of continuing and severe pain in his back. The Secretary of Health and Human Services denied the application. Mr. Houser now appeals that decision to this Court.¹

Mr. Houser raises four issues: (1) Did the Administrative Law Judge ("ALJ") err by not calling a vocational expert; (2) Did the ALJ follow the "treating physician" rule?; (3) Does substantial evidence support the ALJ's decision; and (4) Did the Appeals Council err by not considering newly submitted evidence? For the reasons discussed below, the case will be remanded.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

ENTERED ON DOCKET
DATE 10-26-94

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supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).² A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

II. Summary of Evidence

Mr. Houser, 40 years old and a high school graduate, alleges that pain in his back and leg prevents him from working.³ He testified he can no longer work because of the pain. The medical evidence indicates that Claimant suffered a herniated lumbar disc in 1989 after a steel molding struck him while working. *Record at 153*. A partial laminectomy was done on October 19, 1989 and Mr. Houser's treating physician released him to work on December 11, 1989. *Id. at 151*.

² One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).

³ Mr. Houser's alleged onset date is January 9, 1991. The ALJ's denial decision took place on October 6, 1992.

In 1991, Mr. Houser reinjured his back and leg when climbing into a car. He was diagnosed on January 29, 1991 as having a "recurrent herniated disc". Again a partial lumbar laminectomy was done. *Id. at 147*. Following the laminectomy, Dr. William Smith, Mr. Houser's treating physician, noted that Mr. Houser was making a "very satisfactory recovery." *Id. at 146*. Dr. Smith released Mr. Houser to work on April 1, 1991, noting he could not repeatedly bend or lift more than 40 pounds. *Id.* However, after Mr. Houser return to his office, Dr. Smith indicated that Mr. Houser was "temporarily totally disabled" from working at his job. *Id. at 145*.

Dr. Sami Framjee examined Mr. Houser on May 5, 1991. Dr. Framjee found that Mr. Houser was in "no distress." *Id. at 183*. Dr. Framjee also noted that, based on his examination and a review of the medical records, Mr. Houser could return to work that did not require lifting of more than 40 pounds. *Id. at 186*.

Dr. Jimmy Martin examined Mr. Houser on August 20, 1991. Dr. Martin found that, due to back pain, Mr. Houser was temporarily totally disabled from January 9, 1991 to August 16, 1991. *Id. at 165*. Dr. Martin found that Mr. Houser showed evidence of "severe lumbar sacral nerve injury affecting the right hip and right lower extremity." *Id. at 166*. Dr. Martin also noted that Mr. Houser should learn a "more sedentary" job. *Id.*

On July 13, 1992, Dr. Smith wrote a letter to Mr. Houser's Social Security representative. In the letter, Dr. Smith stated that Mr. Houser was unable to work due to "chronic pain" and "limited lumbar motion." *Id. at 188*. Dr. Smith later submitted a Residual Functional Capacity ("RFC") evaluation, noting that Mr. Houser had the following limitations: Sit up to two hours at a time and four hours during an eight-hour work day;

stand up to two hours at a time and four hours during an eight-hour work day; infrequently lift/carry 50 pounds and occasionally lift and/or carry more than 25 pounds; no crawling or climbing; and infrequent bending or squatting. *Id. at 193.*

After examining the above evidence, the ALJ found that Mr. Houser could work at the full range of light work. In reaching that decision, the ALJ relied on the Medical-Vocational Guidelines ("Grids") and did not call a Vocational Expert. He rejected Dr. Martin's findings because they were inconsistent with those of Drs. Smith and Framjee. *Id. at 32.* He also noted that Dr. Smith's findings were inconsistent, although they still showed that Mr. Houser could do light work. The ALJ also found Mr. Houser's testimony to not be credible because it conflicted with the medical evidence.⁴

III. Legal Analysis

A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). At step 5, the burden shifts to the Secretary to prove that the claimant can work.

⁴ Following the ALJ's decision, Mr. Houser submitted additional evidence to the Secretary. The evidence consisted of (1) December 28, 1992 medical source statement, (2) progress notes from Dr. Smith from July 6, 1992 to November 9, 1992. In addition, on April 19, 1993, Dr. Framjee examined Mr. Houser again. Dr. Framjee indicated that he believed Mr. Houser's condition had "changed for the worse" since his previous examination on May 15, 1991. See Plaintiff's Brief (docket #6). According to Mr. Houser, the letter of Dr. Framjee was submitted to the Appeals Council but not made part of the record.

In this case, the ALJ advanced to step 5 and found that Mr. Houser could perform the full range of light work. Light work involves lifting no more than 20 pounds at a time with frequently lifting or carrying of objects weighing up to 10 pounds. Such work requires "standing and walking, off and on, for six hours of an 8-hour workday. *Social Security Ruling 83-12*. Also, see, 20 C.F.R. § 404.1567(b).

The pertinent question for this Court is whether the ALJ erred by conclusively relying on the Grids. As a general rule, the Grids should not be applied conclusively unless the claimant could perform the full range of work required of the RFC category on a daily basis and unless the claimant possesses the physical capacities to perform most of the jobs in that range. *Hargis v. Sullivan*, 945 F.2d 1482, 1490 (10th Cir. 1991). Resort to the Grids is particularly inappropriate when evaluating nonexertional limitations such as pain. *Id.* If the Grids cannot be used, the ALJ cannot satisfy the burden at step 5 without producing vocational expert testimony. *Id.* at 1491.⁵

Here, despite Mr. Houser's assertions of pain, the ALJ found that neither the pain nor any other nonexertional impairment prevented him from doing light work. As a result, the ALJ relied on the Grids to find Mr. Houser had no disability. Upon review, however, the Court finds that the ALJ should have called the testimony of a Vocational Expert to determine if Mr. Houser's nonexertional impairments (i.e. pain) prevented him from performing light work.

⁵ *The Secretary bears the burden at step 5 of demonstrating Mr. Houser's ability to perform the full range of light work. Ragland v. Shalala*, 992 F.2d 1056, 1058 (10th Cir. 1993).

Several reasons dictate the foregoing finding. Foremost is the ALJ's handling of the evidence submitted by Dr. Smith, a treating physician. It appears the ALJ placed significant weight on some of Dr. Smith's findings and discounted others. Of particular concern is the July 13, 1992 letter and the August 5, 1992 RFC evaluation. The letter states that Mr. Houser can no longer work due to "chronic pain". The RFC letter indicates that Mr. Houser can stand for four hours in an 8-hour work day and sit for four hours in an eight-hour work day. Such limitations suggests that Mr. Houser does not meet the sitting/standing requirements of light and/or sedentary work. The ALJ acknowledged Dr. Smith's findings, but apparently discounted them.⁶

Of further question is the ALJ's handling of the related evidence. Drs. Smith and Martin found that Mr. Houser could not work, in part, due to pain. Mr. Houser testified that he can not work because of pain. Even Dr. Framjee, albeit in a letter after the ALJ's decision, indicates that Mr. Houser has significant pain. The ALJ, in effect, rejected any evidence that supported Mr. Houser's claim of pain and instead based many of his findings on Dr. Framjee's 1991 examination. Placing such weight on a Dr. Framjee's one-time examination raises questions.⁷

Remanding the case for Vocational testimony is a close-call. The question is whether Mr. Houser's nonexertional impairments significantly affect her residual functional

⁶ The treating physician rule mandates that the Secretary give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984). Here, it is unclear as to what reasons were given for disregarding the letter and RFC evaluation.

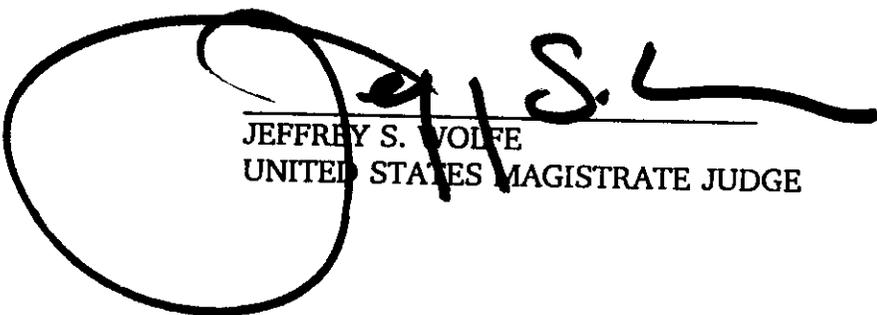
⁷ Part of this conclusion stems from Dr. Framjee's May 7, 1993 letter -- which suggests that he may have overstated Mr. Houser's condition. On remand, the ALJ must determine if the letter addresses the time frame in question (January, 1991 to October, 1992) and whether the letter should be considered "new and material" evidence. The Appeals Council apparently did not examine the letter.

capacity to do light and/or sedentary work. Determining what is significant is a difficult question, but one court attempts to explain:

Under this standard isolated occurrences will not preclude the use of the Guidelines, however persistent nonexertional impairments which prevent the claimant from engaging in the full range of activities listed in the Guidelines will preclude the use of the Guidelines...For example, an isolated headache or temporary disability will not preclude the use of Guidelines where as persistent migraine headaches may be sufficient to require more than the Guidelines to sustain the Secretary's burden. *Thompson v. Bowen*, 850 F.2d 346, 349 (8th Cir. 1988).

In the case at bar, the inconsistent evidence makes it difficult to determine whether the Secretary has met her burden on Step 5. This is especially true concerning the degree and persistence of Mr. Houser's pain and his ability to sit and stand during the work day. Therefore, the case is REMANDED. On remand, the Secretary shall (1) have a consulting physician examine Mr. Houser and complete an RFC (2) have a vocational expert testify.⁸

SO ORDERED THIS 25th day of Oct, 1994.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁸ The Court finds that the ALJ did not err in the first four steps of the sequential analysis. In addition, the Court makes no finding as to whether Mr. Houser is disabled at Step 5. That decision is left to the ALJ on remand.

ENTERED ON DOCKET
DATE OCT 26 1994
FILED

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

OCT 25 1994

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

ELECTRICAL POWER SYSTEMS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 ARGO INTERNATIONAL CORPORATION,)
)
 Defendant.)

Case No. 94-C-158-~~ZBU~~ *al*

JUDGMENT

There comes before the Court the Complaint of Plaintiff Electrical Power Systems, Inc. against Defendant Argo International Corporation. Having previously entered an Order sustaining Plaintiff's Motion for Summary Judgment, which Order is incorporated herein by reference, the Court FINDS AND ORDERS that Judgment should be entered against Defendant, and in favor of Plaintiff, as set forth below.

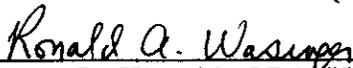
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Electrical Power Systems, Inc. have and recover judgment against Defendant Argo International Corporation for the principal sum of \$106,744.00, together with costs of this action in the amount of \$120.00, interest at the rate of 5.69% per annum (\$16.64 per day) from November 27, 1993, until paid, a reasonable storage fee of \$ 600.00 per month and for a reasonable attorney's fee of \$ 7,432.50 awarded pursuant to 12 O.S. § 936.

DATED this 25 day of oct, 1994.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

22

APPROVED AS TO FORM:


James L. Kincaid, OBA #5021
Ronald A. Wasinger, OBA #15869

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Attorneys for Defendant
ARGO INTERNATIONAL CORPORATION

ENTERED ON DOCKET

DATE OCT 26 1994

FILED

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

OCT 25 1994

ELECTRICAL POWER SYSTEMS, INC.,)
)
Plaintiff,)
vs.)
)
ARGO INTERNATIONAL CORPORATION,)
)
Defendant.)

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

Case No. 94-C-158-BU

ORDER

This matter comes before the Court upon the plaintiff, Electrical Power Systems, Inc.'s Motion for Attorney's Fees and Storage Costs (Docket No. 20), wherein the plaintiff seeks an award of \$7,432.50 for attorney's fees and an award of \$600.00 per month from November 27, 1993 for storage fees.¹ The defendant has not responded to the motion and upon examination of the motion and the attachments thereto, the Court finds that the attorney's fee request of \$7,432.50 and the storage fee request of \$600.00 per month from November 27, 1993 are reasonable. The Court therefore GRANTS the plaintiff's motion and AWARDS the plaintiff attorney's fees in the amount of \$7,432.50 and storage fees in the amount of \$600.00 per month from November 27, 1993.

ENTERED this 25th day of October, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹The Court has already established entitlement to attorney's fees and storage costs in its Order of September 22, 1994 granting the plaintiff's summary judgment motion. However, in that Order, the Court ruled that if the parties could not agree as to an appropriate amount for attorney's fees and storage costs that the plaintiff was to file a motion in regard to the attorney's fees and storage fees for the Court's determination.

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

AMERICAN BUILDERS & CONTRACTORS)
SUPPLY CO., INC. d/b/a ABC SUPPLY)
CO., INC.,)

Plaintiff,)

vs.)

CHARLES BURNS a/k/a CHARLES O.)
BURNS d/b/a A-1 ROOFING, d/b/a POLY-)
FLEX SYSTEMS INT., d/b/a MESSINA-)
REED ROOFING II, d/b/a POLY-FLEX)
ROOFING and d/b/a TROTTER ROOFING,)
CHARLES THOMAS BURNS, and)
LINDA BURNS,)

Defendants.)

ENTERED ON DOCKET
DATE OCT 26 1994

Case No. 93-C-939-BU ✓

FILED

OCT 25 1994

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

JOURNAL ENTRY OF JUDGMENT

This matter comes on for hearing on this 25th day of October, 1994.

The plaintiff, American Builders & Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc. ("ABC"), appearing by and through its attorneys of record, Steven M. Harris and Douglas R. Haughey, of the law firm of Doyle & Harris, and the defendant, Linda Burns ("Burns"), appearing by and through her attorney of record, Terry P. Malloy. After being fully advised in the pleadings in this matter and upon statements of counsel the Court finds as follows:

1. The Court has jurisdiction to hear this cause of action and has jurisdiction over the defendant, Burns, herein.

2. The parties by stipulation have agreed that the allegations contained in the Second Amended Complaint filed by the plaintiff on the 24th day of March, 1994, shall be taken as true.

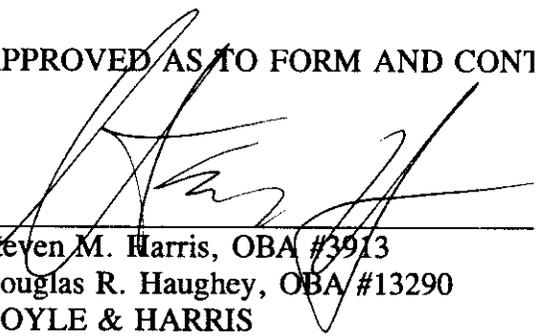
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3. As a matter of law, the plaintiff is entitled to judgment against the defendant, Burns, in the principal amount of \$65,100.50 against which interest shall not accrue.

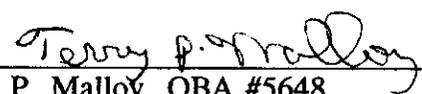
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, American Builders & Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc., have and recover judgment against the defendant, Linda Burns, for the principal amount of \$65,100.50 against which interest shall not accrue.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:



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Attorney for Defendant

Linda Burns
Linda Burns, Defendant

471-10.040:nw

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

ENTERED ON DOCKET
DATE OCT 26 1994

AMERICAN BUILDERS & CONTRACTORS)
SUPPLY CO., INC. d/b/a ABC SUPPLY)
CO., INC.,)

Plaintiff,)

vs.)

Case No. 93-C-939-BU ✓

CHARLES BURNS a/k/a CHARLES O.)
BURNS d/b/a A-1 ROOFING, d/b/a POLY-)
FLEX SYSTEMS INT., d/b/a MESSINA-)
REED ROOFING II, d/b/a POLY-FLEX)
ROOFING and d/b/a TROTTER ROOFING,)
CHARLES THOMAS BURNS, and)
LINDA BURNS,)

Defendants.)

FILED
OCT 25 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOURNAL ENTRY OF JUDGMENT

This matter comes on for hearing on this 25th day of October, 1994.

The plaintiff, American Builders & Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc. ("ABC"), appearing by and through its attorneys of record, Steven M. Harris and Douglas R. Haughey, of the law firm of Doyle & Harris, and the defendant, Charles Burns a/k/a Charles O. Burns ("Burns"), appearing by and through his attorney of record, Terry P. Malloy. After being fully advised in the pleadings in this matter and upon statements of counsel the Court finds as follows:

1. The Court has jurisdiction to hear this cause of action and has jurisdiction over the defendant, Burns, herein.
2. The parties by stipulation have agreed that the allegations contained in the Second Amended Complaint filed by the plaintiff on the 24th day of March, 1994, shall be taken as

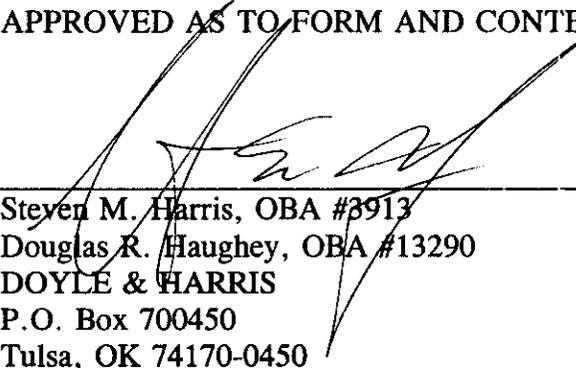
true.

3. As a matter of law, the plaintiff is entitled to judgment against the defendant, Burns, in the principal amount of \$130,200.99, plus accrued interest in the amount of \$20,211.68, plus interest thereon at the rate of 10% per annum from August 1, 1994, until paid in full, plus an attorney's fee of \$12,000.00 and all costs of the action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, American Builders & Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc., have and recover judgment against the defendant, Charles Burns a/k/a Charles O. Burns, for the principal amount of \$130,200.99, plus accrued interest in the amount of \$20,211.68, plus interest thereon at the rate of 10% per annum from August 1, 1994, until paid in full, plus an attorney's fee of \$12,000.00 and all costs of the action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:


Steven M. Harris, OBA #3913
Douglas R. Haughey, OBA #13290
DOYLE & HARRIS
P.O. Box 700450
Tulsa, OK 74170-0450
(918) 743-1276
Attorneys for Plaintiff

Terry P. Malloy

Terry P. Malloy, OBA #5648
1924 South Utica
Suite 820
Tulsa, OK 74104
(918) 749-6692
Attorney for Defendant

Charles O. Burns

Charles Burns a/k/a Charles O. Burns,
Defendant

471-10.029:nw

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

ENTERED ON DOCKET
DATE OCT 26 1994

AMERICAN BUILDERS & CONTRACTORS)
SUPPLY CO., INC. d/b/a ABC SUPPLY)
CO., INC.,)

Plaintiff,)

vs.)

Case No. 93-C-939-BU

CHARLES BURNS a/k/a CHARLES O.)
BURNS d/b/a A-1 ROOFING, d/b/a POLY-)
FLEX SYSTEMS INT., d/b/a MESSINA-)
REED ROOFING II, d/b/a POLY-FLEX)
ROOFING and d/b/a TROTTER ROOFING,)
CHARLES THOMAS BURNS, and)
LINDA BURNS,)

Defendants.)

FILED

OCT 25 1994

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

JOURNAL ENTRY OF JUDGMENT

This matter comes on for hearing on this 25th day of October, 1994.

The plaintiff, American Builders & Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc. ("ABC"), appearing by and through its attorneys of record, Steven M. Harris and Douglas R. Haughey, of the law firm of Doyle & Harris, and the defendant, Charles Thomas Burns ("Burns"), appearing by and through his attorney of record, Terry P. Malloy. After being fully advised in the pleadings in this matter and upon statements of counsel the Court finds as follows:

1. The Court has jurisdiction to hear this cause of action and has jurisdiction over the defendant, Burns, herein.
2. The parties by stipulation have agreed that the allegations contained in the Second Amended Complaint filed by the plaintiff on the 24th day of March, 1994, shall be taken as true.

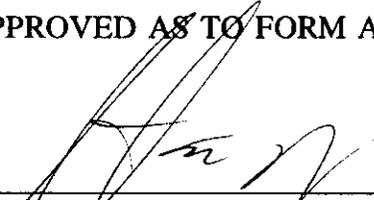
2/0

3. As a matter of law, the plaintiff is entitled to judgment against the defendant, Burns, in the principal amount of \$65,100.50 against which interest shall not accrue.

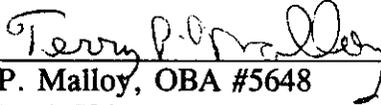
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, American Builders & Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc., have and recover judgment against the defendant, Charles Thomas Burns, for the principal amount of \$65,100.50 against which interest shall not accrue.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:



Steven M. Harris, OBA #3913
Douglas R. Haughey, OBA #13290
DOYLE & HARRIS
P.O. Box 700450
Tulsa, OK 74170-0450
(918) 743-1276
Attorneys for Plaintiff



Terry P. Malloy, OBA #5648
1924 South Utica
Suite 820
Tulsa, OK 74104
(918) 749-6692
Attorney for Defendant

Charles T. Burns
Charles Thomas Burns, Defendant

471-10.039:nw

ENTERED ON DOCKET

DATE ~~OCT 26 1994~~

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

OCT 25 1994

HARRY T. HANIG, an individual,)
)
Plaintiff,)
)
vs.)
)
ALEXANDER & ALEXANDER BENEFITS)
SERVICES, INC., a New Jersey)
corporation,)
)
Defendant.)

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

Case No. 94-C-137-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 25 day of October, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

13

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

ENTERED ON DOCKET
DATE OCT 26 1994

O'MEARA CONSULTING, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
STRATAMODEL INC.,)
a Texas corporation,)
)
Defendant.)

Case No. 94-C-447-K

ORDER DISMISSING ACTION WITH PREJUDICE

Upon the joint application of Plaintiff O'Meara Consulting, Inc. and Defendant Stratamodel Inc., and for good cause shown, the Court hereby finds the parties have settled all claims for relief asserted herein and that all claims for relief asserted herein by either party should be dismissed with prejudice to refiling.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all claims for relief and causes of action asserted by Plaintiff or Defendant in this case are hereby dismissed with prejudice to refiling.

DATED this 25 day of October, 1994.

~~s/ TERRY~~ **TERRY C. KERN**
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE OCT 26 1994

FILED

OCT 25 1994

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

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

Dr. Francisco Franco,

Plaintiff,

vs.

Tulsa Junior College,

Defendant

Case No. 94-C-54-BU ✓

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court has before it the Plaintiff's Application For Order of Dismissal Without Prejudice. For good cause shown, this case is dismissed without prejudice. Each party shall bear his or its own attorney fees and court costs.

DATED Oct 25, 1994


UNITED STATES DISTRICT JUDGE

IN THE UNITED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 26 1994

FILED

OCT 25 1994

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

TEXACO INC. and TEXACO)
EXPLORATION AND PRODUCTION INC.,)
)
Plaintiffs,)
)
vs.)
)
BETHLEHEM SUPPLY CORPORATION,)
)
Defendant.)

Case No. 93-C-788-BU ✓

JUDGMENT

This matter comes on before this Court for the entry of judgment in favor of Texaco Inc. and Texaco Exploration and Production Inc. (collectively, the "Plaintiffs"), in accordance with Plaintiffs' Motion for Summary Judgment which was granted by Order of this Court dated October 17, 1994. That Order was entered on the basis that Defendant failed to respond to Plaintiffs' Motion for Summary Judgment within the time prescribed by the Local Rules and on the basis that Defendant is barred from defending this action pursuant to 12 Okla. Stat. §1212(c). Further, having independently reviewed Plaintiffs' Motion for Summary Judgment, the Court finds that no genuine issues of material fact exist and that Plaintiffs are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs, Texaco Inc. and Texaco Exploration and Production Inc., are hereby granted judgment of and from Defendant, Bethlehem Supply Corporation, in the sum of \$454,236.00, together with pre-judgment interest from September 15, 1988 to October 17, 1994, in the

amount of \$165,167.68, reasonable attorneys' fees incurred in prosecuting this action, post-judgment interest as provided by law, and costs of this action.

DATED this 25 day of Oct, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

OCT 25 1994

RONALD WILLIAMS, and KATHY WILLIAMS, individually and as husband and wife,

Plaintiffs,

vs.

SHONEY'S INC., d/b/a CAPTAIN D'S,

Defendant.

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

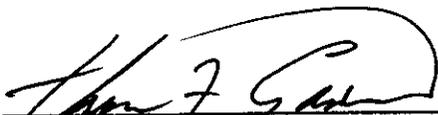
Case No. 94-C-629-E

STIPULATION OF DISMISSAL WITHOUT PREJUDICE
BY PLAINTIFF KATHY WILLIAMS

COMES NOW the Plaintiffs and the Defendant and pursuant to FRCP Rule 41(a)(1) stipulates to the dismissal, without prejudice, by Kathy Williams, individually and as wife of Plaintiff Ronald Williams, of her cause of action against the Defendant as set forth in Plaintiff's Petition, Second Cause of Action, Paragraph 6.

Respectfully submitted,

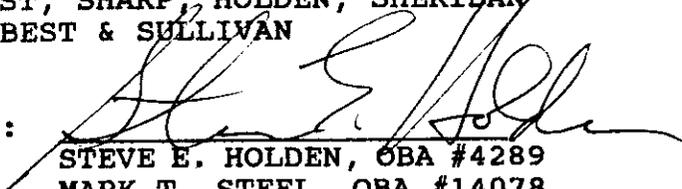
CORLEY & GANEM

BY: 
THOMAS F. GANEM, OBA #3228
TERRILL CORLEY, OBA #1915
1809 East Fifteenth
Tulsa, Oklahoma 74104
(918) 745-9200

LAWRENCE T. SHILES,
OBA #10335
8908 South Yale, Suite 250
Tulsa, Oklahoma 74137
(918) 495-1919

ATTORNEYS FOR PLAINTIFFS

BEST, SHARP, HOLDEN, SHERIDAN
BEST & SULLIVAN

BY: 
STEVE E. HOLDEN, OBA #4289
MARK T. STEEL, OBA #14078
808 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 582-1234

ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET
DATE 10-26-94

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

FILED
OCT 25 1994

Michael D. Lawrence, Clerk
U.S. DISTRICT COURT

LARRY DALE,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 93-C-0008-B

ENTERED IN DOCKET
OCT 25 1994
DATE

ORDER

Petitioner's pro se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for consideration. Respondent has filed a response and an amended response. Petitioner has filed a motion to strike the amended response, a motion for a judgment on the pleadings, and a motion to expedite proceedings. As more fully set out below, the Court concludes that Petitioner's motions and petition for a writ of habeas corpus should be denied.

I. BACKGROUND

In this action, Petitioner attacks his sentence in Case No. CRF-87-2884, where the Tulsa County district court, after a non-jury trial, rejected Petitioner's insanity defense and found him guilty of murder in the first degree and shooting with intent to kill. The Trial Court set punishment at life imprisonment for each count to run consecutively. On appeal, Petitioner's counsel focused again on Petitioner's insanity and argued that the State failed to prove beyond a reasonable doubt that Petitioner was sane

at the time of the offenses. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction, "find[ing] sufficient evidence from which the trier of fact could have found that appellant could distinguish between right and wrong when he committed the offenses." (Doc. #9, ex. B, Unpublished Opinion at 2.)

In his application for post-conviction relief, Petitioner argued that his appellate counsel provided ineffective assistance when he failed to raise on appeal the following grounds of relief:

- (1) That Petitioner was denied his right to jury trial;
- (2) That the second page of the information was improperly admitted because it charged Petitioner with the crime of murder, "the same being a second or subsequent offense";
- (3) That the trial court failed to advise Petitioner that a stipulation as to a prior conviction could result in a sentence enhancement; and
- (4) That trial counsel provided ineffective assistance when he failed (1) to challenge the chain of custody of certain blood tests which were admitted as State's exhibit 8; (2) to object to an allegedly unendorsed witness; and (3) to present evidence of mental impairment or mitigating circumstances.

The Tulsa County District Court denied Petitioner's application, and the Oklahoma Court of Criminal Appeals affirmed.

In the present application for a writ of habeas corpus, Petitioner realleges that his appellate counsel provided ineffective assistance when he failed to raise on appeal the above stated claims. Respondent argues that none of the issues would have prevailed on appeal because the claims are for the most part

frivolous.¹

DISCUSSION

Because the Court has previously stated that Petitioner meets the exhaustion requirements, it need not dwell on this issue. The Court concludes, however, that an evidentiary hearing is not necessary in this case as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), and that the Attorney General is not a proper party in this case because the Petitioner is presently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases.

In this petition for a writ of habeas corpus, Petitioner argues that his appellate counsel provided ineffective assistance when he failed to raise certain issues on direct appeal. To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Although the Strickland test was formulated

¹The Court rejects Respondent's procedural default argument raised for the first time in their amended response. Ineffective assistance of appellate counsel is properly raised for the first time on an application for post conviction relief.

in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992), cert. denied, 113 S. Ct. 2347 (1993).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a weak issue"). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466

U.S. at 690).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices, see Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). Counsel is not required to forecast changes in the governing law. See, e.g., Horne v. Trickey, 895 F.2d 498, 500 (8th Cir. 1990) (ineffectiveness not established by claim that "counsel should have realized that the Supreme Court was planning a significant change rises to the level of constitutional ineffectiveness").

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 113 S. Ct. at 844. To establish prejudice in the appellate context, a petitioner must demonstrate that "there was a 'reasonable probability' that [his] claim would have been successful before the [state's highest court]." Claudio, 982 F.2d at 803 (footnote omitted).

After reviewing the record in this case, the Court concludes that appellate counsel's failure to argue on appeal all the issues

that Petitioner raises in his present application does not fall below the standard of reasonably effective assistance. Petitioner's claims are for the most part frivolous, and he has failed to establish that the ignored issues were more likely to result in a reversal or new trial than the issue actually raised on appeal. See Gray, 800 F.2d at 647.

Contrary to Petitioner's assertion that he was never given an opportunity to waive his right to a jury trial, the record clearly shows that on November 19, 1987, Petitioner affirmatively waived his right to a trial by jury while present with court-appointed counsel. (Doc. #15, transcript of Nov. 19, 1987 hearing.) Therefore, Petitioner's first claim would have been unavailing on appeal. Similarly, even if the trial court erred in accepting a stipulation from counsel as to the second page of the information (as Petitioner argues in his petition), Petitioner cannot show prejudice because he has at no time challenged the validity of his prior conviction.

Additionally, Petitioner's claims of ineffective assistance of trial counsel are patently frivolous. The defense strategy throughout trial was to show that Petitioner was not in control of his faculties as a result of his insanity and, in part, as the result of drugs. Therefore, it would not have been in the best interest of Petitioner to challenge the chain of custody of the blood samples at trial or on direct appeal. Similarly, Petitioner cannot seriously argue that trial counsel failed to present evidence of his mental impairment as that was the main issue at

trial.²

Even if any of Petitioner's claims would have been successful on direct appeal, the Court notes that the failure to raise a particular issue on appeal is not in and of itself indicative of ineffective assistance of appellate counsel. The U.S. Supreme Court has recognized that appellate counsel serves best by winnowing out weaker arguments and focusing upon stronger central claims. Jones v. Barnes, 463 U.S. 745, 751-52. Petitioner's appointed counsel followed to the letter the Supreme Court's suggestion in Jones. As noted above, he focused on Petitioner's insanity defense, his best argument under the law and the facts of this case. Therefore, appellate counsel's decision not to present all possible issues on direct appeal did not deny Petitioner the effective assistance of counsel.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in

²The Court also notes that Petitioner was represented by two experienced public defenders at trial and that at the end of the trial the trial court appraised the Petitioner of the following:

THE COURT: It is the Court's opinion that you have been afforded representation of the caliber that, in my opinion, money could not buy. Mr. O'Neal and Ms. Conway are to be commended on the efforts that they have put forth in seeing that your constitutional rights have been protected through out the course of these proceedings and I think it's a salute to Tulsa County to have attorneys of their caliber to represent indigent defendants such as you in this case. . . .

(Trial tr. at 159-60.)

custody in violation of the Constitution or laws of the United States. Petitioner's application for a writ of habeas corpus must accordingly be denied.

IT IS HEREBY ORDERED that:

- (1) The Attorney General is **dismissed** as a party in this case;
- (2) Petitioner's motion to strike Respondents' amended response (doc. #14) is **denied as moot**;
- (3) Petitioner's motion for judgment on the pleadings and to expedite proceedings (docs. #17 and 18) are **denied**; and
- (4) The petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 25 day of Oct., 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

OCT 25 1994

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

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

MID-CONTINENT CASUALTY CO.,)
)
 Plaintiff,)
)
 v.)
)
 ESSICK MANUFACTURING CO.,)
)
 Defendant,)
)
 and)
)
 MICHAEL J. POTTER,)
)
 Plaintiff,)
)
 v.)
)
 FIGGIE INTERNATIONAL, INC.,)
)
 ESSICK MANUFACTURING CO.,)
)
 GRACE EQUIPMENT CO. OF TULSA,)
)
 PRIMECO, INC., and PRIME)
)
 EQUIPMENT CO.,)
)
 Defendants.)

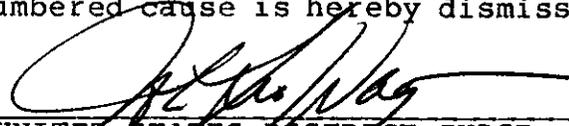
Case No. 93-546-E

Case No. 93-C-510-E ✓

ORDER OF DISMISSAL

NOW on this the 25th day of October, 1994 the above styled and numbered cause comes on for hearing. The Court having examined the files and records and the parties herein having entered into an agreement of settlement, finds that the above styled and numbered cause should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause is hereby dismissed.


 UNITED STATES DISTRICT JUDGE
 Mag.

ROBINSON
 LOCKE
 GAGE
 FITE
 &
 WILLIAMS
 ATTORNEYS AT LAW
 P.O. BOX 87
 MUSKOGEE, OK 74402-0087

ENTERED ON DOCKET
 DATE 10-26-94

57

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OKLAHOMA
OCT 25 1994

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

MID-CONTINENT CASUALTY CO.,)
)
Plaintiff,)

v.)

Case No. 93-546-E ✓

ESSICK MANUFACTURING CO.,)
)
Defendant,)

and)

MICHAEL J. POTTER,)
)
Plaintiff,)

v.)

Case No. 93-C-510-E

FIGGIE INTERNATIONAL, INC.,)
)
ESSICK MANUFACTURING CO.,)
)
GRACE EQUIPMENT CO. OF TULSA,)
)
PRIMECO, INC., and PRIME)
)
EQUIPMENT CO.,)
)
Defendants.)

ORDER OF DISMISSAL

NOW on this the 25th day of October, 1994 the above styled and numbered cause comes on for hearing. The Court having examined the files and records and the parties herein having entered into an agreement of settlement, finds that the above styled and numbered cause should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause is hereby dismissed.

/S/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT JUDGE

ROBINSON
LOCKE
GAGE
FITE
&
WILLIAMS

ATTORNEYS AT LAW

P.O. BOX 87

JSKOGEE, OK 74402-0087

ENTERED ON DOCKET
DATE 10-26-94

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

FILED

OCT 25 1994

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

No. 93-C-576-E

CARDTOONS, L.C.,
Plaintiff,

vs.

MAJOR LEAGUE BASEBALL
PLAYERS ASSOCIATION,

Defendant.

JUDGMENT

An Order having been entered herein granting Plaintiff's Motion for Summary Judgment (Docket # 11) and denying Defendant's Motion for Declaratory Judgment (Docket # 17),

IT IS THEREFORE ORDERED that Judgment be entered in favor of Plaintiff and against Defendant.

ORDERED this 25th day of October, 1994.



CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 10-26-94

25

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
VERDINER WILSON; JAMES WILSON)
aka JAMES M. WILSON; JAMES)
WILSON, JR. aka JIMMY D.)
WILSON aka J.D. WILSON, JR.;)
STATE OF OKLAHOMA, ex rel.,)
OKLAHOMA TAX COMMISSION;)
HILLCREST MEDICAL CENTER;)
STATE OF OKLAHOMA, ex rel.,)
DEPARTMENT OF HUMAN SERVICES;)
PEGGY L. PETERSON; MARK'S)
AUTO-INDUSTRIAL WAREHOUSE;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

OCT 24 1994

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

ENTERED IN DOCKET

DATE 10/25/94

CIVIL ACTION NO. 94-C 341B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24th day
of Oct., 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **State of**
Oklahoma ex rel Oklahoma Tax Commission, appears by Kim D.
Ashley, Assistant General Counsel; the Defendant, **Hillcrest**
Medical Center, appears by its attorney Daniel M. Webb; the
Defendants, **State of Oklahoma, ex rel. Department of Human**
Services and Peggy L. Peterson, appear by their attorney Rodney

Sparkman; and the Defendants, Verdiner Wilson, James Wilson aka James M. Wilson, James Wilson, Jr. aka Jimmy D. Wilson aka J.D. Wilson, Jr. and Mark's Auto-Industrial Warehouse, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, James Wilson aka James M. Wilson, will hereinafter be referred to as ("James Wilson"); the Defendant James Wilson, Jr. aka Jimmy D. Wilson aka J.D. Wilson, Jr. will hereinafter be referred to as ("James Wilson Jr."); and the Defendants, James Wilson and Verdiner Wilson are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on April 8, 1994; that the Defendant, Hillcrest Medical Center, acknowledged receipt of Summons and Complaint on April 8, 1994; that the Defendants, State of Oklahoma ex rel Department of Human Services and Peggy L. Peterson, acknowledged receipt of Summons and Complaint on April 19, 1994; that the Defendant, Mark's Auto-Industrial Warehouse, acknowledged receipt of Summons and Complaint on April 11, 1994; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 15, 1994; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 8, 1994.

The Court further finds that the Defendants, Verdiner Wilson, James Wilson, and James Wilson, Jr., were served by

publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 12, 1994, and continuing through August 16, 1994, 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, **Verdiner Wilson, James Wilson, and James Wilson, Jr.**, 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, **Verdiner Wilson, James Wilson, and James Wilson, Jr.** 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 Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, 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, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on April 29, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on May 2, 1994; that the Defendant, **Hillcrest Medical Center** filed its Answer on April 14, 1994; that the Defendants, **State of Oklahoma ex rel Department of Human Services and Peggy L. Peterson**, filed their Answer on September 22, 1994; and that the Defendants, **Verdiner Wilson, James Wilson, James Wilson, Jr. and Mark's Auto-Industrial Warehouse**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot One (1), in Block Five (5), SMITHDALE, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on November 1, 1988, the Defendants, James Wilson, Verdiner Wilson, and James Wilson, Jr., executed and delivered to CENTRAL MORTGAGE CORPORATION their

mortgage note in the amount of \$33,890.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, James Wilson and Verdiner Wilson, husband and wife, and James Wilson, Jr., a single person, executed and delivered to CENTRAL MORTGAGE CORPORATION a mortgage dated November 1, 1988, covering the above-described property. Said mortgage was recorded on November 4, 1988, in Book 5138, Page 1138, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 1, 1988, CENTRAL MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to TRUST AMERICA MORTGAGE, INC. This Assignment of Mortgage was recorded on November 4, 1988, in Book 5138, Page 1143, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 3, 1988, TRUST AMERICA MORTGAGE INC. assigned the above-described mortgage note and mortgage to The Florida Group, Inc. This Assignment of Mortgage was recorded on November 28, 1988, in Book 5142, Page 320, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 9, 1988, THE FLORIDA GROUP, INC. assigned the above-described mortgage note and mortgage to Trust America Resources, Inc. This Assignment of Mortgage was recorded on December 12, 1988, in Book 5145, Page 32, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 22, 1989, TARI, Inc assigned the above-described mortgage note and mortgage to SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C.. This Assignment of Mortgage was recorded on September 13, 1989, in Book 5207, Page 630, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 1, 1990, the Defendants, James Wilson and Verdiner Wilson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on June 1, 1991 and October 1, 1991.

The Court further finds that the Defendants, Verdiner Wilson, James Wilson, and James Wilson, Jr., made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Verdiner Wilson, James Wilson, and James Wilson, Jr.,** are indebted to the Plaintiff in the principal sum of \$52,165.21, plus interest at the rate of 9.5 percent per annum from March 29, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma,** has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$35.00 which became a lien on the

property as of June 26, 1992; a lien in the amount of \$21.00 which became a lien as of June 25, 1993; and a lien in the amount of \$22.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of a tax warrant in the amount of \$205.86, which became a lien on the property as of May 14, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Hillcrest Medical Center**, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$1,102.55, plus interest, attorney fees and costs, which became a lien as of June 6, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Department of Human Services**, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$17,076.74, plus interest, attorney fees and costs, which became a lien as of October 10, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Peggy L. Peterson**, has a lien on the property which is the subject matter of this action by virtue of judgment in the amount of \$5,950.00,

plus interest, attorney fees and costs, which became a lien as of August 2, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Verdiner Wilson, James Wilson, James Wilson, Jr., and mark's Auto-Industrial Warehouse**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Verdiner Wilson, James Wilson, and James Wilson, Jr.**, in the principal sum of \$52,165.21, plus interest at the rate of 9.5 percent per annum from March 29, 1994 until judgment, plus interest thereafter at the current legal rate of 6.0% percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$78.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Department of Human Services**, have and recover judgment in the amount of \$17,076.74, plus penalties and interest, for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$205.86, plus the costs of this action for unpaid state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Hillcrest Medical Center**, have and recover judgment in the amount of \$1,102.55, plus the costs of this action for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Peggy L. Peterson**, have and recover judgment in the amount of \$5,950.00, plus penalties and interest, for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Verdiner Wilson, James Wilson, James Wilson, Jr., Mark's Auto-Industrial Warehouse, and Board of County Commissioners, County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Verdiner Wilson, James Wilson, and James Wilson, Jr.**, 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 appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, Hillcrest Medical Center, in the amount of \$1,102.55, for a judgment.

Fourth:

In payment of Defendant, State of Oklahoma ex rel Department of Human Services, in the amount of \$17,076.74, for a judgment.

Fifth:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount \$205.86, plus accrued and accruing interest for state taxes which are currently due and owing.

Sixth:

In payment of Defendant, Peggy L. Peterson,
in the amount of \$5,950.00, for a judgment.

Seventh:

In payment of Defendant, County Treasurer, Tulsa
County, Oklahoma, in the amount of \$78.00, personal
property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
pursuant to 12 U.S.C. 1710(1) there shall be no right of
redemption (including in all instances any right to possession
based upon any right of redemption) in the mortgagor or any other
person subsequent to the foreclosure sale.

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

S/THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

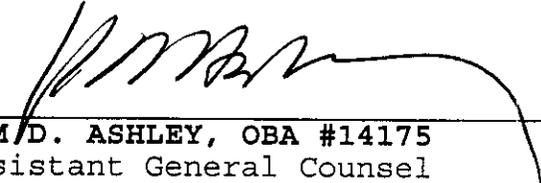
STEPHEN C. LEWIS
United States Attorney



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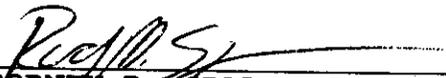
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Attorney for Defendants,
State of Oklahoma ex rel
Department of Human Services and
Peggy L. Peterson

Judgment of Foreclosure
Civil Action No. 94-C 341B

NBK:lg

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

M. R. TUDOR, an
Oklahoma corporation,

Plaintiff,

vs.

WORLDLINE, INC., a Florida
corporation, DEAN WORLDWIDE,
INC., formerly d/b/a/ MAXXIM
INTERNATIONAL, RAM-FORWARDING,
INC., a Texas corporation, d/b/a
MAXXIM INTERNATIONAL, and ELLIOTT
MARINE SERVICES, INC., a Texas
corporation,

Defendants.

F I L E D

OCT 25 1994

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

Case No. 92-C-889-C

ENTERED ON DOCKET

DATE ~~OCT 24 1994~~

OCT 25 1994

ORDER

Now before the Court for its consideration is the motion filed by plaintiff M. R. Tudor ("Tudor") requesting the Court to award Tudor attorney fees in the amount of \$77,305.25 against Dean Worldwide, Inc. d/b/a Maxxim International ("Maxxim"). Tudor relies on the Court's equitable powers as a basis of its claim to attorney fees.¹ For the reasons stated below, the Court awards Tudor reasonable attorney fees in the amount of \$67,305.00.

Tudor brought this action for the recovery of damages alleging breach of contract due to defendants' failure to materially perform under the subject contract for shipping services. Upon discovery, Tudor added theories of negligence, breach of fiduciary duty, and

¹ In a prior order, the Court denied Tudor's claims to attorney fees based on Okla. Stat. tit. 12 § 936 (1991). The Court found that this statute was inapplicable to the facts of this case.

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fraud. Among the Court's findings of fact and conclusions of law are the following:

(1) On or about February 4, 1991, Tudor contracted with Maxxim to arrange the shipment of heavy earth-moving equipment from Houston to Las Palmas, Canary Islands; (2) as a freight forwarder, Maxxim owed a fiduciary duty to Tudor; (3) Maxxim breached its fiduciary duty to Tudor by, among other things, withholding information and making misrepresentations to Tudor concerning the shipment of Tudor's equipment; (4) Maxxim intended Tudor to rely on its misrepresentations and omissions which Tudor did rely on; (5) Maxxim continued to deny facts it knew to be true throughout the litigation; (6) Maxxim's conduct evinced a wanton or reckless disregard for Tudor's rights warranting punitive damages; and (7) as a result of Maxxim's bad faith actions, Tudor suffered damages in excess of \$62,000 in actual damages not including attorney fees. The Court asserted original jurisdiction in admiralty pursuant to 28 U.S.C. § 1333, and diversity jurisdiction pursuant to 28 U.S.C. § 1332. On May 24, 1994 the Court entered judgment in favor of Tudor against defendants Dean Worldwide, Inc. ("Maxxim") and Worldline Inc. ("Worldline") on Tudor's claims of negligence, breach of contract, fraud, and breach of fiduciary duty.

Equitable Powers of the Federal Courts

Tudor states in its motion that in admiralty actions, the granting of attorney fees is discretionary, and that the Court may award attorney fees due to its equitable powers in the exercise of admiralty jurisdiction under 28 U.S.C. § 1333. Although the Court does possess such equitable powers, the source of those powers resides not in § 1333 alone, but in the "historic equity jurisdiction of the federal courts." Vaughan v. Atkinson, 369 U.S.

527, 530 (1961).² In addition, the distinction between powers of courts of law and those of equity and admiralty has been abolished by Rule 2 of the Federal Rules of Civil Procedure. Therefore, the Court may grant equitable relief regardless of its basis of subject matter jurisdiction. Vaughan merely confirms the fact that powers in equity extend to cases involving admiralty.

Power to Award Attorney Fees - Bad Faith Exception

The American Rule generally governs the award of attorney fees. "Although the American Rule disfavors the allowance of attorney fees in the absence of statutory or contractual authorization, federal courts in the exercise of their equitable powers, may award attorney fees when the interests of justice so require." Hall v. Cole, 412 U.S. 1, 4-5 (1972). Also, it is unquestioned that a well recognized exception to the American Rule occurs: "...when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (quoting F.D. Rich Co. v. United States, 417 U.S. 116, 129 (1974)). Due to Maxxim's bad faith actions, the Court finds this exception to the American Rule to be applicable to this case.

Maxxim does not dispute that it acted in bad faith with regard to the substantive claims of this case. However, Maxxim argues that this exception does not apply to this case since Maxxim alleges that there was no bad faith *in the litigation* of this suit. Although the Court recognizes a split in authority among the circuits on this issue, the Court also

² Vaughan further ruled "We find no restriction upon admiralty...as to bar the grant of equitable relief *even when that relief is subsidiary to issues wholly within admiralty jurisdiction.*" Vaughan at 530 (emphasis added).

recognizes that the Supreme Court decision in Hall v. Cole which stated regarding this exception that the "bad faith may be found...in actions that led to the lawsuit." 412 U.S. 1, 15 (emphasis added). See also Dreiling v. Peugeot Motors, 850 F. 2d 1373, 1382 (10th Cir. 1988). Since Maxxim showed bad faith actions, specifically fraud and bad faith breach of fiduciary duty, which led to this lawsuit, the Court finds these actions sufficient to apply the bad faith exception to the American Rule.

Even if Maxxim were correct that the bad faith must be in the litigation, it offers Maxxim no relief. In its finding of facts and conclusions of law, the Court found that Maxxim (1) "made . . . false representations to Tudor, (2) "knew at the [time, that] these representations . . . were false, and (3) intended Tudor to rely on these representations. By denying these facts it knew to be true as alleged in Tudor's complaint and amended complaints, Maxxim did, in fact, act in bad faith in the litigation of this case. Rule 11 of the Federal Rules of Civil Procedure requires admission of facts which a party knows to be true.³ See Fed. R. Civ. P. 11(b)(4) and committee notes. See also, Chambers v. NASCO, 501 U.S. 32 (1991) (ruling there is no abuse of discretion in district court's resort to its inherent power to impose sanctions for bad faith conduct even though some conduct was also sanctionable under Federal Rules of Civil Procedure).

Maxxim cites Autorama Corp. v. Stewart, 802 F.2d 1284 (10th Cir. 1986). In Autorama, this Court's decision to deny attorney fees was upheld by the Tenth Circuit. In that case, Plaintiff brought suit against Defendant alleging violations of the Federal

³ It is not relevant if Maxxim's attorneys had no knowledge that denied facts were true. The reach of Rule 11 clearly extends to "parties which have violated subdivision (b) or are responsible for the violation." Rule 11(c). Maxxim did have such knowledge and will therefore held accountable for its bad faith actions during this litigation resulting in unnecessarily proceeding with this lawsuit.

Securities Act of 1933. After finding that transaction complained of was not within the definition of "security" as defined by statute, this Court dismissed the claim for lack of subject matter jurisdiction. Defendant then requested attorney fees under the bad faith exception, and this Court denied the request. The circuit court used a two prong test to determine if attorney fees should be awarded: the decision must be on the merits and the claim must have been brought or pursued in bad faith. In addition, the 10th Circuit requires the trial judge to make a specific finding of bad faith. The circuit court found neither part of the test was satisfied and affirmed this Court's ruling.

Maxxim argues that if the Court finds bad faith in the litigation, Autorama requires this Court to make a specific finding of bad faith in the litigation which would alter its judgment. Maxxim contends that such an alteration would violate Federal Rule of Civil Procedure 59(e). Maxxim's contention is without merit because such a specific finding would be superfluous in light of the nature of the Court's detailed findings supporting entry of judgment. The Court found that Maxxim stated falsehoods which it knew to be false at the time they were made. Maxxim's continuous knowledge of the falsity of these representations in the process of litigation naturally and necessarily follows from this finding. Therefore, the Court will not be altering the judgment in finding that Maxxim acted in bad faith during the litigation.

In Autorama, like all the other cases Maxxim relies on, there was no showing of any bad faith in the substantive claim. In fact, Maxxim cites no authority which an award of attorney was reversed on the grounds that there was no bad faith in the litigation of the action despite bad faith existing in the substantive claim. Therefore, Maxxim's arguments are unconvincing and rejected by the Court.

Finally, the Court also concludes that overriding considerations of justice compel the Court to award Tudor reasonable attorney fees against Maxxim. See Fleischmann Distilling Corp. v. Mater Brewing, 386 U.S. 714, 718 (1967). If it were not for Maxxim's bad faith actions giving rise to this claim, Tudor would not have suffered such extensive damages. Furthermore, while Tudor exercised its right to seek compensation for its damages, Maxxim's continued its bad faith in not complying with Rule 11. This compounded Tudor's damages by more than double due to the accrual of counsel's fees in this litigation. The Court finds that it is fundamentally unjust to allow Maxxim to escape liability for the attorney fees it caused, while Tudor is forced to pay more in attorney fees than it was awarded in compensatory damages.

In summary, the Court finds three basis for awarding attorney fees: (1) Maxxim asserted bad faith in actions that led to this lawsuit; (2) Maxxim asserted bad faith in conduct of the litigation by denying facts it knew were true in Tudor's complaint and amended complaints; and (3) the overriding considerations of justice compel such a result.

Reasonable Attorney Fees

The courts use several factors which aid in determining the reasonableness of the fees requested. Among these include: time and labor required, novelty difficulty of the questions involved, skill requisite to perform legal service properly, customary fee, whether fee is fixed or contingent, amount involved and results obtained, experience, reputation, and ability of the attorney, and the undesirability of the case. See, e.g., Burk v. City of Oklahoma City, 598 P.2d 659, 660-663 (Okla. 1979).

Maxxim argues that fees requested by Tudor are unreasonable because this action involved simply a breach of contract claim. The Court strongly disagrees. This litigation extended several months and covered many complex issues not only in the area of contract law, but in corporate, admiralty, and tort as well. To say that a party may collect fees on only one of its possible claims would be unduly restrictive. Moreover, the Court disagrees with Maxxim's notion that the presence of two of plaintiff's attorneys at trial was unnecessary. The case was sufficiently complex to require assistant trial counsel.

Next, Maxxim contends that \$77,000 in attorney fees is clearly excessive since Tudor's actual damages are less than \$63,000. Such an award, Maxxim argues, will encourage over staffing and unnecessary legal activities. Although these are generally reasonable concerns when awarding attorney fees, the Court is unsympathetic to Maxxim's argument under the facts of this case. No evidence suggests that Tudor's counsel engaged in activities designed to increase attorney fees. Furthermore, Maxxim could have settled this dispute with Tudor at any time in order to avoid these "excessive" fees. Maxxim's continuous bad faith and refusals to settle is the primary cause of these "excessive" fees.

Finally, Maxxim argues that expenses such as courier services, and computerized legal research, and other miscellaneous expenses should be absorbed by Tudor's attorneys as overhead. Such expenses are not normally collected as costs, but are allowed when reasonable and when it is normal for that attorney or firm to bill their clients directly for such expenses. Since there is no indication that Tudor's attorneys are billing these expenses only for this case, the court will allow these expenses when reasonable.

However, from review of Tudor's statement of fees, the Court finds that a reduction is warranted based on an excessive showing of intra-office conferences between lawyers,

a grouping of fees without differentiating the cost of each activity, and the use of six staff members of plaintiff's firm in prosecuting this action.

Also, at the hourly rate which the court is allowing, some of the miscellaneous expenses such as telecopying and photocopying should be absorbed as attorney overhead. Although the Court does not find that these practices were abusive, the Court feels that they occurred sufficient to warrant a reduction in the amount requested. Accordingly, the Court finds that a reasonable fee is a sum of \$67,305.00.

It is therefore the Order of the Court, that Tudor's motion for an award of attorney fees against Dean Worldwide, Inc. d/b/a Maxxim International is granted in the amount of \$67,305.00.

IT IS SO ORDERED this 24th day of October, 1994.


H. DALE COOK
United States District Judge

ENTERED ON DOCKET
OCT 25 1994

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

Willis Boyd Friend)
)
 Plaintiff,)
)
 vs.)
)
 Farmers Insurance Company,)
 Inc.,)
)
 Defendant.)

Case No. 93-C-990-K ✓

FILED
OCT 24 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before this Court is the Motion for Leave to Intervene brought by Leslie Sellers under Rule 24 of the Federal Rules of Civil Procedure. The Motion is denied.

Intervention under Rule 24(a) should be granted when: (1) the intervenor has an interest in the property or transaction that is the subject matter of the action, (2) the interest might be impaired absent intervention, (3) the existing parties will not adequately represent the interest. Alameda Water & Sanitation District v. Browner, 9 F.3d 88, 90 (10th Cir. 1993). Moreover, intervention requires the interest to be direct, substantial, and legally protectable. Id.

This action is a bad faith failure to settle claim brought by the insured, Willis Boyd Friend ("Friend"), against Farmers Insurance Company ("Farmers"). The only interest held by Leslie Sellers is a judgement she won against Friend in an earlier state court suit as a result of Farmer's alleged bad faith failure to settle. Sellers argues that intervention will assist "as a

practical matter" in protecting her interest in that judgement.

Even if Sellers' interest in the judgement could be characterized as direct or substantial, intervention would not be appropriate. Friend adequately represents the interests of Sellers. Friend has every incentive to press his claim aggressively and to win a judgement against Farmers in this action, thereby enhancing Sellers' ability to protect her interest in the judgement from the underlying action.

Moreover, Sellers is simply a judgement creditor of Friend. As such, she has no direct interest in this action against Farmers, and intervention should therefore be denied. Chitty v. State Farm Mut. Automobile Insurance Co., 38 F.R.D. 37 (E.D. S.Car. 1965).

ORDERED this 24 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

OCT 25 1994
ENTERED ON DOCKET
OCT 29 1994

F I L E D

OCT 24 1994

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

ZEL LILLESKAU,)
)
Plaintiff,)
)
vs.)
)
AIR-X-CHANGERS, et al.,)
)
Defendants.)

No. 94-C-279-K

O R D E R

By Order of October 20, 1994, this Court dismissed without prejudice Lilleskau v. Patterson-Kelly Company, 94-C-102-K, a companion case to the above-styled action, for failure to prosecute. These two cases were consolidated for all purposes by May 4, 1994 Order of Thomas R. Brett. Therefore, the present case should likewise be dismissed.

It is the Order of the Court that this action is hereby dismissed without prejudice.

ORDERED this 24 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

DATE OCT 24 1994

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

CANAL INSURANCE COMPANY,)
)
 Plaintiff,)
)
versus)
)
 JEFF TIMMONS, individually and d/b/a)
 TIMMONS TRUCKING COMPANY,)
 VICKI ANN TIMMONS, individually and as)
 Administratrix of the Estate of JEFFIE)
 RAY TIMMONS, JR., deceased,)
 JOHN WILLIAM RHODES, individually and as)
 Administrator of the Estate of JUSTIN)
 LEE RHODES, deceased, and)
 DAVID HANKE and HELEN HANKE,)
 individually and as next kin of)
 SCOTTIE LYNN HANKE, deceased,)
)
 Defendants.)

CASE NO. 94-C-973-E

FILED

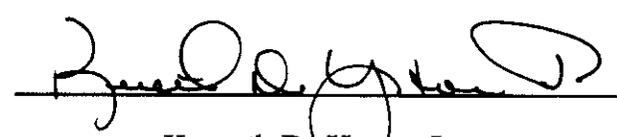
OCT 24 1994

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

NOTICE OF DISMISSAL

Pursuant to FED.R.CIV.P. 41(a)(1)(i), Plaintiff Canal Insurance Company dismisses
the above-styled and numbered matter.

Respectfully submitted,



Kenneth D. Upton, Jr.
of the firm

NIEMEYER, NOLAND & ALEXANDER, P.C.
300 North Walker
Oklahoma City, OK 73102
Telephone: (405) 232-2725
Facsimile: (405) 239-7185
ATTORNEY FOR PLAINTIFF
CANAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TINA J. PRUITT; JOE PRUITT;
aka KENNETH JOE PRUITT aka
KENNETH J. PRUITT; TULSA GREAT
EMPIRE BROADCASTING, INC. dba
KVOO RADIO; CITY OF BIXBY;
COUNTY TREASURER, Tulsa)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)

Defendants.)

FILED
OCT 21 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
ENTERED ON DOCKET
DATE OCT 24 1994

CIVIL ACTION NO. 94-C 235B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day
of Oct., 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendants, **Tina J.**
Pruitt, Joe Pruitt aka Kenneth Joe Pruitt aka Kenneth J. Pruitt,
Tulsa Great Empire Broadcasting, Inc. dba KVOO Radio, and City of
Bixby, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Joe Pruitt aka Kenneth Joe**
Pruitt aka Kenneth J. Pruitt, will hereinafter be referred to as

("Joe Pruitt").; and that the Defendant, Joe Pruitt's, social security number is 566-19-0411.; he was divorced from the Defendant, **Tina J. Pruitt**, in Tulsa County District Court Case Number GD 88-4854 and in those proceedings he was occasionally misidentified as Kenneth W. Pruitt. Since the time of the divorce, both **Tina J. Pruitt** and **Joe Pruitt** have remained single, unmarried persons.

The Court being fully advised and having examined the court file finds that the Defendant, **Tina J. Pruitt**, was served with process on April 21, 1994 as shown on the U.S. Marshal's service; that the Defendant, **Tulsa Great Empire Broadcasting, Inc. dba KVOO Radio**, acknowledged receipt of Summons and Complaint on March 23, 1994; that the Defendant, **City of Bixby, Oklahoma**, acknowledged receipt of Summons and Complaint on March 17, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 21, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 15, 1994.

The Court further finds that the Defendant, **Joe Pruitt**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning August 3, 1994, and continuing through September 7, 1994, 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 Defendant, **Joe Pruitt**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant 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 Defendant, **Joe Pruitt**. 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 Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. 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 Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 5, 1994; and that

the Defendants, Tina J. Pruitt, Joe Pruitt, Tulsa Great Empire Broadcasting, Inc. and City of Bixby, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

BEING LOT FIFTY-FOUR (54), BLOCK TWO (2), BLUE RIDGE II, AN ADDITION TO THE CITY OF BIXBY, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on July 10, 1985, the Defendants, Tina J. Pruitt and Joe Pruitt, executed and delivered to Bright Mortgage Company, a Texas corporation their mortgage note in the amount of \$47,500.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Tina J. Pruitt and Joe Pruitt, husband and wife, executed and delivered to Bright Mortgage Company, a Texas Corporation a mortgage dated July 10, 1985, covering the above-described property. Said mortgage was recorded on July 15, 1985, in Book 4876, Page 1757, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 9, 1988, Bright Mortgage Company assigned the above-described mortgage note and

mortgage to the Secretary of Housing and Urban Development his successors and assigns. This Assignment of Mortgage was recorded on August 22, 1988, in Book 5123, Page 74, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 1, 1988, the Defendant, Tina J. Pruitt, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1989.

The Court further finds that the Defendants, Tina J. Pruitt and Joe Pruitt, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Tina J. Pruitt and Joe Pruitt**, are indebted to the Plaintiff in the principal sum of \$86,042.29, plus interest at the rate of 12.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.92, fees for service of Summons and Complaint.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$28.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$32.00

which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Tina J. Pruitt, Joe Pruitt, Tulsa Great Empire Broadcasting, Inc. dba KVOO Radio and City of Bixby, Oklahoma**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Tina J. Pruitt and Joe Pruitt**, in the principal sum of \$86,042.29, plus interest at the rate of 12.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.04 percent per annum until paid, plus the costs of this action in the amount of \$10.92, fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$60.00 for personal property taxes for the years 1991-1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Tina J. Pruitt, Joe Pruitt, Tulsa Great Empire Broadcasting, Inc. dba KVOO Radio, City of Bixby, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Tina J. Pruitt and Joe Pruitt, 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 appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$60.00, personal property taxes which are currently due and owing.

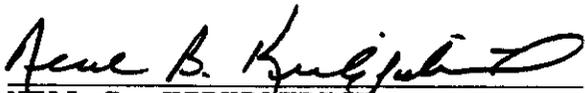
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, 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/ THE COURT
UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 235B

NBK:lg

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

JANET LAVONNE MITCHELL,)
)
Plaintiff,)
)
vs.)
)
W.R. BERKLEY CORPORATION, a)
Delaware corporation, and EMPLOYEE)
BENEFIT ADMINISTRATION OF)
OKLAHOMA, Inc., d/b/a BERKLEY)
RISK MANAGEMENT OF OKLAHOMA,)
an Oklahoma Corporation,)
)
Defendants.)
_____)

Case No. 94-C-812-B

FILED

OCT 21 1994

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

ORDER ENTERED IN COURT
DATE OCT 21 1994

Now on this 21 day of October, 1994, this matter comes before the Court upon the Stipulation of Dismissal Without Prejudice. The Court, after reviewing such Stipulation finds that the case against the defendants should be and is hereby dismissed without prejudice to refiling. IT IS SO ORDERED.

S/T

JUDGE OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MICHAEL SARAH EDERER fka)
Michael Sarah Briggs;)
SEARS, ROEBUCK & COMPANY;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

OCT 21 1994

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

CIVIL ACTION NO. 94-C-541-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21st day
of October, 1994. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, COUNTY TREASURER, Tulsa County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, SEARS, ROEBUCK &
COMPANY, appears by its attorney, J. Michael Morgan; and the
Defendant, MICHAEL SARAH EDERER, appears by her attorney, John W.
Klenda.

The Court being fully advised and having examined the
court file finds that the Defendant, MICHAEL SARAH EDERER, was
served with process a copy of Summons and Complaint on July 27,
1994; and that the Defendant, SEARS, ROEBUCK & COMPANY, signed a
Waiver of Summons on July 23, 1994, filed on July 25, 1994.

ENTERED ON DOCKET

DATE 10-21-94

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1994; that the Defendant, MICHAEL SARAH EDERER, filed her Answer on August 23, 1994; and that the Defendant, SEARS, ROEBUCK & COMPANY, filed its answer on August 30, 1994.

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

**Lot Thirty-one (31), Block Three (3),
SUMMERFIELD SOUTH, an Addition to the City of
Tulsa, Tulsa County, State of Oklahoma,
according to the recorded Plat thereof.**

The Court further finds that on July 26, 1989, Dennis L. Briggs, and the Defendant, MICHAEL SARAH EDERER, executed and delivered to Mercury Mortgage Co., Inc., their mortgage note in the amount of \$72,452.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Dennis L. Briggs and the Defendant, MICHAEL SARAH BRIGGS, then husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated July 26, 1989, covering the above-described property. Said mortgage was recorded on August 3, 1989, in Book 5198, Page 2625, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 8, 1990, Mercury Mortgage Co., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on August 11, 1990, in Book 5270, Page 2104, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1990, the Defendant, MICHAEL SARAH EDERER, a single person, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on August 1, 1991, and September 1, 1992.

The Court further finds that the Defendant, MICHAEL SARAH EDERER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, MICHAEL SARAH EDERER, is indebted to the Plaintiff in the principal sum of \$96,483.04, plus interest at the rate of Ten and One-Half percent per annum from May 13, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$54.00 which became a lien on the

property as of June 25, 1993 and a claim in the amount of \$61.00 for 1993 personal property taxes due. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SEARS, ROEBUCK & COMPANY, has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the amount of \$6,500.22, plus interest at 21% per annum, which became a lien on the property as of March 11, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, MICHAEL SARAH EDERER, in the principal sum of \$96,483.04, plus interest at the rate of Ten and One-Half percent per annum from May 13, 1994 until judgment, plus interest thereafter at the current legal rate of 6.06 percent per annum until paid, plus the costs of this action, and any

additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$115.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SEARS, ROEBUCK & COMPANY, have and recover judgment in the amount of \$6,500.22, plus interest at 21% per annum, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, MICHAEL SARAH EDERER, to satisfy the 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;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$115.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, SEARS, ROEBUCK & COMPANY, in the amount of \$6,500.22, plus interest at 21% per annun.

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 pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, 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:

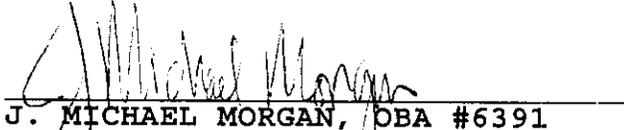
STEPHEN C. LEWIS
United States Attorney



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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



J. MICHAEL MORGAN, OBA #6391
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Attorney for Defendant,
Sears, Roebuck & Company



JOHN W. KLEND, OBA # 5070
1430 South Quaker
Tulsa, Oklahoma
Attorney for Defendant,
Michael Sarah Ederer

Judgment of Foreclosure
Civil Action No. 94-C-541-E

NBK:flv

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

FILED

OCT 20 1994

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
AUGUSTIN JARAMILLO,)
)
Defendants.)

No. 94-CR-27-B

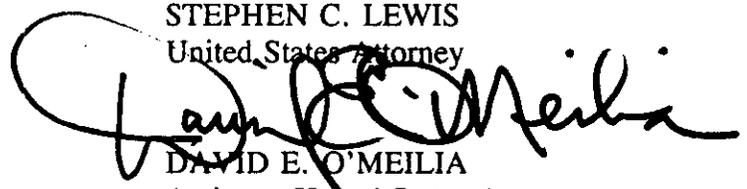
FILED
OCT 21 1994
D.C.

MOTION FOR DISMISSAL

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, and by leave of court endorsed hereon, the United States Attorney for the Northern District of Oklahoma hereby moves to dismiss Counts One and Eight of the Third Superseding Indictment against Augustin Jaramillo, defendant therein.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



DAVID E. O'MELIA
Assistant United States Attorney
3900 U.S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918) 581-7463

ORDER

Leave of court is granted for the filing of the foregoing motion to dismiss and the Court hereby orders dismissal without prejudice of the requested counts of the Third Superseding Indictment, as pertains to AUGUSTIN JARAMILLO only.

Date: 10-20-94

S/ THOMAS R. BRETT

United States District Judge

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

FILED
OCT 20 1994

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

ZEL LILLESKAU,)
)
 Plaintiff,)
)
 v.)
)
 PATTERSON-KELLEY COMPANY,)
)
 Defendant.)

Case No. 94-C-102-K ✓

ORDER

ENTERED ON DOCKET
DATE OCT 21 1994

The court has for consideration the Report and Recommendation of the Magistrate Judge filed September 13, 1994, in which the Magistrate Judge recommended that this case be dismissed without prejudice for failure of plaintiff to appear or obtain appearance of counsel as previously directed. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

IT IS THEREFORE ORDERED that this case be dismissed without prejudice for failure of plaintiff to appear or obtain appearance of counsel as previously directed.

Dated this 19 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

Willis Boyd Friend)
)
Plaintiff,)
)
V.)
)
Farmer's Insurance Company, Inc.)
)
Defendant.)

No. 93-C-990-K ✓

FILED

OCT 20 1994 *mi*

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

ORDER

The Court has before it for consideration a Motion for Summary Judgment brought by Defendant, Farmers Insurance Co., Inc. ("Farmers"). Plaintiff, Willis Boyd Friend ("Friend"), was insured by Farmers and alleges in his Complaint that Farmers acted in bad faith in refusing to settle a claim brought by a third party against him.

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and that as a matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. Adickes v. Kress, 90 S.Ct. 1598 (1970). In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court stated that "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 at trial." Id. at 322, 106 S.Ct. at 2552. The moving party, of course, must

shoulder "the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which [it] believes demonstrate the absence of a genuine issue of fact." Id. at 323, 106 S.Ct. at 2553.

The Court has reviewed the pleadings and filings in this action, and finds, construing the pleadings liberally in favor of the party opposing summary judgment and considering all factual inferences tending to show triable issues, that material issues of fact do remain to be litigated and that full summary judgment is therefore denied. However, the Court grants partial summary judgment, since Farmers cannot be held liable for the punitive damages awarded against Friend in the underlying state court suit.

Factual Background

This action is a bad faith failure to settle claim brought by the insured, Friend, against Farmers. On August 14, 1987, Friend was involved in a motor vehicle accident that injured Leslie R. Sellers ("Sellers"), a passenger in the other car. Sellers was free of any negligence. Friend pled guilty to driving under the influence at the time of the accident with a blood alcohol level of .17 percent. On August 11, 1989, Sellers filed suit in Tulsa County (case no. CJ 89-4392) against Friend, Oklahoma Farm Bureau Mutual Insurance Company and Kansas City Fire and Marine Insurance Company for damages sustained in the accident. The policies provided by

Oklahoma Farm Bureau Mutual Insurance Company and Kansas City Fire and Marine Insurance Company constituted uninsured motorist coverage held by Sellers. At the time of the accident, the Defendant, Farmers, had issued a policy of liability coverage to Friend in the sum of \$100,000.

There were no formal settlement offers until July 23, 1991 at which point Farmers offered to confess judgment in the sum of \$27,500. This offer was based on an evaluation by Mr. Ray Wilburn, the primary attorney representing Friend. Sellers' representatives sought settlement at least in the amount of Friend's policy limits which was \$100,000 although Sellers' attorney believed the limits to be \$50,000.

Settlement negotiations, however, did not resolve the dispute. The case in state court by Sellers against Friend ended in a verdict against Friend. The jury awarded compensatory damages in the amount of \$110,000 and punitive damages of \$10,000. The total award against Friend was \$148,141.31, including sums for prejudgment interest and reasonable costs incurred by Plaintiff. Subsequent to trial, Farmers paid its policy limit of \$100,000 plus various amounts representing interest and costs. Friend is still obligated for \$45,695.40 plus post judgment interest from January 17, 1992 to the present. Friend commenced the present action for bad faith refusal to settle against Farmers. The action was later removed to federal court based on diversity jurisdiction.

Discussion

In its Motion for Summary Judgment, Farmers seeks to prevail in its case based on two arguments. First, Farmers argues that there is no cause of action for bad faith refusal to settle unless the insured shows that the claimant had made an offer to settle the case within the policy limits of the insurer's policy. Second, Farmers argues that its offer to settle of \$27,500 was reasonable as a matter of law, thereby precluding an action asserting bad faith. Neither argument is sufficient for establishing a sufficient basis for granting summary judgment.

According to Defendant, it is a prima facie element of an action for bad faith failure to settle a claim that the insured show that the claimant made an offer to settle the case in an amount within the policy limits of the insurer's policy. The Defendant argues that the proffered settlement by Sellers was not within the \$100,000 limit of the Farmers liability limit but that rights of subrogation would have allowed companies holding uninsured motorist policies to seek an additional \$115,000 from Farmers. Therefore, Defendant says Plaintiff fails to make out a prima facie bad faith failure to settle claim.

In support of this legal proposition, Defendant cites numerous decisions where the definition of a bad faith action includes reference to an insurer failing to compromise at an amount within the policy limits. Typically, however, this element appears as an implicit dimension--not an explicit element--of the bad faith action. In one oft-quoted passage regarding bad faith refusal to

settle actions, the Tenth Circuit stated:

American does not challenge the settled law in Oklahoma that where an insurance company pursuant to the obligation created by its policy of liability insurance acts on behalf of the insured in the conduct of litigation, it must exercise good faith toward the insured in determining whether an offer of compromise and settlement **within the limits of its policy** shall be accepted or rejected; that in determining whether such an offer shall be accepted or rejected, it may properly give appropriate consideration to its own interest; that it must also give equal consideration to the interest of the insured; and that its failure to do so constitutes bad faith which renders it liable to the insured for any resulting damage if the judgment against the insured exceeds the amount of the insurance."

American Fidelity and Cas. Co. v. All American Bus Lines, 190 F.2d 234, 236 (10th Cir. 1951), cert. denied, 342 U.S. 851 (1951) (emphasis added), cited with approval in American Fidelity and Cas. Co. v. L.C. Jones Trucking Co., 321 P.2d 685, 688 (Okla. 1958).¹

Many cases applying Oklahoma law appear to reflect such a rationale, saying an obligation to settle arises when the claimant makes an offer within the policy limits. See Davis v. National Pioneer Ins. Co., 515 P.2d 580, 582 (Ok. App., 1973); National Mutual Casualty Co. v. Britt, 200 P.2d 407, 412 (Okla. 1949).

¹Defendant points to decisions in California courts which have explicitly held that a liability insurer can only be held liable for failure to settle a claim when claimant has made an offer to settle within the insurer's policy limits. Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511 (Cal. App. 1973). In Merritt, the court explained the policy rationale underlying the requirement, saying that the "duty of equal consideration" is designed to mediate the conflict of interest that arises when there is a possibility of a judgment in excess of policy limits. This conflict is particularly acute, the Merritt court reasoned, when the settlement offer is within the policy limits, since the insured has nothing to lose by settling when the offer is within the limits. On the other hand, both the insured and the insurer have an interest in going to trial where the offer is beyond the limits.

Nevertheless, no decision has adopted this requirement as a specific element of a prima facie case of bad faith refusal to settle. Indeed, some formulations of the doctrine do not mention any requirement that the claimant make an offer to settle within the policy limits. In American Fidelity v. L.C. Jones Trucking Co., the Tenth Circuit stated the essence of the bad faith failure to settle action in this alternative way:

It is established by the greatly predominant weight of authority in this country that a public-liability insurer may be liable for the entire amount of a judgment obtained against the insured regardless of any policy limitation, if the insurer's handling of the claim, including the failure to accept a proffered settlement, was done in such a manner as to evidence bad faith.

321 P.2d at 687. This more generic statement of the law leaves out any reference to a settlement offer within policy limits as a prerequisite to the action.

In light of this ambiguity in the law, this Court is not prepared to say that the failure to offer settlement in an amount below the policy limits automatically precludes a bad faith action. One can conceive of an offer of settlement slightly above the policy limits that would similarly involve a conflict of interest just as would an offer below the policy limit. However, a jury may well find more credible an insurer's good faith or "equal consideration" defense when the settlement offer was of an amount far in excess of the policy limits. In such a situation, the interests of the insurer and the insured are more aligned, and the risk of bad faith is decreased.

The Court also refuses to find for summary judgement on these

grounds in light of a factual dispute regarding the amount of the proffered settlement by Sellers. Farmers argues that it understood the settlement offer to leave open rights of subrogation that would create significant additional exposure. In an April 22, 1991 letter from Sellers' attorney, Greg Williams, Sellers made her most explicit settlement offer of the dispute. The letter stated, "Please be advised that the Plaintiff, Leslie Sellers, hereby offers to settle her claim against the Defendant Willis Boyd Friend, for the total liability policy limits, preserving her claim for excess damages from the above captioned uninsured motorist carriers." Exhibit A, Brief in Support of Motion for Summary Judgment by Farmers Insurance Co., Inc. In contrast, Friend relies on a September 6, 1991 letter by John Caslavka, an attorney representing uninsured motorist carrier Oklahoma Farm Bureau Mutual Insurance Company, stating that settlement within policy limits would "give full, final and complete releases" to all parties. Exhibit D, Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment. Moreover, Sellers' attorney, Gregory Williams, states that he was negotiating upon the belief that the liability policy limits of Friend were \$50,000 rather than the actual limit of \$100,000. These factual disputes put into doubt the exact nature of the settlement negotiation process, requiring this Court to allow the jury to make the necessary evaluation of bad faith.

Farmers offers a second argument in support of its Motion for Summary Judgment against Friend. In the alternative, Defendant

argues that the offer of settlement proffered by Sellers in the amount of \$27,500 was reasonable as a matter of law. As one court stated, "The essence of the tort of bad faith, as it is recognized in Oklahoma, is the unreasonableness of the insurer's actions. Conti v. Republic Underwriters Ins. Co., 782 P.2d 1357, 1360 (Okla. 1989). A showing that Farmers acted reasonably in settlement negotiations would therefore require concluding in their favor.

The issue of unreasonableness need not go to a jury. Before the question goes to the jury, the Court must first determine whether the insurer's conduct may reasonably be perceived as tortious. In City National Bank v. Jackson National Life Insurance, the court stated:

[W]hile recognizing the implied duty of good faith and fair dealing encompassed in insurance contracts, Oklahoma law has also recognized that the mere allegation of an insurer's breach of the duties of good faith and fair dealing does not automatically entitle a litigant to submit the issue to a jury for determination.

804 P.2d 463, 468. The court proceeded to quote Duckett v. Allstate Insurance Co., 606 F. Supp. 728, 731 (W.D. Ok. 1985), to show that "a jury question arises only where the relevant facts are in dispute or where the undisputed facts permit differing inferences as to the reasonableness of the insurer's conduct." The Tenth Circuit recently concurred in this understanding of Oklahoma law in Oulds v. Principal Mutual Life Insurance Co., 6 F.3rd 1431 (10th Cir. 1993). The Oulds court stated:

On a motion for summary judgment, the trial court must first determine, under the facts of the particular case and as a matter of law, whether insurer's conduct may be reasonably perceived as tortious. Until the facts, when construed most favorably against the insurer, have

established what might reasonably be perceived as tortious conduct on the part of the insurer, the legal gate to submission of the issue to the jury remains closed.

631 F.3rd at 1436-37 (citations omitted).

While these principles have been expressed mainly in the context of failure to settle claims arising out of first party insurance policies, there is no reason that these same guidelines should not apply in the third party context. A similar approach was used, for example, in the third party insurance case of Davis v. National Pioneer Insurance Company, 515 P.2d 580 (Ok. App. 1973). In Davis, the court approved a lower court's decision to send the question of bad faith to the jury but only after finding "evidence that there was a substantial possibility in the original case of a jury verdict in excess of the . . . policy limit." 515 P.2d at 582.

The evidence underlying the original state suit could give rise to an inference that Farmers' decisions in the settlement negotiations were unreasonable. The facts surrounding the accident suggested the possibility of a significant recovery by Sellers. Liability was not an issue at trial since Sellers was free of all negligence. Friend was driving while intoxicated, a fact that the insurer is required to consider in evaluating the potential result at trial. Furthermore, the medical evidence not only reflected current expenses of \$11,000 but also a claim for permanent damages arising out of the accident. Sellers claimed bodily injuries consisting of various soft tissue injuries plus the possibility of a herniated disk that might require future surgery.

Moreover, the conduct of the settlement negotiations raises

triable issues going to the issue of bad faith. First, Plaintiff points to a delay in evaluating the suit, since the first evaluation came four years after the 1987 accident and two years after the filing of the state court suit by Sellers. Second, although Wilburn was authorized by Farmers to settle for up to \$50,000, he never budged from discussing settlement in the range of \$27,500 to \$35,000. Third, it is noteworthy that Friend made a written demand on Farmers to settle the claim within the limits of his policy. Friend realized that settlement would protect him from excess judgment or punitive damages. However, this request was never honored.

Friend also points to the ultimate jury verdict of \$148,141.31 to show that the \$27,500 offer by Farmers was in bad faith. The final verdict does not, by itself, resolve the issue of bad faith. The mere fact that the jury responded with a higher verdict than either party expected is not sufficient evidence to bring the question of bad faith refusal to settle to trial. In McCorkle v. Great Atlantic Ins. Co., 637 P.2d 583, the Oklahoma Supreme Court stated:

We do not hold that an insurer who resists and litigates a claim made by its insured does so at its own peril that if it loses the suit or suffers a judgment against it for a larger amount than it had offered in payment, it will be held to have breached its duty to act fairly and in good faith and thus be liable in tort.

637 P.2d at 587 (quoting Christian v. American Home Assurance Co., 577 P.2d 899, 904-905). In Manis v. Hartford Fire Ins., 681 P.2d 760, 761 (Okla. 1984), the Court stated:

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.

While the higher verdict is not *per se* bad faith, the verdict of more than three times the proffered settlement, does raise an additional inference that could reasonably lead a juror to conclude, in conjunction with other evidence, that Farmers acted in bad faith.

Defendant also seeks summary judgment with regard to Friend's request for punitive damages. The availability of a punitive damage award in a bad faith case is not automatic but is governed by the same standard used in other tort contexts. Buzzard v. Farmers Ins. Co., 824 P.2d 1105, 1115 (Okla. 1991). The plaintiff must show that the defendant acted with oppression, malice, fraud, or gross negligence or wantonness. Id. Given the facts of the case, particularly Friend's intoxicated state and Farmers' refusal to negotiate aggressively, the issue of punitive damages cannot be decided as a matter of law at this point. A juror might reasonably infer under the evidence provided that the standard required for punitive damages has been met.

Finally, Defendant Farmers argues that it cannot be liable in this bad faith failure to settle claim for the \$10,000 in punitive damages assessed against Friend in the underlying case. Farmers claims that it would contravene Oklahoma public policy to assess such damages against Farmers. In making this argument, Farmers cites Dayton Hudson v. American Mutual Liability Insurance Co., 621

P.2d 1155 (1980) which held that punitive damages should not be indemnified through liability insurance. In Dayton Hudson, the Court stated:

If liability could be shifted to the insurer . . . the burden would ultimately come to rest not on the insurance company but rather on the public at large since the added recovery would be passed to the premium payers. Society would then be punishing itself rather than the actual author of the wrong.

Essentially, Farmers hopes to extend this Dayton Hudson principle to the bad faith failure to settle context.

Farmers argues that public policy frees Farmers from having to compensate Friend for any punitive damages Friend suffered as a result of Farmers' refusal to settle. In response, Friend claims that the jury's award of \$10,000 in punitive damages would have been avoided had Farmers acted in good faith. Therefore, Friend argues that punitive damages represent a portion of the damages Friend suffered due to Farmers' tortious conduct. Friend wants compensation for this aspect of his loss.

In light of the social policy underlying punitive damages, this Court agrees with Farmers that Friend should not be entitled to compensation for the punitive damages awarded against him. Otherwise, insurance companies would indirectly absorb the costs of punitive damages, leading to higher settlement values and insurance premiums. Insurance companies would internalize the risks associated with potential bad faith failure to settle claims that could result in awards that included punitive damages. This risk internalization would have an inflationary effect on insurance costs that would inevitably be passed on to the public at large.

Recently, the New York Court of Appeals came to this same conclusion concerning punitive damages in a bad faith failure to settle context. In Soto v. State Farm Insurance Co., New York's highest court wrote:

[A]n insurer's failure to agree to a settlement, whether reasonable or wrongful, does no more than deprive the insured of a chance to avoid the possibility of having to suffer a punitive damage award for his or her own misconduct. Regardless of how egregious the insurer's conduct has been, the fact remains that any award of punitive damages that might ensue is still directly attributable to the insured's own moral and blameworthy behavior.

613 N.Y.S.2d 352, 354 (1994) aff'g 600 N.Y.S.2d 407 (N.Y. App. Div. 1993) and 588 N.Y.S.2d 505 (Sup. Ct. 1992). The court noted that it was only a secondary effect of settlement that a wrongdoer could escape punitive damages.

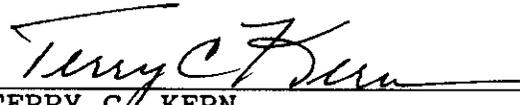
Our system of civil justice may be organized so as to allow a wrongdoer to escape the punitive consequences of his own malfeasance in order that the injured plaintiff may enjoy the advantages of a swift and certain pretrial settlement. However, the benefit that a morally culpable wrongdoer obtains as a result of this system, i.e., being released from exposure to liability for punitive damages, is no more than a necessary incident of the process. It is certainly not a right whose loss need be made subject to compensation when a favorable pretrial settlement offer has been wasted by a reckless or faithless insurer.

Id. As the Dayton Hudson court said, punitive damages are designed to punish the offender and deter others, not to rest on the public at large. Therefore, this Court holds that Oklahoma public policy precludes Farmers' liability for punitive damages assessed against Friend in the underlying state court suit.

With respect to Defendant's liability for punitive damages assessed against Friend, summary judgment is granted. This Court

denies granting summary judgment with regard to Defendant's liability for bad faith failure to settle and for punitive damages based on that claim. IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is denied in part and granted in part.

So ORDERED this 20 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 20 1994

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

ZEL LILLESKAU,

Plaintiff,

v.

PATTERSON-KELLEY COMPANY,

Defendant.

Case No. 94-C-102-K ✓

ORDER

ENTERED ON DOCKET

DATE OCT 21 1994

The court has for consideration the Report and Recommendation of the Magistrate Judge filed September 13, 1994, in which the Magistrate Judge recommended that this case be dismissed without prejudice for failure of plaintiff to appear or obtain appearance of counsel as previously directed. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

IT IS THEREFORE ORDERED that this case be dismissed without prejudice for failure of plaintiff to appear or obtain appearance of counsel as previously directed.

Dated this 19 day of October, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE OCT 21 1994

DEBRA A. EAVES,
Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT
NO.1 OF PAWNEE COUNTY,
OKLAHOMA, et al.,

Defendants.

No. 94-C-465-K ✓

F I L E D

OCT 20 1994

O R D E R

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

Before the Court is the motion of the defendants to dismiss. Plaintiff brings this action pursuant to 42 U.S.C. §§ 1983 and 1985 and this Court's supplemental jurisdiction arising out of the following allegations. Plaintiff and her husband had two children, previously diagnosed as having learning disabilities, whom they sought to enroll in the Pawnee Public Schools. During the enrollment period, plaintiff identified her children to the School as handicapped, but the School twice refused to enroll the children. On January 14, 1992, plaintiff and her husband submitted a request for a due process hearing pursuant to 20 U.S.C. § 1415(b)(2), which is part of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1401 et seq.¹ After the request for due process hearing, but before the hearing took place, plaintiff's children were enrolled and were designated as special

¹Plaintiff's complaint also recites duties imposed on an educational entity by the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213.

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education students.

Plaintiff and her husband then sought to contribute to the development of their children's separate Individualized Education Program ("IEP"). See 20 U.S.C. § 1401(20). Disagreeing with some steps which were taken, the parents did not withdraw their request for due process hearing. A meeting was held on April 7, 1992, apparently between the parents and various school officials to discuss disagreements. Ultimately, plaintiff and her husband executed a written withdrawal of their request for a due process hearing.

On May 5, 1992, the Pawnee School District filed a civil action against plaintiff in the District Court of Pawnee County, alleging abuse of process in her pursuit of the due process hearing and seeking an award of attorney fees and costs. It appears from the record the state action remains pending. On May 5, 1994, plaintiff filed the present action, alleging the state lawsuit represents (1) violation of First Amendment rights, (2) deprivation of due process and (3) intentional infliction of emotional distress. Defendants move to dismiss for failure to state a claim pursuant to Rule 12(b)(6) F.R.Cv.P.. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. A reviewing court presumes all plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir.1991).

First, plaintiff contends the state lawsuit was filed against her to chill her First Amendment rights to comment about the public school system and its treatment of handicapped children or to retaliate against her for having so commented. Defendants have pointed to Acevedo v. Surles, 778 F. Supp. 179, 183-84 (S.D.N.Y.1991), in which the court stated in order to prove a First Amendment violation and recover under § 1983, a plaintiff must demonstrate (1) her actions are protected by the First Amendment, (2) defendants' actions have the effect of chilling plaintiff's First Amendment rights, and (3) defendant's actions are motivated by, or substantially caused by, plaintiff's decision to exercise these rights. The court in Acevedo was reviewing a summary judgment motion, and therefore spoke in terms of proof. Construing the plaintiff's allegations, and the inferences drawn therefrom, in the light most favorable to plaintiff, the Court concludes the First Amendment claim survives a 12(b)(6) motion.

Next, defendants ask to dismiss plaintiff's claim that the state lawsuit was filed in retaliation for plaintiff pursuing her rights under federal law. Defendants acknowledge the existence of a non-retaliation provision under the ADA, 42 U.S.C. §12203, and case law holding retaliation claims are cognizable under the Rehabilitation Act, Hoyt v. St. Mary's Rehabilitation Center, 711 F.2d 864, 867 (8th Cir.1983). Defendants' argument is that plaintiff did not engage in activity protected under either of these Acts, but instead merely requested a due process hearing pursuant to the IDEA. Though not stated explicitly, defendants

seem to contend that, unlike the ADA and Rehabilitation Act, retaliation claims under the IDEA are not cognizable. The Court finds no authority on the issue, but notes the IDEA is a remedial statute which should be broadly applied and liberally construed. Espino v. Besteiro, 520 F.Supp. 905 (S.D.Tex.1981). In her response, plaintiff contends she was proceeding under all substantive federal laws regarding her children's education. The Court cannot say it is "beyond doubt" plaintiff can prove no set of facts establishing her claim. The motion to dismiss is denied regarding this claim as well.

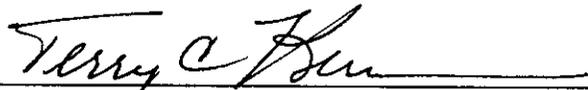
Finally, defendants contend the plaintiff's pendent state claim for intentional infliction of emotional distress should be dismissed. The first ground stated is that plaintiff allegedly did not comply with the provisions of the Oklahoma Governmental Tort Claims Act ("the Act"). In seeking to establish this ground, defendants submit an affidavit from the clerk of the board of education of the Pawnee Public Schools. The Court may not consider matters outside the pleadings in ruling upon a Rule 12(b)(6) motion. While such a motion may, upon notice, be converted to a motion for summary judgment, the Court declines to do so. Defendants may assert this alleged basis again, if they choose, upon the filing of subsequent dispositive motions.

The second ground stated is that under the Act, a plaintiff may sue only the School District (for an employee's acts within the scope of employment) or the School Board Members (for acts outside the scope of employment). See 51 O.S. §163. In this action,

plaintiff has sued both. In her response, plaintiff concedes the point and states "it is not the intent of plaintiff to seek damages against the school stemming from pendent state torts, but against the board members only who acted under color of their office." (Plaintiff's Response at 19). Therefore, this aspect of the motion shall be granted as to the school district.

It is the Order of the Court that the motion of the defendants to dismiss is hereby GRANTED solely as to plaintiff's claim of intentional infliction of emotional distress against defendant Independent School District No. 1 of Pawnee County, Oklahoma. In all other respects, the motion is DENIED.

ORDERED this 20 day of October, 1994.


TERRY Q. KERN
UNITED STATES DISTRICT JUDGE