

ENTERED ON DOCKET
NOV 30 1994

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

ROBERT HICKS,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF COUNTY COMMISSIONERS)
 OF CREEK COUNTY, OKLAHOMA,)
 DON NICHOLS, CREEK COUNTY)
 SHERIFF, DEPUTY SHERIFF)
 GEORGE ELLIOTT, DEPUTY SHERIFF)
 RON POWERS, and OTHER UNKNOWN)
 DEPUTIES OF THE CREEK COUNTY)
 SHERIFF'S OFFICE,)
)
 Defendant.)

No. 93-C-549-K

FILED
NOV 27 1994
Richard M. [unclear] Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court for consideration of the defendants' 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 defendants Mark Ihrig, George Elliott and Ron Powers and against the plaintiff.

ORDERED this 28 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

DATE NOV 30 1994

HYPERVISION, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID NOSS and MYRIAD)
 TECHNOLOGIES, INC.)
)
 Defendants.)
)
 MYRIAD TECHNOLOGIES, INC.)
)
 Third Party Plaintiff,))
)
 vs.)
)
 JERRY BULLARD and JIM)
 NOEL,)
)
 Third Party Defendant)

Case No. 94-C-737-K ✓

FILED
 COURT CLERK
 DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before this Court is the Application by Plaintiff, Hypervision, Inc. and Jerry Bullard and Jim Noel, Third Party Defendants, for a stay of injunction and for the setting of a bond pending appeal.

On November 1, 1994, this Court entered an Order accepting the Report and Recommendation of the Magistrate and granting an injunction against Plaintiff and Third Party Defendants. The Plaintiffs and Third Party Defendants now ask this Court to set a bond and stay the injunction pending appeal of this matter. The stay and bond are allegedly necessary to protect the rights of the adverse party pending appeal.

According to its terms, Fed.R.Civ.P. 62(c) clearly places the granting of such a stay in the discretionary power of the Court.

The Rule states:

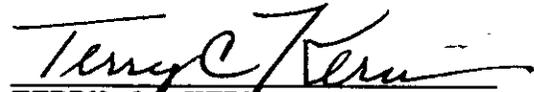
When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for security of the rights of the adverse party.

(emphasis added). In Securities Investor Protection v. Blinder, et al., 962 F.2d 960, 968 (10th Cir. 1992) the Tenth Circuit noted four factors in determining whether an order should be stayed pending appeal. The court stated that a party moving for such a stay must show: 1) its strong position on the merits of the appeal; (2) irreparable injury if the stay is denied; (3) that a stay would not substantially harm other parties to the litigation; and (4) that the public interests favor a stay. Id. These factors track the same concerns typically raised in evaluating a motion for a preliminary injunction. Lehnert v. Ferris Faculty Association-MEA-NEA, 707 F. Supp. 1490, 1492 (W.D.Mich 1989).

The movant has made no attempt at such a showing. Indeed, the reasons discussed in the Magistrate's Report and Recommendation as well as the Order issue by this Court weigh heavily against the grant of a stay. Plaintiff and Third Party Defendants have offered no basis to evaluate the merits of an appeal. Moreover, both this Court and the Magistrate found that Myriad, not Hypervision, would suffer severe harm without imposition of an appropriate injunction.

Moreover, Fed.R.Civ.P. 62(a) contemplates a stay of an injunction only after an appeal is taken from a decision reached by a district court. In this case, the movant has not yet filed an appeal. Therefore, any application for a stay or bond is premature until an appeal has been filed.

IT IS SO ORDERED THIS 30 OF NOVEMBER, 1994

A handwritten signature in cursive script, reading "Terry C. Kern". The signature is written in black ink and is positioned above a horizontal line.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

GARY MEDLIN an individual,
and DAWN MEDLIN, an individual

Plaintiffs,

v.

SHERWOOD CONSTRUCTION COMPANY,
INC. (now Sherwood South, Inc.),
MIDWEST ENVIRONMENTAL SERVICES,
INC., HEMPHILL CORPORATION,
SINCLAIR OIL CORPORATION,
TEXACO, INC., and WILDCAT
CONSTRUCTION COMPANY, INC.

Defendants.

ENTERED ON DOCKET

DATE NOV 30 1994

CASE NO. 94-C-701-B ✓

FILED

NOV 29 1994

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

O R D E R

This matter comes on for consideration of Plaintiffs' Motion
To Remand (docket entry # 22).

STATEMENT OF THE CASE

Plaintiffs Gary Medlin and Dawn Medlin sued Defendants
Sherwood Construction Company, Inc. (now Sherwood South, Inc.),
(Sherwood), Midwest Environmental Services, Inc., (Midwest),
Hemphill Corporation, (Hemphill), Sinclair Oil Corporation,
(Sinclair), Texaco, Inc., (Texaco), and Wildcat Construction
Company, Inc. (Wildcat) in May, 1993, in Tulsa County District
court alleging that Gary Medlin suffered injury while working as
the supervisor of a safety crew removing buried drums containing
hazardous material in connection with the construction of a
sanitary sewer for the City of Tulsa on property owned by Sinclair
and leased to the City of Tulsa. Dawn Medlin sues for loss of
consortium.

Plaintiffs have dismissed their action as to Defendant Hemphill, who was hired to perform 26 soil tests at various locations on the project. Plaintiff also voluntarily dismissed Texaco on August 15, 1994, but moved, on Oct. 3, 1994, to amend its Third Amended Complaint to name Texaco again, alleging new information through discovery implicates Texaco as one of the parties who created the hazard that injured Gary Medlin. At the Case Management Conference held November 17, 1994, the Court indicated it would perhaps sustain Plaintiffs' motion (docket entry #16) if Plaintiffs' Motion To Remand is denied.

Plaintiffs generally claim that Defendant Sinclair was negligent in burying the drums and also claim Sinclair intentionally altered the integrity of substances contained in the drums after the drums had been excavated. Defendants Sherwood, Midwest and Wildcat provided services connected with the Westbank Interceptor project and are alleged against for failure to act in a reasonably prudent manner regarding the buried drums.

Plaintiffs filed their Motion to Remand on November 10, 1994, alleging that Plaintiffs' Third Amended Petition, filed before removal here, failed to make any mention of the federal jurisdiction (42 U.S.C. §§9600) upon which removal was predicated or any other federal law upon which to base jurisdiction.

Sinclair has responded¹ to Plaintiffs' remand motion arguing that: 1) Plaintiffs now may address only lack of subject matter jurisdiction as a basis for remand because the allowed time to move

¹ Defendants Sherwood, Midwest and Wildcat have also responded to Plaintiffs' motion, essentially adopting Sinclair's response and their earlier pleadings. Texaco has yet filed no response.

to remand based upon a removal procedural defect (30 days) has long since expired; 2) The Court may look beyond Plaintiffs' Third Amended Petition to determine Federal question jurisdiction; 3) Plaintiffs, in their response filed approximately June 20, 1994,² to Sinclair's Motion For Summary Judgment, clearly invoke The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 6901 et seq, which demonstrates Plaintiffs' reliance on federal claims which therefore establishes federal subject matter jurisdiction; 4) Even if Plaintiffs did not intend to rely upon a CERCLA claim the Court may assume that they did; 5) Plaintiffs have actively litigated this case in this Court, thereby acquiescing in federal jurisdiction.

Several of Sinclair's issues are of ready disposition. First, the Court agrees Plaintiffs are now limited to the single issue of subject matter jurisdiction, which may be brought up at any time. Secondly, however, the Court disagrees with Sinclair that a Plaintiff may acquiesce or waive subject matter jurisdiction. It is black letter law that federal subject matter jurisdiction may not be waived or conceded, and that a case may be remanded for lack of subject matter jurisdiction at any time before final judgment. 28 U.S.C. § 1447(c).

Sinclair argues that Plaintiffs' Third Amended Petition is "artful pleading" which indeed it may be. The Court recognizes and

² It does not appear Plaintiffs' response was actually ever filed in the state court action, or, if filed, was ever stamped as filed by the state court clerk. The pleading which purports to be the original of Plaintiffs' response fails to reflect a filing stamp thereon. However, it is apparent that Sinclair received a copy of the pleading since it argues its content.

endorses the "well-pleaded complaint" exception to the universal rule that a federal claim must generally appear on the face of the complaint, unaided by any other pleadings, including a removal petition. Sinclair's theory is that Plaintiffs, when faced with Sinclair's summary judgment motion, conjured up a strict liability claim, bottomed in federal statutory law, notably CERCLA. Sinclair cites Vitarroz Corp. v. Borden, Inc., 644 F.2d 960 (2nd Cir. 1981) in support its thrust. That case, however, is premised upon a plaintiff who "was willing to see its trademark infringement claim treated as one based on federal law." Id. at 964. In the present matter Plaintiffs reject a CERCLA or other federal claim in no uncertain terms.

In their motion Plaintiffs remind the Court that "[I]t is undisputed that Plaintiffs' Third Amended Petition makes no reference whatsoever to 42 U.S.C. §§ 9600 et seq. or any other federal law" and further state categorically that "Plaintiffs have no intention of relying on 42 U.S.C. §§ 9600 et seq., 42 U.S.C. §§ 6900 et seq or any other federal law in pursuing their claims against Sinclair. Rather, Plaintiffs intend to rely solely upon the laws of the State of Oklahoma, including the Oklahoma Controlled Industrial Waste Disposal Act, Okla. Stat. tit. 63 §§ 1-2001 et seq.".

It is axiomatic that a plaintiff, possessing both state and federal claims against a defendant, may choose either one or the other, or both, at his discretion, without requirement to combine the two. Coulston v. International Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 423 F.Supp. 882 (D.C.E.D.Pa.)

Preemption, not argued here, may affect this choice, willingly or otherwise.

Sinclair also argues that, since "Plaintiffs sat silent for nearly four months, this Court and Defendants are entitled to conclude that Plaintiffs are willing to see their strict liability claim 'treated as one based on federal law.'" The Court concludes to the contrary because Plaintiffs have, in the clearest of terms, made a definitive choice that theirs is not a federal claim of any kind or nature. As presently constituted Plaintiffs' claims are, in this Court's view, state claims or no claims at all.³

"Artful pleading" and the "Well-pleaded Complaint" are each based on having to give up none of one's claims at the same time avoiding an unwanted forum. That is not the case herein. Plaintiffs are indeed avoiding federal jurisdictional but at the price of foregoing federal claim possibility be it CERCLA or other federally based claim.

The Court concludes Plaintiffs' Motion To Remand should be and the same is hereby GRANTED. This matter is herewith REMANDED to the District Court for Tulsa County, State of Oklahoma. In view of the remand, no action is taken on Plaintiffs motion to add Texaco as an additional party defendant.

IT IS SO ORDERED this 29th day of November, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

³ Should Plaintiffs, at any time in the future, amend and add a federal claim, the matter would then be subject to a timely removal.

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

F I L E D

NOV 30 1994

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

IN RE:)
)
SIGGI GRIMM MOTORS, INC.,)
)
Debtor.)
)
THE DONALD R. OLSON TRUST,)
)
Appellant,)
)
vs.)
)
THRIFTY RENT-A-CAR SYSTEM, INC.,)
)
Appellee.)

Case No. 94-C-161-E



ORDER

This order pertains to the appeal of the Donald R. Olson Trust ("the Trust"), a creditor in this bankruptcy case, from the final judgment order, sustaining Thrifty Rent-A-Car System, Inc.'s ("Thrifty") Motion for Summary Judgment and denying the Trust's Proof of Claim, entered on February 11, 1994.

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

ENTERED ON DOCKET

DATE 11-30-94

The Trust's claim arises from loans made by it at two different times to certain parties. The undisputed facts determined by the bankruptcy court are that, at the time of the events at issue, Donald R. Baker ("Baker") was a 60 percent owner of the stock of M-B Leasing, Inc. ("M-B Leasing"), the 100 percent owner of the stock of the Debtor, Siggi Grimm Motors, Inc. ("Siggi Grimm"). Baker was also Chairman of the Board, President and Chief Executive Officer of Siggi Grimm. On July 30, 1990, the Trust issued a check to Baker for \$100,000.00, and Baker personally executed a promissory note to the Trust for that amount. On July 31, 1990, Baker endorsed the check in blank and deposited it into a non-Siggi Grimm account. On the same date, Baker deposited \$100,000.00 into Siggi Grimm's account. The deposit slip listed Baker as the depositor.

The July 30, 1990 note was not timely paid and a renewal note, signed by Baker on behalf of Siggi Grimm, was issued on October 29, 1990. Because the Trust's name was misspelled, a corrected note was issued on November 14, 1990, signed by Baker alone, with no reference to Debtor. During the fall of 1990, the Trust received the following payments from Debtor: \$1,999.80 on October 8, \$999.90 on November 1, \$1,000.00 on December 3, and \$1,033.23 on December 28. When the November 14, 1990 note was likewise not timely paid, a third renewal note was executed on January 1, 1991, signed by Baker as Chairman of Siggi Grimm.

On January 9, 1991, the Trust wire transferred \$100,000.00 to the account of M-B Leasing, and the next day the Trust received a promissory note from Siggi Grimm in this amount, signed by Baker as Chairman. No reference was made in the note to M-B Leasing, which actually received the funds.

On February 27, 1991, a deposit slip shows that Baker deposited \$100,000.00 into Siggi Grimm's account.

On August 30, 1991, another promissory note was executed by both M-B Leasing and Siggi Grimm in favor of the Trust in the sum of \$200,000.00. This note was executed fifteen days after the assets of Siggi Grimm were sold to Jackie Cooper Imports of Tulsa, Ltd. Two weeks later, on September 14, 1991, an Involuntary Petition was filed against Debtor. On August 23, 1993, the Trust filed a proof of claim in the amount of \$200,000.00, plus interest, based on the final note executed on August 30, 1991. Thrifty objected to the Trust's claim on September 9, 1993.

The issue before the bankruptcy court was whether there was evidence that Siggi Grimm received any consideration for the August 30, 1991 note. If there was such evidence, the motion for summary judgment would be denied and the court would hold an evidentiary hearing on the objection to the claim. If there was no such evidence, the court would grant summary judgment and deny the claim of the Trust. The bankruptcy court found that there was no evidence that Siggi Grimm received any consideration for the note and therefore the claim of the Trust was denied as a matter of law.

The bankruptcy court found that the evidence was clear that the Trust advanced \$100,000.00 to Baker on July 30, 1990 and received in return a promissory note from him in that amount. The following day Baker deposited \$100,000.00 into Debtor's account, but the bankruptcy court found no evidence that this deposit had any connection with, or was related to, the advance from the Trust to Baker made the previous day. Likewise, the bankruptcy court found clear evidence that the Trust advanced a second \$100,000.00 to

M-B Leasing on January 9, 1991, and that the next day Siggi Grimm executed a note in this amount payable to the Trust. On February 27, 1991, Baker made a \$100,000.00 deposit into the account of Siggi Grimm. However, the bankruptcy court found no evidence that the money advanced by the Trust to M-B Leasing was the money that Baker later deposited into Siggi Grimm's account.

The bankruptcy court noted that the Trust brought forth no evidence by way of affidavit or deposition of an original agreement between the Trust and Baker. There was no evidence to support the argument of the Trust that Baker was merely acting as an agent for Siggi Grimm in receiving the funds from the Trust and that at all times it was understood that Siggi Grimm was the true obligor. There was also no evidence that the Trust and Baker agreed that Baker was receiving the money on behalf of Siggi Grimm, or that the money received from the Trust actually went to Siggi Grimm.

The clear evidence established that the Trust loaned the money to Baker and to M-B Leasing, not to Siggi Grimm. There was absolutely no evidence that Siggi Grimm actually received the funds and was intended to be the obligor, other than the notes executed by Baker on Siggi Grimm's behalf long after the transfers took place. The bankruptcy court concluded that the notes appeared to be an attempt by Baker to shift the liability from himself and M-B Leasing to Siggi Grimm. The bankruptcy court noted that this was permissible under the doctrine of novation, but only if Siggi Grimm received consideration for the obligation undertaken. No evidence was produced showing that Siggi Grimm received consideration, although the Trust had an opportunity to produce such evidence. Therefore, its claim was denied as a matter of law.

The Trust argues that the bankruptcy court erred in this determination, because Siggi Grimm's liability to repay the Trust's loans is based on its status as an accommodation party with respect to Baker in the transactions, pursuant to Okla. Stat. tit. 12A, § 3-419.¹ The Trust claims that Baker incurred personal liability as the maker of the promissory notes, and when Siggi Grimm subsequently signed renewal notes covering the same debt as a maker, it became a party to the instruments securing the Trust's loan to Baker. The Trust contends that Siggi Grimm obviously intended to incur liability by signing the loan documents as maker, so the transactions have all the necessary attributes of an accommodation arrangement under § 3-419.

The Trust points out that § 3-419(b) provides that an accommodation party "may sign the instrument as maker, drawer, acceptor or endorser and . . . is obliged to pay the instrument in the capacity in which the accommodation party signs." Thus, the fact that Siggi Grimm signed the promissory notes as maker does not defeat its status as accommodation party, but exhibits liability under those notes and an intention to act as an accommodation party with respect to the subject loans. The Trust also claims that Siggi Grimm acknowledged its liability for repayment of the loans when it issued payments to the Trust under the notes, thereby suffering a detriment. The Trust cites Powers Restaurants, Inc. v. Garrison, 465 P.2d 761, 763 (Okla. 1970), to support its contention that, if there is detriment to a promisee, consideration exists.

¹Section § 3-419(a) states as follows:

If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

The Trust argues that the bankruptcy court erroneously based its denial of the Trust's claim on the failure of consideration, because Oklahoma law provides that consideration need not pass to an accommodation party. Under Okla. Stat. tit. 12, § 3-419(b), the "obligation of an accommodation party may be enforced . . . whether or not the accommodation party receives consideration for the accommodation."

The Trust contends that even if Siggie Grimm is not an accommodation party, it is liable on the notes, because it signed the renewal notes and the promise was supported by consideration. The Trust claims that there is a genuine issue of material fact as to whether there was consideration for the funds loaned by the Trust and whether Baker endorsed the first Trust check and deposited it into a non-Siggie Grimm account.² The language of Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, only if a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

² The bankruptcy court received evidence from Thrifty that the Trust's check made payable to Baker in the amount of \$100,000.00 dated July 10, 1990 was deposited into an account at Village South National Bank on July 31, 1990, for which the first three numbers were 103. Siggie Grimm's Schedule B-Personal Property listing of all its bank accounts that existed when the case was filed and an affirmation in its Statement of Financial Affairs that no bank accounts had been closed within one year immediately preceding the bankruptcy did not include the account identified on the check. The court concluded that the first installment was deposited into something other than a Siggie Grimm account. The Trust now claims it had no chance to contest this evidence, because Thrifty first made its assertions in a reply brief filed on February 9, 1994, and the bankruptcy court issued its judgment on February 11, 1994. The Trust contends it had no opportunity to submit affidavits which would illustrate that the numbers identified by Thrifty on the Trust's check are not account numbers, but rather the banking institution number for Village South National Bank, where Siggie Grimm did hold accounts. However, the Trust does not allege that the first installment was deposited into one of those Siggie Grimm accounts.

Thrifty responds that § 3-419 requires that both an accommodated party and an accommodation party be parties to an instrument and both notes were executed solely by Siggi Grimm, so § 3-419 is not applicable to the situation. Thrifty also states that Baker cannot be an accommodation party for Siggi Grimm with regard to the first \$100,000.00 installment since he received the proceeds of the July 30, 1990 check. Under § 3-419, only the party who is not a direct beneficiary for value can qualify as an accommodation party.

Thrifty argues that the record is devoid of any evidence that Baker or M-B Leasing ever forwarded the proceeds received from the Trust to Siggi Grimm or that Siggi Grimm obtained any collateral benefit.

As to the Trust's claims that there are issues of material fact which cannot be resolved on summary judgment, Thrifty argues that none of the "facts" disturb the bankruptcy court's conclusion that the Trust failed to show that consideration flowed to Siggi Grimm in exchange for the notes. As to the first "fact" that Baker, who received the funds, executed a renewal note in which he deleted himself as maker and replaced himself with Siggi Grimm, no evidence of any additional consideration provided to Siggi Grimm was presented which might justify Baker's unilateral action. Baker's act does not establish that Siggi Grimm ever received any of the first \$100,000.00 payment from the Trust to Baker.

Thrifty claims that it does not matter that \$100,000.00 was transferred to M-B Leasing. While the Trust alleges M-B Leasing was Siggi Grimm's wholly owned subsidiary, in fact, M-B Leasing was the owner of Siggi Grimm. There is no evidence that these were not separate and independent entities, so the fact that \$100,000.00 was wired to M-B

Leasing does not lead to the conclusion that Siggi Grimm received the proceeds or any benefit from them.

Thrifty contends that the Trust has not contested the fact that it forwarded \$100,000.00 to Baker, not Siggi Grimm, that Baker endorsed the check to himself, and that Baker deposited it into the account of an unidentified third party. Since there was absolutely no evidence that the \$100,000.00 installment was ever received by Siggi Grimm, the bankruptcy court could only conclude that no consideration passed for that loan.

Thrifty argues that the Powers Restaurants, Inc. case does not support the claim that the Trust's loss must be paid by Siggi Grimm, because it suffered a detriment when it made payments to the Trust. In that case, a third party was sued on a debt owed to the plaintiff by a party which had turned over all its assets to the defendant. The court found no consideration was transferred which might require the defendant to make good on the defendant's debt.

Finally, Thrifty contends that the fact that Baker caused Siggi Grimm to make interest payments on Baker's and M-B Leasing's respective debts to the Trust does not create a question as to whether Siggi Grimm received consideration for the notes, but prove Baker's intent that a third party pay his debt and that of another corporation he controlled.

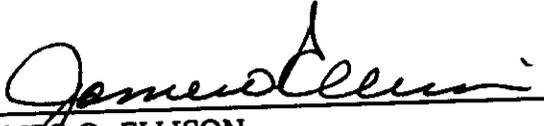
Under 11 U.S.C. § 502(a) and Bankruptcy Rule 3001(f), a properly executed and filed proof of claim amounts to prima facie evidence of both the validity and amount thereof. In re J. Bildner & Sons, Inc., 106 B.R. 8, 13 (Bankr. D. Mass. 1989). Any party objecting thereto bears the initial burden of producing evidence to defeat the claim. The

objecting party must produce evidence equal in probative value to that offered by the creditor in its claim. In re VTN, Inc., 69 B.R. 1005, 1008 (Bankr. S.D. Fla. 1987).

The evidence presented to the bankruptcy court did not establish any material questions of fact. The Trust did not present any evidence that any or all of the \$200,000.00 aggregate proceeds ever reached Siggi Grimm. In fact, the check and wire transfer receipt by which those funds were transferred clearly establish that the funds were received by parties other than Siggi Grimm. The Trust failed to prove a subsequent transfer of those funds from the recipients. The bankruptcy court did not err in concluding there was no consideration for the notes.

The decision of the bankruptcy court, sustaining Thrifty's motion for summary judgment and denying the Trust's Proof of Claim, entered on February 11, 1994 is affirmed.

Dated this 30th day of November, 1994.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

S: Siggi
ctck

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

NOV 30 1994

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

UNITED STATES OF AMERICA)
 Plaintiff)
 VS)
 WAYNE HURD)
 Defendant)

Case Number: 92-CR-039-001-E
 ENTERED ON DOCKET
 DATE 11/30/94

ORDER REVOKING SUPERVISED RELEASE

Now on this 28th day of November, 1994, this cause comes on for sentencing after the Court found, on November 17, 1994, that the defendant had violated the conditions of Supervised Release in that, while on Supervised Release, he had committed three acts of Sexual Battery, as defined by Oklahoma State Statutes, and that he had left the district of supervision without the permission of the Court or the probation officer. The defendant is present and represented by Mr. Steven Greubel, the government by Mr. Gordon Cecil, and the Probation Office by Senior Probation Officer Robert E. Boston.

The defendant was heretofore sentenced on December 9, 1992, in Counts One and Two, to terms of fifteen months custody, followed by three years supervised release, to run concurrently, along with a Special Monetary Assessment of \$100.00, after being convicted by jury of Use of Counterfeit Access Devices and Aiding and Abetting, and Bankruptcy Fraud, violations of 18 USC §§ 1029, 2, and 152. In addition to the standard conditions,

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.

Richard M. Lawrence, Clerk
 By Ber M. Culbaugh
 Deputy

of Supervised Release heretofore adopted by the Court, the following special conditions were ordered:

1. The defendant shall abide by the "Special Financial Condition."
2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.
3. The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
4. The defendant shall make restitution to Citibank Credit Services, of Richardson, Texas, in the amount of \$6,765.09.

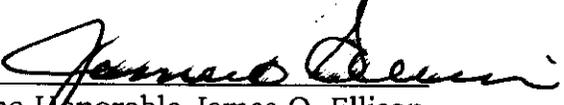
The Court hereby finds that the violations occurred after November 1, 1987, and that Chapter 7 of the U. S. Sentencing Guidelines is applicable. Further, the Court finds that the violations of Supervised Release constitute Grade B and C violations in accordance with U.S.S.G § 7B1.1(a)(2) and (3), and that the defendant's original criminal history category of III is applicable for determining the imprisonment range. In addition, the Court finds that Grade B and C violations and a criminal history category of III 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 hereby committed to the custody of the U.S. Bureau of Prisons for a term of fourteen months. Because the defendant admitted at the sentencing hearing that he is in need of treatment for sexual abuse, the Court recommends that the defendant be

designated by the Bureau of Prisons to the Federal Correctional Institution at Butner, North Carolina, so that he may have the opportunity to participate in the sex offender treatment program offered at that facility. Further, the defendant is hereby ordered, while incarcerated, to continue paying restitution to the victim of his original offense, as previously ordered.

The defendant shall surrender himself to the U.S. Marshal at Tulsa, Oklahoma, by 12:00 p.m., on December 27, 1994, to begin service of his sentence, and for transportation to the designated institution. The defendant is to remain free on the previously imposed \$25,000 Unsecured Bond and is to remain under the supervision of the U.S. Pretrial Services Office in Kansas City, Missouri, pending surrender.

The defendant is admonished to have no contact, directly or indirectly, with any witnesses involved in these proceedings.


The Honorable James O. Ellison
United States District Judge

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

ENTERED ON DOCKET
DATE NOV 29 1994

ROBERT HICKS,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF COUNTY COMMISSIONERS)
 OF CREEK COUNTY, OKLAHOMA,)
 DON NICHOLS, CREEK COUNTY)
 SHERIFF, DEPUTY SHERIFF)
 GEORGE ELLIOTT, DEPUTY SHERIFF)
 RON POWERS, and OTHER UNKNOWN)
 DEPUTIES OF THE CREEK COUNTY)
 SHERIFF'S OFFICE,)
)
 Defendant.)

No. 93-C-549-K

F I L E D

NOV 29 1994

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

O R D E R

Before the Court are the motions of defendants Mark Ihrig, Ron Powers, Board of County Commissioners of Creek County, Doug Nichols and George Elliott for summary judgment. The action arises out of the following facts. On June 20, 1992, plaintiff married Marcella Cooley ("Marcella"). At the time of the marriage plaintiff was 62 years old. The couple executed a Prenuptial Agreement which provided the home owned by Marcella at 23 Stagecoach Drive in Sapulpa, Creek County, Oklahoma, would remain her property if the parties divorced. On September 17, 1992, Marcella filed a petition for divorce, and on September 18, 1992, Judge White of Creek County issued a Temporary Restraining Order which stated: "It is further ordered, adjudged and decreed that the Defendant is ordered to leave and vacate the Plaintiff's residence located at 23 Stagecoach Drive, Sapulpa, Oklahoma."

Creek County Deputy Sheriff Ron Powers served plaintiff with

the Order between 5:20 and 5:30 of that afternoon at the Stagecoach Drive address. Powers was in uniform, drew plaintiff's attention to the Order's language requiring him to vacate the premises and told plaintiff to take forty-five minutes or an hour to get what he needed to take away. Around 6:54 p.m. Deputy Powers spoke to Marcella, who told him plaintiff had not left the house. Deputy Powers sought out Judge White and she advised him to get plaintiff out of the house pursuant to the Order. Powers returned to the address and knocked on the door. Plaintiff opened the door partially, and Powers told him to vacate the house. Plaintiff responded that he wanted to speak to his lawyer, and closed the door.

Plaintiff spoke to his attorney, George Washington, Jr., who had plaintiff read Washington the Temporary Order. Washington advised plaintiff he could leave the house at that time or appear in court to show cause why he should not leave. Plaintiff elected not to leave and barricaded himself inside the house by pushing furniture against the doors. Attorney Washington talked to Judge White; she informed him, contrary to his previous understanding, of a change in Oklahoma law which made the Temporary Restraining Order effective immediately. Washington advised plaintiff of this fact, but plaintiff still refused to leave. Judge White was called again; she said plaintiff could have fifteen minutes to get a toothbrush and what he needed and vacate. This was around 11:15 p.m..

Washington was aware the officers were concerned about

firearms in the house. Washington was going to take a shotgun which plaintiff had and give it to the officers. Washington and plaintiff came out into the garage, the garage door being up. Washington handed the unloaded shotgun to a police officer. The officers then contend the unarmed plaintiff turned to go back into the house. Defendant Elliott grabbed plaintiff by the arm and defendant Nichols grabbed plaintiff around the head and took him down on the concrete floor of the garage. Plaintiff suffered an abrasion on his shoulder and face.

Plaintiff brings this action pursuant to 42 U.S.C. §1983, alleging in his first cause of action excessive force on the part of defendants Elliott, Powers, Nichols and Ihrig. The second cause of action, asserted solely against defendant Powers, is arrest without probable cause. The third cause of action, against defendant Nichols in his official capacity and against defendant Board of County Commissioners, alleges failure to properly train and supervise personnel in the lawful use of force. Finally, plaintiff brings two pendent state law claims. The fourth cause of action alleges false arrest against defendants Board of County Commissioners and Powers. The fifth cause of action alleges battery against defendants Board of County Commissioners, Powers, Elliott, Nichols and Ihrig.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most

favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Defendants raise the defense of qualified immunity. The plaintiff bears the initial burden of showing (1) the public official's alleged conduct violated the law, and (2) the law was clearly established when the alleged violation occurred. Hinton v. City of Elwood, 997 F.2d 774, 779 (10th Cir.1993). If such a showing is made, the burden shifts to the public official to demonstrate there is no genuine issue of material fact as to whether his actions were "objectively reasonable in light of the law and the information he or she possessed at the time." Id. In making these determinations, the Court must evaluate the evidence in the light most favorable to the nonmoving party. Dixon v. Richer, 922 F.2d 1456, 1462 (10th Cir.1991).

The Court therefore examines whether plaintiff has presented specific facts demonstrating the officers' conduct violated the Fourth Amendment standard governing excessive force claims. Courts look at the facts and circumstances of each case including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of officers or others, and whether

the suspect actively resisted arrest or attempted to evade arrest by flight. Graham v. Connor, 490 U.S. 386, 396 (1989). Reasonableness of the use of force is viewed from the perspective of a reasonable officer on the scene and includes an allowance for the fact that officers are forced to make split second judgments in tense, uncertain, and rapidly changing situations. Id. at 396-97.

Here, the Court concludes defendants have failed to demonstrate the absence of genuine issue of material fact as to the objective reasonableness of their conduct. The necessity of tackling an unarmed man in his sixties under the facts of this case has not been shown. The defendants have attempted to interpret a statement made by plaintiff on the telephone to one officer that plaintiff "might not see him in this life" as a threat, but the Court finds this speculative at best. Even if it were a threat, defendants have failed to show the arrest could not have been effectuated in some less violent manner. The reasonableness of the conduct presents "a factual inquiry best answered by the fact finder." Quezada v. County of Bernalillo, 944 F.2d 710, 715 (10th Cir.1991). Summary judgment is denied on qualified immunity grounds.

Next, defendants rely upon the absolute "quasi-judicial" immunity recognized in Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir.1989) which protects peace officers while executing a facially valid court order. As recognized in Martin v. Board of County Commissioners, 909 F.2d 402, 404-405 (10th Cir.1990), this immunity does not empower officers to execute an

arrest with excessive force or render them absolutely immune for the manner in which they carry out otherwise proper court orders. Moreover, in this case the court order did not specifically direct the arrest of plaintiff. The Court also denies summary judgment on this basis.

Still in reference to the third cause of action, defendants Board of County Commissioners and Nichols move for summary judgment on the basis that plaintiff has made no showing of custom or policy causing this incident. "When a policy is not unconstitutional in itself, the county cannot be held liable solely on a showing of a single incident of unconstitutional activity." Meade v. Grubbs, 841 F.2d 1512, 1529 (10th Cir.1988). The plaintiff's argument in its response brief, that this single incident reveals a county policy of excessive force, does not comport with controlling authority. The actual claim articulated in the Amended Complaint is "failure to train". Inadequate training may constitute an illegal policy or custom for purposes of governmental liability under §1983. City of Canton v. Harris, 489 U.S. 378 (1989). Plaintiff herein has presented virtually no evidence as to the training procedures undergone by Creek County law enforcement personnel. Defendants have noted a written policy of reasonable use of force in the Operations Manual of the Sheriff's Department. (Appendices to Defendant Doug Nichols' Brief in support of motion for summary judgment at 70). Plaintiff only points to an interrogatory in which defendant was asked whether it had a specific policy governing a situation involving the precise facts

of this case, and defendant answered it did not. No requirement exists that a county promulgate guidelines for every imaginable situation. Summary judgment is granted in favor of the Board of County Commissioners and Nichols on the third cause of action.

Defendant Mark Ihrig¹ moves for summary judgment on the basis that, although he was present at the scene, he did not participate in the arrest. Plaintiff has presented no facts to contradict this account. Accordingly, summary judgment is granted in favor of defendant Ihrig on the only causes of action which name him, the first and fifth.

In a similar vein, defendant Powers moves for summary judgment on the excessive force claim, stating that he only escorted plaintiff to the patrol car after plaintiff was handcuffed. Again, plaintiff has responded with no facts indicating Powers' personal participation in the alleged use of excessive force. The Court grants judgment in favor of Powers on the first cause of action.

Also, defendant Elliott has moved for summary judgment as to the first cause of action, arguing that his action of grabbing plaintiff by the arm does not constitute excessive force. The Court agrees, and no evidence of additional actions by Elliott has been presented, other than placing handcuffs on plaintiff after plaintiff had been restrained. Summary judgment is granted in

¹Ihrig is not mentioned in the original Complaint in this case. The Amended Complaint asserts the claims of excessive force and battery against him, but does not list his name in the caption as a defendant. However, the parties have proceeded as though Ihrig were a properly named defendant and the Court will address the fully briefed motion on Ihrig's behalf.

Elliott's favor on the first cause of action.

Both the second cause of action (arrest without probable cause cognizable under §1983) and the fourth cause of action (false arrest) may be resolved on one basis. It is undisputed plaintiff's misdemeanor conviction has recently been upheld by the Oklahoma Court of Criminal Appeals, and that court has denied a request for rehearing.² "If there is a final judgment, the criminal conviction is conclusive evidence in a civil action." Benham v. Plotner, 795 P.2d 510, 513 (Okla.1990). The affirmed conviction establishes the legality of the arrest and precludes relitigation of the issue. See also Franklin v. Thompson, 981 F.2d 1168, 1170-71 (10th Cir.1992). Judgment is granted in favor of defendant Powers on the second cause of action and in favor of Powers and Board of County Commissioners on the fourth cause of action.

Finally, the Court turns to plaintiff's fifth cause of action, battery against defendants Board of County Commissioners, Powers, Elliott, Nichols and Ihrig. As already stated, the record reflects no injurious acts against plaintiff were performed by defendants Powers, Elliott and Ihrig. Plaintiff has not raised a genuine issue of material fact which would necessitate trial to a jury on a claim of battery against those three, and summary judgment is therefore appropriately entered. Defendant Board of County

²By Order dated November 18, 1994, the Court granted defendants leave to file supplemental supporting documents to their summary judgment motions, relating to the finality of the criminal conviction. At the Pre-Trial conference held in this case, plaintiff's counsel stated he had no objection and would file no response to the supplement.

Commissioners raises the Oklahoma Governmental Tort Claims Act, 51 O.S. §151, et seq.. It is undisputed that at the relevant times, defendant Nichols was an employee of the Creek County Sheriff's Department, which is an agency designated to act in behalf of the state or a political subdivision. 51 O.S. §152(2). As an employee, he was authorized to act in behalf of the agency. 51 O.S. §152(5). The Act immunizes state employees from tort liability so long as they are acting within the scope of their employment. Rooks v. State, 842 P.2d 773, 777 (Okla. Ct. App.1992); 51 O.S. §152.1(A). The "scope of employment" involves an employee acting in good faith within the duties of his office. 51 O.S. §152(9).

Plaintiff has made no showing that defendant Nichols' conduct could amount to gross negligence or willful and wanton conduct, such as in Houston v. Reich, 932 F.2d 883 (10th Cir.1991). The case at bar involves a single act, not a series of blows or repeated mistreatment. The Court finds as a matter of law defendant Nichols acted within the scope of his employment at the time in question. He is therefore immune from the claim of battery and summary judgment is granted in Nichols' favor. However, "[t]he state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment. . . ." 51 O.S. §153(A). Therefore, the claim of battery is allowed to proceed as against the defendant Board of County Commissioners. In sum, plaintiff's surviving claims are (1) the first cause of action [use of excessive force]

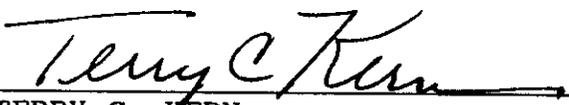
solely as to defendant Nichols and (2) the fifth cause of action [battery] solely as to defendant Board of County Commissioners.

It is the Order of the Court that the motions for summary judgment of defendants Mark Ihrig, George Elliott and Ron Powers are hereby GRANTED in all respects.

It is the further Order of the Court that the motion for summary judgment of defendant Board of County Commissioners of Creek County, Oklahoma is hereby GRANTED as to plaintiff's third and fourth causes of action and is hereby DENIED as to plaintiff's fifth cause of action for alleged battery.

It is the further Order of the Court that the motion for summary judgment of defendant Doug Nichols is hereby GRANTED as to plaintiff's third and fifth causes of action and is hereby DENIED as to plaintiff's first cause of action under 42 U.S.C. §1983 for alleged use of excessive force.

ORDERED this 28 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 29 1994 *ll*

RUDOLPH KELLEY, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, Secretary of)
 Health and Human Services,)
)
 Defendant.)

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

Case No. 93-C-296-BU ✓

ENTERED ON DOCKET

DATE NOV 29 1994

ORDER

This is an appeal from a denial of social security disability benefits. Plaintiff was denied benefits for his alleged disability by the Appeals Council of the Department of Health and Human Services upon the recommendation of the Administrative Law Judge (ALJ). The May 21, 1992 decision of the ALJ became the final decision of the Secretary, of which Plaintiff now seeks judicial review pursuant to 42 U.S.C. § 405(g).

The Court finds that the ALJ has adequately and correctly set forth the relevant facts of this case and that duplication of this effort would serve no useful purpose. The Court, in its review, has been granted power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, Plaintiff alleges the record does not support the determination of the Secretary by substantial evidence. Plaintiff requests that this case be reversed and that this case be remanded to the Secretary for a determination of the monthly benefits

payable to Plaintiff.

Court review of the Secretary's denial of Social Security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g). This Court is not permitted to conduct a trial de novo but is obligated to determine whether there is substantial evidence in the record to support the Secretary's decision. Weakly v. Heckler, 795 F.2d 64 (10th Cir. 1986), Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

The transcript of the proceedings has been carefully reviewed by the Court. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that Plaintiff was not under a disability as defined by the Social Security Act.

The Court finds that the final administrative decision should be affirmed because there is substantial evidence in the record to support the ALJ's decision. Further, correct legal standards were followed in the ALJ's determination that Plaintiff was not disabled because he could perform other work in the national economy. See, Casias v. Secretary of HHS, 933 F.2d 799, 800-01 (10th Cir. 1991).

Accordingly, the Court AFFIRMS the decision of the ALJ, which is the final decision of the Secretary.

ENTERED this 28th day of November, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

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

NOV 29 1994 *RL*

ROBIN C. AUSTIN,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, Secretary of)
 Health and Human Services,)
)
 Defendant.)

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

Case No. 93-C-821-BU

ENTERED ON DOCKET

DATE 11-29-94

ORDER

This is an appeal from a denial of social security disability benefits and supplemental security income disability benefits. Plaintiff was denied benefits for his alleged disability by the Appeals Council of the Department of Health and Human Services upon the recommendation of the Administrative Law Judge (ALJ). The December 7, 1992 decision of the ALJ became the final decision of the Secretary, of which Plaintiff now seeks judicial review pursuant to 42 U.S.C. § 405(g).

The Court finds that the ALJ has adequately and correctly set forth the relevant facts of this case and that duplication of this effort would serve no useful purpose. The Court, in its review, has been granted power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, Plaintiff alleges the record does not support the determination of the Secretary by substantial evidence. Plaintiff requests that this case be reversed and that this case be remanded

for the award of benefits to Plaintiff.

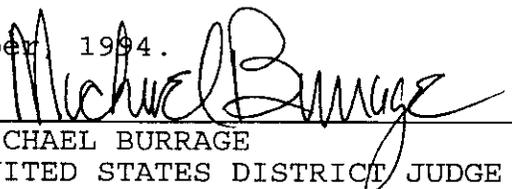
Court review of the Secretary's denial of Social Security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g). This Court is not permitted to conduct a trial de novo but is obligated to determine whether there is substantial evidence in the record to support the Secretary's decision. Weakly v. Heckler, 795 F.2d 64 (10th Cir. 1986), Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

The transcript of the proceedings has been carefully reviewed by the Court. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that Plaintiff was not under a disability as defined by the Social Security Act.

The Court finds that the final administrative decision should be affirmed because there is substantial evidence in the record to support the ALJ's decision. Further, correct legal standards were followed in the ALJ's determination that Plaintiff was not disabled because he could perform other work in the national economy. See, Casias v. Secretary of HHS, 933 F.2d 799, 800-01 (10th Cir. 1991).

Accordingly, the Court AFFIRMS the decision of the ALJ, which is the final decision of the Secretary.

ENTERED this 28th day of November, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

NOV 29 1994 *RL*

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

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

EARL G. HILL,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, Secretary of)
 Health and Human Services,)
)
 Defendant.)

Case No. 93-C-794-BU ✓

ENTERED ON DOCKET

DATE 11-29-94

ORDER

This is an appeal from a denial of social security disability benefits. Plaintiff was denied benefits for his alleged disability by the Appeals Council of the Department of Health and Human Services upon the recommendation of the Administrative Law Judge (ALJ). The December 7, 1992 decision of the ALJ became the final decision of the Secretary, of which Plaintiff now seeks judicial review pursuant to 42 U.S.C. § 405(g).

The Court finds that the ALJ has adequately and correctly set forth the relevant facts of this case and that duplication of this effort would serve no useful purpose. The Court, in its review, has been granted power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, Plaintiff alleges the record does not support the determination of the Secretary by substantial evidence. Plaintiff requests that this case be reversed.

Court review of the Secretary's denial of Social Security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g). This Court is not permitted to conduct a trial de novo but is obligated to determine whether there is substantial evidence in the record to support the Secretary's decision. Weakly v. Heckler, 795 F.2d 64 (10th Cir. 1986), Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

The transcript of the proceedings has been carefully reviewed by the Court. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that Plaintiff was not under a disability as defined by the Social Security Act.

The Court finds that the final administrative decision should be affirmed because there is substantial evidence in the record to support the ALJ's decision. Further, correct legal standards were followed in the ALJ's determination that Plaintiff was not disabled because he could perform other work in the national economy. See, Casias v. Secretary of HHS, 933 F.2d 799, 800-01 (10th Cir. 1991).

Accordingly, the Court AFFIRMS the decision of the ALJ, which is the final decision of the Secretary.

ENTERED this 28th day of November, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

NOV 29 1994 *RL*

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

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

CARMEN BRAY,)
)
Plaintiff,)
)
vs.)
)
HOMELAND STORES, INC.,)
)
Defendant.)

Case No. 93-C-937-BU ✓

ENTERED ON DOCKET

DATE 11-29-94

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 28 day of November, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV 29 1994

VOS ELECTRIC, INCORPORATED,)
)
) Plaintiff,)
)
vs.)
)
THOMAS ALLEN QUIGLEY,)
)
individually and in his)
capacity as business agent)
for International Brotherhood)
of Electrical Workers, Local)
No. 584; and INTERNATIONAL)
BROTHERHOOD OF ELECTRICAL)
WORKERS, LOCAL NO. 584,)
an unincorporated association,)
)
) Defendants.)

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

Case No. 94-C-802-BU

ENTERED ON DOCKET

DATE 11-29-94

ORDER

This matter comes before the Court upon the Motion to Remand filed by Plaintiff, Vos Electric, Incorporated. Defendants, Thomas Allen Quigley, individually and in his capacity as business agent for International Brotherhood of Electrical Workers, Local No. 584 and International Brotherhood of Electrical Workers, Local No. 584, have responded to the motion and upon review of the parties' submissions and the applicable case law, the Court makes its determination.

This case was originally filed in the District Court in and for Tulsa County, Oklahoma. In its Amended Petition filed on August 11, 1994, Plaintiff alleged claims of malicious prosecution, intentional interference with business relationship, civil conspiracy and respondeat superior. Defendants timely filed a Notice of Removal on August 22, 1994. In the Notice of Removal, Defendants claimed that the activities alleged in the Amended

Petition were protected by operation of 29 U.S.C. § 151, et seq.; that the Court had subject matter jurisdiction of this case by virtue of 28 U.S.C. § 1331 and § 1332; and that removal was proper under 28 U.S.C. § 1441.

In its motion to remand, Plaintiff contends that removal was improper for two reasons. First, Plaintiff contends that removal was improper under 28 U.S.C. § 1441(b) because Defendant, Thomas Quigley, is a citizen of the State of Oklahoma. According to Plaintiff, section 1441(b) specifically precludes removal if one of the defendants is citizen of a state in which an action is brought. Second, Plaintiff contends that removal is improper under 28 U.S.C. § 1441(a) because federal question jurisdiction does not exist since Plaintiff's claims all arise under state law rather than federal law.

Defendants, in response, do not dispute that removal was precluded under 28 U.S.C. § 1441(b) by virtue of Defendant, Thomas Quigley's citizenship. However, they contend that removal was proper under 28 U.S.C. § 1441(a) because all of Plaintiff's claims fall within the scope of section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, and are preempted by the NLRA. Because Plaintiff's claims are preempted, Defendants contend that such claims arise under federal law. Consequently, federal question jurisdiction exists and removal is proper under 28 U.S.C. §1441(a).

The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint rule," which provides that

"federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). Under the well-pleaded complaint rule, the plaintiff is the master of its claim and it may avoid federal jurisdiction by exclusive reliance on state law. Id. Further, it is settled that a case may not be removed on the basis of a federal law defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint and even if both parties concede that the federal defense is the only question truly at issue. Caterpillar, 482 U.S. at 393, 107 S.Ct. at 2430.

In this case, the claims of Plaintiff are based solely on state law theories of malicious prosecution, intentional interference with business relationship, civil conspiracy and respondeat superior. It is clear that Defendants removed this case based upon its defense that Plaintiffs' claims are preempted by the NLRA. Under the well-pleaded complaint rule, such defense does not provide grounds for removal.

An independent corollary does exist to the well-pleaded complaint known as the "complete preemption" doctrine, pursuant to which the Supreme Court has determined that the preemptive force of a statute is so extraordinary that it converts an ordinary state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Caterpillar, 482 U.S. at 393. Once an area of state law has been completely preempted, any claim

purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law. Id. One example of the complete preemption doctrine is a case arising under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, which gives district courts jurisdiction over disputes involving collective bargaining agreements and authorizes the courts to fashion a body of federal common law for the enforcement of such agreements. Id.

Defendant does not claim that Plaintiff's claims are preempted by section 301, however. Rather, it claims that Plaintiff's claims are preempted by section 7 of the NLRA. Section 7 provides that employees shall have the right to form, join, or assist a labor organization. 29 U.S.C. § 157. Unlike cases arising under section 301, section 7 does not confer original federal court jurisdiction over actions within their scope. United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus., Local No. 57 v. Bechtel Power Corp., 834 F.2d 884, 886 (10th Cir. 1987), cert. denied, 486 U.S. 1055 (1988). Instead, actions under section 7 of the NLRA are committed in the first instance to the National Labor Relations Board. Id.; Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1397 (9th Cir. 1988).

Because section 7 does not confer original federal court jurisdiction and because only state court actions which could originally have been filed in federal court may be removed by a defendant, see, Caterpillar, 482 U.S. at 392, the Court finds that

removal by Defendants in this case was improper and that remand is required pursuant to 28 U.S.C. § 1447(c).

Accordingly, the Court GRANTS Plaintiff's Motion to Remand (Docket No. 5). the Clerk of the Court is directed to mail a certified copy of this Order to the Clerk of the District Court in and for Tulsa County, Oklahoma. In light of the Court granting Plaintiff's motion, the Court declares MOOT Plaintiff's Application to Amend Complaint (Docket No. 8) and Defendants' Motion to Dismiss or in the Alternative Motion for Judgment on the Pleadings (Docket No. 10).

ENTERED this 29th day of November, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

DATE: NOV 29 1994

FILED
NOV 28 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

BONNIE S. MASTERSON,)
)
 Plaintiff,)
)
 vs.)
)
 RESOLUTION TRUST CORPORATION)
 as Receiver of SAVERS SAVINGS)
 ASSOCIATION, a Federal Mutual)
 Savings and Loan Association,)
 and ONTRA, INC., a Texas)
 corporation,)
)
 Defendants.)

Case No. 94-C-947-B

ORDER

Before the Court for consideration is a Motion to Dismiss for lack of subject-matter jurisdiction (Docket #3) filed by Defendant Resolution Trust Corporation ("RTC"), alleging that the Court has no jurisdiction to entertain claims for specific performance against the RTC.

Plaintiff Bonnie S. Masterson ("Masterson") alleges that Defendants RTC and Ontra, Inc., breached a contract to sell two parcels of land to her for \$67,506 each. Ontra allegedly served as the RTC's agent during the contract-negotiation proceedings. Masterson seeks specific performance of the contract, damages of \$1,000, or, if specific performance is not awarded, damages of \$135,012. The RTC alleges that the Court has no jurisdiction to award Masterson non-monetary relief due to provisions in the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which limit the jurisdiction of the courts in such matters.

9

Twelve U.S.C. § 1821(j) states that

[e]xcept as provided in this section, no court may take any action ... to restrain or affect the exercise of powers or functions of the Corporation as a conservator or as a receiver.

While the Tenth Circuit has not addressed the reach of § 1821(j), other circuits uniformly hold that a court is barred from providing injunctive relief.¹ The purpose of the statute is to permit the RTC as conservator or receiver to "function without judicial interference that would restrain or affect the exercise of its power." Rosa v. Resolution Trust Corporation, 938 F.2d 383, 397 (3d Cir. 1991). The RTC's power includes the ability to dispose of assets of a failed savings and loan institution. Ward, 996 F.2d at 104. *See also* Pyramid Construction Co. v. Wind River Petroleum, Inc., 1994 WL 519024 (D.Utah 1994) ("Clearly, the disposition of a failed thrift's assets ... is one of the quintessential statutory powers of the RTC as a receiver."); and 12 U.S.C. § 1821(d)(2)(E) (giving the RTC the express power to "realize upon the assets of the institution"). When Congress prohibits a federal court from granting a certain type of remedy,

¹Telematics International, Inc. v. NEMLC Leasing Corporation, 967 F.2d 703 (1st Cir. 1992); Volges v. Resolution Trust Corporation, 32 F.3d 50 (2d Cir. 1994); Gross v. Bell Savings Bank, 974 F.2d 403 (3rd Cir. 1992); In re Landmark Land Co. of Oklahoma, Inc., 973 F.2d 283 (4th Cir. 1992); Carney v. Resolution Trust Corporation, 19 F.3d 950 (5th Cir. 1994); United Liberty Life Insurance Co. v. Ryan, 985 F.2d 1320 (6th Cir. 1993).

that limitation is jurisdictional.²

Several courts have spoken directly to the issue here: whether a court may order specific performance of a sales contract to which the RTC is a party. They agree that a court cannot do so, even if the RTC breaches an otherwise valid sales contract.³ As the court stated in Manir Properties v. Resolution Trust Corporation, 1993 WL 381445 (E.D.Pa.):

The statutory scheme and provisions make clear ... that judicial actions seeking injunctions and/or rescissions of sales and/or transfers of real property, specific performance of alleged oral agreements affecting interests in real estate and similar types of equitable relief are plainly and simply not permitted under the applicable statutes.

Id. at 2.

The only limit on the RTC's freedom from court injunction is when it acts clearly outside its statutory powers. See Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp., 489 U.S. 561, 572-3 (1989). However, if the RTC is acting within its statutory powers, the fact that it carries out those duties improperly will not invoke the court's jurisdiction to allow injunctive relief. "[W]here the RTC performs functions assigned it

²See Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981) (prohibitions against enjoining or restraining Internal Revenue Service assessments in the Tax Injunction Act constitute limitations on federal court jurisdiction).

³See Volges, 32 F.3d 50; Jenkins-Petre Partnership One v. Resolution Trust Corporation, 1991 WL 160317 (D.Colo.); Shoreline Group, Ltd. v. Commonwealth Federal Savings and Loan Association, 1991 WL 496658 (S.D.Fla.); Back to the Bible Apostolic Faith Church v. Resolution Trust Corporation, 1994 WL 146821 (D.Md.).

under the statute, injunctive relief will be denied even where the RTC acts in violation of other statutory schemes." Gross, 974 F.2d at 407.

The Volges plaintiff argued, as does Masterson here, that the RTC is not statutorily authorized to breach its own contracts. Therefore, the RTC was acting outside its powers by doing so and is subject to the injunctive power of the court. The Volges court was unpersuaded by this argument. "The fact that the sale might violate Volges's state law contract rights does not alter the calculus ... the fact that the RTC's actions might violate some other provision of law does not render the anti-injunction provision inapplicable." Volges, 32 F.3d at 52. *See also* Back to the Bible, 1994 WL at 4 (In denying specific performance of a land-sale contract, the court stated that "even if the RTC acts unlawfully or improperly in carrying out its statutory powers and duties, section 1821(j) prohibits federal courts from restraining its actions.")

This prohibition on equitable relief does not leave the plaintiff without a remedy, however, because a plaintiff may seek money damages from the RTC for breach of contract, as Masterson is doing in this case. "Although FIRREA prevents courts from enjoining the actions of the RTC when its acts within its statutory powers, 'it does not deprive plaintiffs, if wronged, of any other remedy that would not 'restrain or affect' the exercise of the receiver's or conservator's powers or functions.'" Back to the Bible 1994 WL at 6, *citing* Rosa, 938 F.2d at 399-400. *See also* National Trust v. Federal Deposit Insurance Corporation, 21 F.3d 469 (D.C.

Cir. 1994).

Masterson points to Homeland Stores, Inc. v. Resolution Trust Corporation, 17 F.2d 1269 (10th Cir. 1994) in support of her proposition that the Court has jurisdiction to hear her claim for specific performance. In Homeland, she alleges, the court found that the RTC's actions were taken as "conservator" rather than "receiver", and that § 1821(d), which contains a jurisdictional bar, refers primarily to the RTC's actions as "receiver" rather than as "conservator". However, the Court believes that Homeland is not controlling in this case. The Homeland court expressly declined to address the issue of whether § 1821(j) prohibits injunctive relief against the RTC. Id. at 1272. Rather, the issue addressed in Homeland dealt solely with whether the plaintiff's claims for monetary damages were subject to FIRREA's administrative review process, thereby requiring exhaustion of remedies against the RTC before filing a court action.

The RTC's Motion to Dismiss the claim for specific performance is hereby GRANTED. Remaining for adjudication in this case are Masterson's claim for damages against both the RTC and Ontra.

IT IS SO ORDERED THIS 28th DAY OF NOVEMBER, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE NOV 29 1994

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND ASSIGNS)
OF RALPH P. NELSON, DECEASED;)
STATE OF OKLAHOMA, ex rel.)
OKLAHOMA TAX COMMISSION; COUNTY)
TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

NOV 28 1994

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

CIVIL ACTION NO. 94-C 449B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day
of Nov, 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 its disclaimer; and the Defendants, **The Unknown**
Heirs, Executors, Administrators, Devisees, Trustees, Successors
and Assigns of Ralph P. Nelson, Deceased, appear not, but make
default.

The Court being fully advised and having examined the
court file finds that the Defendant, **State of Oklahoma ex rel**

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

Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint via certified mail on May 4, 1994.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ralph P. Nelson, 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 23, 1994, and continuing through September 27, 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 Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ralph P. Nelson, 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 address of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ralph P. Nelson, 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 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 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 May 19, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Disclaimer on June 16, 1994; and that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ralph P. Nelson, 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 SEVEN (7), BLOCK EIGHTEEN (18), SUMMIT
HEIGHTS ADDITION TO THE CITY OF TULSA, 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 Ralph P. Nelson and of judicially determining the heirs of Ralph P. Nelson.

The Court further finds that Ralph P. Nelson became the record owner of the real property involved in this action by virtue of that certain General deed dated December 12, 1987, from Lawrence D. Stanberry and Susan D. Stanberry, husband and wife, which General Deed was filed on December 17, 1987, in Book 5070, Page 449, in the records of Tulsa county, Oklahoma.

The Court further finds that Ralph P. Nelson died on an unknown date, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 28640 was issued by the Oklahoma State Department of Health certifying Ralph P. Nelson's death.

The Court further finds that on February 14, 1985, Lawrence D. Stanberry and Susan D. Stanberry, executed and delivered to FIRSTIER MORTGAGE CO. their mortgage note in the amount of \$30,302.00, 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, Lawrence D. Stanberry and Susan D. Stanberry, husband and wife, executed and delivered to

FIRSTIER MORTGAGE CO. a mortgage dated February 14, 1985, covering the above-described property. Said mortgage was recorded on February 20, 1985, in Book 4845, Page 2112, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVING & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on September 20, 1988, in Book 5129, Page 90, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 29, 1989, LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT. This Assignment of Mortgage was recorded on March 29, 1989, in Book 5174, Page 1666, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, the Defendant, Ralph P. Nelson, 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 March 1, 1990 and September 1, 1990.

The Court further finds that Ralph P. Nelson, 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 \$63,573.67, 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 accrued and accruing.

The Court further finds that Plaintiff is entitled to a judicial determination of death of Ralph P. Nelson and to a judicial determination of the heirs of Ralph P. Nelson.

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 \$11.00 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 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, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ralph P. Nelson, 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 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 \$63,573.67, 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 6.48 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 death of Ralph P. Nelson be and the same is hereby judicially determined to have occurred on an unknown date, 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 Ralph P. Nelson, Deceased, have been discovered and it is hereby judicially determined that Ralph P. Nelson, Deceased, has no known heirs, executors, administrators, devisees, 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 \$11.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ralph P. Nelson, 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 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 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 \$11.00, 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 #8076
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 449B

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE NOV 29 1994

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WARD A. CHENEY, JR.; CATHY L.
CHENEY; COUNTY TREASURER, Tulsa
County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

FILED

NOV 28 1994

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

) CIVIL ACTION NO. 93-C-814-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 21 day of Nov,

1994, upon the Motion of the Plaintiff, United States of America, acting through the Small Business Administration, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendants, **Ward A. Cheney, Jr. and Cathy L. Cheney**, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion, Declaration and Supplement to Motion were mailed by first-class mail to **Warren G. Morris**, Attorney for Defendants, **Ward A. Cheney, Jr. and Cathy L. Cheney**, 1918 East 51st Street, Suite 1-E, Tulsa, Oklahoma 74105, and by first-class mail to all answering parties and/or counsel of record.

~~U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA~~

The Court further finds that the amount of the Judgment rendered on April 20, 1994, in favor of the Plaintiff United States of America, and against Defendants, **Ward A. Cheney, Jr. and Cathy L. Cheney**, with interest and costs to date of sale is \$100,345.50.

The Court further finds that the appraised value of the real property at the time of sale was \$60,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered April 20, 1994, for the sum of \$40,000.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 3rd day of October, 1994.

The Court further finds that the Plaintiff, United States of America, acting through the Small Business Administration, is accordingly entitled to a deficiency judgment against the Defendants, **Ward A. Cheney, Jr. and Cathy L. Cheney**, as follows:

Principal Balance Plus Pre-Judgment Interest as of 20 April 1994	\$ 98,720.67
Interest From Date of Judgment to Sale	1,097.83
Abstracting	155.00
Publication Fees of Notice of Sale	147.00
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$100,345.50
Less Credit of Appraised Value	<u>\$ 60,000.00</u>
DEFICIENCY	\$ 40,345.50

plus interest on said deficiency judgment at the legal rate of 6.47 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America acting through the Small Business Administration have and recover from Defendants, **Ward A. Cheney, Jr. and Cathy L. Cheney**, a deficiency judgment in the amount of **\$40,345.50**, plus interest at the legal rate of 6.48 percent per annum on said deficiency judgment from date of judgment until paid.

S/ WILLIAM R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB:css

the Appeals Council concluded there was no basis for review of the decision issued on June 10, 1992, the Administrative Law Judge's decision became the final decision of the Secretary in this case. Plaintiff seeks review of this final decision regarding plaintiff's earlier alleged onset date of disability.

The issues to be determined are whether the Secretary abused its discretion by (1) failing to reopen the 1986 application in view of the medical evidence, (2) violating plaintiff's right to due process, and (3) failing to inquire of a vocational expert as to Mrs. Jenks' mental residual functional capacity.

Born January 28, 1937, Mrs. Jenks is married with 4 adult sons, has an 8th grade education, and was previously employed as a vaccinator and debeaker of chickens, food cannery packer, and most recently, as a school custodian. Plaintiff alleges she suffers from an anxiety disorder, in particular, agoraphobia and panic attacks. In addition, medical history reveals plaintiff was born with one kidney, an extra rib on both sides, had an hysterectomy in 1977 for removal of double uterus, has hypertension, tachycardia, emphysema, diabetes and glaucoma.

The claimant testified she experienced panic attacks, high blood pressure, dizziness, weakness, shakiness, racing heart beat, depression and anxiety prior to March 1, 1989. She listed her medications as Valium 10 mg three times a day, Mellaril (for a short time), nitroglycerin patches, Tranxene, Tenormin. Additional medications for the relevant time period were Inderol, Maxzide, Vistaril, Premarin 1.25 and Timoptic and cream for her eyes. (Tr.

62, 68, 177, 224, 230, 264). She "used to crochet embroidery ... fish" but stopped in 1986 or last of 1985. Mrs. Jenks stated she had acquaintances but no friends, in fact, didn't like to be around people. Since she worked from 3:30 in the afternoon to 12:00 midnight as a custodian, she had very little occasion to be around other people. On the few instances when someone else was around at work, she was argumentative. (Tr. 69). During this same time, her daughter-in-law and son were living with her, and although testimony from Mrs. Jenks indicates feelings of hostility, she nevertheless had the mental capacity to continue her daily functions, manage household chores, go to work and maintain self-care and personal hygiene. Even though she experienced no pain nor any limitations due to pain, claimant testified she had panic attacks four or five times a week, some of which would last all day. She lost weight, was scared to leave the house, would sit and look out the window, and would throw things. In April or May 1986 Mrs. Jenks related a specific pivotal event which occurred when she was at the grocery store. "... I started sweating all over, I got weak and shaking and everything spun around ... I was hanging onto the counter ... my heart was just beating so fast, I thought I was going to die." (Tr. 58-59). According to Mrs. Jenks after this time, it became increasingly more difficult for her to function outside her home. After November of that year, she did not return to work because she felt too weak and scared to leave the house. (Tr. 60).

The Social Security Act defines disability as the "inability

to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted ... for a continuous period of not less than 12." 42 U.S.C. §416(i)(1), §423(d)(1)(A). An individual is under a "disability" only if the impairment is of such severity that it not only prevents the successful performance of his past work but also, considering his age, education, and work experience, prevents the successful performance of any other work that exists in significant numbers in the national economy. 42 U.S.C. §423(d)(2)(A), §1382c(a)(3)(B). A "physical or mental impairment" is defined as an anatomical, physiological, or psychological abnormality which is demonstrable by acceptable clinical and laboratory diagnostic techniques. 42 U.S.C. §423(d)(3).

First, plaintiff contends the Secretary abused her discretion by failing to reopen the 1986 disability application for a variety of reasons: (1) the ALJ effectively accomplished a de facto reopening of the November 1986 application at the hearing held May 5, 1992; (2) Mrs. Jenks allegedly suffers from a mental impairment which precluded her from attending the earlier 1987 hearings; and (3) the notice of dismissal in June of 1988 (Tr. 267-269) was insufficient, depriving plaintiff of her Fifth Amendment right to due process.

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable

mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

During the hearing held May 5, 1992 before the Administrative Law Judge ("ALJ"), plaintiff's counsel requested that the 1987 application be reopened to evaluate claimant's condition. Counsel contended there was new and material medical evidence to show Mrs. Jenks could not attend the 1988 hearing. The ALJ agreed to allow plaintiff to present the evidence but reserved review of the additional medical submitted until a later date. The time frame reviewed would be November 12, 1986 through March 1, 1989. (Tr. 54). Under 20 C.F.R. 404.988(b), a case may be reopened for good cause, within four years of the date of the notice of the initial determination. As defined in 404.989, there is good cause if new and material evidence is furnished; a clerical error in computation

or recomputation of benefits was made; or the evidence that was considered in making the determination or decision clearly shows on its face that an error was made. At the hearing however, the ALJ stated he was reopening the previous application for review only on the basis of whether any of that previous evidence was relative to the entire matter. As a general rule, absent any colorable constitutional claim and no evidentiary hearing having been conducted on request to reopen, federal courts lack jurisdiction to review a decision by the Secretary not to reopen a previous claim for benefits. Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); Cottrell v. Sullivan, 987 F.2d 342 (6th Cir. 1992); Kasey v. Sullivan, 3 F.3d 75 (4th Cir. 1993). There is no indication the previous 1986 claim was reconsidered on the merits. Furthermore, ... the mere allowance of evidence from the earlier applications, without more, cannot be considered a reopening of the earlier case. Burks-Marshall v. Shalala, 7 F.3d 1346, 1348 (8th Cir. 1993). As was explained in Burks-Marshall, treating the admission of evidence from prior applications as a waiver of the Secretary's power not to reopen would certainly not be in the best interest of claimants. Id. at 1348. This reconsideration of prior evidence to determine whether it was relevant is neither a constructive nor a de facto reopening of the 1986 application. Nothing in the record indicates the ALJ used the prior evidence in his denial of the plaintiff's claim for the relevant time period. The ALJ correctly concluded that "no good cause has been shown, and further finds that the claimant's application dated November 12,

1986, and finally denied April 21, 1987, is not being reopened." (Tr. 16-17).

Secondly, plaintiff argues that the mental condition of Mrs. Jenks precluded her from attending the hearings in 1988. The record indicates that on more than three occasions the hearing was rescheduled. During this period claimant was represented by counsel, was able to respond to the notices, and certainly able to govern her own business affairs. There is no evidence in this record that plaintiff's mental impairment was so severe that she was incapable of knowing her rights or the consequences of her actions, or lacked the mental capacity to understand the review process. The ALJ determined the provisions of Social Security Ruling 91-5p did not apply, and this Court concurs.

Thirdly, plaintiff contends that the June 1988 Notice of Dismissal was so deficient as to violate her Fifth Amendment right to due process. The June 1988 Notice of Dismissal, plaintiff argues, is devoid of language advising her that "she would be denied her back benefits if she failed to continue the appeals process..." While several district courts have considered this issue and concluded that at a minimum it creates a colorable constitutional claim, the plaintiff has presented no evidence to show a causal connection between the insufficiency of the Notice and her failure to seek further review. Burks-Marshall, 7 F.3d at 1349. In reviewing the instant case, the Court finds no testimony whatsoever which would even whisper the existence of a relationship between the Notice and plaintiff's failure to appear or that

claimant relied to her detriment on the inadequate notice. Absent this causal connection, no colorable constitutional claim has been presented, and this Court lacks jurisdiction to review the Secretary's decision not to reopen. Califano, 430 U.S. at 107-08, 97 S.Ct. 985-86; Cottrell, 987 F.2d at 345.

Finally, plaintiff asserts that the ALJ failed to fully develop the record by failing to permit testimony from the vocational expert, and consequently, prohibited plaintiff from questioning the expert about the claimant's mental residual functional capacity. Plaintiff contends the medical evidence is replete with findings of the claimant's anxiety disorder, and therefore, the testimony of a vocational expert was proper to assess Mrs. Jenks' condition prior to 1989.

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, *i.e.*, the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

At Step 1, the ALJ found that the claimant had not performed substantial gainful activity since April 22, 1987. Step 2 requires a determination of whether the claimant has a vocationally severe impairment. Although the medical record of Mrs. Jenks reveals a variety of dysfunctions, the ALJ concluded claimant's impairments of mental illness and emphysema "are expected to interfere slightly more than minimally with the claimant's work-related activities." (Tr.40). Determination of whether the claimant's impairments prior to March 1, 1989 meet or equal the signs, symptoms, and laboratory findings specified for any impairment described in the Listing of Impairments in Appendix 1, Subpart P, of the Regulations No. 4 are evaluated in Step 3.

To assist the ALJ in his determination of the earlier onset date, plaintiff presented some additional medical history. A

review of the relevant medical record reveals that claimant was hospitalized for acute anxiety on June 10, 1981 by Dr. David Dean. According to the progress notes, Mrs. Jenks had recently separated from her husband and was fearful something "awful will happen." Dr. Dean noted the next day she was less anxious but was continuing with the separation from her husband. Follow-up a month later indicated claimant's anxiety level was down. (Tr. 250-263). Earlier entries as far back as December 1965 confirm hypertension medication, hormonal treatment, and Valium 10 mg. Amid the various medical records and the apparent stressful environment of plaintiff, it appears Dr. Webb initially prescribed Valium for elevated heart rate but never did any tests. (Tr. 189). Albeit the claimant is "nervous," appears "upset," "forgetful," "absent-minded," and experienced "insomnia." Progress notes completed assumedly by Dr. Webb on April 13, 1985, recited an episode when claimant experienced "air hunger" with difficulty in speech, was "very forgetful and absent-minded." His notes also indicated claimant quit taking Valium "about 1 month ago... ." (Tr. 246-249). Plaintiff testified, and the medical evidence confirms, that in April 1986 while at a grocery store she had a "sudden onset of tachycardia and full-headed feeling." (Tr. 58-59, 146, 189). Approximately one month later, claimant became "acutely distressed" with complaints of fleeting chest pains when informed that her daughter-in-law had been killed in a motor vehicle accident. Again in 1986 on June 8, June 28 and August 11, claimant was seen in the emergency room, complaining of nervousness, anxiety and chest

pains. (Tr. 151-154). Contemporaneous with these 1986 emergency room episodes, Mrs. Jenks was seen by Lisa Allen, BSW, with Grand Lake Mental Health Center. Ms. Allen noted, "Claimant arrived on time, dressed neatly but very casually; has taken off work to come from Colcord for appointment; states uncertainty why Dr... referred her. Gives history of heart and blood pressure problems and states these are probably due to her bad life. Problem with breathing associated with anxiety began 25 years ago." She then goes on to relate claimant's abusive childhood and abusive relationship with her alcoholic husband. Nonetheless, claimant feels support from her 3 sons, likes her job and has interests. (Tr. 191-192). A subsequent visit later in August 1986 confirmed claimant's "spell in the grocery store" and trip to the emergency room. Mrs. Jenks was told she needed treatment for a defective heart valve as her blood pressure had climbed to 210/110. As a result, claimant was referred to Siloam Springs Medical Center, "where she was told the problem was 'change of life.'" (Tr. 188).

Thereafter claimant was presented for psychiatric examination to David B. Dean, M.D., on January 6, 1987. Dr. Dean recorded plaintiff was alert, oriented and entirely appropriate throughout the examination. She was neat in appearance and attractively groomed. Mrs. Jenks chronologized events of her life, relating an abusive childhood, the death of her mother which necessitated discontinuing her public school education in the 8th grade and generally becoming "the woman of the house." She "states that she is able to do her housework, take care of her children, and look

after the needs of her husband and is generally not overwhelmed with anxiety." Although upon occasion she has the need to be alone "to compose herself," Mrs. Jenks denied ever having experienced hallucinations or delusional thinking. Typical daily activities included housework, cooking, washing, and shopping. Mrs. Jenks denied going to civic organizations or church. She has no hobbies nor friends. Dr. Dean described claimant as cordial, in contact with reality at all times, spontaneous in verbal productions and logical at all times. "She feels herself to be a worthwhile person and has not contemplated suicide." His diagnosis of plaintiff consisted of (1) anxiety neurosis, chronic, moderate in severity; (2) schizoid personality¹; and (3) menopausal syndrome, chronic, severe. The results of this psychiatric examination provide the psychiatric baseline from which to formulate subsequent psychological evaluations. In order to rule out significant heart problems, Dr. Dean did refer Mrs. Jenks to an internist for exercise treadmill testing on January 13, 1987. Although the target heart rate was not reached because of lingering effects of hypertension medication, the impression was adequate low level treadmill without evidence of ischemia. And even though her pulmonary function was impaired, it was still adequate for a fair level of exercise. As far as the rest of the testing, there was no ST depression significant enough to correlate with coronary artery disease and no arrhythmias occurring. (Tr. 200).

¹Stedman's Medical Dictionary, 25th Edition (1990), defines schizoid as "socially isolated, withdrawn, having few (if any) friends or social relationships."

Plaintiff was again presented to Dr. Dean for psychiatric examination on September 29, 1989. His report included, "Mrs. Jenks was alert, oriented, but extremely anxious during the examination." Her history is consistent with the previously related abusive childhood, panic attacks, numerous avoidances, and reclusive lifestyle. Nevertheless, Dr. Dean stated she denies experiencing auditory or visual hallucinations, denies delusional thinking, has never experienced "a nervous breakdown," and never been hospitalized in a psychiatric hospital. Although Mrs. Jenks has sought psychiatric care at local mental health clinics near her home, she was currently undergoing no psychiatric care. Mrs. Jenks admitted mild to moderate depression and felt herself to be less than a worthwhile person, but denied suicidal ideas. She was able to get out of bed every day, manage her own matters, and assume responsibility for household management. Dr. Dean related she was oriented to time, place and person; memory for recent, remote and past events was entirely intact; able to recall dates of significant events of her own personal life; possessed a fund of information commensurate with attainment of secondary school education; able to use simple arithmetic easily and accurately; gave responses which were concrete in their content and symbolism to proverb interpretation and logical judgment to hypothetical questions. Although his prognosis for recovery was poor, Dr. Dean's medical assessment of Mrs. Jenks concluded she demonstrated no evidence of psychotic disorganization now or at any time in the past. He did conclude that she experiences anxiety which was

profound and of chronic duration, which in the work place, may exceed tolerable limits and thus prevent her from continuing employment. (Tr. 166-167). When later questioned by the Disability Examiner as to whether Mrs. Jenks was agoraphobic, Dr. Dean emphasized that although her condition had deteriorated significantly, "she is not agoraphobic." (Tr. 169).

From the transcript of the record it is apparent the medical information for the relevant period² from Drs. Bland, McCollum and Webb were provided at the behest of plaintiff. (Tr. 158-159, 207-209, 230-232). Although these records confirm treatment for high blood pressure and tachycardia, the aggravation by severe anxiety and agoraphobia indicated by Dr. Webb is not confirmed by the previous psychiatric examination. Clinical data provided by Dr. Bland on 7-25-88 indicated blood pressure of 200/120, tachycardia, a fear of having blood pressure taken, and feeling nervous and upset. These family practice physicians proffer conclusory observations of plaintiff but are not supported by objective evidence and are at variance with the conclusions of the examining psychiatric physician. Under 20 C.F.R. 404.1527 et seq., the ALJ weighed the medical opinions of the claimant's treating physicians, accurately deciding the weight given in view of the examining relationship. While substantial weight must be given to the testimony of claimant's treating physician(s) unless good cause is shown, the treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v.

²The relevant period under consideration is from April 22, 1987, through February 28, 1989.

Bowen, 851 F.2d 297 (10th Cir. 1988). Thus, the ALJ appropriately concluded this medical data was unsupported and therefore reduced in weight accordingly. This medical data was neither new nor material, nor did it furnish good cause for the reopening of the November 12, 1986 application. (Tr. 41-42). Furthermore, the ALJ found, and the Court agrees, that inasmuch as these documents (Exhibits 22, 25 and 43)³ constitute the medical evidence for the April 21, 1987, through February 28, 1989 period, there is no basis for establishing disability under any applicable standard of the Social Security Act. (Tr. 41).

Interestingly, plaintiff points to the examination by John W. Hickman, clinical psychologist, which was conducted on September 1990. At the conclusion of extensive neuropsychological testing, Dr. Hickman's diagnostic impression of plaintiff was cerebral degeneration, unspecified depressive disorder with recurring episodes of agoraphobia. (Tr. 216-222). In mid-November 1990, Dr. Hickman was asked to respond concerning whether Mrs. Jenks was disabled at, or prior to, November 17, 1986, due to her anxiety. He determined that his findings suggested Mrs. Jenks has a significant degree of impairment to complex sensory functions, higher level cognitive functions, a depressive syndrome characterized by a plethora of symptoms, all resulting in a marked restriction of activities of daily living, social functioning, and work-type settings. "It is my belief that Mrs. Jenks was probably

³Exhibit 22 appears at pages 158-159; Exhibit 25 appears at pages 169-170; and Exhibit 43 appears at pages 232 of the Transcript of the Record.

experiencing a non-exertional mental residual functioning capacity impairment to such a degree, that she was not able to sustain employment at, or prior to, November of 1986. This is a speculative statement, but it is also based upon the knowledge that chronic anxiety disorders are progressive." (Tr. 229). While it is true that a treating physician may provide a retrospective diagnosis of a claimant's condition, this is not the situation here. Millner v. Schweiker, 725 F.2d 243, 246 (4th Cir. 1984). Further, this retrospective opinion can hardly be given the same weight as the medical data recorded in 1986 contemporaneous with the treatment received by Mrs. Jenks. The relevant analysis is whether the claimant was actually disabled prior to March 1, 1989. A retrospective diagnosis without evidence of actual disability is insufficient. This is especially true where the disease is progressive. See Potter v. Secretary of HHS, 905 F.2d 1346, 1348-49 (10th Cir. 1990). The Court agrees with the determination of the ALJ in "that no matter how sincere the opinion, it is not based upon first-hand knowledge of the claimant's mental status as of the time questioned. To the extent that it attempts to extrapolate from prior psychiatric reviews, it also must fail inasmuch as the prior documents were determined to show no basis for disability for the claimant." (Tr. 41). Therefore, the ALJ properly determined at Step 3 of the sequential evaluation process that the claimant's impairments do not meet or equal the signs, symptoms and laboratory findings required for any listed impairment prior to March 1, 1989.

According to 20 C.F.R. §404.1520a, if a claimant has a severe

impairment(s), but the impairment(s) neither meets nor equals the listings, a residual functional capacity assessment must then be completed. The ALJ evaluated Mrs. Jenks' residual functional capacity as part of the fourth step of the disability analysis. From review of the previously indicated medical reports of Dr. Dean, the medical data from Drs. McCullom, Webb and Bland, the clinical notes of Siloam Springs Hospital and claimant's testimony, the ALJ found that the claimant was moderately restricted in her activities of daily living, did experience some anxiety problems but was able to function appropriately. With respect to her social functioning difficulties, Mrs. Jenks was able to get along with her relatives, liked her job, was alert and oriented with memory fully intact and no deficits in concentration, which indicated only a slight mental impairment. For the relevant time period, none of the doctors reported any episodes of deterioration or decompensation, prohibiting claimant from work-related activities. And even when treadmill testing was administered, the claimant had no significant problems despite the minimal restrictions in breathing. Appropriately the ALJ found that the claimant had no significant restrictions on her physical capabilities as to prevent her from performing medium exertional work. Taking into consideration her distinct aversion to socializing, the ALJ concluded that her mental limitations would require a job that had limited contact with the public.

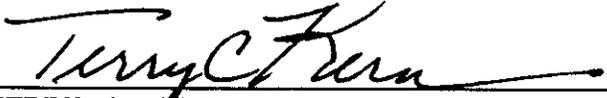
Step 4 of the sequential evaluation process requires a determination of whether the claimant can perform her past relevant

work. Mrs. Jenks previous employment included vaccinator and debeaker of chickens, food cannery packer and school custodian. According to the claimant's testimony, she worked "all those years just staying by myself." (Tr. 64). At school she worked as a custodian from 3:30 in the afternoon to 12:00 midnight, and only occasionally encountered any other people. (Tr. 70). If she became dizzy or weak, Mrs. Jenks would "go sit in the janitor's room" (Tr. 67). Neither the poultry processing clerk nor the school custodian require extensive contact with the public. The record revealed an impairment that was not especially severe, and the mere existence of a psychoneurosis in this context does not constitute a disability. Dressel v. Califano, 558 F.2d 504, 508 n.7 (8th Cir.1977). Based upon the medical record and review of the Psychiatric Review Technique form completed by the ALJ, the Court concludes there is substantial evidence for the ALJ to determine that Mrs. Jenks was able to perform her prior relevant work. Plaintiff has not met her burden of proving that she was precluded from performing her past work for a continuous period of at least twelve months during the relevant time period. The Tenth Circuit has said that the ALJ is under no obligation to elicit the testimony of a vocational expert if the claimant has failed to meet her burden. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992). Consequently, the ALJ was not required to produce the vocational expert for questioning by plaintiff's counsel.

In conclusion, this Court determines there is sufficient relevant evidence to support the ALJ's determination that plaintiff

was able to perform her prior work from April 22, 1987 through February 28, 1989. The claimant was not under a "disability" and the Secretary's determination allowing claimant benefits under Title II of the Social Security Act commencing March 1, 1989, remains in effect and is therefore, AFFIRMED.

IT IS SO ORDERED THIS 23 DAY OF NOVEMBER, 1994.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would

have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

Here, the inquiry ended at step two, with the Administrative Law Judge ("ALJ") finding claimant's impairments, whether singly or in combination, were not severe enough to limit her ability to do basic work activities. (R.O.A. 27). The ALJ's decision was issued May 19, 1992, and the Appeals Council denied the plaintiff's request for review on February 8, 1993.

The Court need not engage in a detailed review of the evidence, because the Court concludes the first issue raised by plaintiff requires a remand. Plaintiff appeared at the December 13, 1991 administrative hearing unrepresented. After the hearing, the ALJ "determined there was insufficient medical documentation before him to find the claimant had a severe medically determinable impairment." (R.O.A. 21). He therefore scheduled a consultative medical examination with Dr. E. Joseph Sutton. Claimant was examined by Dr. Sutton on February 7, 1992. The ALJ sent plaintiff a letter dated March 5, 1992 (R.O.A. 219) which stated he proposed to include the results of Dr. Sutton's post-hearing examination in the case record. Plaintiff was offered the opportunity to submit additional written materials or additional evidence not previously supplied. It is undisputed plaintiff made no further submissions. The Appeals Council seemed to treat this as a waiver. (R.O.A. 4).

It is plain from the ALJ's discussion of his ruling that Dr. Sutton's report was weighed against evidence presented in plaintiff's behalf and, in view of Dr. Sutton's expertise and credentials, his conclusions were given "precedence" (R.O.A. 23).

Plaintiff, who is now represented by counsel, points in this appeal to Allison v. Heckler, 711 F.2d 145, 147 (10th Cir.1983), in which the Court stated "[a]n ALJ's use of a post-hearing medical report constitutes a denial of due process because the applicant is not given the opportunity to cross-examine the physician or to rebut the report." The government attempts to draw a distinction: "Unlike the claimant in Allison, plaintiff knew of the existence of Dr. Sutton's report and she was given the opportunity to rebut the report." (Brief in Support of Defendant's Administrative Decision at 2). This mirrors the "waiver" concept implicit in the Appeals Council decision.

The Court rejects the government's argument. In Wallace v. Bowen, 869 F.2d 187 (3rd Cir.1988), an ALJ obtained consultative physicians reports post-hearing, and sent claimant virtually the identical form letter which was sent to the claimant in the case at bar. The court held that the opportunity to "comment" on post-hearing reports did not adequately protect a claimant's rights. Rather, the claimant must be given the opportunity to cross-examine the authors of such reports when cross-examination is necessary to the full presentation of the case. Id. at 192-93. See also Green v. Shalala, 17 F.3d 1436, 1994 WL 60384 (10th Cir.). The ALJ erred in considering Dr. Sutton's report without permitting claimant full

opportunity to challenge the report.

As an alternative position, the government asserts "even if Dr. Sutton's report is excluded from the record, the ALJ would have found that plaintiff had no 'severe' impairments and denied her claim." (Brief in Support of Defendant's Administrative Decision at 3). The Court declines to engage in such speculation. Clearly, the ALJ thought the consultative examination was necessary and, as noted, balanced Dr. Sutton's conclusions against other submitted evidence favorable to plaintiff's position. It is at least conceivable that, under proper cross-examination, Dr. Sutton's report would have proven more favorable to plaintiff than the absence of such a report. Only remand will answer this question. Under the facts of this case, the Court will not redact the administrative record and surmise that the ALJ would have nevertheless reached the same conclusion.

It is the Order of the Court that the decision of the Secretary is hereby vacated, and the case is remanded for further proceedings not inconsistent with this Order.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

F I L E D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NOV 23 1994 *B*

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

UNITED STATES OF AMERICA)
 Plaintiff)
 VS)
)
Timothy Allen Smith)
)
 Defendant)

Case Number: 91-CR-082-001-E ✓

ENTERED ON DOCKET
↓
DATE 11/28/94

ORDER REVOKING SUPERVISED RELEASE AND SENTENCING

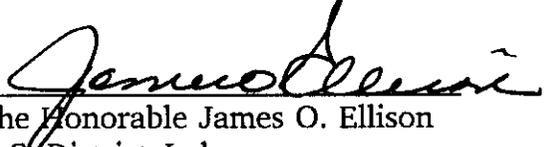
Now on this 18th day of November 1994, this cause comes on for sentencing after a finding that the defendant violated conditions of supervised release as set out in the Petition on Probation and Supervised Release filed in open Court on June 24, 1994. The defendant is present in person and represented by counsel, Richard Couch, and the Government by James Swartz, Assistant U.S. Attorney, and the United States Probation Office is represented by Frank M. Coffman.

On October 28, 1994, a revocation hearing was held regarding the allegations noted in the Petition on Probation and Supervised Release. The Court made a finding that the defendant violated his conditions of supervised release as memorialized in the Petition, and that the violations constituted Grade C violations. In accordance with U.S.S.G. § 7B1.4(a) a Grade C violation and a criminal history category of III establishes an imprisonment range of 5-11 months. However, the Court is not bound by Chapter 7 of the guidelines. Sentencing was

scheduled for November 18, 1994, at 4:00 p.m.

It is therefore adjudged and ordered that the defendant shall be sentenced to serve five (5) months in the custody of the Bureau of Prisons. The defendant is also ordered to pay restitution in the amount of \$332.90.

The defendant is remanded to the custody of the U.S. Marshal.


The Honorable James O. Ellison
U.S. District Judge

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

IN RE: ASBESTOS LITIGATION:	:	M-1417
	:	ASB (I) <u>6685</u>
CECIL FAYE SHRUM, Individually,	:	
and as Surviving Spouse and Next	:	
of Kin of JILES DEAN SHRUM,	:	NO. 90-C-1031-B
Deceased,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
FIBERBOARD CORPORATION, et al.,	:	
	:	
Defendants.	:	

F I L E D
NOV 28 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

**DEFENDANTS', ARMSTRONG WORLD INDUSTRIES, INC. (f/k/a
ARMSTRONG CORK COMPANY), FLEXITALLIC, INC. (f/k/a
FLEXITALLIC GASKET COMPANY, INC.), AND GAF CORPORATION,
WITHDRAWAL OF MOTIONS IN LIMINE**

COME NOW the Defendants, Armstrong World Industries, Inc. (f/k/a Armstrong Cork Company), Flexitallic, Inc. (f/k/a Flexitallic Gasket Company, Inc.), and GAF Corporation, and hereby withdraw the following motions in limine filed on or about November 21, 1994:

1. Motion in Limine to Preclude Testimony of John Covey, Jr. and Fred Leeds, designated ASB-6680;
2. Motion in Limine Prohibiting Any Exposure Evidence Prior to 1978, designated ASB-6678;
3. Brief in Support of Motion in Limine Prohibiting Any Exposure Evidence Prior to 1978, designated ASB-6679; and
4. Appendix to Motion in Limine Prohibiting Any Exposure Evidence Prior to 1978, designated ASB-6677.

Further, these Defendants hereby withdraw their request for oral argument with regard to these motions in limine.

Respectfully submitted,

Charles J. Kalinoski

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Charles J. Kalinoski
Margaret M. Chaplinsky
David J. Darrell
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Martha J. Beekwith OBA #10209
Martha Phillips OBA #011958
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BRITTINGHAM
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for Martha Phillips

COUNSEL FOR DEFENDANTS ARMSTRONG
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ARMSTRONG CORK COMPANY),
FLEXITALLIC, INC. (f/k/a FLEXITALLIC
GASKET COMPANY, INC.), AND GAF
CORPORATION

CERTIFICATE OF MAILING

This is to certify that on this 23^d day of November,
1994, a true and correct copy of the above and foregoing was placed
in the United States Mail, postage prepaid, addressed to all
counsel of record as shown on the attached service list.

Charles J. Kalinoski

Original filed.

Copy to:

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1109 NORTH FRANCIS
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OKLAHOMA CITY, OK 73126

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

FILED

THERMOFLUX, INC.,)
)
Plaintiff,)
)
v.)
)
ALLEN TANK, INC.,)
)
Defendant.)

NOV 23 1994 *RL*

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

No. 94-C-807-BU

ENTERED ON DOCKET

DATE 11-25-94

DISMISSAL WITH PREJUDICE

Plaintiff, Thermoflux, Inc. and Defendant, Allen Tank, Inc., pursuant to Federal Rule of Civil Procedure 41, hereby stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross-complaints, and causes of action of any type, either party against the other, all issues therein presented having now been compromised, settled, satisfied, and released between the parties. The parties agree that the Court shall retain jurisdiction to resolve any future disputes which may arise in connection with the settlement agreement executed by the parties. Each party shall bear its own costs, expenses, and attorney fees.

Randall G. Vaughan

Randall G. Vaughan, OBA #11554
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 ONEOK Plaza
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ATTORNEYS FOR PLAINTIFF

Stephen R. Clark

Stephen R. Clark, OBA #1713
MCCORMICK, ANDREWS & CLARK
111 E. First Street
Tulsa, OK 74103

ATTORNEYS FOR DEFENDANT

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

F I L E D

NOV 23 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-CV-438-BU

ENTERED ON DOCKET

DATE 11-23-94

O R D E R

Upon the joint application of plaintiff, Forrest Towry, and defendant Casino Credit Services Inc., d/b/a CRW Financial, Inc., and each of them, to dismiss the Amended Complaint herein and for good cause shown, the court finds that:

1. The plaintiff's Amended Complaint filed herein should be dismissed by stipulation pursuant to the provisions of Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.
2. That said dismissal is with prejudice, and further that each party is responsible for its own attorneys fees and costs incurred herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the above styled and captioned cause should be and the same is hereby dismissed with prejudice and that the parties herein are responsible for the payment of their own attorneys fees and costs incurred herein.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

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

FILED

NOV 23 1994

FIRST FINANCIAL INSURANCE)
COMPANY,)
)
Plaintiff,)
)
vs.)
)
CLIFFORD CROSS, PEARL CROSS,)
and ARVILLA M. TISHER, personal)
representative, father and next)
of kin of Clayton Tisher,)
)
Defendants.)

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

Case No. 93-C-1089-BU

11-25-94

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment and the Motion for Entry of Judgment Against Clifford and Pearl Cross filed by Plaintiff, First Financial Insurance Company, and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED and ADJUDGED that Judgment be entered in favor of Plaintiff, First Financial Insurance Company, against Defendants, Clifford Cross, Pearl Cross and Arvilla M. Tisher, personal representative, father and next of kin of Clayton Tisher.

DATED at Tulsa, Oklahoma, this 22 day of November, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV 23 1994

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

No. ⁹⁴~~93~~ C-696-B

GARY PAUL FISK,)
)
 Plaintiff,)
)
 vs.)
)
 DEWAYNE BRIGGS,)
)
 Defendants.)

O R D E R

Plaintiff has submitted a properly completed motion for leave to proceed in forma pauperis to proceed with this civil rights action. He has also submitted an amended complaint.

In reliance upon the representations and information set forth in Plaintiff's motion, the Court concludes that Plaintiff should be **granted** leave to proceed in forma pauperis. The Court also concludes that Plaintiff should be **granted leave to file** his amended complaint. Upon review of the original and amended complaint, however, the Court finds that proper venue does not lie in this district. See 28 U.S.C. § 1391(b). Therefore, Plaintiff's complaint is hereby **dismissed without prejudice**. See 28 U.S.C. § 1406(a).

IT IS SO ORDERED this 23rd day of Nov., 1994.

Thomas R. Brett
THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 11-25-94

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

FILED
NOV 23 1994
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PATRICK L. WILSON,)
)
 Petitioner,)
)
 vs.) No. 93-C-757-B
)
 MIKE ADDISON,)
)
 Respondent.)

ORDER

Petitioner's pro-se application for a writ of habeas corpus is now at issue before the Court. Respondent filed a Rule 5 response and Petitioner has filed a reply. As more fully set out below, the Court concludes that Petitioner's application should be denied.

I. BACKGROUND

In July and August, 1987, while incarcerated at the Oklahoma State Penitentiary in McAlester, Pittsburgh County, Oklahoma, Petitioner mailed two threatening letters to his wife then living in Bartlesville, Washington County, Oklahoma. A Washington County jury convicted Petitioner of mailing threatening letters, after former convictions of two or more felonies, Case No. CRF-87-363. Petitioner was sentenced to two concurrent twenty-year sentences.

At trial and on direct appeal, Petitioner argued that his case should have been tried in Pittsburgh County; that Washington County was an improper venue; and that prosecuting him in Washington County violated his constitutional guarantees under the Sixth Amendment of the U.S. Constitution and Art. 2, § 20 of the Oklahoma

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DATE 11-25-94

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Constitution, to be tried in the venue where the crime was committed. In an unpublished opinion, the Oklahoma Court of Criminal Appeals found that venue was proper in either of the two counties under Oklahoma law and therefore, that it was not error to prosecute the Petitioner in Washington County. Wilson v. State of Oklahoma, F-89-272.

In the present petition, Petitioner argues once again that the State of Oklahoma tried him in the wrong county in violation of his constitutional guarantees under the Sixth Amendment of the U.S. Constitution and Art. 2, § 20 of the Oklahoma Constitution. Respondent contends that Petitioner venue claim does not raise a cognizable federal claim. (Doc. #3.) Petitioner replies that the claim presented is federal in nature because "[t]he Bill of Rights guarantees the people of the United States the right to be tried in the County where the crime is committed." (Doc. #5.)

II. ANALYSIS

At the outset the Court finds that Petitioner meets the exhaustion requirements under the law and that an evidentiary hearing is not necessary 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). Next the Court turns to the sole question in this case: whether Petitioner's claim on the basis of improper venue raises a cognizable constitutional claim or only a state law claim. It is clear that only violations of federal law are cognizable under the

federal habeas corpus statute. 28 U.S.C. § 2254(a); see also Pulley v. Harris, 465 U.S. 37, 41 (1984).

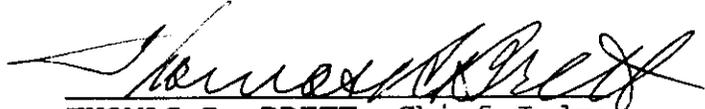
In the case at hand, the alleged improper venue involves solely the interpretation of a state statute and a state constitutional provision and therefore, raises no federal question cognizable in a federal habeas corpus proceeding absent an affirmative showing that the state court's findings were arbitrarily made or based upon clearly erroneous factual findings. 28 U.S.C. § 2254(a); Townsend, 372 U.S. 293. "Petitioner has made no such showing here, and has moreover, failed to demonstrate with any particularity, substantial prejudice resulting from the allegedly improper venue." Glucksman v. Birns, 398 F.Supp. 1343 (S.D.N.Y. 1975) (holding that state venue claim was not cognizable in a federal habeas corpus action).

Petitioner's reliance on the Sixth Amendment of the U.S. Constitution for the proposition that it guarantees him the right to be tried in the county where the crime was committed is misplaced. Article 2, section 20 of the Oklahoma Constitution, and not the Sixth Amendment of the U.S. Constitution, states that "the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed or, where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed."

Accordingly, the Court concludes that the alleged improper venue does not raise a federal constitutional issue cognizable

under the habeas corpus statute. The petition for a writ of habeas corpus is, therefore, **DENIED**.

SO ORDERED THIS 23 day of Nov., 1994.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FILE
NOV 22 1994

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

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

MELISSA WOLFE,)
)
Plaintiff,)
)
vs.)
)
VERDIGRIS VALLEY SOD FARMS,)
INC., an Oklahoma corporation,)
et al.,)
)
Defendants.)

Case No. 94-C-399-BU ✓

ENTERED ON DOCKET
DATE 11-23-94

ORDER

This matter comes before the Court upon the Motion for Summary Judgment of Defendant, Verdigris Valley Sod Farms, Inc. filed on September 19, 1994. Plaintiff has responded to the motion and states that she is unable to dispute the factual allegations contained in Defendant's motion and has no objection to the granting of Defendant's motion. The Court therefore deems the Motion confessed.

Having reviewed the Motion, the Court finds that no genuine issues of material fact exist and that Defendant is entitled to judgment as a matter of law.

Accordingly, Defendant, Verdigris Valley Sod Farms, Inc.'s Motion for Summary Judgment (Docket No. 13) is GRANTED.

ENTERED this 21 day of November, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

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

NOV 22 1994

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

FIRST COLONY LIFE INSURANCE)
COMPANY,)
Plaintiff,)
vs.)
CLAY T. ROBERTS, et al.,)
Defendants.)

Case No. 94-C-470-BU ✓

ENTERED ON DOCKET
DATE 11-23-94

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 21 day of November, 1994.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 22 1994

TIFFANY HOLLAND,)
)
 Plaintiff,)
)
 v.)
)
 JEFF HUBER, d/b/a)
 HUBER RESTORATIONS,)
)
 Defendant.)

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

Case No. 94-C-835Bu ✓

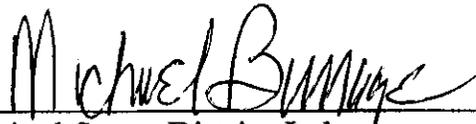
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ORDER OF DISMISSAL

It appearing to the court from the plaintiff's motion to dismiss that the above entitled action has been fully settled, adjusted and compromised; therefore,

IT IS ORDERED AND ADJUDGED that the above entitled action be and it is hereby dismissed with prejudice to the plaintiff.

DATED this 21 day of November, 1994.


United States District Judge

FILED
NOV 23 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

MARY L. CORDRAY,)
)
 Plaintiff,)
)
 VS.)
)
 LOUIS W. SULLIVAN , M.D.,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

Case No. 92-C-701-B

ENTERED ON DOCKET
DATE NOV 23 1994

O R D E R

Before the court for consideration is Plaintiff Mary L. Cordray's appeal (Docket #4), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits. This claim is based on complaints of kyphosis, scoliosis, degenerative arthritis of the thoracic spine, depression, osteophytes on the anterior margins of T8-11, a narrowing of Plaintiff's lumbosacral and L4-5 disc spaces, and compression fractures or degenerative spurs at T12-L1.

This claim was filed on June 25, 1990, and was denied by the ALJ on August 28, 1991. The Appeals Council denied Plaintiff's request for review on the basis that Plaintiff is able to perform past relevant work as a key punch operator and a ward clerk at a hospital. Plaintiff now seeks judicial review.

Plaintiff asserts the following grounds for reversing the ALJ's denial of benefits:

1. The ALJ has engaged in an improper reading of the evidence as a whole by selecting only portions of the objective medical records to support his denial of benefits;
2. The ALJ erroneously held that Plaintiff is not

λ

presumed to be disabled because her impairments did not meet or equal at least one of the listed impairments set out in 20 C.F.R. § 404 subpt. P, app. 1;

3. The ALJ improperly evaluated Plaintiff's pain symptoms in determining her residual functional capacity; and

4. The ALJ erroneously held that Plaintiff could engage in her past relevant work as a keypunch operator and as a ward clerk at a hospital.

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

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

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the

ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brcwn v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

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

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

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set

forth in Reyes, 845 F.2d at 243, proceed as follows:

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

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

In this case, the ALJ entered a decision at the fourth level of the sequential evaluation process. The ALJ is convinced that the claimant has residual functional capacity for the full range of light exertional activity, which would allow her to engage in her past relevant work as a key punch operator and as a ward clerk at a hospital. (TR 39, 40).

Plaintiff's first and second arguments for reversal are based on the ALJ's evaluation of the evidence provided by the physicians.

Plaintiff contends that the ALJ improperly weighed the evidence provided by the consulting physicians, which led to a decision that is contradictory to the evidence in the record as a whole, and is therefore not supported by substantial evidence. She alleges that the ALJ gave unwarranted weight to the opinion of Dr. McGovern, a consulting physician, and failed to give proper weight to the opinion of Dr. Cosby, also a consulting physician.

Dr. McGovern, after reviewing Dr. Sisler's and Dr. Cosby's findings, reported that Plaintiff's subjective complaints of pain were not consistent with the objective medical evidence (TR 393). Dr. Sisler, Plaintiff's treating physician, reported that, although Plaintiff has a past history of discomfort in the lower back, she is currently suffering "no significant back discomfort." (TR 374, 376). Dr. Cosby, however, states in his report that Plaintiff is not employable in any job that requires standing, sitting, walking, bending, or stooping. (TR 381).

The ALJ took issue with Dr. Cosby's findings and concluded that there are no objective findings to support such absolute limitations. (TR 25, 26). After a thorough review of the evidence, records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings. The Court does not interpose its judgment for that of the ALJ. The following is a brief summary of some of the relevant medical evidence revealed by Dr. Cosby's examination of Plaintiff.

On September 24, 1990, Dr. Cosby examined the Plaintiff, determining that the Plaintiff could walk with ease, and that she

had a normal range of motion throughout her spine. The Plaintiff's neck, shoulders, hips, knees, elbows, wrists, ankles, and thumbs all showed a full range of motion. (TR 382, 383). There are no findings to indicate the Plaintiff should not be able to stand or walk for at least 6 hours in an 8-hour day, and there is no objective evidence to support an absolute inability to bend or stoop. The results of Dr. Cosby's medical examination are contrary to his own conclusions, and contrary to the findings of Dr. McGovern, with whom Dr. Sisler concurs. (TR 26). Because Dr. Sisler is the Plaintiff's treating physician, his opinion is entitled to extra weight unless it is contradicted by substantial evidence; which, in this case, it is not. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

Furthermore, determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence. In this case, the ALJ carefully compared the claimant's signs, symptoms, and laboratory findings with the criteria specified in all the Listings of Impairments. The ALJ placed specific emphasis upon sections 1.05 and 12.04, and decided, based upon this analysis, that the Plaintiff's impairments do not meet or equal the criteria established for any impairment shown in the Listings of Impairments in Appendix 1, subpart P, Regulations No. 4. Based on the above standards of evaluation, the ALJ did give proper weight to the

findings of each physician. The ALJ's decision was not contrary to the evidence in the record as a whole, and was supported by substantial evidence which can be found in the reports of Dr. McGovern and Dr. Sisler. (TR 391-393, 374-376).

Plaintiff's third argument is that the ALJ did not properly evaluate her claim that the pain she suffers is disabling. "Subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Also, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams, 844 F.2d at 755.

The ALJ considered all the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and concluded that Plaintiff's pain was not disabling. The objective medical evidence shows no underlying medical condition so severe as to produce severe, disabling pain. In addition, Plaintiff's activities are inconsistent with a claim of incapacitating pain.

Again, because Dr. Cosby's assertions were not consistent with his own findings, or with those of the other medical evidence presented, the assertions were discounted and given no weight. The ALJ chose to rely on the report of Dr. McGovern, stating that Dr. McGovern considered all the evidence, including his own examination

results; therefore, Dr. McGovern's findings will control. (TR 27).

Plaintiff presented herself to Dr. McGovern for a consultative orthopedic examination on May 6, 1991. Plaintiff's chief complaint was of pain in her low back, upper dorsal spine (between the shoulders), and the right leg. (TR 391). Dr. McGovern noted that the Plaintiff's complaints of pain were not consistent with objective findings. (TR 393). Dr. McGovern noted there was an obvious kyphosis and a reported scoliosis. However, Plaintiff's complaints of leg pain, wrote Dr. McGovern, had no objective support. (TR 393).

Plaintiff stated that standing for 15 minutes, or walking a block, caused her to have right leg discomfort that radiated up into the posterior lateral thigh, to the hip, but not into the low back. (TR 391). Plaintiff took aspirin for the pain because she said she could not afford her prescribed medication. (TR 62, 391). Plaintiff could however, afford to support a smoking habit which cost her a minimum of two packs of cigarettes per day. (TR 79). Plaintiff also, it was noted in Dr. McGovern's consultative examination, recently quit using a cane while walking. (TR 391). Plaintiff stated that she was able to shop for groceries and was able to lift and carry from 5 to 10 pounds. (TR 392). Plaintiff stated that she could drive herself up to 25 miles at a time, and she was found to be able to heel to toe walk normally. (TR 27, 392).

As Dr. McGovern correctly stated in his May 6 report, measuring the amount of pain that one is suffering is a "tough

question." (TR 393). Because the amount of pain that a person suffers at any given time is purely subjective, the credibility of the witness must be taken into account. The ALJ was not convinced that the Plaintiff was a purely credible witness and found "several conflicting testimonies concerning her pain." (TR 34). As stated previously, determining the credibility of witnesses is solely with the province of the ALJ, so the Court does not disturb this finding.

Plaintiff's fourth argument for reversal states that ALJ erroneously held that Plaintiff could engage in her past relevant work as a keypunch operator and as a ward clerk at a hospital. The ALJ has found the Plaintiff capable of performing the full range of light work, (TR 34), in addition to finding that the Plaintiff does not suffer from a "disability" as defined in the Social Security Act. (TR 40).

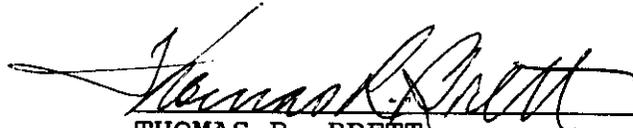
Plaintiff stated she is able to lift her grandson, who weighed approximately 40 pounds. Lifting her grandson did cause her some pain but Plaintiff was clearly able to at least lift the 40 pounds. (TR 77, 78, 81). Plaintiff "[c]an go shopping and take one lap around Wal-Mart." (TR 34, 35). Dr. McGovern's report states that Plaintiff has a good ability to sit and could sit for at least a total of 8 hours in an 8-hour workday. (TR 394). All the Plaintiff's consultative examiners have found Plaintiff to have a full range of motion in her spine, and each joint has been determined to have a full range of motion. (TR 34). Medical evidence shows that Plaintiff can clearly perform the full range of

light exertional activity required to perform light work. (TR 35).

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent her from performing her past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). Although there is one doctor who stated that Plaintiff is not employable in any job, there certainly is substantial evidence to support the ALJ's finding that Plaintiff is able to perform her past relevant work.

There appears to be little doubt that Plaintiff suffers from some pain. However, this Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that Plaintiff is able to perform her past relevant work. The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 23rd DAY OF NOVEMBER, 1994


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
NOV 25 1994
Richard M. Leonard, Court Clerk
U.S. DISTRICT COURT

HARTFORD INSURANCE COMPANY OF)
THE MIDWEST, a corporation,)
)
Plaintiff,)
)
vs.)
)
INTERNAL DATA MANAGEMENT, INC.,)
an Oklahoma corporation,)
)
Defendant.)

Case No. 94-C-704-B

ENTERED ON DOCKET

DATE ~~NOV 23 1994~~
NOV 23 1994

O R D E R

After further development of the record, the Court now reconsiders its denial of Defendant's Motion to Dismiss.

Plaintiff Hartford Insurance Company of the Midwest ("Hartford") denied coverage to Defendant Internal Data Management, Inc. ("IDM") in two state court cases against IDM. Consequently, IDM filed suit on November 15, 1993, in Tulsa County District Court against Hartford for failure to provide IDM a defense in the two cases. Hartford then filed this action, requesting this Court to declare that the insurance policy between IDM and Hartford does not cover the two state court cases.

Under the Declaratory Judgment Act, 28 U.S.C. § 2201, the assumption of jurisdiction over declaratory judgment actions is discretionary. The Court, in its Order dated October 25, 1994, denied IDM's Motion to Dismiss for failure to join indispensable parties, or, in the alternative to stay these proceedings until the

pending state case between Hartford and IDM has been resolved. The Court remains of the view that Robert Sloan ("Sloan") and Gordon Tyler Co., Inc. ("Tyler"), the agents who sold the Hartford policy to IDM, are not indispensable parties to this declaratory judgment action.

However, the Court believes that this case should be dismissed, although not on the grounds alleged by IDM. Rather, the interests of judicial economy militates dismissal of this case. Sloan and Tyler have been added to the pending state court case between IDM and Hartford. The state court must reach the issue presented here--whether IDM was owed coverage by Hartford--in order to determine if the insurance contract was breached, which is the cause of action in the state court case. Not only will the state court address this issue, it also will address the claims against Sloan and Tyler, which this Court cannot do. In considering whether to entertain a declaratory judgment action, the court should determine "whether there is such a plain, adequate and speedy remedy afforded in the pending state court action, that a declaratory judgment action will serve no useful purpose." ARW Exploration Corp. v. Aguirre, 947 F.2d 450, 454 (10th Cir. 1991), citing Franklin Life Ins. Co. v. Johnson, 157 F.2d 653, 657 (10th Cir. 1946). The Court believes this is such a case - because the state court will address directly the issue of coverage, a federal declaratory judgment action will serve no useful purpose. See also Brillhart v. Excess Ins. Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942). Therefore, this case is hereby DISMISSED without

prejudice.

IT IS SO ORDERED THIS 23rd DAY OF NOVEMBER, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 23 1994

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

STEVEN RAY YOUNG,)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT,)
)
 Respondent.)

No. 93-C-1103-B

ENTERED ON DOCKET
DATE NOV 23 1994

ORDER

Petitioner's pro-se application for a writ of habeas corpus is now at issue before the Court. The Respondent filed a Rule 5 response, and Petitioner has filed a reply. As more fully set out below, the Court concludes that Petitioner's application should be denied and that an evidentiary hearing is not necessary 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).

I. BACKGROUND

In October 1979, Petitioner and his codefendant, Ted Faulkner, were convicted by a jury of robbery with firearms, after former conviction of two or more felonies, in Tulsa County District Court, Case No. CRF-78-3172. The trial court sentenced Petitioner pursuant to the recommendation of the jury to ninety-nine years imprisonment. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction and sentence on direct appeal. Faulkner v. State, 646 P.2d 1304 (Okla. Crim. App. 1982). In April 1993,

Petitioner sought post-conviction relief which the District Court of Tulsa County denied. The Oklahoma Court of Criminal Appeals affirmed.

Having presented all of his claims to the state courts, Petitioner, pro se, raises eight grounds for review in this petition for a writ of habeas corpus: (1) that the trial court erred in allowing hearsay testimony concerning an individual named Marilyn Faulkner and her alleged connection to the armed robbery; (2) that the trial court erred in allowing testimony concerning the introduction of illegally seized hair samples from the defendants; (3) that the trial court erred by failing to suppress evidence that was the fruit of an illegal search of one of the defendants apartments; (4) that the trial court erred in allowing the State to present irrelevant testimony of Douglas Kay; (5) that the trial court erred in failing to grant a mistrial for two instances of prosecutorial misconduct during closing argument; (6) that the accumulation of errors at trial deprived the defendant of a fair trial: (7) that the trial court failed to protect the defendants rights when it accepted his guilty pleas in case Nos. CRF-75-801 and CRF-75-802; and (8) that the State failed to prove that the defendant was an habitual offender.

II. ANALYSIS

A. Fourth Amendment Claim

In his third ground for relief, Petitioner alleges that the trial court erred in failing to suppress evidence that was obtained

during an illegal search of the Petitioner's apartment in violation of his Fourth Amendment rights.

The Court will not belabor its discussion of this claim because the State court granted Petitioner a full and fair opportunity to litigate his fourth amendment claims. In Stone v. Powell, 428 U.S. 465, 494 (1976), the Supreme Court stated that where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. The Tenth Circuit has reiterated that a federal-habeas-corpus court need not address a fourth amendment question as long as the state court has given petitioner a full and fair opportunity for a hearing on the issue. Miranda v. Cooper, 967 F.2d 392, 400-01 (10th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 347 (1992).

In the instant case, Petitioner received not one but two opportunities to fully, fairly, and adequately discuss the admissibility of the evidence in question in the State court. Petitioner first filed a motion to suppress and had an opportunity to present his arguments at a hearing which included the testimony of several witnesses. (Petitioner's brief on direct appeal at 28-34, doc. #5 ex. B.) The appellate court also addressed this matter and found the items properly seized under the plain view doctrine. Faulkner, 646 P.2d at 1307. Therefore, the Court concludes that Petitioner's application for a writ of habeas corpus must be denied on the ground that Petitioner has had a full and fair opportunity

to litigate his Fourth Amendment claims in the State court.

B. Evidentiary Rulings

In his first, second, and fourth grounds for relief, Petitioner challenges evidentiary rulings by the trial court. In particular, he argues (1) that the trial court erred in allowing hearsay testimony from Officers Overton and Wortham concerning an individual named Marilyn Faulkner (who was found sitting in a van near the scene of the crime) and her alleged connection to the armed robbery; (2) that the trial court erred in allowing testimony concerning the introduction of illegally seized hair samples from the defendants while at the Tulsa County Jail; and (3) that the trial court erred in allowing the State to present irrelevant testimony of Douglas Kay.

On federal habeas corpus review, this Court is concerned only with whether federal constitutional rights were infringed. "State court rulings on the admissability of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980).

After considering the testimony about Marilyn Faulkner and the testimony of Douglas Kay, the Court concludes that such testimony did not render Petitioner's trial fundamentally unfair. Contrary to Petitioner's allegations, the testimony from Officers Overton and Wortham concerning Marilyn Faulkner did not involve Brutton v.

United States, 391 U.S. 123 (1968), where a co-defendant's confession implicated a defendant who had not confessed. Ms. Faulkner was not a co-defendant at trial and her statements were not introduced into evidence.

Petitioner's reliance on state law in support of his first and fourth grounds for relief is misplaced. "In a habeas action, the inquiry is not whether the state court has properly applied its own rules of evidence, but whether errors of constitutional magnitude have been committed. The State court is the final arbiter of state rules, and [this Court] must uphold its ruling unless the state evidentiary rule itself denies defendants due process." Hopkins v. Shillinger, 866 F.2d 1185, 1197 n.7 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

In his second ground for relief, Petitioner contends that the trial court erred in allowing testimony concerning the introduction of illegally seized hair samples from the Petitioner while in custody at the Tulsa County Jail. On direct appeal, the Court of Criminal Appeals held that seizing the head hair samples from the defendants while in custody of the Sheriff and by giving them a hemostat clamp to remove hair samples from their head did not offend personal privacy and dignity, and thus did not constitute an unwarranted intrusion by the State. Faulkner, 646 P.2d at 1307. The Court also concluded that the request for head hair sample was distinguishable from the request for blood, saliva, seminal fluid, and pubic hairs from a defendant. Id.

Any contention by the Petitioner that the actual taking of the

hair sample violated the Fourth Amendment will not be reviewed in this habeas corpus petition because Petitioner had a full and fair opportunity to litigate this claim in the State court. See Stone v. Powell, 428 U.S. 465, 494 (1976) (more fully discussed in section A above). Petitioner had an opportunity to litigate this issue in a pre-trial motion to suppress and again on direct appeal. See Appellant's br. at 25, ex. B attached to doc. #5. With regard to the admission of the testimony by Officer Raska on how he obtained the hair samples, the Court concludes that Petitioner has not shown that such testimony rendered his trial fundamentally unfair.

Accordingly, Petitioner is not entitled to habeas corpus relief on his first, second, and fourth grounds for relief.

C Prosecutorial Misconduct

In analyzing "whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, [a federal habeas court] must [] determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process." Fero v. Kerby, ___ F.3d ___, No. 93-2201, slip op. at 19 (10th Cir. Oct. 28, 1994) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see also Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2)

whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

Because Petitioner is proceeding pro se, the Court liberally construes his petition to raise the same prosecutorial comments which his counsel challenged on direct criminal appeal.

The first instance of alleged misconduct was when the prosecutor made the following comments:

Now, how in the world did they know to go to that apartment on North Utica to try to arrest these two guys? I wonder who told them about it? Remember the conversation that the officers had with this man's wife. And he stands up here and tells you that nobody got on that stand with a marriage certificate. A lot of people don't bother doing that, but if there's another story about whose husband this guy is, or whose wife she is we have not heard it. They can subpoena witnesses just the same as we can.

Petitioner argues that these comments were improper because they violate Brutton v. United States, 391 U.S. 123 (1968), and because they refer to Petitioner's failure to take the stand and call witnesses.

After carefully reviewing the record, the Court cannot conclude that the above comments individually or in summation constitute misconduct. The Court finds no Brutton violation because Ms. Faulkner's statements were not introduced into evidence. At the most the prosecutor did nothing more than state reasonable inferences which the jury could draw from the evidence presented at trial. See United States v. Boyce, 797 F.2d 691, 694 (8th Cir. 1986) (prosecutors are entitled to argue reasonable

inferences to be drawn from the facts in evidence during closing arguments); United States v. Buchbinder, 796 F.2d 910, 919 (7th Cir. 1986) (it is well established that a party may argue during closing argument any reasonable inferences to be drawn from the evidence presented at trial). Similarly, the Court finds that these comments did not refer to Petitioner's failure to testify in violation of his Fifth Amendment rights. See, e.g., Griffin v. California, 380 U.S. 609 (1965) (improper for prosecutor to comment on defendant's invocation of privilege to remain silent). The remarks at issue were made during the prosecutor's discussion that there was a gap in the evidence and the fact that the defense could subpoena witnesses to fill that gap. At any rate, in the context of the entire trial, the Court finds that the comments at issue do not appear to be "so prejudicial" that they render the trial "fundamentally unfair."

The second instance of alleged misconduct was when the prosecutor stated as follows:

Look at this evidence in its entirety, don't pick out a piece of it to the exclusion of the rest of it and the next time, if you want to turn these two guys loose on this kind of evidence, the next time the Nunnelee's get robbed, then, by gosh, they better get them a movie camera--

Although the Court of Criminal Appeals agreed that the comment was improper, it found that "[i]n light of the evidence adduced at trial, however, we do not find that this comment influenced the jury's decisions." This Court agrees. While comments regarding a defendant's future dangerousness are highly improper during closing argument, this Court concludes that given the strength of the

states case, the above comments were not "so prejudicial" to render the trial "fundamentally unfair."

Accordingly, the Court concludes that Petitioner is not entitled to habeas relief on the basis of prosecutorial misconduct.

D. Accumulation of Errors

In his sixth ground for relief, Petitioner argues that the accumulation of errors at trial deprived him of a fair trial. As none of the alleged errors about which the Petitioner complains herein considered alone have any merit, the alleged errors considered collectively have no merit either. See Fero v. Kerby, ___ F.3d ___, No. 93-2201, slip op. at 23 (10th Cir. Oct. 28, 1994) (citing United States v. Riviera, 900 F.2d 1462, 1470-1471 (10th Cir. 1990)). The Tenth Circuit, however, recognizes an exception where "the entire trial was so fundamentally unfair that Defendant's due process rights were violated." Fero, slip op. at 24 (quoting Riviera, 900 F.2d at 1470-71)). The Court finds no such circumstances in this case. Therefore, this ground for relief is without merit.

E. Improper Enhancement of his Sentence

In his seventh ground for relief, the Petitioner contends that the trial court failed to protect his constitutional rights when accepting his guilty pleas in Case Nos. CRF-75-801 and CRF-75-802 which were the basis for enhancement of his present sentence. Respondent argues that Petitioner procedurally defaulted this claim

by failing to raise it on direct appeal and that the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar. Petitioner replies that under Gamble v. Parsons, 898 F.2d 117 (10th Cir.), cert. denied, 498 U.S. 879 (1990), the fact that the prior convictions were used to enhance his present sentence automatically entitles him to federal habeas review of the prior convictions.

On July 9, 1975, Petitioner entered pleas of guilty to burglary in the second degree and extortion in case Nos. CRF-75-801 and CRF-75-802, in the district court of Tulsa County. He received two years sentences in each case to be served concurrently. Petitioner did not file a direct appeal in either case. On February 5, 1993, however, he sought post-conviction relief. He alleged that he was not properly advised of his right to confront the accuser, of his right against compulsory self-incrimination, and his right to a trial by jury. He also alleged that the trial judge did not ensure that his plea was being made knowingly and voluntarily. The Tulsa County District Court denied post-conviction relief and the Oklahoma Court of Criminal Appeals affirmed on the basis that Petitioner should have raised those issues on direct appeal of his sentence.

After carefully reviewing the record, the Court agrees with the Respondent that Petitioner is procedurally barred from challenging his 1975 convictions. While Petitioner correctly cites Gamble, 898 F.2d 117, for the proposition that he is "in custody" under the prior convictions for purposes of habeas review, that

case does not alter the rule that states procedural defaults may preclude federal habeas review. See Taylor v. Champion, No. 92-5200, 1993 WL 128693, **1 (10th Cir. Apr. 22, 1993) (unpublished opinion). "Gamble does not excuse Petitioner's unexplained failure to take a direct appeal from his sentence." See Taylor, 1993 WL 128693, **1.

Because Petitioner has not shown cause and prejudice, or a fundamental miscarriage of justice, this Court must conclude that Petitioner's claims regarding his prior convictions are procedurally barred. Accordingly, Petitioner is not entitled to habeas corpus relief on his seventh ground for relief.

F. Habitual Offender

Lastly, in his eighth ground for relief, the Petitioner contends that the State failed to sufficiently prove that he was an habitual offender pursuant to the holding in Cooper v. State, 810 P.2d 1303 (Okla. Crim. App. 1991). Respondent contends that, because the Oklahoma Court of Criminal Appeals declined to apply the holding in Cooper retroactively, this ground for relief is meritless. This Court agrees.

On appeal from the denial of post-conviction relief, the Court of Criminal Appeals stated as follows:

Petitioner is correct insofar as he alleges that a subsequent change in case law can be addressed in a post conviction application if such change is found to affect a petitioner's case. See Hale v. State, 807 P.2d 264 (Okla. Crim. 1991). However, changes in case law can only affect a petitioner's case if they are applied retroactively. Not all changes in case law are retroactively applied to cases decided prior to the new

law. See Phillips v. State, 650 P.2d 876 (Okla. Crim. 1982); Stowe v. State, 612 P.2d 1363 (Okla. Crim. 1980).

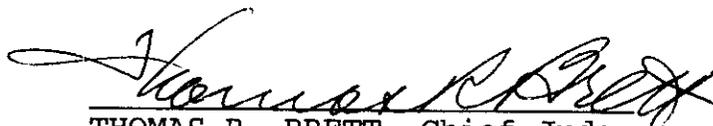
In the present case, we note that we have not previously held the rule enunciated in Cooper to apply retroactively and we are not now persuaded to do so. Accordingly, the order of the district court denying petitioner's application for post conviction relief is **AFFIRMED**.

This Court also notes that this last ground for relief rests only on the alleged violation of state law which is not sufficient to support habeas corpus relief in this case. Pulley v. Harris, 465 U.S. 37, 41 (1984) ("[a] federal court may not issue the writ on the basis of a perceived error of state law"). Therefore, Petitioner is not entitled to habeas corpus relief on this ground as well.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 23rd day of NOV, 1994.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

NOV 22 1994

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

ULUS GUY, JR.)
)
 Petitioner,)
)
 vs.)
)
 STATE OF OKLAHOMA, et al,)
)
 Respondent.)

No. 94-C-1073-B

ENTERED ON DOCKET

DATE NOV 23 1994

ORDER REQUIRING RESPONDENT TO SHOW CAUSE

Petitioner has paid the court filing fee to file the above captioned petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Accordingly, Respondent is directed to prepare his response pursuant to Rule 5 of the Rules Governing § 2254 Habeas Corpus Cases. That rule states:

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts...are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court may on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

As an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to Rule 9 of the Rules Governing § 2254 Habeas Corpus Cases, or lack of jurisdiction. If Respondent files a motion to dismiss based upon alleged nonexhaustion, and if Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Petitioner's brief on appeal and of the opinion of the appellate court, if any, should be filed by Respondent with the motion to dismiss.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. That the Clerk shall **serve** by mail a stamped-filed copy of the petition on the Oklahoma Attorney General, see Local Rule 9.3(B);
2. That Respondent shall file a response to the petition for a writ of habeas corpus within thirty (30) days. Extensions of time will be granted for good cause only and in no event for longer than an additional twenty (20) days. Fed. R. Civ. P. 81(a)(2).

SO ORDERED THIS 22nd day of Nov., 1994.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 THOMAS A. SCHOOLEY, D.O.,)
)
 Defendant.)

NOV 23 1994

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

No. 92-C-495-E

AGREED JUDGMENT

This matter comes on for consideration this 23 day of November, 1994, the Plaintiff appearing by Steven C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss, Assistant United States Attorney, and the Defendant, Thomas A. Schooley, D.O., appearing by his counsel, Frank H. McCarthy and Jeffrey C. Sacra.

On September 30, 1994, this Court entered an Order granting summary judgment for the United States and against the Defendant, Thomas A. Schooley, D.O. In conformity with that Order, the Court enters judgment against Thomas A. Schooley, D.O. in the following amounts:

1. \$46,006.35, constituting \$15,335.45 in principal originally loaned to Defendant, multiplied by three as provided by 42 U.S.C. § 754C.
2. \$58,334.30, constituting accrued interest as of November 4, 1994 on the loan principal, calculated in accordance with 42 U.S.C. § 754C.
3. \$18.78 per day in accrued interest on the loan principal from November 4, 1994 until the filing of this Judgment.

ENTERED ON DOCKET
DATE 12-23-94

4. Post-judgment interest at the legal rate of 6.48% from the date of the filing of this Judgment until the debt is paid in full.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff recover judgment against the Defendant in the principal amount of \$46,006.35, plus accrued interest in the amount of \$58,334.30 as of November 4, 1994, plus \$18.78 per day in accrued interest from November 4, 1994 until the filing of this Judgment, plus post-judgment interest at the legal rate of 6.48% from the date of filing of this Judgment until the debt is paid in full.

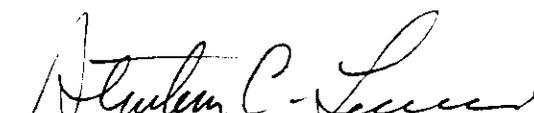
DATED this 23 day of November, 1994.

S/ JAMES O. ELLISON

THE HONORABLE JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

UNITED STATES OF AMERICA

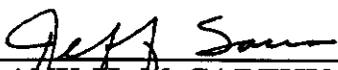


STEPHEN C. LEWIS
UNITED STATES ATTORNEY



KATHLEEN BLISS
ASSISTANT U.S. ATTORNEY

BARKLEY, RODOLF & McCARTHY


FRANK H. McCARTHY
SCOTT B. WOOD
JEFFREY C. SACRA

ATTORNEYS FOR DEFENDANT

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

RANDY KEITH,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA,)
)
Respondents.)

No. 94-C-584-B

ENTERED ON DOCKET

DATE 11/23/94

FILED
NOV 23 1994
U.S. DISTRICT COURT

ORDER

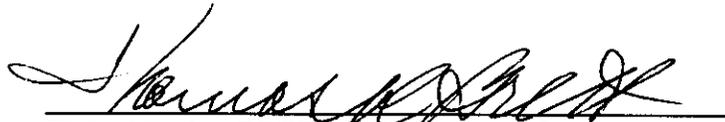
Before the Court is Respondents' motion to dismiss Petitioner's application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, for failure to exhaust state remedies. Respondents assert that Petitioner failed to appeal the denial of his petition for post-conviction relief. Petitioner does not object and merely requests instructions on what he should do next.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the Petitioner has not exhausted his state remedies. Because Petitioner failed to appeal the denial of his petition for post-conviction relief or seek an appeal out of time, the Court of Criminal Appeals has not had the opportunity to address the merits of his claims. Petitioner must therefore give the Court of Criminal Appeals that opportunity. In the event Petitioner is not granted the relief which he seeks, he may renew his petition for a writ of habeas corpus in this Court.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondents' motion to dismiss (doc. #10) is **granted** and that the petition for a writ of habeas corpus is hereby **dismissed without prejudice** to it being reasserted when Petitioner has fully exhausted his state remedies.

IT IS SO ORDERED this 23 day of Nov., 1994.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

NOV 21 1994

DONALD NEWMAN,)
)
 Plaintiff,)
)
 v.)
)
 STAR MOTORCARS, INC., An)
 Oklahoma Corporation; ROBERT)
 CLARK; and the UNITED STATES)
 OF AMERICA,)
)
 Defendants.)

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

Case No. 93-C-298 BU

ENTERED IN DOCKET
DATE 11-23-94

JUDGMENT

This case came for a non-jury trial on August 4-5, 1994. The plaintiff, Donald Newman (Newman), was represented by Mark S. Rains of Rosenstein, Fist & Ringold. The defendant, the United States of America, was represented by Carolyn Jones. The Court previously granted summary judgment in favor of Newman and against defendants, Star Motorcars, Inc. (Star Motorcars) and Robert Clark (Clark), on August 13, 1993.

The Court, after hearing the testimony of the witnesses, after reviewing the exhibits introduced and admitted into evidence, and after considering the arguments of counsel, directed the parties to submit proposed findings of fact and conclusions of law. On October 27, 1994, the Court entered and filed its findings of fact and conclusions of law.

Based on the evidence and exhibits introduced at trial and on the findings of fact and conclusions of law entered on October 27, 1994, and pursuant to Federal Rule 54, the Court enters the following final judgment.

IT IS THEREFORE ORDERED that judgment be entered in this case as follows:

1. Newman's security interest in the following collateral:
 - (a) 1988 Mercedes 300E, VIN WDBEA30D0JA681987;
 - (b) 1987 Mercedes 300E, VIN WDBEA30D9HA558313;
 - (c) 1991 Honda Accord, VIN JHM CB7682MC017723;
 - (d) 1990 Acura Legend, VIN JH4KA3278LC013145;
 - (e) The furniture, fixtures, and equipment purchased and owned by Star Motorcars prior to September 30, 1992;
 - (f) The ninety percent of the existing parts inventory of Star Motorcars currently held in storage which was purchased on or before November 14, 1992; and
 - (g) All of Star Motorcars' accounts receivable, accounts, general intangibles, contracts, contract rights together with all additions thereto, substitutions therefore and proceeds thereof;

is foreclosed and pursuant to the terms of his security agreement and applicable law, Newman is entitled to take immediate possession of and dispose of the collateral described in this paragraph 1 and the United States, Star Motorcars and Clark are barred and prohibited from asserting any right, claim, interest or title in and to the collateral described in this paragraph.

2. Pursuant to the terms of the Collateral Agreement executed between Newman and the United States, Newman is entitled to receive and recover from the United States the sum of \$62,000 out of the proceeds of the \$83,000 letter of credit posted by Newman as substituted collateral and which was drawn down by the United States. The sum of \$62,000 represents the stipulated value of the 1988 Mercedes, the 1987 Mercedes, the Honda and the Acura described above.

3. The United States' tax lien interest in the following collateral or substituted collateral:

- (a) The sum of \$21,000 representing the stipulated value of the 1991 BMW;
- (b) The Jaguar parts and tools purchased by Star Motorcars after November 14, 1992, valued at \$3,122.37;
- (c) The equipment and tools purchased by Star Motorcars after November 14, 1991, which consists of Mac Tools, Snap-on Tools or items purchased from Terra Telecom, Allied Berring, C&H or C&W with a value of \$1,528.44;
- (d) The ten percent of the existing parts inventory of Star Motorcars currently held in storage which was purchased after November 14, 1992, and which consists of spark plugs, brake pads, oil filters and other fast-moving inventory items;

is foreclosed and pursuant to applicable law, the United States is entitled to take possession of and dispose of the collateral described in this paragraph 3 and Newman, Star Motorcars and Clark are barred and prohibited from asserting any right, claim, interest or title in and to the collateral described in this paragraph.

4. Newman is granted judgment in rem only against Robert Clark in the amount of \$492,600, together with interest accruing thereon from and after June 30, 1992 at the rate of 18% per year until paid.

Dated this 18 day of Nov, 1994.



Michael Burrage
United States District Court Judge

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

FILED

NOV 21 1994

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

RUBY G. BRAWDY,)
)
Plaintiff,)
)
v.)
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

92-C-271-E ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.¹

In the case at bar, the ALJ made his decision at the fifth step of the sequential

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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evaluation process.² He found that the claimant's subjective complaints of increased pain and the functional limitations resulting from her back condition were credible, but the evidence as a whole did not establish that the pain and functional limitations prevented the performance of all levels of sustained work activity. Therefore, he concluded that the claimant has the residual functional capacity to perform the physical exertion requirements of work, except for lifting frequently or lifting more than 25 pounds at a time on occasion, walking or standing for prolonged periods, bending or stooping frequently, sitting continuously without an opportunity to walk or stand for brief periods from time-to-time, and twisting or turning.

The ALJ found that claimant was unable to perform her past relevant work as a glass selector for a glass manufacturer, and has the residual functional capacity to perform the full range of sedentary work, as well as a restricted range of light work. He concluded that, as of March 7, 1990, the stated date of onset, the claimant was 57 years old, which is defined in the Social Security Regulations as an individual of advanced age, had a high school education, and had acquired work skills in quality control which she demonstrated in past work which could be applied to meet the requirements of semi-skilled work activities of other work which exists in significant numbers in the national economy.

² The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

Examples of such jobs are production examiners of eye glass frames, bead inspectors, button reclaimers, bottled beverage inspectors, and quality control inspectors, and tens of thousands of these jobs exist in the national economy. These conclusions directed a finding that, considering the claimant's residual functional capacity, age, education, and work experience, claimant was not under a "disability", as defined in the Social Security Act, at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) That the ALJ failed to give proper weight to the opinions of Drs. Hendricks and Simmons, as treating physicians.
- (2) That the ALJ improperly conducted a pain test in evaluating claimant's pain.
- (3) That the ALJ failed to consider claimant's impaired balance and loss of strength and flexibility in her legs.
- (4) That the ALJ failed to show that other jobs exist in significant numbers that claimant can perform consistent with her impairments, functional limitations, age, education, and work experience.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that the claimant has severe osteoporosis and grade 1 spondylolisthesis of L5 on S1 with associated chronic pain and permanent weakness in her low back.

At the hearing claimant admitted that she does light housework, takes the trash out, does part of the cooking, talks on the telephone, and goes to the grocery store, but does not vacuum floors or do laundry (TR 39). She also does yard work (TR 131). She attends

church regularly and has "lots of hobbies", including painting, sewing, swimming, riding a bicycle, playing cards, and bowling, which causes her back to "swell" (TR 40, 54, 129, 131). She visits family and friends and takes her grandson to school occasionally (TR 41). In her application for benefits, she stated "I can do anything as long as I do it slowly." (TR 131).

Claimant can walk three-quarters of a mile at normal speed before her back starts to hurt (TR 42). She can sit for only half an hour before she needs to change positions (TR 43). The only pain medication she takes is Motrin (TR 46, 50). In addition to back pain, she claims she has pain in her neck and right shoulder on exertion, suffers numbness in her hands at night, and has a "loose rib" that causes chest pain (TR 48-49). Her doctors recommended she lose weight because her condition was worsened by excess weight and that she obtain a back support, but these recommendations have not been followed (TR 58).

Claimant fell in her shower on October 13, 1989, straining her lower back and aggravating a pre-existing osteoporosis and grade 1 spondylolisthesis. X-rays taken on October 19, 1989 showed: "1st degree spondylolisthesis of L5-S1, otherwise negative lumbar spine. The vertebral bodies and interspaces are of normal height at all levels. There is some degree of bilateral osteitis pubis." (TR 174).

On November 29, 1989, an electromyography report and interpretation showed:

... There was normal insertional activity seen in all the muscles tested. No abnormal electrical potentials were seen. On voluntary contraction there was a normal recruitment pattern and the motor unit action potentials were of normal amplitude and duration. DISCUSSION: The above electrical findings are within normal limits. There are no electrical

findings to indicate neuropathy, myopathy o [sic] radiculopathy. (TR 179).

Dr. Terrill H. Simmons examined claimant on December 4, 1989 and found "mechanical low back pain secondary to spondylolisthesis. Laboratory and records reviewed from Dr. Shunatona indicate there was a mild inflammatory condition evidenced by increased ESR, now resolved. EMG was normal." Simmons recommended "weight reduction program, swimming, walking, bicycling". (TR 181). He also said: "She has a taxing vocation particularly concerning her back. It may be difficult to get her back to the type of job she was doing. I recommend she gradually build up, walking a mile a day, swimming if this is available. Mild anti-inflammatory, Motrin 800 twice a day. Weight reduction diet." (TR 181-182).

By December 18, 1989, Dr. Simmons reported that claimant was "significantly improved" and was increasing her activity, while being careful with bending and stooping and remaining off work (TR 193). However, on January 8, 1990, Dr. Simmons said claimant's "back pain is much better, but she is unable to tolerate even normal household activity" because she had had the flu and done harder than normal work at home (TR 193). The doctor recommended "[w]eight reduction, strengthening abdominal muscles", swimming, walking, and bicycling (TR 193). A month later, on February 7, 1990, Dr. Simmons found "marked improvement", increased activity, satisfaction with progress, and success with the exercise program, but no weight reduction (TR 193). Claimant was planning on going to "St. John's back program" before returning to work (TR 193-194).

On February 23, 1990, Dr. Simmons noted claimant had lost ten pounds and continued to improve (TR 194). The doctor concluded: "Pt is advised her condition is now

stable to the point she no longer needs medical care. She is apprehensive about returning to work. She is advised her back does have permanent weakness and she would have to be very careful in lifting and she has been instructed in same about overusing her back. We'll see her again on an as-needed basis." (TR 194).

However, the claimant returned to Dr. Simmons on April 9, 1990, after seeking a second opinion and Dr. Simmons stated:

She has a spondylolisthesis that is producing weakness of her back that makes it unable for her to perform any strenuous activity at all. She is reluctant to retire if there is any other modality. She is advised that there is no other regimen, that she has permanent weakness and pain in her back. She has to be careful lifting, bending and stooping. She is unable to perform normal vocational activities the way they are described to me and as far as changing vocations, considering her age and educational requirements and experience, she will be totally disabled. I will see her back on an as-needed basis. FINAL DX: Spondylolithesis [sic], residual. (TR 194).

Dr. John B. Vosburgh provided the second opinion to claimant on March 7, 1990, finding: "This lady has significant trouble in her low back. I have recommended maybe considering a lumbosacral support, outpatient physical therapy. I told her to stop her work at this time. It may be that her days of doing work, standing on her feet all day long are over. I think a lumbar fusion may also be considered in the future if the pain remains unrelenting. I will see her on a prn basis." (TR 195).

On March 21, 1990, Dr. Vosburgh reported: "I have recommended that she continue with the PT every other day for two weeks and then discontinue it, return here in three weeks and if she is still better, will release her to work." (TR 195).

On April 11, 1990, Dr. Vosburgh concluded: "I have little more to offer her other than to suggest that she change work. I don't think that she will be able to go back to work as a Kerr Glass Inspector unless she can sit 50 percent of her workday. She also should avoid frequent bending, stooping and lifting, no lifting over 25 pounds. I think this is on a permanent basis. I have recommended activity as tolerated and we will see her on a prn basis." (TR 195).

Dr. Randall L. Hendricks saw claimant once on June 22, 1990, and found:

No atrophy was identified and her straight leg raising tests were negative. Reflexes were normal and symmetrical. Babinski was downgoing; no clonus was identified. She displayed no motor weakness of the lower extremities, but did have tenderness in the midline at L5-S1 to palpation.

Review of x-rays showed a bilateral pars defect at L5 with a spondylolisthesis of L5 on S1, grade I in severity.

I have discussed with the patient my recommendation for further evaluation with a CT scan of the lumbar spine; however, she has declined this at this juncture. She was also complaining of some mid thoracic pain and I suggested if she followed up I would be happy to x-ray the thoracic area; however, she has not made a return appointment to my knowledge, as of this date.

Certainly with the patient's diagnosis and her age of 58, it would be difficult for her to carry out gainful employment and returning would be difficult at best. (TR 207-208).

As defendant noted in his brief, Dr. Hendricks did not have the training to evaluate claimant's ability to carry out employment and retrain.

A year later, after the ALJ had made his decision, Dr. Hendricks saw claimant and reported:

Ruby returns to our office in follow up of her lumbar myelogram and CT scan from L3 to the sacrum. This shows that the patient has a spondylolisthesis of L5 on S1. Now interestingly when I look at the oblique, I'm having a hard time seeing the pars defect, but the patient indeed has some impingement upon the L5 nerve roots bilaterally. She has an instability that is noted well on the flexion extension studies and I believe this to be causing a good portion of the patient's pain. In fact, she has not improved with time. She has not lost weight either. She actually has deteriorated and due to the fact that she is not improving, but she is getting worse, I believe she will require a decompression and stabilization procedure. This was discussed in detail with the patient and she is understanding. She indicated to me that her insurance company demands a second opinion and we will work to fulfill that obligation. I answered the patient's questions to her satisfaction. Will refer her to a neurosurgeon for decompression. (TR 222).

The lumbar myelogram done on May 31, 1991 showed "IMPRESSION: 1) SPONDYLOLISTHESIS OF L5-S1, SLIGHTLY INCREASING IN FLEXION AND DECREASING IN EXTENSION. POOR FILLING OF 5 NERVE ROOT SLEEVES. 2) NO EVIDENCE OF DISK HERNIATION."

A vocational expert testified at the hearing. The ALJ posed a first hypothetical question to her:

Q Miss Kelsay, let's assume we have a hypothetical individual that is 58 years of age and has the past work history of the claimant in this case. This hypothetical individual can lift 10 pounds frequently and 20 pounds occasionally, can reach, handle, feel, push, pull, see, hear, speak, bend forward only 45 degrees when standing perpendicular with level ground, or bend forward only 45 degrees when they are seated with their upper torso perpendicular with level ground. [T]he hypothetical individual can operate stationary machinery with normal vibrations in a seated, from a seated position. The hypothetical individual can sit or stand at will, walk, and stand occasionally. For purposes of the hypothetical question number 1, as to nonexertional impairments, there are none in

this hypothetical individual in connection with temperature or environment or sight or hearing or feel or sensory or posture or skin. However, the hypothetical individual does have mild to moderate frequent pain on exertion and at nonexertional postures in the right shoulder, low back and both hips and the legs. The hypothetical individual can sit 5 hours in a 8 hour work day. They [sic] hypothetical individual has fine finger manipulation in both hands, cannot raise arms above shoulder level frequently, but can do so occasionally. The hypothetical individual is right-handed. Can make change in a business setting and has a high school education. Now, then for purposes of this hypothetical question number 1, could such a hypothetical individual perform the past work of the claimant in this case and if they could, or if they couldn't, what other jobs might fit this definition for this hypothetical individual that are available in significant numbers in the nation's work force?

A An individual with this hypothetical profile could not act as the prior work of the claimant in this case.... However, there are a group in production inspectors and examiners that are, where the work is sedentary. They meet, these jobs would meet the demands of the hypothetical and the skill level does not exceed that as represented in the past work history and that's very significant because the skill level in the past work was quite limited. It was an SVP of 3, which is the lowest level of transferrable skills and there are many production inspectors and examiner jobs with skill levels higher, but I have selected only those with the same skill level, the SVP of 3. This, these jobs would include job titles such as eye glass frames inspector ... bead inspector ... button reclaimer.... There are approximately 225 such sedentary jobs in the State of Oklahoma, 21,000 in the national economy, and that's all that I would have to suggest based on the hypothetical. (TR 65-67).

The ALJ then asked a second hypothetical:

Q ... Hypothetical question number 2. The hypothetical individual can sit or stand at will, sit or stand intermittently, can walk and stand frequently. I say walk and stand frequently, walk and stand up to 4 hours a day.

A Walking and standing at 4 hours a day would not

change my answers. [T]hey would be, my answers would be the same as they were in hypothetical 1.

The ALJ finally asked:

Q ... Walk and stand frequently would be hypothetical question number 3.

A All right. A person with the profile explained in hypothetical number 3 would be able to access the job of selector as it's normally performed in the economy. Those jobs exist in the hundreds in the State of Oklahoma and in the tens of thousands nationally [I]n addition, the second part of the question would be concerned with transferrable skills to other work. [T]here are at the light duty level, which would meet demands of hypothetical number 3, additional jobs that are in the production inspector and examiner group that do not exceed the SVP of 3 or the skill level evidence in the past work history. They would included such job titles as bottle beverage inspector ... quality control inspector ... and there are numbers of other jobs.... This group of light semi-skilled production checkers and examiners accounts for about 1,400 jobs in Oklahoma and 150,000 in the national economy. (TR 67-69).

There is no merit to claimant's argument that the ALJ failed to follow the "treating physician's rule" in ignoring Dr. Simmons' opinion and rejecting Dr. Hendricks' opinion. The ALJ must give substantial weight to the statement of claimant's treating physician. Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985), unless the opinion is brief, conclusory, and unsupported by medical evidence. Allison v. Heckler, 711 F.2d 145, 148 (10th Cir. 1983). The ALJ clearly stated that he did not give Dr. Hendricks' opinion much weight as claimant's treating physician, because he only saw her once for the purpose of evaluation rather than for treatment and also because he drew conclusions that involved vocational factors which were outside his field of expertise (TR 19). While the ALJ did not state why he did not consider Dr. Simmons' conclusion of April 9, 1990, the court assumes

that this occurred because Dr. Simmons, too, drew conclusions that involved vocational factors which were outside his field of expertise. The ALJ discussed Dr. Simmons' other opinions in his ruling (TR 19). The decision to disregard the opinion that plaintiff did not have the age, education, or experience to change vocations was proper in this case. "It is an accepted principle that the opinion of a treating physician is not binding if it is contradicted by substantial evidence." Mongeur v. Heckler, 722 F.2d 1033, 1039 (2nd Cir. 1983). The doctor did not have the training to make this kind of evaluation. The vocational expert testified based on her training that there were jobs claimant could perform based on her educational and vocational background.

While the ALJ asked claimant to rate her pain on a scale of one to ten (claimant contends that he "conducted a pain test" in evaluating her pain), he did not mention her responses in his ruling. Instead, he properly relied on the opinion of Dr. Vosburgh (who limited her sitting to only 50% of her work day) (TR 19), her use of Motrin successfully for relief of pain (TR 19), and especially her daily activities (TR 20) in concluding that her pain was not disabling.

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515

(10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. She must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and

to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). "[T]he absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court finds that the ALJ properly concluded that claimant's complaints of pain were credible, but the evidence as a whole did not establish that the pain prevented the performance of all levels of sustained work activity. He also applied the factors in Luna to claimant's case in making his decision (TR 19). The court notes that claimant has failed to lose weight and wear a back support, as recommended by her physicians.

There is also no merit to claimant's contention that the ALJ failed to consider her "impaired balance" and loss of strength and flexibility in her legs. While Dr. Vosburgh noted on March 7, 1990, that, in certain positions claimant experienced paresthesias in her lower extremities (TR 195), claimant then claims "such paresthesias can reasonably be expected to significantly interfere with" her balance (Plaintiff's Brief, pg. 6). There is no medical evidence of impaired balance or loss of leg strength. On her disability application, claimant states her disabling condition only as "mechanical low back pain caused by spondylolisthesi [sic]". (TR 128).

Finally, the ALJ correctly applied the Medical Vocational Guidelines, in conjunction with the opinion of the vocational expert, after concluding plaintiff did not suffer disabling pain. Use of the Medical-Vocational Guidelines ("the grids"), 20 C.F.R. § 404, Subpt. P, App. 2, is predicated on an impairment that limits the physical strength or exertional

capacity of a claimant. Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987). The Social Security Regulations note, however, that certain mental, sensory, or skill impairments, environmental restrictions, or postural and manipulative restrictions may be independent from exertional limitations. Id. at 515-16. Where "nonexertional" limitations, such as pain, combine with exertional limitations which do not in and of themselves establish a disability, then the "grids" are to provide no more than a framework for determining disability. 814 F.2d at 1460. The ALJ did not automatically or mechanically apply the grids, but instead considered all the relevant facts in determining whether the nonexertional limitations diminish the claimant's ability to perform other work. Id. Based on the testimony of the vocational expert, the ALJ properly concluded that there were many jobs in the national economy claimant could perform.

There is substantial evidence in the record to support the decision of the ALJ. The decision is affirmed.

Dated this 21st day of November, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

FILED

NOV 21 1994

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

CAROLYN S. THOMPSON,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 92-C-395-E ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.¹

In the case at bar, the ALJ made his decision at the fourth step of the sequential

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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evaluation process.² He found that from April 6, 1988 through April 11, 1990, the claimant had the residual functional capacity to perform less than the full range of sedentary work. Commencing April 12, 1990, he found that the claimant had the residual functional capacity to perform work-related activities except for work involving lifting more than 20 pounds occasionally and 10 pounds frequently. He found that claimant's past relevant work as a waitress or restaurant manager did not require performance of work-related activities precluded by these limitations commencing April 12, 1990. Having determined that claimant's impairments did not prevent her from performing her past relevant work commencing April 12, 1990, the ALJ concluded that she was disabled commencing April 6, 1988, and the disability ended April 11, 1990.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) That the ALJ's decision that claimant was not permanently disabled is not supported by substantial evidence.
- (2) That the ALJ's finding that claimant's allegations of pain were not credible for periods commencing April 12, 1990 was in error.
- (3) That the ALJ erred in ignoring the opinions of three independent physicians.

It is well settled that the claimant bears the burden of proving his disability that

² The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The ALJ found that claimant has "severe low back pain" (TR 23). She began seeing her treating physician, Dr. Donald D. Collins, on April 18, 1988, complaining of back pain following an incident twelve days earlier when she was tugging a heavy floor jack while unloading a pallet from a trailer truck (TR 157). She was given Darvocet N-50 and Ibuprofen 400 mg., but these did not help the pain (TR 157). The doctor noted no muscle spasms, but found tightness in the back, and gave her Meprobamate and Naprosyn 500 mg. (TR 157).

On April 28, 1988, Dr. Allan S. Fielding saw claimant for the pain. He noted that her back was tender, but she had a negative straight leg raising test and unremarkable x-rays (TR 161). He diagnosed her condition as a back strain (TR 161). On January 10, 1989, Dr. Fielding wrote a letter saying that she had attempted C.H.A.R.T. Rehabilitation and failed to improve (TR 159). She was complaining of nearly constant low back pain radiating into her left leg, and he discussed a lumbar laminectomy and fusion (TR 159).

On February 21, 1989, Dr. Don L. Hawkins reviewed her EMG and nerve conduction study, as well as a CT scan, myelogram, MRI scan, and x-rays. The doctor noted as follows:

The needle electrode studies show abnormal responses, particularly in the left extensor digitorum brevis, left peroneal, and left gastroc muscles. This would be indicative of an L5-S1 nerve root distribution. Plain x-ray films of the lumbar spine shows a grade II spondylolisthesis of L5 on S1, slightly less than 50 percent slippage. There is significant interspace narrowing at L5-S1. I have also reviewed the lumbar myelogram which shows the previous defects as described,

however, on the column of dye there is a defect bilaterally of the S1 nerve roots at L5-S1 with moderate narrowing of the spinal canal which would be consistent with primarily spinal stenosis at this region.

The CT scan was also reviewed, obtained after the myelogram with contrast still in place. There is some bulging apparent of both the L4-5 and L5-S1 discs. There is stenosis in the neural foramen, greater on the left than the right side at L5-S1 involving the L5 nerve root on the left. There is also protrusion of the disc bulging significantly across the space at L5-S1. I have also reviewed the MRI scan dated May 4, 1988 of the lumbar spine. This shows degenerative changes of both the L4-5 and L5-S1 disc. There are no degenerative changes above the L4 level. There is some bulging of the 4-5 disc, primarily annulus. There is also significant bulging of the L5-S1 disc noted diffusely across the space. (TR 228).

On March 31, 1989, claimant had a complete laminectomy and fusion at L4-5 and L5-S1, and plates and screws were implanted to form a fixation of the bone mass (TR 163-186). On August 11, 1989, tests showed a suspected fracture of the left plate (TR 197), so on August 14, 1989, the plate and screws were removed and the laminectomy and fusion were redone (TR 187-196). On February 19, 1990, surgery was done to remove the orthopedic implants from the spine and a solid fusion was found (TR 200-201). Throughout this time period, claimant continued to complain of pain (TR 213-225).

On April 13, 1990, Dr. Hawkins wrote a letter to the State Insurance Fund, which the ALJ relied on exclusively for his finding that claimant's disability ended at that time.

Dr. Hawkins stated:

She has very little pain in her back and no pain in her left buttock or left leg. She still has an area which produces some intermittent pain in the right side of her low back region which on closer evaluation is located directly over the sacroiliac joint. She has some pain which seems to radiate into the buttock and upper thigh region which is consistent with referred pain

rather than any neurologic problem. She has no other complaints or problems.

Her evaluation is unremarkable except for tenderness over the right sacroiliac joint. Range of motion of the back is greatly improved with only mild restrictions now noted. Complete neurologic evaluation reveals no deficit with deep tendon reflexes 2+ and equal and without any demonstrable motor weakness or sensory deficit in the extremities. The only reproducible positive finding is as stated, pain over the SI joint with some increased pain with stress tests to the right SI joint. All of these are negative on the left side. (TR 209).

....

I have recommended a local injection performed in the right S1 joint, performed under sterile technique with Hydrelta TBA and in hopes that this will resolve the irritation there. It is my belief with time this should subside. The patient otherwise has reached maximum medical improvement. I do not believe that any additional treatment, other than that locally to the right SI joint, performed today would be expected to improve this patient's overall condition.

A permanent partial impairment rating has been calculated According to the Combined Values Chart, 10 percent based on loss in motion, 5 percent for each of the operated levels as well as 1 percent for each of the subsequent surgeries as well as 1 percent for the persistent right sacroiliac pain would then equal 22 percent permanent partial impairment The patient is able to sit, stand, and walk on a frequent basis without the need for any specific restrictions of any of those activities. I would still feel that a lifting restriction of 35 pounds would be appropriate for this patient. The patient may lift 10 pounds or light weights on a continuous basis without any problems. The patient may push, pull, twist, climb, balance, stoop, kneel, crawl, reach, grasp, and perform repetitive movements as long as these are not absolutely continuous and as long as she stays within the lifting restrictions. The patient is dismissed from treatment effective today with the impairment rating and the restrictions as outlined. This patient has reached maximum medical improvement. She may return back to work within these restrictions whenever she desires. (TR 210).

There is substantial evidence to support plaintiff's claim that she suffers disabling pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain

is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Claimant testified at the hearing before the ALJ that she felt no better after her three back surgeries (TR 41). She described the pains as follows: "They're in my lower back and the right hand side. I get to the point if I try to do anything at all, and I get to where I can't walk. My husband has to help me to bed and I take Lortabs (Phonetic) for pain." (TR 41). She admitted that the pain made her feel depressed, but she was trying to work out of the depression without the help of a psychiatrist (TR 47).

Claimant stated that she can walk four or five blocks and then suffers "a lot of pain." (TR 42). On a scale of 1 to 10, her pain is about a 6 most the time and then gets worse until she has to go to bed (TR 43). This happens at least once a week (TR 43). It hurts if she lifts just a gallon of milk (TR 43). If she bends or stoops, she has "to have something to help [her] up." (TR 44). She can only halfway bend her knees without pain (TR 44). She can only sit for ten minutes without changing positions (TR 44), and she has to stand up and move around every 15-20 minutes (TR 45). During an eight-hour period, she could sit for 20 minutes and then would have to lay down for 30 minutes to an hour (TR 45). During such a day, she could only be seated four hours and could stand two hours and lay down two hours (TR 46).

Claimant stated that she can dress and bathe herself, make her bed, and do a little laundry (TR 48). She can only shop for 15-20 minutes and does very little cooking or dish washing (TR 48). Her children clean the house and do yard work (TR 49). She spends most her day listening to the radio and watching television (TR 49-50). She can only drive short distances (TR 50). She has trouble sleeping because she wakes up often in pain and has to change positions (TR 51). She had to stand up during her examination by the ALJ (TR 53). She takes up to five Lortab pain medications a week with no side effects (TR 54-55).

At the hearing, a vocational expert testified that a person with claimant's past work history who could only lift up to 35 pounds, had limited motion in her spine, and could only bend, stoop, crouch, and twist occasionally could be a restaurant manager (TR 60). If moderate depression and ability to concentrate were added, the expert listed the jobs of assembly line, production helper, inspector, and cashier (TR 60-61). The ALJ then asked:

Q All right. Now let's assume that we have some additional restrictions and these are based on the claimant's testimony today. Let's assume that because of her back pain which ranges from say number 4, mild to moderate pain and moderate pain number 6 up to -- occasionally goes up to severe pain, and the severe pain occurs when she's walking more than four to five blocks, or bending, or riding in small cars or pick-up trucks or in damp weather. So when these things occur let's say she needs to take her medicine and lay down. So in an average day let's say in an eight hour day she has the ability to stand or walk for two hours, sit for four hours and she would spend about two hours laying down out of an eight hour work day, and also assume that she needs help when she's bending to get -- or stooping to get back up again and I think those are the primary restrictions. With those restrictions would there be any jobs in the regional or national economy? (TR 61).

The vocational expert responded:

A No there would not. That is because as these jobs exist they would generally require that the person be present and able to perform the job for eight hours out of an eight hour work day. They don't allow the opportunity for the person to lay down. Generally they would also require the person to have self-mobility so that if they bent down they'd have to be able to get up themselves without assistance. (TR 61-62).

Claimant was seen by Dr. Jimmy C. Martin on May 29, 1990 for a social security impairment evaluation. Dr. Martin found:

The patient has marked muscle spasm and tenderness from L1 to S1 bilaterally. She has point tenderness over the sacroiliac joints bilaterally, right greater than left. Range of motion reveals flexion to 70 degrees, extension 0 degrees, lateral flexion 10 degrees bilaterally and rotation 10 degrees bilaterally. The patient has pain radiating into her right sacroiliac joint with extension of her right leg while in the sitting position. Dorsiflexion of both feet appears to be strong and equal. Deep tendon reflexes are 1+ on the right and 2+ on the left. The patient has a positive straight leg raising test on the right at 40 degrees. (TR 233).

....

Consideration was also given to chronic weakness and decreased function of the low back and hips. (TR 234).

As a result, Dr. Martin stated:

[C]onsidering the nature of the patient's employment, and her educational history of eighth grade, it is my opinion that this patient is 100% permanently totally economically disabled. I feel that this patient is unemployable. (TR 234).

A full day of testing was performed by Cary L. Bartlow to prepare a vocational rehabilitation evaluation on July 31, 1990. After giving claimant many different types of tests, Dr. Bartlow concluded:

This counselor feels that the client is not a candidate for any rehabilitation service because of her inability to sustain a work day. Similarly she is not able to perform any type of work or job due to her constant pain and limited exertional ability. Through the one half day evaluation at this testing center the client required breaks lasting between five and fifteen minutes after a maximum of twenty minutes of work activities. As the work evaluation progressed she required the breaks more frequently. It was clear that the client was decreasing in her work productivity and performance at the end of the evaluation. As a matter of fact it is to be noted the client requested and was allowed to lay on the reception area couch for a short period of time before she was able to leave the office to return home.

In my opinion, this client cannot follow continuously a substantial gainful occupation without serious discomfort. Since the client has difficulty and is not satisfied with her own level of performance and maintenance of household duties and responsibilities and because the client cannot lift certain objects, it would indeed be difficult to satisfy the demands of any prospective employer. The client still remains motivated to work and would most likely attempt work if work were available that matched the limitations and abilities of the client. We have not been able to identify any work in the labor market of reasonable quantity, dependability or quality the client is capable of performing. The client has not retained sufficient residual capacity to work. She is not employable in her current medical and educational condition. The client, with reasonable probability, is disqualified from performing the regular, ordinary and usual tasks of a workperson and is consequently 100% economically disabled and unemployable. In my opinion, Carolyn Thompson is permanently totally disabled as a result of the inability to earn any wage in any employment for which she is or may become physically suited for or reasonably fitted by the education, training or experience of the client as a result of the injury. (TR 247).

The ALJ did not consider, but the Appeals Council had before it, the medical report of Dr. Russell F. Allen, who examined claimant and reviewed her medical history and records on September 25, 1990, but conducted no tests of his own. He concluded "as a

result of the nature, severity and multiplicity of the injuries arising from the accident of 4-6-88, as well as her limited educational and vocational background, she is totally and permanently, economically impaired." (TR 263).

Dr. Donald R. Inbody conducted a social security psychiatric examination of claimant on October 31, 1990. He found that she was suffering a single episode of severe depression.

This is a pleasant, well-groomed female who walks with some discomfort and pain and stiffness. Her speech was logical, coherent and sequential with no affective disturbances or associational defects in thinking. No psychotic symptomatology was noted. She was oriented in all spheres, and appears to be of average intelligence. She appeared to be somewhat tense and irritable, and states that with the depression has occurred a fair amount of irritability at her family. She shows significant signs of clinical depression with some psychomotor retardation, but no serious suicidal ideation There were moderate disturbances in attention and concentration, primarily because of the lower back pain and her depression. (TR 250).

There is not substantial evidence in the record to support the decision of the ALJ that claimant was not disabled after April 12, 1990. There is certainly an objective medical basis for the severity of pain asserted by claimant. Her treating doctors have recognized her constant complaints even after surgery (TR 209-210). While the ALJ admitted that claimant was "incapacitated" through April 11, 1990, amazingly he found that after that date she could go back to waitress work (TR 22). He concluded that "the claimant's complaints concerning her pain are overstated, and she clearly indicated that she could go for a week without taking any pain medications, and when she did have problems, she only used 5. The Administrative Law Judge finds the claimant's pain to be no more than mild

to moderate, and it would not interfere with concentration or performance by the claimant of any work" (TR 22). This finding was limited to periods commencing April 12, 1990. (TR 22). The court refuses to give absolute deference to this conclusion.

While one doctor, Dr. Hawkins, has concluded that claimant can work, numerous others have found otherwise, including Drs. Martin, Inbody, and Allen. The Secretary must give great weight to the report of a treating physician absent specific and legitimate reasons for not doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). Here there was much evidence to refute Dr. Hawkins' conclusion that claimant has "made a dramatic progressive improvement and had reached maximum medical improvement." (TR 22). Such dramatic improvement following three back surgeries would certainly be the exception rather than the rule. The ALJ ignored the vocational expert's conclusion that claimant would not be able to hold any jobs in the national economy if she had to lay down periodically during the work day.

The final decision of the ALJ is reversed and claimant is found to be disabled as of April 6, 1988 and is entitled to disability insurance benefits under §§ 216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. § 416(i) and 423.

Dated this 21st day of November, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Thompson.or

DOLLAR SYSTEMS, INC.,)
 a Delaware corporation,)
)
 Plaintiff,)
 vs.)
)
 INTERNATIONAL FRANCHISING)
 SERVICES, LTD., a/k/a)
 INTERNATIONAL FRANCHISING)
 SERVICES, INC., SIGMA FOUR)
 INTERNATIONAL MARKETING, INC.,)
 ROBERTO GALOPPI and CECILIA)
 GALOPPI,)
)
 Defendants.)

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

Case No. 94-C-33-BU

ENTERED ON DOCKET
 DATE 11-22-94

ORDER

This matter comes before the Court upon the Joint Motion for Dismissal With Prejudice filed on November 14, 1994. Upon due consideration, the Court finds that the motion should be and is hereby **GRANTED**. Plaintiff, Dollar Systems, Inc.'s claims against Defendants, International Franchising Services, Ltd., a/k/a International Franchising Services, Inc., Sigma Four International Marketing, Inc. and Roberto Galoppi are **DISMISSED WITH PREJUDICE** and Defendant, International Franchising Services, Ltd., a/k/a International Franchising Services, Inc.'s counterclaims against Plaintiff, Dollar Systems, Inc., are **DISMISSED WITH PREJUDICE**. Each party shall bear its own costs and attorney's fees.

Entered this 18th day of November, 1994.


 MICHAEL BURRAGE
 UNITED STATES DISTRICT JUDGE

F I L E D

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

NOV 21 1994

WAYNE H. CREASY and MARTHA
CREASY, husband and wife,)
)
)
 Plaintiffs,)
)
 vs.)
)
)
 ALBION NORMAN, d/b/a ESSEX)
 LOUDOUN & CO. and ESSEX LOUDOUN)
 & COMPANY, a Delaware Corporation,)
)
 Defendants.)

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

ENTERED ON DOCKET
DATE 11-22-94

Case No. 93-C-773-~~E~~ Bu

JOURNAL ENTRY OF JUDGMENT

NOW, on this 18th day of November, 1994, the
above entitled cause comes on for entry of judgment.

On the 12th day of October, 1994, the Honorable Jeffrey
S. Wolfe, United States Magistrate Judge, entered his Report
and Recommendation for the entry of judgment in favor of the
Plaintiffs and against the Defendants.

On the second day of November, 1994, the Court affirmed
and adopted the Report and Recommendation of said United
States Magistrate Judge in its entirety, and directed
counsel for the Plaintiffs to prepare and submit this
Journal Entry for the Court's approval on or before
Wednesday, November 16, 1994.

IT IS, THEREFORE, ORDERED, adjudged and decreed that
the Plaintiffs be and they are hereby granted judgment, in
addition to the judgment for 1.7 million dollars as and for
specific performance heretofore granted in this cause, a
judgment for consequential damages in the amount of

\$68,500.00, plus attorney fees of \$750.00 and court reporter fees of \$200.00, together with their costs expended herein.

Entered the date first above written.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

Approved as to form:



Attorney for Plaintiffs

b:crm/albion

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

FILED

NOV 21 1994

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

ARNOLD J. SCHMIDT AND THOMAS J. ZELUFF,

Plaintiffs,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR HEARTLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,

Defendant.

Tulsa County District
Court Case No. CJ 92-3256

Case No. 93-C-930-*JK*

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated, pursuant to Fed.R.Civ.P. 41(a)(1), that the Plaintiffs, Arnold J. Schmidt and Thomas J. Zeluff dismiss with prejudice the claims set forth in their Complaint on file herein. Each party is to bear its own costs and attorneys fees.

Respectfully submitted,

JONES, GIVENS, GOTCHER & BOGAN

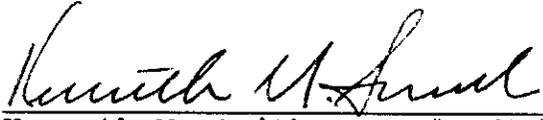
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FILED

NOV 21 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

IN RE: ASBESTOS LITIGATION:)
)
KIM SHUMATE, Individually)
and as Personal)
Representative of the Heirs)
and Estate of HERBERT)
FLICKINGER,)
)
Plaintiff,)
)
v.)
)
FIBREBOARD CORPORATION,)
et al.,)
)
Defendants.)

M-1417
ASB (I) 6654

ENTERED ON DOCKET
DATE NOV 22 1994

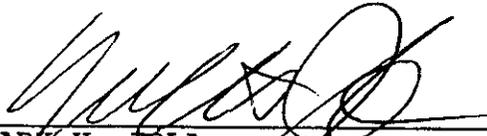
Case No. 90-C-260-C

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc., has been settled and compromised as to Defendant Owens-Illinois, Inc., only, and Plaintiffs' cause of action against Owens-Illinois, Inc., should be, and the same hereby is, dismissed with prejudice with each party to bear its own costs.

78

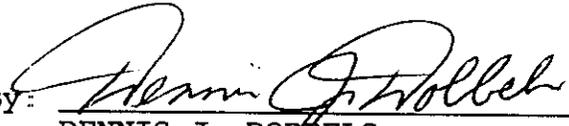
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OWENS-ILLINOIS, INC.

15438/16636
SSPLAZA1: Y:\KKKAT\PLDG\19909.1

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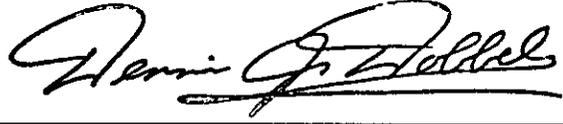
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15435/12790
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

NOV 21 1994

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

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

_____)
This Document Relates To:)

ENTERED ON DOCKET

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

DATE NOV 22 1994

IN RE: ASBESTOS LITIGATION:)

M-1417
ASB (I)

6663

ROY O. BURGESS)
AND)
ADELAIDE A. BURGESS,)

Plaintiffs,)

v.)

Case No. 87-C-404-C

FIBREBOARD CORPORATION,)
et al.,)

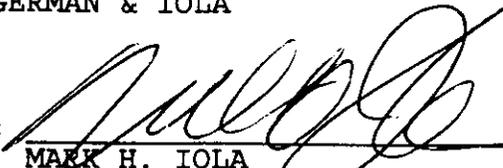
Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc., has been settled and compromised as to Defendant Owens-Illinois, Inc., only, and Plaintiffs' cause of action against Owens-Illinois, Inc., should be, and the same hereby is, dismissed with prejudice with each party to bear its own costs.

36

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15438/16614
SSPLAZA1: Y:\KKKAT\PLDG\19893.1

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15435/12790
SSPLAZA1: W:\POCUR\PLDG\19959.1

FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

_____)
This Document Relates To:)

ENTERED ON DOCKET

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

DATE NOV 22 1994

IN RE: ASBESTOS LITIGATION:)

M-1417
ASB (I)

6667

EDWARD FRANK CLAYPOOL)
AND)
GAYOLA JEAN CLAYPOOL,)

Plaintiffs,)

v.)

Case No. 87-C-519-C

FIBREBOARD CORPORATION,)
et al.,)

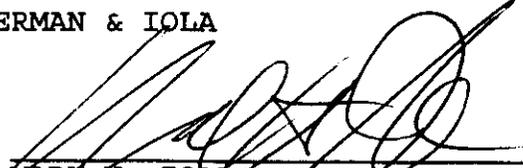
Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc., has been settled and compromised as to Defendant Owens-Illinois, Inc., only, and Plaintiffs' cause of action against Owens-Illinois, Inc., should be, and the same hereby is, dismissed with prejudice with each party to bear its own costs.

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OWENS-ILLINOIS, INC.

15438/16625
SSPLAZA1: Y:\KKKAT\PLDG\19903.1

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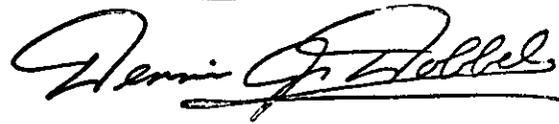
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NEERING



15435/12790
SSPLAZA1: W:\POCUR\PLDG\19959.1

FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

_____)
This Document Relates To:)

ENTERED ON DOCKET
DATE NOV 22 1994

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

IN RE: ASBESTOS LITIGATION:)

M-1417)
ASB (I) 6650)

SHERMAN F. RIDDLE AND)
PHYLLIS V. RIDDLE,)

Plaintiffs,)

v.)

Case No. 91 C 733 C)

FIBREBOARD CORPORATION,)
et al.,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc. only is dismissed with prejudice, with each party to bear its own costs.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 22 day of November, 1994 to:

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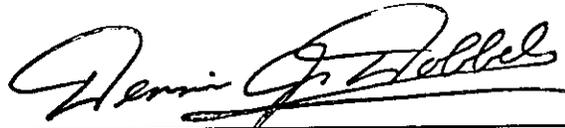
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COUNSEL FOR COMBUSTION ENGINEERING



FILED

NOV 21 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

IN RE: ASBESTOS LITIGATION:)
)
LAGRACE BENIGAR, Individually,)
and as Surviving Spouse and)
Next of Kin of GARLAND)
WILLIAM BENIGAR, Deceased,)
)
Plaintiff,)
)
v.)
)
FIBREBOARD CORPORATION,)
et al.,)
)
Defendants.)

M-1417
ASB (I)

6660 ENTERED ON DOCKET
NOV 22 1994
DATE _____

Case No. 89-C-438-C

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Plaintiff's attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiff's cause of action against Owens-Illinois, Inc., has been settled and compromised as to Defendant Owens-Illinois, Inc., only, and Plaintiff's cause of action against Owens-Illinois, Inc., should be, and the same hereby is, dismissed with prejudice with each party to bear its own costs.

63

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OWENS-ILLINOIS, INC.

SERVICE LIST

I hereby certify that the foregoing pleading was mailed via U.S. Mail on this 22 day of November, 1994 to the following:

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COUNSEL FOR COMBUSTION ENGI-
NEERING



15435/12790
SSPLAZA1: W:\POCUR\PLDG\19959.1

FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products Liability Litigation (No. VI)

Civil Action No. MDL 875

This Document Relates To:

ENTERED ON DOCKET
NOV 22 1994

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

DATE _____

IN RE: ASBESTOS LITIGATION:

M-1417
ASB (I) 66711

ARTHUR LEON HAMLIN AND WANDA LORRAINE HAMLIN,

Plaintiffs,

v.

Case No. 87 C 523 C

FIBREBOARD CORPORATION, et al.,

Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc. only is dismissed with prejudice, with each party to bear its own costs.

UNGERMAN & IOLA

By: [Signature]
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ATTORNEYS FOR SETTLING DEFENDANT
OWENS-ILLINOIS, INC.

CERTIFICATE OF SERVICE

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A handwritten signature in cursive script, appearing to read "William G. Smith", is written over a horizontal line.

FILED
NOV 21 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

This Document Relates To:)

ENTERED ON DOCKET
DATE NOV 22 1994

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

IN RE: ASBESTOS LITIGATION:)

M-1417)
ASB (I) 6443)

EDDIE M. JUNK AND)
SANDRA L. JUNK,)

Plaintiffs,)

v.)

Case No. 88 C 223 C

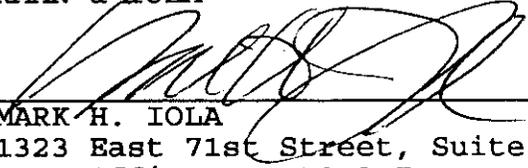
FIBREBOARD CORPORATION,)
et al.,)

Defendants.)

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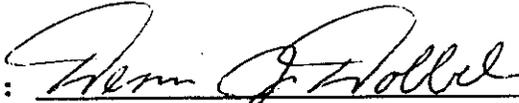
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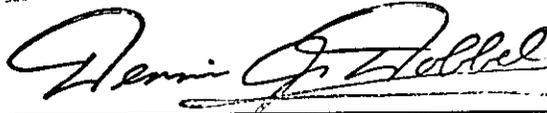
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FILED

NOV 22 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

_____)
This Document Relates To:)

ENTERED ON DOCKET

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

~~DATE NOV 22 1994~~

IN RE: ASBESTOS LITIGATION:)

M-1417)
ASB (I) 6645

FRED MARBLE AND)
NORMA MARBLE,)

Plaintiffs,)

v.)

Case No. 89 C 130 B ✓

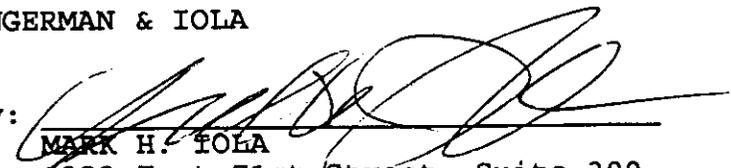
FIBREBOARD CORPORATION,)
et al.,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc. only is dismissed with prejudice, with each party to bear its own costs.

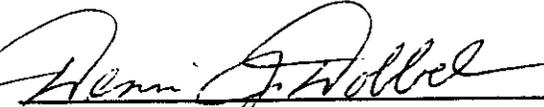
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FILED
NOV 22 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
TULSA, OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products
Liability Litigation (No. VI)

This Document Relates To:
In the United States District
Court for the Northern
District of Oklahoma
IN RE: ASBESTOS LITIGATION:
JIMMY WAYNE MCCORKLE,
Plaintiff,
v.
FIBREBOARD CORPORATION,
et al.,
Defendants.

Civil Action No. MDL 875

ENTERED ON DOCKET
DATE NOV 22 1994

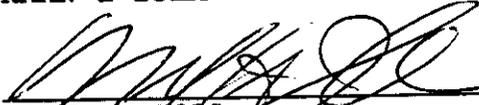
M-1417
ASB (I) 6646

Case No. 88 C 499 B

STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiff, Plaintiff's attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiff's cause of action against Owens-Illinois, Inc. only is dismissed with prejudice, with each party to bear its own costs.

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OWENS-ILLINOIS, INC.

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Dennis J. Haddad

FILED

NOV 21 1994

[Handwritten mark]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

In Re: Asbestos Products
Liability Litigation (No. VI)

Civil Action No. MDL 875

This Document Relates To:

ENTERED ON DOCKET
DATE NOV 22 1994

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

IN RE: ASBESTOS LITIGATION:

M-1417
ASB (I) 6643

GARRETT G. JUBY
AND
RACHEL JEAN JUBY,

Plaintiffs,

v.

Case No. 88-C-302-B ✓

FIBREBOARD CORPORATION,
et al.,

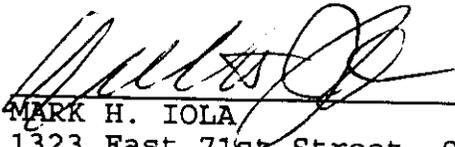
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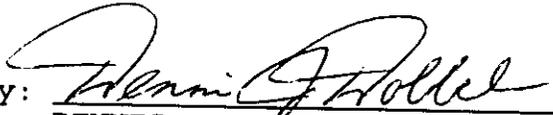
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OWENS-ILLINOIS, INC.

15438/16673
SSPLAZA1: Y:\KKKAT\PLDG\19929.1

SERVICE LIST

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FIBERGLAS

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COUNSEL FOR KEENE CORPORATION

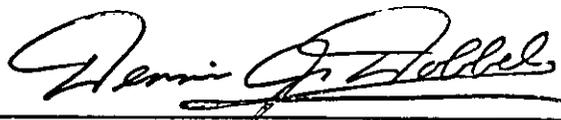
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COUNSEL FOR COMBUSTION ENGI-
NEERING



15435/12790
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FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

_____)
This Document Relates To:)

ENTERED ON DOCKET
DATE NOV 22 1994

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

IN RE: ASBESTOS LITIGATION:)

M-1417
ASB (I) 6659

DONALD B. APPLE AND)
ADAIRA JEAN APPLE,)

Plaintiffs,)

v.)

Case No. 91 C 736 B

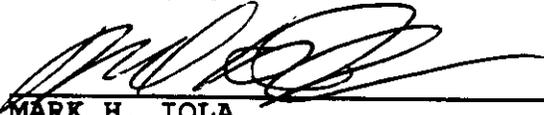
FIBREBOARD CORPORATION,)
et al.,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc. only is dismissed with prejudice, with each party to bear its own costs.

UNGERMAN & IOLA

By: 

MARK H. IOLA
1323 East 71st Street, Suite 300
Post Office Box 701917
Tulsa, Oklahoma 74170-1917
Telephone: (918) 495-0550

ATTORNEYS FOR PLAINTIFFS

3

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ATTORNEYS FOR SETTLING DEFENDANT
OWENS-ILLINOIS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 22 day of November, 1994 to:

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and

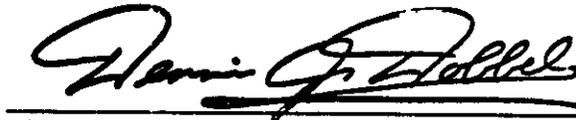
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COUNSEL FOR COMBUSTION ENGINEERING



A handwritten signature in black ink, appearing to read "William G. Smith", is written over a horizontal line.

15438/17880
SSPLA2A2: Y:\MEMOL\PLDG\21270.1

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 21 1994

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAMES DARRAGH JOHNSTON;)
)
MARCIA ANN JOHNSTON;)
)
JAMES ALLEN HEWETT;)
)
DR. BARBARA BURTON HEWETT;)
)
STATE OF OKLAHOMA, ex rel.)
)
OKLAHOMA TAX COMMISSION;)
)
COUNTY TREASURER, Tulsa County,)
)
Oklahoma;)
)
BOARD OF COUNTY COMMISSIONERS,)
)
Tulsa County, Oklahoma)
)
Defendants.)

ENTERED IN CLERK'S OFFICE
DATE 11-22-94

CIVIL ACTION NO. 94-C-542-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day of Nov,
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, DR. BARBARA BURTON HEWETT, appears *Pro Se*; and the
Defendants, JAMES DARRAGH JOHNSTON; MARCIA ANN JOHNSTON and JAMES
ALLEN HEWETT, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, were served with process a copy of Summons and Complaint on July 25, 1994; that the Defendant, JAMES ALLEN HEWETT, signed a Waiver of Summons on June 23, 1994, filed on June 27, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on May 26, 1994, by Certified Mail; and that Defendant, DR. BARBARA BURTON HEWETT, was served with process a copy of Summons and Complaint on July 27, 1994.

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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on June 20, 1994; that the Defendant, DR. BARBARA BURTON HEWETT, filed her Answer on September 21, 1994; and that the Defendants, JAMES DARRAGH JOHNSTON; MARCIA ANN JOHNSTON; and JAMES ALLEN HEWETT, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 14, 1985, JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, filed their petition for bankruptcy in the United States Bankruptcy Court Northern District of Oklahoma, case number 85-B-2012; on March 13, 1986, the United States Bankruptcy Court Northern District of Oklahoma, filed its Discharge of Debtor, and the case was subsequently closed on March 27, 1986.

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 ONE (1), SUMMERFIELD, 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, 1985, the Defendants, JAMES ALLEN HEWETT and BARBARA BURTON HEWETT, executed and delivered to Firstier Mortgage Co., their mortgage note in the amount of \$68,900.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-Half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JAMES ALLEN HEWETT and BARBARA BURTON HEWETT, husband and wife, executed and delivered to Firstier Mortgage Co., a mortgage dated July 26, 1985, covering the above-described property. Said mortgage was recorded on August 5, 1985, in Book 4882, Page 489, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 10, 1990, Firstier Mortgage Co., assigned the above-described mortgage note and mortgage to Leader Federal Savings and Loan Association. This Assignment of Mortgage was recorded on January 30, 1990, in Book 5233, Page 1104, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 20, 1989, Leader Federal Bank for Savings, 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 6, 1989, in Book 5212, Page 1231, in the

records of Tulsa County, Oklahoma; and re-recorded on January 30, 1990, in Book 5233, Page 1105, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 31, 1985, JAMES ALLEN HEWETT and BARBARA BURTON HEWETT, husband and wife, granted a General Warranty Deed to JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, husband and wife. This deed was recorded with the Tulsa County Clerk on December 31, 1985, in Book 4915 at Page 3159 and James Darragh Johnston and Marcia Ann Johnston, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on September 1, 1989, the Defendants, JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, 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 March 1, 1990, March 1, 1991, and April 1, 1992.

The Court further finds that the Defendants, JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, 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, JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, are indebted to the Plaintiff in the principal sum of \$105,450.14, plus interest at the rate of Eleven 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 in the amount of \$14.76 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 \$61.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$54.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$62.00 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 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 state taxes in the amount of \$962.39 which became a lien on the property as of December 14, 1988. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, DR. BARBARA BURTON HEWETT, has a lien on the property which is the subject matter of this action by virtue of a Second Real Estate Mortgage in the amount of \$19,773.35 which became a lien on the property as of December 31, 1985. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JAMES DARRAGH JOHNSTON; MARCIA ANN JOHNSTON; and JAMES ALLEN HEWETT, 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 Defendants, JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, in the principal sum of \$105,450.14, plus interest at the rate of Eleven and One-Half percent per annum from May 13, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum until paid, plus the costs of this action in the amount of \$14.76 fees for service of Summons and Complaint, 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 \$177.00, plus accruing interest, 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. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$962.39, plus accrued and accruing interest, for state taxes for the year 1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, DR. BARBARA BURTON HEWETT, have and recover judgment in the amount of \$19,773.35, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; JAMES DARRAGH JOHNSTON; MARCIA ANN JOHNSTON; and JAMES ALLEN HEWETT, 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, JAMES DARRAGH JOHNSTON and MARCIA ANN JOHNSTON, 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 the Defendant, DR. BARBARA BURTON HEWETT, in the amount of \$19,773.35.

Fourth:

In payment of the Defendant, STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION, in the amount of \$962.39,
plus accrued and accruing interest, state taxes
which are currently due and owing.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa
County, Oklahoma, in the amount of \$177.00, 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.

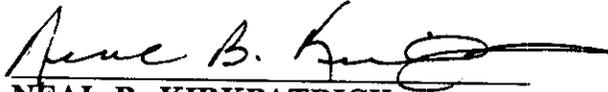
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any
right to possession based upon any right of redemption) in the mortgagor or any other person
subsequent to the foreclosure sale.

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/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED:

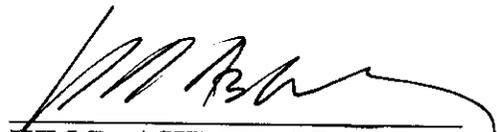
STEPHEN C. LEWIS
United States Attorney



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Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 74152-3248



DR. BARBARA BURTON HEWETT
Pro Se Defendant

Judgment of Foreclosure
Civil Action No. 94-C-542-E

NBK:flv

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

FILED

NOV 21 1994

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES M. TORRES; DIXIE L.
TORRES; COUNTY TREASURER, Tulsa
County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

Case No. 94-C-548-B

ENTERED ON DOCKET

DATE NOV 22 1994

O R D E R

Before the Court for consideration is a Motion for Summary Judgment (Docket #5) filed by Plaintiff United States of America on behalf of the Secretary of Housing and Urban Development. Plaintiff seeks summary judgment against Defendants Charles M. Torres and Dixie L. Torres in this foreclosure action. Defendants County Treasurer and Board of County Commissioners are not involved in this motion.

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

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time

6

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

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

As Defendants Charles M. Torres and Dixie L. Torres have not responded to Plaintiff's Motion for Partial Summary Judgment, the following facts are not in dispute:

1. Defendants Charles M. Torres and Dixie L. Torres are husband and wife. (Plaintiff's Exhibit B).

2. 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 Five (5), Block Six (6), WOODLAND GLEN
FOURTH, an Addition to the City of Tulsa,
Tulsa County, State of Oklahoma, according to
the recorded Plat thereof.

(Plaintiff's Exhibit B).

3. On July 30, 1986, the Defendants Charles M. Torres and Dixie L. Torres, executed and delivered to First Security Mortgage Company, their mortgage note in the amount of \$78,701.00, payable in monthly installments, with interest thereon at the rate of 10.5 percent per annum. (Plaintiff's Exhibit A).

4. As security for the note, Charles M. Torres and Dixie L. Torres executed and delivered to First Security Mortgage Company, a real estate mortgage dated July 30, 1986, which was recorded on August 13, 1986, in Book 4692, Page 2217, in the records of Tulsa Oklahoma. (Plaintiff's Exhibit B).

5. On August 6, 1986, First Security Mortgage Company assigned the mortgage note and mortgage to Associated National Mortgage Corporation. This Assignment of Mortgage was recorded on September 3, 1986, in Book 4967, Page 267, in the records of Tulsa County, Oklahoma. (Defendants' Answer).

6. On January 30, 1989, Associated National Mortgage Corporation assigned the mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his/her successors and assigns. This Assignment of Mortgage was recorded on February 7, 1989, in Book 5165, Page 1490, in the records of Tulsa County, Oklahoma. (Plaintiff's Exhibit A).

7. On April 1, 1990, Defendants Charles M. Torres and Dixie L. Torres 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 April 1, 1991, and February 1, 1992. (Defendants' Answer).

8. On July 25, 1994, Defendants Charles M. Torres and Dixie L. Torres filed their Answer admitting allegations 1 through 8 of the Complaint (Plaintiff's Exhibit C).

9. Defendants Charles M. Torres and Dixie L. Torres, in their

answer, object to interest being added to the account; and object to adding any other amounts of money to the principal sum. (Plaintiff's Exhibit D).

10. On September 8, 1994, Plaintiff mailed Requests for Admissions to Defendants Charles M. Torres and Dixie L. Torres, who have not responded to said request (Plaintiff's Exhibit E).

Pursuant to Fed.R.Civ.P. 36, the Court deems the following facts admitted due to the Defendants' failure to respond to Plaintiff's Request for Admissions:

1. By virtue of the Defendants, Charles M. Torres and Dixie L. Torres, signing the mortgage note, they accepted the terms included in the mortgage. (Request No. 3).

2. The mortgage, on page 2, at paragraph 4, allows for the accrual and addition of interest, penalties, and costs upon the institution of a foreclosure action due to the mortgagee's failure to pay the monthly installments. (Plaintiff's Exhibit B, Request No. 5).

3. The last payment made on the mortgage and note was on March 23, 1992, in the amount of \$797.00. (Request No. 6).

4. Upon the failure of the Defendants, Charles M. Torres and Dixie L. Torres, to make monthly payments, they defaulted on the mortgage and note. (Request No. 7).

5. Due to the default of the Defendants, Charles M. Torres and Dixie L. Torres, the Mortgagor has a right to foreclose on the subject property. (Request No. 8).

6. As of May 18, 1994, the Defendants, Charles M. Torres and Dixie L. Torres, are indebted to the Plaintiff in the principal sum of \$122,039.50. (Request No. 9).

No material issues of fact are in dispute in the evidence before the Court; therefore, Plaintiff is entitled to judgment as a matter of law. Plaintiff's Motion for Summary Judgment as against Defendants Charles M. Torres and Dixie L. Torres is hereby GRANTED. Because the other Defendants, Board of County Commissioners and County Treasurer, have responded that they claim no interest in the subject property, there are no issues remaining in this matter for adjudication.

The Plaintiff is directed within seven days of the date of this Order to submit a proposed Judgment in keeping with the Court's Order sustaining the Motion for Summary Judgment.

IT IS SO ORDERED THIS 21ST DAY OF NOVEMBER, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

PHILLIPS PETROLEUM COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 BRUCE BABBITT, Secretary of)
 the Interior, et al.,)
)
 Defendants.)

No. 89-C-914-B
(On remand from No.
92-5136 (10th Cir.))

ENTERED ON DOCKET
NOV 22 1994
DATE

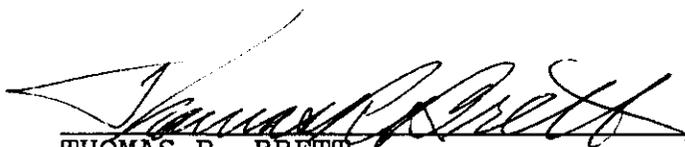
J U D G M E N T

Pursuant to the Findings of Fact and Conclusions of Law filed this date, declaratory judgment is hereby entered in favor of the Defendant, Bruce Babbitt, Secretary of the Interior, et al., and against the Plaintiff, Phillips Petroleum Company. The Court hereby declares the applicable six-year period of limitation (28 U.S.C. § 2415(a)) has not expired regarding the \$2,969.95 obligation for the following production months:

July 1983	\$1,655.45
August 1983	\$1,053.45
September 1983	\$ 261.05

Costs are hereby assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1. The parties are to pay their own respective attorney fees.

DATED this 21ST day of November, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

80

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GREGORY L. WILLIAMS; MARGARET A.)
 WILLIAMS; CITY OF BROKEN ARROW,)
 Oklahoma; STATE OF OKLAHOMA)
 ex rel OKLAHOMA TAX COMMISSION;)
 STATE OF OKLAHOMA ex rel)
 DEPARTMENT OF HUMAN SERVICES;)
 COUNTY TREASURER,)
 Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET

DATE NOV 22 1994

CIVIL ACTION NO. 94-C 468B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21st day
of Nov., 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, **City of Broken**
Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney;
the Defendant, **State of Oklahoma ex rel Department of Human**
Services, appears by its attorney Rodney B. Sparkman; the
Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,**
appears not having previously filed its Disclaimer; and the
Defendants, **Gregory L. Williams and Margaret A. Williams,** appear
not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Gregory L. Williams and Margaret A. Williams**, were served with process on June 23, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, acknowledged receipt of Summons and Complaint via certified mail on May 19, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via certified mail on June 20, 1994; and that the Defendant, **State of Oklahoma ex rel Department of Human Services**, acknowledged receipt of Summons and Complaint via certified mail on June 20, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 23, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its original Answer on June 3, 1994, and subsequently filed an Answer to Amended Complaint on June 28, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on July 8, 1994, and subsequently filed a Disclaimer on July 20, 1994; that the Defendant, **State of Oklahoma ex rel Department of Human Services**, filed its Answer on July 20, 1994; and that the Defendants, **Gregory L. William and Margaret A. Williams**, 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 Twenty-three (23), Block One (1),
SILVERTREE, an Addition to the City of Broken
Arrow, Tulsa County, State of Oklahoma,
according to the recorded plat thereof.**

The Court further finds that on August 28, 1986, the Defendants, Gregory L. Williams and Margaret A. Williams, executed and delivered to Mercury Mortgage Co., Inc. their mortgage note in the amount of \$78,369.00, 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, Gregory L. Williams and Margaret A. Williams, husband and wife, executed and delivered to Mercury Mortgage Co., Inc. a mortgage dated August 28, 1986, covering the above-described property. Said mortgage was recorded on September 11, 1986, in Book 4969, Page 739, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 25, 1988, MERCURY MORTGAGE C., 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 February 25, 1988, in Book 5083, Page 629, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 1, 1990, the Defendants, Gregory L. Williams and Margaret A. Williams, 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 and June 1, 1991.

The Court further finds that the Defendants, Gregory L. Williams and Margaret A. Williams, 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, **Gregory L. Williams and Margaret A. Williams**, are indebted to the Plaintiff in the principal sum of \$101,913.92, 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 in the amount of \$9.36 (fees for service of Summons and Complaint).

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, Case number FD-90-8531, in Tulsa County District Court, in the amount of \$910.00, which became a lien on the property as of February 25, 1994. Said lien is inferior to the interest of the plaintiff, United States of America.

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

The Court further finds that the Defendant, **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 Defendants, **Gregory L. Williams and Margaret A. Williams**, 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 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, **Gregory L. Williams and Margaret A. Williams**, in the principal sum of \$101,913.92, 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 6.48 percent per annum until paid, plus the costs of this action in the amount of \$9.36 (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, State of Oklahoma ex rel Department of Human Services, have and recover judgment in the amount of \$910.00, 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 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 Defendants, Gregory L. Williams, Margaret A. Williams, State of Oklahoma ex rel Oklahoma Tax Commission, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Gregory L. Williams and Margaret A. Williams, 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, State of Oklahoma ex rel Department of Human Services, in the amount of \$910.00, plus penalties and interest, for a judgment.

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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State of Oklahoma ex rel
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Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 468B

NBK:lg

F I L E D

NOV 21 1994

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

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

KAREN JO SMITH,)
)
 Plaintiff,)
)
 V.)
)
 THE TRAVELERS INDEMNITY COMPANY)
 OF ILLINOIS, improperly named as)
 TRAVELERS INSURANCE COMPANY,)
)
 Defendant.)

CASE NO. 94-C-625-B

ENTERED ON DOCKET

DATE NOV 22 1994

O R D E R

This matter comes on for consideration of Plaintiff Karen Jo. Smith's Motion To Remand (docket # 3) and Defendant The Travelers Indemnity Company of Illinois' (Travelers) Motion to Dismiss (docket # 2).

This is an action removed from Creek County on diversity grounds, arising from the alleged bad faith denial by a Worker's Compensation insurer (Travelers) of Plaintiff's injury claim.

Plaintiff has filed a motion to remand alleging the court has no subject matter jurisdiction in that she specifically sought "judgment against the defendant The Travelers Insurance Company for actual and punitive damages in excess of \$10,000 but not more than \$50,000, interest, costs, expenses, attorneys fees and such other and further as is just."

Travelers responds stating the amount sought could be more than \$50,000 based upon Plaintiff's answer to a request for

admission. Travelers served a Request for Admission on Plaintiff seeking to establish the amount sought was more than \$50,000, as follows:

REQUEST FOR ADMISSION NO. 1: Admit that the amount of actual and punitive damages you are entitled to recover in this litigation will not under any circumstances exceed \$50,000.

RESPONSE TO REQUEST NO. 1: Denied in that discovery has not been completed in this case and that this Plaintiff is not required by any law in Oklahoma or any other jurisdiction to make such an admission. Plaintiff has the right to file her petition in any amount she decides is appropriate at the time of filing, and the further right to pursue that action under her petition as filed. Furthermore, negotiation for settlement of this case has never been offered by Defendants.

Travelers argues that unless it appears to a legal certainty that a plaintiff's claim is for less than the jurisdictional amount a federal court sitting in diversity should not remand an action to state court. Travelers cites Hough v. Merrill Lynch, Pierce, Fenner & Smith, 757 F.Supp. 283 (S.D.N.Y. (1991)), Bowman v. Iowa State Travelers Mutual Assurance Co., 449 F.Supp. 60 (E.D. Okla. 1978), and Lonquist v. J.C. Penney Company, 421 F.2d 597 (10th Cir. 1970) in support of its argument.

Of the cases cited by Travelers only Hough offers remote pertinence to present matter. None of the cases cited deal with a plaintiff who specifically limits his original claim to "but no more than \$50,000", the federal diversity jurisdictional amount being an amount which exceeds the sum of \$50,000. 28 U.S.C. § 1332.

Hough sets forth the "legal certainty" test which requires dismissal of an action when it appears to a legal certainty that the plaintiff's claim is for less than the jurisdictional amount, citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283

(1938). Hough also teaches that in applying the legal certainty test "resort to matters outside the pleadings may be used to amplify the meaning of the complaint's allegations." Id. at 285, which leads us to Plaintiff's somewhat disingenuous answer to Travelers' Request For Admission.

The Court views Plaintiff's answer as essentially no answer at all regarding the jurisdictional amount issue. Indeed it is true that "Plaintiff has the right to file her petition in any amount she decides is appropriate at the time of filing, and the further right to pursue that action under her petition as filed" but it may also be true that Plaintiff has, by her choice of limiting language, set the outer parameters of her potential recovery as well as stating the minimum state court jurisdictional amount.

Plaintiff's state court Petition is contra to 12 O.S.A. § 2008 which provides, in paragraph A.2, that the Petition shall contain: "A demand for judgment for the relief to which he deems himself entitled. Every pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00) except in actions sounding in contract. Every pleading demanding relief for damages in money in an amount of Ten Thousand Dollars (\$10,000.00) or less shall specify the amount of such damages sought to be recovered."

The Court views Plaintiff's Petition (Complaint), as it now stands, as a arguable limitation of her right to recover an amount in excess of \$50,000. The Court has been cited no authority, nor

has determined that such authority exists, for the proposition that a state court plaintiff can, by artful crafting of a damage prayer, fail to follow the Oklahoma pleading code by stating a maximum recovery amount in an obvious attempt to avoid federal diversity jurisdiction without risking a limitation on her potential recovery.

The Court concludes that Plaintiff's Petition fails to state the jurisdictional amount without which this Court has no subject matter jurisdiction. The Court further concludes that Plaintiff's Motion to Remand should be and the same is hereby GRANTED. The Court declines to enter a ruling on Traveler's Motion to Dismiss in view of its REMAND herein.¹

IT IS SO ORDERED this 21ST day of November, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ The Court further opines that remand may be entirely appropriate from a standpoint of judicial economy. This is so because the parties herein have submitted agreed upon certified questions regarding the central issues of this case. As the matter is now sent back to state court the certified questions to which answers were sought may be determined by an appeal of a district court verdict through the state appellate system. However, in view of the Joint Petition filed in the Workers Compensation Court, and the full, final settlement of all claims executed herein, the "bad faith" issues upon which the parties seek answers to certified questions, may be in the nature of advisory questions only.

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

GEO-GRAPHICS, Inc.,
an Oklahoma corporation,

Plaintiff,

versus

GLOBAL GRAPHICS, Inc.
an Oklahoma corporation, *et al.*,

Defendants.

Case No. 93-C-116-B

ENTERED ON DOCKET
DATE NOV 22 1994

MONETARY JUDGMENT

NOW, on this ^{November} ~~July~~ 21st day of 1994, comes on for consideration the entry of judgment against the corporate Defendant herein, pursuant to the Settlement Agreement reached by all the Parties herein, with the exception of Mr. Kevin Filan and Mr. Thomas Wright.

Pursuant to that Settlement Agreement, and the confession of the corporate Defendant and the consent of the individual Defendants Bretz, Basham, Putnam, Hilligoss, Seitz, Crofford, and Billingsley, of judgment against them in favor of the Plaintiff, which the Court finds to be provident,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED By the Court that the Plaintiff, Geo-Graphics, Inc. ("Geo"), shall recover, for willful copyright infringement, monetary judgment against the Defendant Global Graphics, Inc. ("Global"), in the amount of Forty-Five Thousand Dollars (\$45,000.00), due and payable according to the following schedule, time being of the essence:

a. Global Graphics, Inc. ("Global") shall pay unto Geo-Graphics, Inc. ("Geo") the sum of One Thousand Dollars (\$1,000.00) immediately (within 24 hours) upon entry of this Monetary Judgment;

b. Global shall pay to Geo an additional sum of One Thousand Dollars (\$1,000.00) within ninety (90) days from the entry of this Monetary Judgment;

30

c. Global shall pay to Geo twelve additional monthly sums of Seven Hundred Fifty Dollars (\$750.00) apiece, commencing six months from the entry of this Monetary Judgment, which \$750.00 monthly payments shall continue for twelve months;

d. Commencing with the month next immediately following the last payment prescribed in the preceding sub-paragraph, Global shall pay to Geo twelve additional monthly sums of Eight Hundred Fifty Dollars (\$850.00) apiece, which \$850.00 monthly payments shall continue for twelve months; and,

e. Commencing with the month next immediately following the last payment prescribed in the preceding sub-paragraph, Global shall pay to Geo the additional sums of One Thousand Dollars (\$1,000.00) each and every month thereafter until the total judgment amount herein of \$45,000.00 shall be fully paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED By the Court that if the day for any payment prescribed above should fall on a Saturday, a Sunday, or a legal holiday, then that payment shall be deemed timely made if made on the first business day following the holiday or weekend on which that payment would otherwise fall.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED By the Court that each payment prescribed above shall be made in the following manner: by cash, or by a check drawn on a downtown Tulsa bank, or by a cashier's check drawn on any Tulsa bank; if by check, the check shall be made payable to the order of "Fred P. Gilbert, Atty. for Geo-Graphics, Inc."; and whether mailed, or personally or otherwise delivered, must arrive at the law offices of Dorman & Gilbert (whose address is at 830 Beacon Building, 406 South Boulder, Tulsa, Oklahoma, 74103-3825) by the close of regular business on the day due – time being of the essence. If future consent is given by both Global and Geo, payment may also be tendered electronically to an account designated by the Plaintiff.

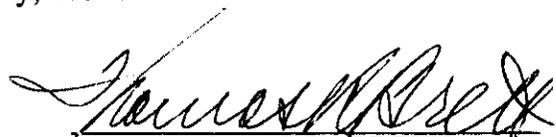
IT IS FURTHER ORDERED, ADJUDGED AND DECREED By the Court that upon any default of any payment prescribed above, then, at the option of Geo-Graphics, the entire

unpaid balance due from Global under the preceding schedule shall become immediately due and owing in full, and the individual "stand-by" judgments to be entered against the individual Defendants herein (excepting Messrs. Adair, Coleman, Filan, Solberg and Wright) shall also become immediately fileable and executable (after notice and opportunity to be heard). As used in this paragraph, a "default" by Global on any payment prescribed above shall include: any lateness of payment (time being of the essence); any underage, in whole or part, of a particular payment; any defect in the currency or check by which a payment may be tendered, causing the non-negotiability thereof, in whole or part, by Geo (or by Geo's counsel); or dishonor, in whole or part, of any check by which a payment may be tendered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED By the Court that this Monetary Judgment shall constitute a lien on the accounts receivable of Global Graphics, Inc., subject only to the existing first lien held by Stillwater National Bank or by Woodrum, Shoulders and Kemendo, that said single first lien being in the original amount of \$16,000, and since diminishing, and which first lien may not, to the prejudice of this judgment lien, be increased from any amount to which that first lien might be reduced at any time.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED By the Court that each Party hereto shall bear its own legal costs and expenses, to include attorney's fees, for legal efforts expended through the execution and filing of this and the related Settlement papers.

IT IS SO ORDERED, this 21 day of ^{16th} July, 1994.

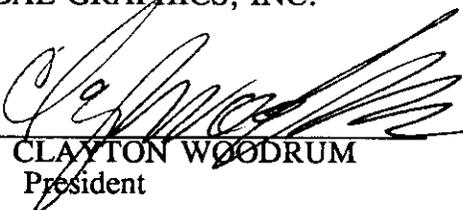

THOMAS R. BRETT
United States District Judge

APPROVED:


FRED P. GILBERT
Attorney for Plaintiff and Third-Party Defendants


THERESE BUTHOD
Attorney for Global Graphics, Inc.

GLOBAL GRAPHICS, INC.

by: 
CLAYTON WOODRUM
President

FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

_____)
This Document Relates To:)

ENTERED ON DOCKET

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

NOV 22 1994
DATE

IN RE: ASBESTOS LITIGATION:)

M-1417)
ASB (I) 6644)

SAMUEL BERT LEE)
AND)
LARITHA F. LEE,)

Plaintiffs,)

v.)

Case No. 92-C-220-B)

FIBREBOARD CORPORATION,)
et al.,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc., has been settled and compromised as to Defendant Owens-Illinois, Inc., only, and Plaintiffs' cause of action against Owens-Illinois, Inc., should be, and the same hereby is, dismissed with prejudice with each party to bear its own costs.

5

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OWENS-ILLINOIS, INC.

15438/23830
SSPLAZA1: Y:\KKKAT\PLDG\19933.1

SERVICE LIST

I hereby certify that the foregoing pleading was mailed via U.S. Mail on this 22 day of November 1994 to the following:

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15435/12790
SSPLAZA1: W:\POCUR\PLDG\19959.1

FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products
Liability Litigation (No. VI)

Civil Action No. MDL 875

This Document Relates To:
In the United States District
Court for the Northern
District of Oklahoma

ENTERED ON DOCKET

DATE NOV 22 1994

IN RE: ASBESTOS LITIGATION:

M-1417
ASB (I) 6657

CHARLES W. YORK AND
PAMELA R. YORK,

Plaintiffs,

v.

Case No. 93 C 0252 B ✓

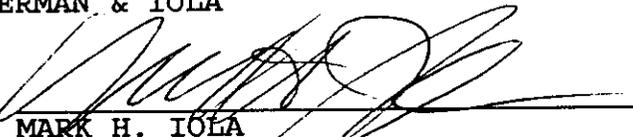
FIBREBOARD CORPORATION,
et al.,

Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc. only is dismissed with prejudice, with each party to bear its own costs.

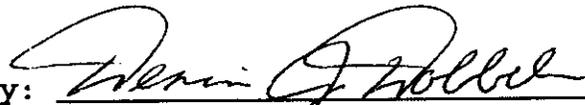
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ATTORNEYS FOR SETTLING DEFENDANT
OWENS-ILLINOIS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 22 day of November, 1994 to:

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Dennis J. Habel

FILED

NOV 21 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

IN RE: ASBESTOS LITIGATION:)
)
GEORGIA B. BESSER,)
)
Individually, and as the)
)
Surviving Spouse and Next of)
)
Kin of DARRELL RICHARD)
)
BESSER, Deceased,)
)
Plaintiff,)
)
v.)
)
FIBREBOARD CORPORATION,)
)
et al.,)
)
Defendants.)

M-1417
ASB (I) 6661

ENTERED ON DOCKET
DATE NOV 22 1994

Case No. 91-C-932-B

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Plaintiff's attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiff's cause of action against Owens-Illinois, Inc., has been settled and compromised as to Defendant Owens-Illinois, Inc., only, and Plaintiff's cause of action against Owens-Illinois, Inc., should be, and the same hereby is, dismissed with prejudice with each party to bear its own costs.

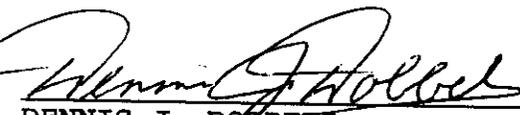
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OWENS-ILLINOIS, INC.

15438/22701
SSPLAZA1: Y:\KKKAT\PLDG\19882.1

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15435/12790
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

NOV 22 1994

Richard M. Lawrence
U. S. DISTRICT COURT
EASTERN DISTRICT OF PA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

This Document Relates To:)
In the United States District)
Court for the Northern)
District of Oklahoma)

ENTERED ON DOCKET
DATE NOV 22 1994

IN RE: ASBESTOS LITIGATION:)

M-1417
ASB (I) 6656

HARMON LYNN WATKINS AND)
BELINDA DALE WATKINS,)

Plaintiffs,)

v.)

Case No. 90 C 1054 B ✓

FIBREBOARD CORPORATION,)
et al.,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs, Plaintiffs' attorneys, Defendant Owens-Illinois, Inc., and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc. only is dismissed with prejudice, with each party to bear its own costs.

UNGERMAN & IOLA

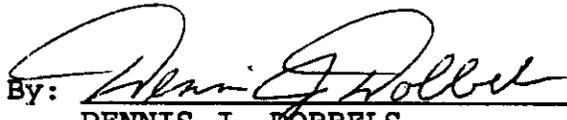
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COUNSEL FOR COMBUSTION ENGINEERING



FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products)
Liability Litigation (No. VI))

Civil Action No. MDL 875

_____)
This Document Relates To:)

ENTERED ON DOCKET

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

DATE NOV 22 1994

IN RE: ASBESTOS LITIGATION:)

M-1417
ASB (I) 6672

THOMAS K. HATHCOAT,)

Plaintiff,)

v.)

Case No. 88 C 924 C

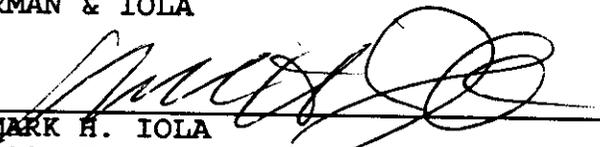
FIBREBOARD CORPORATION,)
et al.,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE
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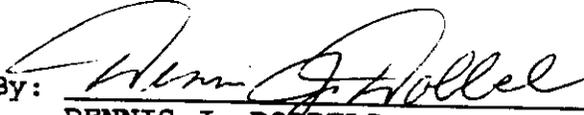
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OWENS-ILLINOIS, INC.

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COUNSEL FOR COMBUSTION ENGINEERING



FILED

NOV 21 1994

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: Asbestos Products
Liability Litigation (No. VI)

Civil Action No. MDL 875

This Document Relates To:

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

ENTERED ON DOCKET

DATE ~~NOV 22 1994~~

IN RE: ASBESTOS LITIGATION

M-1417
ASB (I)

6673

MORRIS A. HOPKINS and
DOROTHY HOPKINS,

Plaintiffs,

Case No. 88-C-300-CV

v.

FIBREBOARD CORPORATION,
et al.,

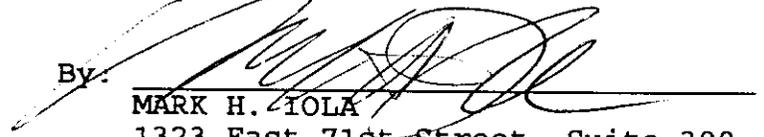
Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE

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OWENS-ILLINOIS, INC.

15438/16653
SSPLAZA1: Y:\KKKAT\PLDG\19917.1

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15435/12790
SSPLAZA1: W:\POCUR\PLDG\19959.1

ENTERED ON DOCKET

DATE NOV 21 1994

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

F I L E D

NOV 18 1994

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

BURLINGTON NORTHERN RAILWAY)
COMPANY, a Delaware Corp.)

Plaintiff,)

vs.)

BASSICHIS COMPANY)

Defendant.)

No. 94-C-376-K

O R D E R

Now before this Court is Plaintiff's Motion for Costs of Service and Defendant's Motion to Dismiss for Lack of Jurisdiction. Both parties agree that the present case should be dismissed for lack of subject matter jurisdiction since the parties have been determined to be non-diverse. Nonetheless, Plaintiff objects to dismissal until the Defendant pays Plaintiff for the costs of service of a summons pursuant to Rule 4(d) of the Federal Rules of Civil Procedure. Plaintiff contends that Defendant failed to waive service as required by the Rule.

Rule 4(d), as revised in 1993, provides a specific mechanism by which a plaintiff can obtain a waiver of service of a summons from a defendant in order to avoid costs. A plaintiff must mail a notice and request for waiver of service to the defendant which satisfies all the requirements of 4(d)(2)(A)-(G). If those requirements are met, the court may impose any costs subsequently incurred by the plaintiff in effecting service on the defendant unless the defendant can show good cause for the failure to waive.

In April, 1994, Plaintiff filed its Complaint with the Court,

4

and the Defendant filed its Answer on June 27th. Subsequent to that Answer, Defendant moved for dismissal of the case on August 3, 1994, in light of a corporate merger that destroyed the diversity needed for subject-matter jurisdiction. While Plaintiff responded on August 31, 1994 by agreeing to propriety of the proposed dismissal, Plaintiff requested that it be reimbursed for the costs of service pursuant to Rule 4(d). As of the time of a Case Management Conference held on November 3, 1994, Defendant had still failed to respond to Plaintiff's Motion for Costs under Rule 4(d), giving the Court no explanation as to why those costs should not be available to Plaintiff.

Defendant eventually submitted a response to the Motion for Costs, arguing that this Court lacks the power to impose costs where it lacks jurisdiction. In sum, Defendant urged that the Court must dismiss the case immediately upon determining that jurisdiction is lacking and cannot take any other action with respect to the litigation.

However, this question is not as clear-cut as the Defendant asserts. The Court maintains a clear interest in ensuring that the rules of procedure are honored. In Willy v. Coastal Corp. et al., 112 S.Ct 1076, 1080-81 (1992), the Supreme Court held that a district court could impose Rule 11 sanctions without running afoul of Article III even though it was later determined that the district court lacked subject-matter jurisdiction over the case. The Court held that "the interest in having rules of procedure obeyed . . . does not disappear upon a subsequent determination

that the court was without subject-matter jurisdiction. Id. at 1081.

Similarly, one could read Willy to allow for the imposition of costs in this case in light of the judicial policy of encouraging compliance with the rules of procedure. The Supreme Court in Willy held that since sanctions were collateral to the actual merits of the controversy, it would not be improper to allow the lower court's sanctions ruling to stand even though the lower court was without jurisdiction to hear the actual merits of the dispute.

Unlike the current case, however, the Willy precedent involved a situation where the lower court originally believed it had jurisdiction. The Supreme Court simply upheld the imposition of Rule 11 sanctions based on the theory that the lower court's decision on sanctions should not be overturned by a subsequent ruling that jurisdiction was improper. This Court faces a somewhat different situation in that all parties, including the Court, recognize that diversity is not present in this action. The dispute simply is whether the Court can impose costs once it knows it is without jurisdiction over the merits of the controversy.

This Court believes that Willy can be extended to the current situation. Federal courts have "broad inherent powers 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" Sherman v. U.S.A., 801 F.2d 1133, 1135 (9th Cir. 1986) quoting Link v. Wabash Railroad, 370 U.S. 626, 630-631 (1962). Typically, courts utilize these powers "to impose a variety of sanctions on both litigants and attorneys in order to

regulate their docket, promote judicial efficiency, and deter frivolous filings." Clark v. Commissioner of Internal Revenue, 744 F.2d 1447 (10th Cir. 1994). In this pursuit, Willy has been extended to allow district courts to impose Rule 11 sanction even when it is clear at the time that jurisdiction is lacking over the merits of the controversy. In Vongnaraj v. U.S.A. No. CIV.A.91-1462, 1992 W.L. 84893 at *1 (D.D.C Apr. 7, 1992), the court stated that "[T]he reasoning of Willy would also apply to the situation sub judice where the sanctions were imposed concurrently with the finding of lack of subject matter jurisdiction." The court believed that because the Rule 11 issue was collateral, it "implicates no constitutional concern" under Article III. Id. See also Wojan v. General Motors Corp., 851 F.2d 969, 973 (7th Cir. 1988). In Wojan, the court held that "the district court could and should have exercised its inherent jurisdiction for the purpose of ruling on the merits of . . . Rule 11 motions, despite the fact that the court lacked subject matter jurisdiction over the case."

Finally, we must determine whether the enforcement of Rule 4(d) of the Federal Rules is analogous to the enforcement of Rule 11 motions. While the waiver of service provision under Rule 4 may not be as strong a weapon as Rule 11 in the judicial arsenal, its function is analogous. According to the Advisory Committee Notes accompanying the 1993 amendments, Rule 4(d) is designed to foster cooperation among adversaries and counsel by eliminating those costs that could have been avoided had the parties cooperated in a reasonable manner. Thus, the objectives of Rule 4(d) and Rule 11

are similar in that they seek to avoid unnecessary costs and delays. See Rule 11(b)(1). Whereas the court imposes sanctions to achieve the objectives of Rule 11, the court may impose service costs to effectuate Rule 4(d).

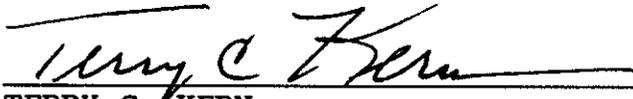
By awarding costs in this case, the Court is not using the rules to gain jurisdiction. As Rule 82 of the Federal Rules of Civil Procedure clearly states, "[these] rules shall not be construed to extend or limit the jurisdiction of the United States district courts" See also 28 U.S.C. §2072. In other words, "The Rules only implement the exercise of jurisdiction otherwise conferred by Congress and do not provide an independent basis for parties without any other jurisdictional grant to get into federal court in the first place." Port Drum Co. v. Humphrey 852 F.2d 148, 149-150 (5th Cir. 1988). The court, in this case, is not using a rule violation to gain jurisdiction. The Plaintiff did not seek federal court review to adjudicate a dispute over the rules, as in an action simply to determine responsibility for payment of Rule 11 sanctions. Instead, the violation of the rules arose subsequent to the filing of the instant lawsuit and is collateral to the dispute that gave rise to the litigation.

As stated above, Defendant ultimately filed a response to Plaintiff's Motion for Costs. Along with arguing that this Court lacked jurisdiction to award costs, Defendant also stated, in the alternative, that Plaintiff failed to properly notify the Defendant of commencement of the action under Rule 4(d). Apart for a conclusory comment that the recipient of the summons was not a

registered agent under Rule 4(d)(2)(A), Defendant failed to specifically respond to the Plaintiff's charges of failure to waive service.

For the reasons discussed above, Plaintiff's Motion for costs is granted, requiring payment by the Defendant of \$64.40 in service costs and \$425 in related legal fees. The Court also grants Defendant's Motion to Dismiss the underlying case due to lack of subject-matter jurisdiction.

ORDERED this 18 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

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

DATE NOV 21 1994

CONSOLIDATED FUEL CORPORATION,)
a Delaware corporation, and)
SUNRISE ENERGY SERVICES, INC.,)
a Delaware corporation,)

Plaintiffs,)

v.)

THOMAS S. LAWRENCE,)

Defendant.)

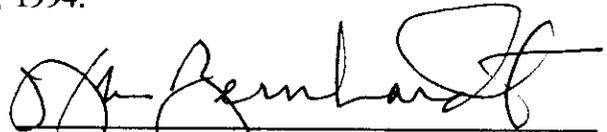
FILED
NOV 17 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

No. 93-C-802-K ✓

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Sunrise Energy Services, Inc. ("Sunrise"), and the Defendant, Thomas S. Lawrence, through their counsel, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and stipulate that all claims for relief asserted by Sunrise as set forth in the Third Cause of Action may be and are hereby dismissed with prejudice, with each party to bear their respective costs and attorney fees.

DATED this 17th day of November, 1994.



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SUNRISE ENERGY SERVICES, INC.

23

dismissed to Sunrise only per court



Patrick D. O'Connor, OBA #6743

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IMEL & TETRICK

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Tulsa, Oklahoma 74103

ATTORNEYS FOR DEFENDANT

THOMAS S. LAWRENCE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 Tina Ann Blöse fka Tina Ann)
 Kimbrell; Huey Blöse; Larry)
 Eugene Kimbrell; Deborah Loree)
 Hamman; Beneficial Oklahoma, Inc.)
 fka Beneficial Finance Co. of)
 Oklahoma; State of Oklahoma,)
 ex rel. Oklahoma Tax Commission;)
 City of Glenpool;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE NOV 21 1994

CIVIL ACTION NO. 94-C-172-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day
of Nov., 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; and the Defendants, CITY OF
GLENPOOL, Oklahoma; TINA ANN BLOSE fka Tina Ann Kimbrell; HUEY
BLOSE; LARRY EUGENE KIMBRELL; DEBORAH LOREE HAMMAN; and
BENEFICIAL OKLAHOMA, INC., fka Beneficial Finance Co. of
Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, HUEY BLOSE, was served with process a copy of Summons and Complaint on July 25, 1994; that the Defendant, BENEFICIAL OKLAHOMA, INC., fka Beneficial Finance Co. of Oklahoma, was served a copy of Summons and Complaint on April 20, 1994 by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on March 18, 1994; the Defendant, CITY OF GLENPOOL, Oklahoma, acknowledged receipt of Summons and Complaint on or about March 23, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 3, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 25, 1994.

The Court further finds that the Defendants, TINA ANN BLOSE fka Tina Ann Kimbrell; LARRY EUGENE KIMBRELL and DEBORAH LOREE HAMMAN, 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, TINA ANN BLOSE fka Tina Ann Kimbrell; LARRY EUGENE KIMBRELL and DEBORAH LOREE HAMMAN, 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, TINA ANN BLOSE fka Tina Ann Kimbrell; LARRY EUGENE KIMBRELL and DEBORAH LOREE HAMMAN. 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 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 March 17, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,

filed its Answer on March 18, 1994; and that the Defendants, CITY OF GLENPOOL, Oklahoma; TINA ANN BLOSE fka Tina Ann Kimbrell; HUEY BLOSE; LARRY EUGENE KIMBRELL; DEBORAH LOREE HAMMAN; and BENEFICIAL OKLAHOMA, INC., fka Beneficial Finance Co. of Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the personal liability of the defendants Tina Ann Blose fka Tina Ann Kimbrell and Larry Eugene Kimbrell was discharged in U.S. Bankruptcy Court for the Northern District of Oklahoma in case number 82-B-1291 filed October 20, 1982, discharge granted December 30, 1982, and closed January 18, 1983. In Addition, Tina Ann Kimbrell was the debtor in U.S. Bankruptcy Court for the Northern District case number 91-B-1692-W, filed May 17, 1991, discharge granted September 9, 1991, and closed October 28, 1991. The Defendant, Larry Eugene Kimbrell and Deborah Loree Hamman filed a Chapter 13 Bankruptcy in the Northern District of Oklahoma case number 91-B-4157-W on November 20, 1991. The Case was converted to Chapter 7 and a discharge was granted on February 11, 1993. The case was closed on April 12, 1993.

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-FIVE (35), BLOCK ONE (1), APPALOOSA ACRES THIRD ADDITION, AN ADDITION TO THE CITY OF GLENPOOL, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

TOGETHER WITH:
HUMIDIFIER, RANGE AND OVEN, DISPOSAL, DISHWASHER AND CARPET.

THE EXPRESS ENUMERATION OF THE FOREGOING ITEMS SHALL NOT DEEMED TO LIMIT OR RESTRICT THE APPLICABILITY OF ANY OTHER LANGUAGE DESCRIBING IN GENERAL TERMS OTHER PROPERTY INTENDED TO BE COVERED HEREBY

The Court further finds that on July 9, 1979, the Defendants, LARRY EUGENE KIMBRELL and TINA A. KIMBRELL, then husband and wife, executed and delivered to The Lomas and Nettleton Company, a mortgage note in the amount of \$40,400.00, 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, the Defendants, LARRY EUGENE KIMBRELL and TINA A. KIMBRELL, then husband and wife, executed and delivered to The Lomas & Nettleton Company, a mortgage dated July 9, 1979, covering the above-described property. Said mortgage was recorded on August 3, 1979, in Book 4417, Page 1688, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 28, 1987, The Lomas & Nettleton Company, assigned the above-described mortgage note and mortgage to Cenlar Federal Savings Bank. This Assignment of Mortgage was recorded on July 24, 1987, in Book 5041, Page 983, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 11, 1991, Cenlar Federal Savings Bank, 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 March 18, 1991, in Book 5311, Page 1482, in the records of Tulsa County, Oklahoma, and a corrected by an assignment recorded on March 22, 1991, in Book 5311, Page 1482, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 1, 1991, the Defendant, TINA ANN KIMBRELL, 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, LARRY EUGENE KIMBRELL and TINA ANN BLOSE fka Tina Ann Kimbrell, then husband and wife, 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, LARRY EUGENE KIMBRELL and TINA ANN BLOSE fka Tina Ann Kimbrell, are indebted to the Plaintiff in the principal sum of \$53,332.36, plus interest at the rate of Ten percent per annum from February 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 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 \$56.00 which became a lien on the

property as of June 26, 1992; a lien in the amount of \$37.00 which became a lien on the property as of June 25, 1993; a lien in the amount of \$36.00 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 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 state taxes in the amount of \$101.63 which became a lien on the property as of November 5, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CITY OF GLENPOOL, Oklahoma; TINA ANN BLOSE fka Tina Ann Kimbrell; HUEY BLOSE; LARRY EUGENE KIMBRELL; DEBORAH LOREE HAMMAN; and BENEFICIAL OKLAHOMA, INC., fka Beneficial Finance Co. of Oklahoma, 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 Defendants, LARRY EUGENE KIMBRELL and TINA ANN BLOSE fka Tina Ann Kimbrell, in the principal sum of \$53,332.36, plus interest at the rate of Ten percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 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 \$129.00, plus accruing costs and interest, 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. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$101.63, plus accrued and accruing interest, for state taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, CITY OF GLENPOOL, Oklahoma; TINA ANN BLOSE fka Tina Ann Kimbrell; HUEY BLOSE; LARRY EUGENE KIMBRELL; DEBORAH LOREE HAMMAN; and BENEFICIAL OKLAHOMA, INC., fka Beneficial Finance Co. of 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, LARRY EUGENE KIMBRELL and TINA ANN BLOSE fka Tina Ann Kimbrell, 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$101.63, plus accrued and accruing interest, for state taxes which are currently due and owing.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$129.00, plus cost and interest, for 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.

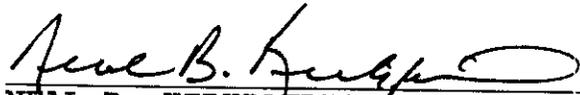
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of 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
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(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-172-B

NBK:flv

on April 25, 1994; that the Defendant, RONALD W. NUNNELEY, acknowledged receipt of Summons and Complaint on April 1, 1994; that the Defendant, SCHELL SECURITY OF TULSA, INC., was served of Summons and Complaint on October 7, 1994, by Certified Mail; 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; that the Defendant, ROBERT J. OELKE, was served a copy of Summons and Complaint on June 22, 1994 by Certified Mail; that the Defendant, CITIZENS BANK OF TULSA, was served a copy of Summons and Complaint on May 11, 1994, by Certified Mail.

The Court further finds that the Defendant, DONALD P. HAVENER, 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 July 19, 1994, and continuing through August 23, 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, DONALD P. HAVENER, 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, DONALD P. HAVENER. 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 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 Answers on April 25, 1994; and that the Defendants, TRAVIS MILTON HARVEY; ROBERT J. OELKE; DONALD P. HAVENER; RONALD W. NUNNELEY; SCHELL SECURITY OF TULSA, INC.; and CITIZENS BANK OF TULSA, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 25, 1991, the personal liability of the Defendant, TRAVIS MILTON HARVEY on the debt represented by the subject note and mortgage was discharged in United States Bankruptcy Court for the Northern District of Oklahoma Case Number 89-3643-C, filed November 20, 1989, as a Chapter 7 and converted March 27, 1990, to a Chapter 13. The Case was subsequently closed on January 23, 1992.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Two (2), Block Nine (9), JEFFERSON TERRACE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 26, 1983, the Defendants, TRAVIS MILTON HARVEY and ROBERT J. OELKE, executed and delivered to Charles F. Curry Company, a mortgage note in the amount of \$48,950.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-Half percent (11½%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, TRAVIS MILTON HARVEY and ROBERT J. OELKE, executed and delivered to Charles F. Curry Company, a mortgage dated May 26, 1983, covering the above-described property. Said mortgage was recorded on June 2, 1983, in Book 4695, Page 1728, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 15, 1988, Charles F. Curry 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 22, 1988, in Book 5147, Page 956, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 1, 1989, the Defendant, TRAVIS MILTON HARVEY, 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, TRAVIS MILTON HARVEY and ROBERT J. OELKE, 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, TRAVIS MILTON HARVEY and ROBERT J. OELKE, are indebted to the Plaintiff in the principal sum of \$68,180.73, plus interest at the rate of Eleven 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 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 \$6.00 which became a lien on the property as of June 20, 1991; a lien in the amount of \$30.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$13.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$14.00 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, TRAVIS MILTON HARVEY; ROBERT J. OELKE; DONALD P. HAVENER; RONALD W. NUNNELEY; SCHELL SECURITY OF TULSA, INC.; and CITIZENS BANK OF TULSA, 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 Defendants, TRAVIS MILTON HARVEY and ROBERT J. OELKE, in the principal sum of \$68,180.73, plus interest at the rate of Eleven and One-Half percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 12.48 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 \$63.00 for personal property taxes for the years 1990-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, TRAVIS MILTON HARVEY; ROBERT J. OELKE; DONALD P. HAVENER; RONALD W. NUNNELEY; SCHELL SECURITY OF TULSA, INC.; CITIZENS BANK OF TULSA 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, TRAVIS MILTON HARVEY and ROBERT J. OELKE, 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:

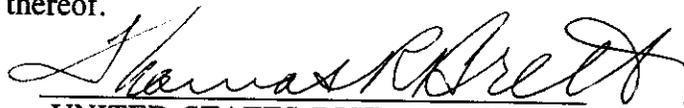
In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$63.00, personal property taxes which are currently due and owing.

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.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
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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-303-B

NBK:flv

FILED

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

NOV 17 1994

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

GEO-GRAPHICS, Inc.,
an Oklahoma corporation,

Plaintiff,

versus

GLOBAL GRAPHICS, Inc.
an Oklahoma corporation, *et al.*,

Defendants.

Case No. 93-C-116-B1

ENTERED ON DOCKET

DATE NOV 21 1994

**INJUNCTION
(CONSENT DECREE)**

NOW, on this 17th day of Nov ~~July~~, 1994, comes on for consideration the entry of judgment for injunctive relief, pursuant to the Settlement Agreement reached by all the Parties herein, with the exception of Mr. Kevin Filan and Mr. Thomas Wright.

Pursuant to that Settlement Agreement, and the corporate confession of willful copyright infringement committed by it against the Plaintiff, which the Court finds to be provident,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED By the Court that no Defendant subject to this Injunction (which term shall mean all Defendants, with the exception of Mr. Kevin Filan and Mr. Thomas Wright, neither of whom are parties to the Settlement Agreement reached by the other Defendants herein), singly or jointly, and together with its, his, her or their successors, heirs and assigns, and its, his, her or their officers, employees and agents, shall do or not do as follows:

1. The corporate Defendant, Global Graphics, Inc., shall change its corporate name, to that of "WORLDWIDE, Inc.," by filing the necessary change-of-name documents with the Oklahoma Secretary of State within thirty (30) days of the date on which this Injunction (Consent Decree) is entered; shall adopt as its "logo" (or pictorial trade/service mark) the design attached hereto as Exhibit A; and no Defendant subject to this Injunction shall, without the Plaintiff's consent, thereafter adopt or do business under any trademark, service mark, trade name or other

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designation of origin similar to "Global Graphics," without prior approval by the Court and the Plaintiff.

2. No Defendant subject to this Injunction shall, without the Plaintiff's consent, henceforth hold itself, himself, herself, or themselves out to any member, corporate or individual, of the purchasing public as related or connected in any way to the Plaintiff, and in particular in any one or more of the following manners:

a. As a past or present employee or agent of the Plaintiff. [This shall not preclude any of the individual Defendants, in applying for future employment with other employers, in stating that they were previously employed by the Plaintiff, and stating the dates thereof].

b. As being in any way connected to or with the Plaintiff or as connected in any way with products or services originating with or from the Plaintiff.

c. By passing or palming off any product as related or connected in any way to the Plaintiff, the Plaintiff's products, or as originating from the Plaintiff.

d. By stating or suggesting to any person anything to the effect of being "the same people who did your map last year," "the same company that has done this map in the past," or the like (with respect to the confidential list of Plaintiff's maps contained in the Sealed Confidential Appendix referenced in the Settlement Agreement entered to herein).

3. All Defendants subject to this Injunction shall return all property, files, records, memoranda, data, whether in paper, print-out, hard copy, diskette or other computer-readable storage/memory medium, to include a complete purge of all Defendants' hard disks, tape/disk back-ups, and the like (whether designated as a Defendant's "personal" copy, corporate copy, separate property, or otherwise) ever removed from the premises of the Plaintiff. This includes items containing substantive data such as source maps, rotation lists, customer lists, financial records, and the like. In the event that any such items, or the data contained therein, have been transferred outside the Defendants' possession or control, the Defendants shall identify all such

third parties to whom any such items or data have been transferred, and shall retrieve all such items or data from those third parties.

4. No Defendant subject to this Injunction, without the Plaintiff's consent, shall, for a period of five (5) years from the date of this Injunction, produce any of the 108 city, county or lake maps listed in the Sealed Confidential Appendix identified hereinabove in sub-paragraph 2(d); PROVIDED, however, that the Plaintiff shall certify, by submission to the Settlement Magistrate of a copy of that map sheet with proof of printing 2000 copies thereof, every year after the second year to the corporate Defendant (commencing on the second anniversary of this Injunction) which communities the Plaintiff has published in for the previous two years, a two-year period of non-publication constituting abandonment of that community and market by the Plaintiff, said abandonment to be presumed from the lack of certification as noted above, and which abandonment shall release the Defendants from this paragraph with respect to the communities/markets so abandoned.

5. The Defendants shall transmit and circulate to all their clientele in the Plaintiff's 108 maps (and corresponding trade-territories and communities) listed in the Sealed Confidential Appendix referred to in the preceding paragraph, and "flagged" thereon as among the maps which the corporate Defendant published between the time of the individual Defendants' leaving Plaintiff's employ and the resolution of this litigation, a letter in substantially the format as set forth in Appendix B hereto, to be signed by the Court, or some Judge or Magistrate hereof. The Defendants' attorneys shall certify, upon personal review, the completing of such mailing.

6. All Parties hereto, being the Plaintiff, all Defendants (except for Mr. Filan and Mr. Wright), and the Third-Party Defendants, shall refrain from engaging in any behavior that may in any way have the effect of harassing one another, or any of their officers, employees or agents, or members of their families.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED By the Court that this Injunction shall be binding upon all Parties in this lawsuit (except for Mr. Filan and Mr.

Wright), and upon any and all of their heirs, successors and assigns, and any of their officers, employees, agents, co-workers or other confederates, from this day forward.

IT IS SO ORDERED, this 17th day of July, 1994.


THOMAS R. BRETT
United States District Judge

APPROVED:

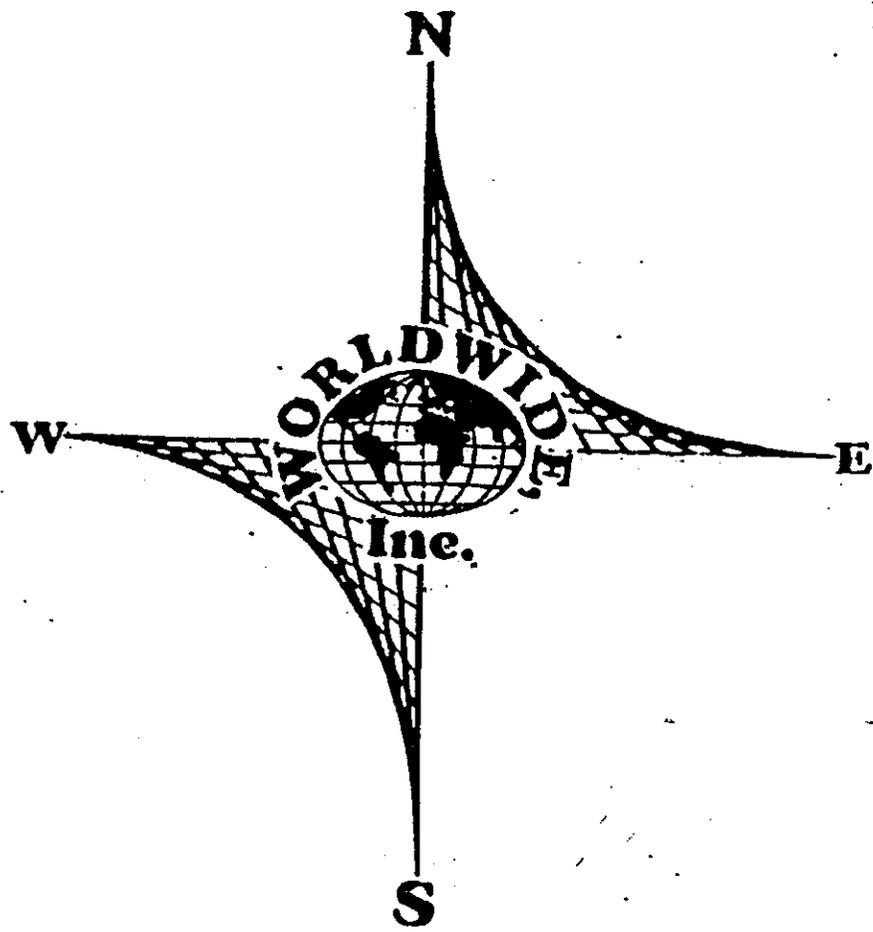

Charles ("Lucas") Adair


FRED P. GILBERT
Attorney for Plaintiff and Third-Party Defendants


THERESE BÜTHOD
Attorney for Defendants

Except for:

Charles ("Lucas") Adair
Kevin Filan
Thomas Wright



United States District Court

Northern District of Oklahoma
333 West Fourth, Room 4-536
United States Courthouse
Tulsa, Oklahoma 74103

J. Wolfe
Magistrate Judge

(918) 581-7136
(FTS) 581-6902

Settlement of Litigation between Geo-Graphics, Inc. and Global Graphics, Inc.

Global Graphics Customer:

The United States District Court for the Northern District of Oklahoma has an effective Alternative Dispute Resolution Program. The purpose of the program is to resolve disputes between parties before the court, saving the parties from having to proceed with trial.

As you may be aware, *Geo-Graphics* brought suit against *Global Graphics* before the U.S. District Court. Since the filing of the lawsuit the parties have participated in the court's Alternative Dispute Resolution Program and have resolved their differences. During the course of those proceedings, I acted as "settlement judge", helping the two companies reach an agreement to settle their dispute.

I agreed, as part of the settlement, to write a letter to persons, such as yourself, who have placed advertisements with both companies. There is some concern among the parties that advertisers are unaware that the companies are different from one another. Part of this confusion may stem from the fact that certain *Geo-Graphics* personnel formed and joined *Global Graphics*.

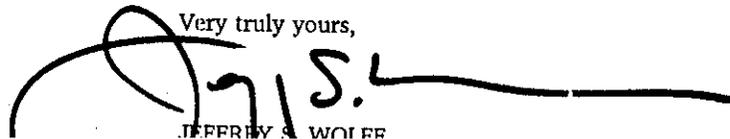
Fortunately the parties have now completely resolved the lawsuit and it is my pleasant task to write to persons such as yourself, who have purchased ads from both companies, of the final resolution. The purpose, of course, is to assure both parties that you, their customers, are fully informed of the differences between the companies, so that you can make an informed choice in future, as to where to place your ads.

In sum, the parties have agreed to resolve their differences as follows:

- * **GEO-GRAPHICS** - There will be no change of name. The company will produce maps within your area in the immediate future.
- * **GLOBAL GRAPHICS** - The company will change its name to: **WORLDWIDE, INC.** and will not produce a map in your area until 1999.
- * **Alternative Features:**
 - (1) If **GEO-GRAPHICS** decides not to produce a map in your area for a two year period, then following that period, **WORLDWIDE, INC.** may decide to go ahead and produce a map.
 - (2) At the end of five years, both companies may decide to produce maps in your area.

Both **GEO-GRAPHICS** and **WORLDWIDE** appreciate your business and patience. Both parties are quite pleased to announce this resolution of their differences and look forward to a bright future. On behalf of the court, please allow me to express my appreciation for your understanding in working with both companies as they have striven to settle their differences.

Very truly yours,



JEFFREY A. WOLFE

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

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY, an Illinois)
corporation,)

Plaintiff,)

vs.)

BETTY SUE WILSON, an individual,)
PAULA MARIE TITUS, an)
individual, PAULA J. WALLS, an)
individual, RICKY EUGENE SIMMONS,)
an individual, MARK POOLE, an)
individual, WAYNE EDWARDS and)
DORIS EDWARDS, and as husband)
and wife,)

Defendants.)

No. 93-C-1109-B

ENTERED ON DOCKET
DATE NOV 21 1994

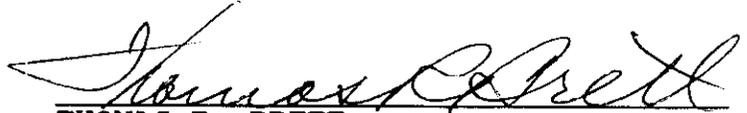
J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of the Defendants, Betty Sue Wilson, an individual, Paula Marie Titus, an individual, Paula J. Walls, an individual, Ricky Eugene Simmons, an individual, Mark Poole, an individual, Wayne Edwards and Doris Edwards, and as husband and wife, and against the Plaintiff, State Farm Mutual Automobile Insurance Company, an Illinois corporation; the Court having determined herein insurance coverage within the express terms and provisions of the subject insurance policy is provided to the subject accident of July 21, 1991, in Sand Springs, Oklahoma, in which Paula J. Titus was driving a vehicle owned by Ricky Eugene Simmons. Costs are hereby awarded to the Defendants against the Plaintiff if timely applied for pursuant to Local Rule

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54.1, and the parties are to pay their own respective attorney fees.

DATED this 18th day of November, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §404.1520 and §416.920. If a determination can be made at any of the steps that the claimant is or is not disabled, the review ends. The five steps are as follows:

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

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The administrative law judge ("ALJ") denied benefits at step five, finding that plaintiff was not precluded from performing

sedentary and light work, including certain jobs enumerated by the vocational expert, for twelve continuous months during the relevant period, September 30, 1991 through May 6, 1993.

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

Plaintiff raises the following issues to be considered:

- (1) The ALJ's determination that Mr. McLaurin had the residual functional capacity to perform the full range of light work is not supported by substantial evidence;
- (2) Mr. McLaurin's impairments precluded mechanical applications of the Medical-Vocational Guidelines; and
- (3) The hypothetical which elicited the vocational testimony did not reflect Mr. McLaurin's true limitations.

Plaintiff, William O. McLaurin, who alleged disabling complaints of osteoporosis, was a 51 year old male at the time of the hearing before the administrative law judge. He had a work history of being a type maker and a caster in a steel factory. He

has a 12th grade education. Past medical history includes a gastric resection in March of 1988 for stomach cancer; a "cutting torch" burn of the lower left leg of November 1988; liquid steel burns to the chest and neck in March 1990; neck strain in July 1991 from a motor vehicle accident; and cervical laminectomy in 1983 for cervical spondylosis. The present medical problems appear to begin on or about October 1, 1991, when plaintiff was examined by Dr. Steven Coulter and presented a two day history of pain in the rib cage. (Tr. 167). On October 14, 1991, Dr. Veteto indicates his impression of osteoporosis, compression fracture, and suspected low bicarbonate level reflecting chronic respiratory alkalosis. (Tr.163). A lumbar thoracic myelogram and a CT of the thoracic spine was performed at the Hillcrest Medical Center on October 25, 1991. The tests indicated a compression fracture at T-11 with slight kyphosis and stated, "Impression: (1) No evidence of cord compression or source of radiculopathy is seen. (2) T-11 compression fracture without involvement of the neural arch or compression of the cord." (Tr. 150). Plaintiff continued to see a number of physicians with complaints of pain. These physicians found back muscle spasms, pain with range of motion, and palpable tenderness along the lower thoracic and upper lumbar area of the spine. (Tr. 158-159, 176, 179-180). By March 20, 1992, Dr. Lewis Greenburg indicated that plaintiff "does have a compression fracture which is debilitating, and I have put in for him to have physical therapy as an adjunct in his care." (Tr. 172). His discomfort was determined to be persistent despite muscle relaxants

and application of local heat. However, during a prior examination on March 13, 1992, Dr. Greenburg had indicated that "the patient does not have any significant proven of symptoms currently," but stating, "he is limited by his back discomfort in the T-11 distribution." (Tr. 173).

While plaintiff's complaints of discomfort and pain are fairly consistent throughout the course of his medical treatment, the various medical examinations provide no consistent indication of causation. The impression from Dr. Veteto, plaintiff's treating physician, in November of 1991 is that of recurrent back strain. (Tr. 159). By December of 1991, the impression was that of vertebral fracture with continued muscle spasm, though much improved. The treating physician recommended walking and Williams' exercises for lumbar strengthening. (Tr. 158). Upon examination in February 1992, Dr. Greenburg indicates that although plaintiff is in obvious chronic pain the neurological exam confirms intact strength of the upper and lower extremities as well as reflexes. Plaintiff does not show any signs of paresthesia. (Tr. 176). In April of 1992, Dr. Greenburg indicated that the T-11 compression fracture has been unresponsive to physical therapy and current medical management, however, the patient is a known alcoholic and has been non-compliant with recommended medical management. The examination was essentially unchanged with marked paravertebral muscle spasm at the T-11 level. However, plaintiff was found to have no new neurologic symptoms to warrant further investigation at the time. (Tr. 170). The July 6, 1992 examination by Dr. Timothy

Young indicates a history of limited range of activity as plaintiff indicated he could sit for only 10 to 15 minutes in one position, and could not stand for more than a minute or two, secondary to pain. However, on physical exam, plaintiff was determined to be a well-developed male, whose reflexes were preserved as was strength. Dr. Young found pain with range of motion and it was somewhat reduced with both tenderness and muscle spasm present. Ranges of motion were normal in all joints except for the back. Plaintiff's gait was slow, but otherwise stable and safe. X-rays of the back showed an anterior and right lateral wedge deformity of the 11th thoracic vertebra consistent with previous compression fracture. Sitting straight leg raising test was negative; and he could toe and heel walk without difficulty. However, straight leg raising test while lying down was positive. Range of motion on lumbosacral spine flexion was 45 degrees, 20 degrees extension, and 20 degrees bending left and right, but with pain. Cervical range of motion was somewhat greater but also positive for pain. (Tr. 179-183).

Plaintiff was referred to Dr. Frank Letcher, who had previously operated on plaintiff in 1993 for cervical spondylosis. Physical examination on October 19, 1992 revealed that plaintiff was in obvious pain throughout the interview. Dr. Letcher noted that plaintiff rises from a seated position with difficulty but walks satisfactorily with a normal gait and station although he holds his trunk in a rather unusual fashion. He has normal strength and sensation in both upper and lower extremities. Deep tendon reflexes are 1+ and symmetrical in both upper and lower

extremities. He has restriction of range of motion of his neck and of his low back due to paraspinal muscle spasm. There was spotty tenderness to palpation up and down the lumbar and thoracic spine. The doctor explained to the plaintiff he could find no evidence of malfunction of the nerves associated with the spine. Because of the intractability of the symptoms, the doctor recommended further x-rays be taken. (Tr. 198-199). However, x-rays taken on October 22, 1992, showed no new findings from the October 1991 examinations. (Tr. 197).

Plaintiff's testimony indicates that he can climb stairs and squat, although he does not do much bending. He is able to drive a car to church. He exercises two to three times a day for his back although it may bring pain as well. He takes care of his own needs including some cooking although his daughter and sister help with the house cleaning. Plaintiff is an usher at his church and attends regularly. Six months prior to the hearing before the ALJ, plaintiff was walking about a mile a day. However at the time of the hearing, he indicates he was walking only two blocks a day. He occupies his time during the day with reading and sometimes watching TV. Although not tested, he believes he could comfortably lift 20 pounds. Plaintiff complains of being able to comfortably sit for only 30 to 40 minutes at a time and stand still for only 15 to 20 minutes. He claims to need crutches or a cane at all times in case his back would "go out." However, these complaints are difficult to reconcile with the medical exhibits in the record.

Although the objective medical findings of back spasm and the

recurrent subjective statements of obvious pain are of concern, the ALJ's decision is supported by substantial evidence. The medical records reflect that on CT examination of the T-11 fracture, the neural arch appeared intact without evidence of instability. No compression of the cord was seen and there is no evidence of other source of radiculopathy. Range of motion is noted to be normal in virtually all examinations with the exception of the back. Plaintiff's gait is slow but otherwise stable and safe. Significantly, plaintiff had normal strength, full sensation and no findings of muscle wasting or atrophy.

The Court has reviewed the record and concludes the plaintiff retains the residual functional capacity to engage in light exertional activity and, therefore, is not disabled. The ALJ's conclusion that plaintiff has not been disabled at any time relevant to the ALJ's decision is supported by substantial evidence. The ALJ's decision is also supported by the residual functional capacity assessments of record, which were submitted in 1992 by two separate physicians upon review of plaintiff's medical records. These physicians' assessments are consistent with plaintiff's ability to perform the occasional lifting, frequent lifting, standing, sitting or walking, pushing and/or pulling requirements for the full range of light and sedentary work (Tr. 110-116, 121-128). Essentially, plaintiff asks the Court to reject the ALJ's credibility determination. The Court declines to do so, also noting such determinations are generally treated as binding upon review. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir.1988).

Moreover, there is no requirement a claimant be able to perform an entire range of work, so long as he can perform a substantial number of jobs within the identified range. See Soc. Sec. Rul. 83-12.

Finally, plaintiff contends that even if he could perform some light work, the Secretary still bears the burden of showing that work exists in the national economy that he can perform, citing 42 U.S.C. §423(d)(2)(A). Plaintiff agrees that it was proper for the Secretary to submit the testimony of a vocational expert in order to meet her burden of proof concerning evidence of work which Mr. McLaurin could perform. However, plaintiff complains that the expert's testimony is elicited by hypothetical questions that do not precisely relate all of claimant's impairments, and that the testimony cannot constitute substantial evidence to support the Secretary's decision. Plaintiff further complains that the expert's testimony was elicited by hypothetical questions which did not clearly articulate the alternate sit and stand limitation, or plaintiff's need to "keep moving." The ALJ asked the expert to assume the individual has the capability of standing and/or walking with normal breaks for up to 6 hours in an 8 hour work day, along with the capability of sitting with normal breaks for up to 6 hours in an 8 hour work day and occasional stooping, crouching and limited to occasional bending. This assumption further included an individual afflicted with symptomatology from a variety of sources to include mild to moderate to occasional chronic pain that would be of sufficient severity as to be noticeable to him at all times,

but nonetheless he would be able to remain attentive and responsive in a work setting and carry out normal work assignments satisfactorily within these limitations. (Tr. 54-55). The only direct evidence of such ability is contained in the physicians' residual functional capacity assessments of the plaintiff. (Tr. 110-129). Plaintiff's counsel on examination asked the vocational expert to take the same hypothetical but to reduce attentiveness and responsiveness to only a 50% level. The expert indicated, "It would probably have a minimal effect on his ability to hold a job that would be more at an alternating type job where he could sit and/or stand at his convenience. For example, a parking attendant." The expert also indicated that a food cashier would be another example of the type of job plaintiff could fulfill, especially with the accommodation of working a midnight to morning shift, which would be prior to the heavy work load. Plaintiff's counsel then asked the expert the same basic hypothetical but offered a scenario wherein the individual would be able to sit only for a period of 3 to 4 hours per day with normal breaks and would be totally prohibited from stooping, crouching and bending. The expert indicated that the change in the scenario would not affect the parking attendant or food cashier positions. (Tr. 57-58).

The vocational expert testified nationally there were some 8,000 sedentary, parking attendant positions and 25,000 light, parking attendant positions. With regard to food cashier, there were 234,000 sedentary positions and 315,000 light positions available in the national market. (Tr. 55-58) Even allowing for

the accommodation for working the midnight to morning shift, there were still 274,500 positions as food cashier in the national economy. Relying on the testimony of the vocational expert, the ALJ found that there are a significant number of jobs existing in the national economy that the plaintiff can perform. Therefore, the ALJ found that the claimant is "not disabled" within the meaning of the Social Security Act and has not been disabled at any time through the date of the ALJ's decision.

Upon thorough review of the medical evidence, plaintiff's testimony and transcript of the record, the Court concludes the record fully supports the ALJ's determination. Plaintiff's complaint for benefits is hereby DENIED.

So ordered this 18 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
NOV 21 1994
DATE _____

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corp.,)
)
Plaintiff,)
)
vs.)
)
Daniel Henke,)
)
Defendant.)

No. 94-1000K

FILED
NOV 18 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 18 day of November, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE