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DATE: DEC 30 1994

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

FILED

DAVID QUEEN,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

93-C-0980-B

DEC 29 1994

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

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff David Queen applied for Social Security disability benefits, alleging he could no longer work. The Secretary of Health and Human Services denied that application. Mr. Queen now appeals that decision to this court.¹ The matter has been referred to the United States Magistrate Judge for report and recommendation.

The narrow issue is whether substantial evidence supports the Secretary's determination that Mr. Queen was not disabled between January 20, 1992 and September 21, 1993. Mr. Queen contends that headaches, seizures and blurred vision prevent him from returning to work. The Administrative Law Judge ("ALJ"), however, found that he could return to work in jobs such as a custodian, service station attendant, toll booth attendant, car wash attendant, bench assembler and dispatcher. For the reasons discussed below, the Magistrate Judge recommends the case be **affirmed**.

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

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The primary issue is whether substantial evidence supports the Secretary's finding that Mr. Queen is not disabled.² Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).³ A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992). Upon review of the record, substantial evidence does support the Secretary's finding.

The pertinent medical evidence includes treatment at Morton Health Center Clinic between August 31, 1992 and December 3, 1992. *Record at 181-192*. A December 3, 1992 examination at that clinic by Dr. Shashi Husain, M.D., was, for the most part, unremarkable. Dr. Husain noted some increased muscle spasm in the lumbosacra region, but indicated Mr. Queen's gait was normal. His impression was that Mr. Queen had a history of seizures⁴, low back pain and headaches. Dr. Husain recommended that Mr.

² A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found, at step 5, that Queen could return to work.

³ One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. *Social Security Law and Practice*, §37.1 (1993).

⁴ Dr. Husain summarized what Queen told him of his medical history as follows: "For the past five years patient has been known to have seizures. He has had urinary incontinence, loss of consciousness and tonic and clonic movements. However, he has informed me that he has never been worked up for this. He has been treated with Dilantin and Tregretol, but because he became seizure free for almost 2 to 3 years he stopped taking the medication. Two months ago he had another seizure. Description was same as mentioned above. Patient, however, was not restarted on medication." *Id.* at 182.

Queen take muscle relaxants and anti-inflammatory medicine. *Id. at 182-183.*

The other significant medical evidence stems from a June 6, 1992 examination by Dr. Carolyn Steel. Dr. Steel, a consulting physician, said that Mr. Queen complained of headaches, loss of consciousness, back pain, distorted vision and decreased vision in his right eye. She diagnosed him with (1) a "history" of seizure activity, (2) chronic headaches, (3) chronic lumbar pain and (4) unstable knee. *Id. at 156.*

During a February 16, 1993 hearing before the ALJ, Mr. Queen testified that he was 41 years old, 6-foot-tall and 193 pounds. He said he has a 12th grade education and that his past relevant work was as a truck driver. He last worked on January 20, 1992 as a dump truck driver. *Id. at 41-51.*

Mr. Queen testified that his impairments were headaches, seizures, back pain, leg pain, vision problems and that his legs and arms go numb. *Id. at 52.* He said that his left eye is 20/20, but he has little vision with his right eye. Mr. Queen also testified that his vision is sometimes blurred. In addition, Mr. Queen testified that he had frequent headaches, "alot of back pain" and pain in both legs. *Id. at 53.* He said he had not suffered a seizure in the three months preceding the hearing and has not taken medication for the seizures. *Id. at 54.* He also testified that he had two seizures in 1992 -- one in February and one in April. *Id. at 62.*

Mr. Queen also testified that he could lift 5 to 10 pounds and walk a block. His daily activities consist of fixing breakfast, watching television, listening to music and reading a book. He said he can sit and/or stand for up to 15 minutes at a time. He testified that he lays down most of the day. *Id. at 56-57.*

A Vocational Expert also testified at the hearing. In response to the ALJ's hypothetical questions, the expert testified that Mr. Queen could work as a custodian, service station attendant, toll booth attendant, car wash attendant, bench assembler and dispatcher. The Vocational Expert also testified that, if all of Mr. Queen's testimony was taken as true, Mr. Queen would be unable to work. *Id.* at 71-78.

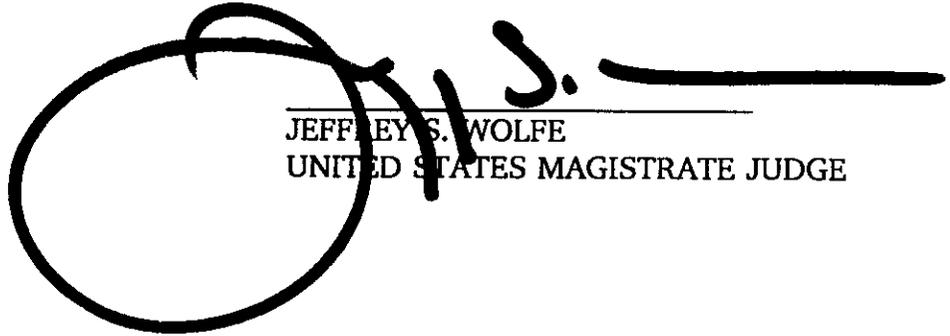
The evidence submitted by Drs. Husain and Steele suggests that Mr. Queen can return to work. The testimony of the Vocational Expert also indicates that Mr. Queen can return to work. In sum, the medical evidence, coupled with the Vocational Expert testimony, constitutes "substantial evidence". Mr. Queen's testimony supports, in part, his allegations of disability, but, that, in itself, does not override the Secretary's decision.

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985). However, the arguments advanced by Mr. Queen are without merit. The ALJ did not err when assessing Mr. Queen's Residual Functional Capacity ("RFC"). As noted, substantial evidence supported the ALJ's finding of no disability. Therefore, the United States Magistrate Judge recommends the case be **AFFIRMED**.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁵

⁵ See *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991).

Dated this 29th day of Dec . , 1994.

A large, stylized handwritten signature in black ink, appearing to read 'J.S.' with a large circular flourish on the left side.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

20, 1989, with the same November 15, 1985 onset date. In addition to the right arm injury, she alleged arthritis in her lower back and legs. This application was pursued through the hearing level and denied by the ALJ. She appealed the decision. Upon review, the Appeals Council vacated the ALJ's decision and remanded the matter for further consideration. On December 16, 1991, a supplemental hearing was held, at which time the ALJ concluded that claimant was not entitled to a period of disability or disability insurance benefits under Section 216(i) and 223, respectively, of the Social Security Act. Since the ALJ determined that good cause did not exist to reopen the claimant's 1987 application, Plaintiff had the burden of proving her condition had worsened since June 2, 1987. (Tr. 11-13). The Record substantiates that Mrs. Green was last insured for disability insurance benefits on December 31, 1990. In order to be eligible for benefits, Plaintiff must show she was disabled and qualified for benefits prior to expiration of her disability insurance coverage. 42 U.S.C. §423(a)(i); 20 C.F.R. §404.131(b). Therefore, the ALJ limited his examination, as does this Court, to whether the evidence reflects a disability since June 2, 1987, and prior to December 31, 1990.

II. PLAINTIFF TESTIMONY

Mrs. Green was born on June 20, 1938. She is right-handed, 5'2" tall, and lives with her husband, youngest son and invalid aunt. (Tr 78-79). She has completed the 9th grade and worked as an assistant supervisor of domestic engineering at a hospital, but has

not worked since November 15, 1985, due to right arm and low back problems, an arthritic condition, ulcer disease and chronic pain. (Tr. 76, 79, 219, 221). She is able to read, add, subtract and make change adequately. (Tr. 119-120).

Her medications include Tylenol 3 with codeine, taken as needed for severe pain; Chlorzoxazone taken three times daily for inflammation/pain; and Vasotec for high blood pressure, all prescribed by Dr. Reed, her treating physician. She occasionally takes Maalox for the ulcer. (Tr. 81-85, 128). Her arthritic condition improves for several hours due to the medication. She has had no back injury or surgery. She describes pain in her lower back as "numb and achy" which persists "everyday." (Tr. 86). "Tingling" pain runs down her legs if she is walking or standing, but she does not use a walker or cane. She says she can walk about a half block without resting, can stand 10 minutes, and sit between 20-30 minutes before needing to alternate positions. She cannot lift more than five pounds and has occasionally dropped a coffee cup. (Tr. 87-88). She has a driver's license but has not driven in approximately three years because the traffic makes her nervous. (Tr. 89). Her daily activities include: attending to personal hygiene; reading the newspaper; sitting and watching television; fixing dinner with assistance from her invalid aunt; washing dishes; grocery shopping with her husband; and light housekeeping. She says she "can bend over and pick something up" but stooping or squatting presents problems.

Until about three years ago, she was able to go to church, sing in the choir and play the piano. She no longer plays piano because of pain and swelling in her wrists. (Tr. 91). She uses a wrist brace when her right wrist bothers her, and medication and rest also help relieve the pain. (Tr. 92). "I can't pick anything up. I can't lift anything with this [right] hand. I can't do no writing with it. Because it gets stiff and numb." (Tr. 93). She has headaches, pain and "aches all the time" in the right side of the neck and right shoulder. She says that turning to the right hurts and causes a pain to run up and down her right arm.

When questioned by the ALJ, claimant admitted that medication relieved the arm pain. She said that since she has been on medication, it has not been bothering her recently. (Tr. 94-96). There is no problem on the left side of her neck or in the left shoulder. Her husband testified her pain was consistent "maybe five days out of seven." (Tr. 102).

At the time of the supplemental hearing in December 1991, Mrs. Green was 53 years old. She felt her back was worse and still complained of problems and pain in the right wrist, arm, and shoulder. (Tr. 122, 128). A typical day would include getting up, an unassisted shower or bath; some cooking; and cleaning the house but without the ability to use the sweeper. She is able to grasp objects but has difficulty removing jar lids. She says she "can't lift a 32-ounce bottle of pop" because the right hand will "swell up ... any time I start moving it." She is able to lift her arm above her head. (Tr. 123, 130). Arthritis causes her back and

shoulder to hurt "if I walk a little ways" or "if I sit a long time." (Tr. 124). Although she has high blood pressure, it is controlled by medication. Claimant and her treating physician, Dr. Reed, provided a list of medications. The medications include: Flexeril three times daily for back pain; Catapres three times daily for hypertension; Ibuprofen three times daily for back pain; Depro-medral injection every 2-3 months for back pain; Progendyl inhaler for asthma; Alka-Seltzer for gas; Alka-Seltzer Plus cold medicine as needed; Tylenol for headache; and Gas-X when needed. (Tr. 124-125, 320). She does not take all of the medications all of the time. Pain in the right wrist and shoulder is relieved with two Ibuprofen twice a day, and she only takes the Flexeril when having trouble with her neck. (Tr. 126). Claimant testified she is unable to return to her prior job because of the pain in her right arm, wrist, shoulder, right side of neck, and arthritis pain in her lower back. (Tr. 123, 127).

III. SECRETARY'S DECISION

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).

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.

In an action for recovery of social security disability benefits, the claimant has the initial burden of proof, which is satisfied by showing that [she] cannot return to [her] former occupation. Salas v. Califano, 612 F.2d 480, 482-83 (10th. cir. 1979). Since plaintiff met this burden ((Tr. 29-30), the burden shifts to the Secretary to show that the claimant, given her age, education and work experience, has the capacity to perform specific jobs that exist in the national economy. Id. at 582.

In an effort to determine whether such specific jobs exist, the ALJ posed hypothetical questions to a vocational expert, who identified a substantial number of occupations that Plaintiff could perform. Therefore, the ALJ found that claimant was not disabled, nor under a disability, within the meaning of the Social Security Act.

Plaintiff contends the ALJ (1) failed to give proper weight to the opinion of Dr. Reed, her treating physician, (2) failed to properly consider the claimant's subjective complaints of pain, and (3) erred in finding that the claimant was capable of light work activity.

IV. DISCUSSION

Since Plaintiff contends the ALJ erred at Step 5, this Court will focus its inquiry at this step of the sequential process. The ALJ found Plaintiff not disabled based on a residual functional capacity for light work and the claimant's age, education, and work experience. The regulations define "light work" in the following manner:

Work which involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 CFR §404.1567(b). A claimant's residual functional capacity (RFC) measures the claimant's maximum sustained work capability. Williams v. Bowen 844 F.2d 748, 751 (10th Cir. 1988). Under Social Security Ruling 83-10:

The ability to perform the full range of "light " work requires the ability to stand or walk, off and on, for a total of approximately 6 hours out of an 8-hour workday, and that sitting may occur intermittently during the remaining 2 hours of the workday. The ability to lift "occasionally" up to 20 pounds requires the ability to do so for up to one-third of the workday. The ability to lift "frequently" up to 10 pounds requires the ability to do so from 1/3 to 2/3 of an 8-hour workday, or for more than 5 hours in an 8-hour workday.

The Ruling explains that "light" work requires the use of the arms and hands to grasp and to hold and turn objects, but generally does not require use of the fingers for fine activities to the extent

required in much sedentary work. The majority of "light" jobs requires the ability to bend both the waist and knees up to one third of the eight-hour workday.

Pursuant to 20 CFR §404.1545, assessment of the claimant's RFC is the responsibility of the ALJ. The ALJ is required to assess physical abilities and take into account exertional limitations. Bowen, 844 F.2d at 752. This RFC assessment is based on all of the evidence, including any statements regarding claimant's capabilities provided by treating or examining physicians, consultative physicians or other medical or psychological consultants designated by the Secretary. 20 CFR §404.1546.

A. TREATING PHYSICIAN'S OPINION

Typically, special deference is given to the opinions of the treating physician. Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). However, the ALJ is allowed to discount the opinion of the treating physician where it is internally inconsistent, conclusory, or contradictory to substantial other evidence in the Record. Id. at 513. In this case, the ALJ properly questioned the accuracy of the reports of the treating physician and decided not to rely on them for his determination. The ALJ specifically noted (1) that interrogatories [to Dr. Reed] were propounded by the claimant's representative; (2) credibility problems in light of contradictions between answers to interrogatories and Dr. Reed's own records; (3) Dr. Reed's findings were based solely on Plaintiff's subjective complaints rather than actual physical medical findings; and (4)

Dr. Reed's findings were at direct variance to the objective findings of the two consultative examinations. (Tr. 19-20).

If the ALJ chooses to disregard a treating physician's medical opinion, he must set forth specific, legitimate reasons for doing so, and this decision must itself be based on substantial evidence. Jones v. Heckler, 760 F.2d 993 (9th Cir. 1985).

The ALJ noted that the records of Plaintiff's treating physician, Dr. Reed, differed greatly from answers the doctor provided the court through interrogatories.¹ First, Dr. Reed relied upon undocumented tests in limiting claimant's ability to sit, stand and walk. In his answers to interrogatories, he stated, "I performed a straight leg raising test on June 20, 1990, which was positive bilaterally at the 40 degree level on the right side and at the 50 degree level on the left side. A Patrick's test confirmed the SLR test." (Tr. 268). However, his treating notes for June 20, 1990, do not reveal any of these tests and state that the patient is "doing very well." (Tr. 284). There is no indication in Dr. Reed's treating notes, nor in any other laboratory or diagnostic report, of these tests being performed and/or their results.

Second, Dr. Reed indicated plaintiff's carpal tunnel syndrome was reconfirmed in his examination of June 20, 1990, when the "patient demonstrated a positive Tinel's and Phalen's sign on both forearms and wrists." Notwithstanding the objective medical

¹ The actual date of these Answer to Interrogatories should be August 9, 1990, rather than 1980 as indicated in Exhibit 27, Page 271 of the Record.

evidence from various other physicians relative to the carpal tunnel syndrome, Dr. Reed's treating notes show no tests performed or results therefrom as indicated in his answers. Dr. Reed made no mention in his notes of various other complaints of pain addressed in his answers to interrogatories. Nevertheless, in his answers to interrogatories, he drastically limited claimant's functional capability due to what he termed her "degenerative arthritic condition." (Tr. 268). As a result of the condition, he said she was unable to walk for more than 1/2 block or for extended periods of time; cannot stand in one position for more than a few minutes without experiencing pain in the lower back that radiates down both legs; has increased pain in patient's upper and lower back when sitting for more than 10 minutes; cannot lift, carry, or push even minimally; and has increased difficulty with fine tasks with the upper extremities. (Tr. 268-269). He called claimant's intermittent pain "moderate to severe" with partial relief provided by Chlorzoxazone. (Tr. 270). There are no objective tests or results that support these limitations. Instead, Dr. Reed's clinical notations demonstrated that plaintiff's impairment was not of the level of severity stated in his answers to interrogatories.

Dr. Reed also stated in interrogatories that Plaintiff suffered from "severe duodenal ulcer disease." Other than an occasional notation of recurrent "reflux esophagitis" or "history of duodenal ulcer", there are no objective findings to confirm this condition as "severe." (Tr. 236, 277, 283-284). On March 7, 1988, Dr. Reed indicated that Plaintiff's stomach was "doing well." (Tr.

227). The Record is insufficient to determine this condition was "severe" as indicated by Dr. Reed, when, in fact, it was apparently under control by medication. Claimant testified she took Maalox occasionally for her ulcer. Even claimant's list of medications dated December 12, 1991, did not include ulcer medication, only "Alka-Seltzer for gas" and "Gas-X when the need arises." None of these medications substantiate a "severe" condition.

In light of these discrepancies, there is substantial relevant evidence in the Record to support the ALJ's decision to reduce the credibility of Dr. Reed's medical assessment of the Plaintiff. (Tr. 20-21).

B. MEDICAL HISTORY

Plaintiff sustained an on-the-job injury to her left wrist in 1984. The diagnosis was "sprained left wrist" with flexion/extension producing no pain but with some swelling and mild tenderness of the wrist between the radial and ulnar heads. (Tr. 219, 242). Dr. Stamile explained that Mrs. Green injured her left wrist, which developed discomfort in her left forearm as a result of her trying to protect the wrist. Subsequently Mrs. Green complained of discomfort in her right wrist. Electromyograms of both wrists were performed, demonstrating "bilateral carpal tunnel syndromes." (Tr. 205). Dr. Stamile felt claimant's left wrist problem was chronic tendonitis and caused a five percent permanent partial impairment to her left upper extremity.

Dr. Stamile referred claimant to Dr. Raptou for another EMG of the right upper extremity in May 1987. This EMG of both upper extremities was within normal limits. The right and left ulnar motor and sensory nerve conduction velocity studies were within normal limits. However, the right median sensory wrist delay was on the borderline high limits of normal and suggested the possibility of a mild compression neuropathy involving the right median nerve at wrist level. (Tr. 208). Dr. Stamile confirmed that a flexor retinaculum incision would most likely give complete relief of symptoms with minimal permanent partial impairment. In his report of May 15, 1987, Dr. Stamile confessed he was "unable to explain why the patient [had] not returned to employment for greater than 1-1/2 years." (Tr. 204). When claimant was referred to Dr. Clendenin for examination on June 17 and again on June 29, 1987, he wrote that "this patient [was] not suffering from carpal tunnel syndrome." (Tr. 221). Dr. Clendenin noted her primary complaints continued to be pain from the shoulder down to the hand and muscle swelling over the ulnar aspect of her wrist. However, x-rays of the wrists indicated no evidence of bone or joint abnormalities or unusual soft tissue swelling. By letter dated June 29, 1987, Dr. Clendenin stated, "There has been no change in the patient's work status. I feel that she is capable of performing ordinary activities based on my examination." (Tr. 221-224). However, on September 8, 1988, claimant was examined by Dr. Smith who determined she was "not capable of performing ordinary manual labor but could work at a very sedentary level with marked

restrictions in terms of lifting, pulling, pushing, and repetitive motions with her upper extremities." (Tr. 242-243).

In view of the reduced weight given to Dr. Reed's records and the medical evidence of the other treating physicians, the ALJ instead relied more heavily on the objective findings corroborated by the consultative physical examinations of Dr. Cooper and Dr. Dandridge.

On November 14, 1989, Dr. Cooper noted that although claimant complained of right arm pain and wrist injury, "she very freely gesticulates with the hand and arms, both left and right." (Tr. 248). He found her gait to be normal, and she appeared well-nourished and oriented. He said that grip strength, biceps, triceps, shoulder shrug strength were full and equal on both sides. Finger dexterity was good, but she did have positive Tinel test at right median nerve but not at left. The cranial nerves II through XII were grossly intact, and the range of motion of the cervical spine, thoracolumbar spine, fingers, wrists, elbows, shoulders, hips, knees, and ankles were all full range. He found the strength of the quadriceps, hamstrings, adductors and abductors of the hips and toe dorsiflexors to be full and equal on both sides. She was able to walk on toes and heels without difficulty. Straight leg raising tests were negative. Knee structural exams were negative. Dr. Cooper concluded that Plaintiff suffered from: hypertension; probably from carpal tunnel on the right side; and some right ulnar nerve problems. While remarking that Plaintiff complained of

several ailments, he said, "[h]owever, the ranges of motion are full." (Tr. 249).

Dr. Dandridge's examination on October 1991 closely parallels Dr. Cooper's analysis. Dr. Dandridge found some swelling over the ulnar aspect of the left forearm above the wrist but no neurological deficits over the ulnar, median or radial nerves of the upper extremities. He said there was no pain or tenderness over the median nerve to the wrists on the right or left. Both upper and lower extremity deep tendon reflexes were physiologically normal. No abnormal sensory distributions of the upper or lower extremities were present. A functional evaluation assessment found that Plaintiff could effectively oppose the thumb to finger tips; could manipulate small objects; and could effectively grasp tools such as a hammer. There were no significant restrictions in the movement of the toes, ankles, knees, hips, fingers, wrists, elbows or shoulders. No restriction of any significance was found in the range of motion of the cervical dorsal or lumbar spine. He further noted that in an 8-hour work day, Plaintiff could sit, stand and/or walk 10-30 minutes at one time and during the entire 8-hour day would be able to sit, stand and/or walk at least 6 hours. Plaintiff could frequently carry or lift 5 lbs. occasionally 6-20 lbs., infrequently 21-25 lbs., but nothing over 26 lbs. There was no limitation on Mrs. Green's use of feet for repetitive movements such as pulling and pushing leg controls. He did restrict claimant's use of the right hand for repetitive movement such as grasping. (Tr. 306-314).

C. PLAINTIFF'S SUBJECTIVE COMPLAINTS OF PAIN

The ALJ also took note of Plaintiff's daily activities to evaluate her exertional and nonexertional impairments. Plaintiff complained of pain in the lower back that radiated down her legs, pain in the right arm, right shoulder and right side of her neck. When she turned her head a certain way to the right, she said she hit a nerve that caused pain to go down her shoulder and right arm. Pain was "all the time" in her neck and shoulder, her lower back ached every day. Physical activity such as stooping or squatting elicited pain. Since bending did not bother her much, she was able to pick up most small things. (Tr. 90).

However, claimant also testified that medication relieved the arthritic pain for six to seven hours. In fact, her right arm and wrist were not "bothering" her at the time of the hearing since she was taking medication. (Tr. 86, 93, 96). Pain in the right wrist and shoulder was relieved by taking Ibuprofen. She said she only occasionally she took Flexeril for neck pain. (Tr. 126). Despite these allegations of constant pain, Plaintiff could get into and out of a bathtub by herself; attend to her personal hygiene; sit and watch television; prepare dinner; stand and wash dishes; do light housework; visit neighbors; go grocery shopping with her husband; and other similar activities. The ALJ is authorized to assess credibility and "decide whether he believes the claimant's assertions of severe pain." Williams v. Bowen, 844 F.2d 748, 754 (10th Cir. 1988) quoting Luna v. Bowen, 834 F.2d at 163. Special

deference is generally afforded a trier of fact who makes a credibility finding. Williams, 844 F.2d at 755. Taking into consideration Plaintiff's subjective complaints, inconsistencies in her testimony, and his personal observations, the ALJ concluded that her subjective complaints were sincere but credible only to the extent consistent with her ability to perform light work activities under specific restrictions.

D. PLAINTIFF'S RESIDUAL FUNCTIONAL CAPACITY

To determine Plaintiff's RFC, the ALJ applied the criteria established in 20 CFR 404.1529 as interpreted by S.S.R. 88-13, and Luna v. Bowen, 834 F.2d 161 (10th. Cir. 1987). He adequately evaluated: Plaintiff's signs and symptoms; their nature, duration, frequency and intensity; precipitating and aggravating factors; dosage, effectiveness, and side effects of the medication; the Plaintiff's functional restrictions and the combined impact on her daily activities. The ALJ noted that Plaintiff walks without assistance and has the full range of motion in her back, neck, hips, legs and wrists. The pain is relieved to a significant extent with medication. All of the doctors, except Dr. Reed, agreed that claimant would be able to perform some type of work activity within certain limitations.

Consequently, the ALJ correctly found Plaintiff capable of performing light exertional activity limited by restrictions on sitting or standing for more than 30 minutes at a time without changing position, walking more than 30 minutes at a time without

rest, and excessive repetitive use of the right upper extremity. This determination is consistent with Social Security Ruling 83-12 as interpreted in cases such as McGuire v. Department of Health and Human Services, No. 93-5210, 1994 WL 123321, at *2 (10th Cir. Apr. 11, 1994). In McGuire, the Tenth Circuit upheld a determination of not disabled for a claimant who could not sit or stand for more than thirty minutes to an hour at a time. The ALJ found that claimant's allegations of pain would not act to further limit or reduce the residual functional capacity assessment.² Based on a thorough review of the medical evidence including claimant's testimony, there is substantial evidence to support the ALJ's conclusion that Mrs. Green could perform a range of light work in spite of her complaints of pain and discomfort.

The Secretary must show that jobs exist in the national economy that claimant may perform in light of the pain suffered. Hargis v. Sullivan, 945 F.2d 1482, 1490 (10th Cir. 1991). The ALJ did not rely solely on the grids but also consulted a vocational expert regarding the number of jobs available to Plaintiff in the economy. The vocational expert identified claimant's past relevant work as unskilled, light exertional activity. The vocational expert confirmed that Mrs. Green could not return to her past relevant work, but could fill a significant number of light and sedentary positions within the national economy. In fact, there

² There appears to be an inadvertent misstatement in the ALJ's finding that "the claimant is suffering from a totally disabling pain syndrome." (Tr. 28). Such a finding is unsupported by the evidence and contradicted in the body of the ALJ's decision.

were some 2000 sedentary exertional activity positions in Oklahoma as a gate attendant and 400,000 nationally; 1000 sedentary positions in Oklahoma as a bottling line attendant and 75,000 existing nationally; and 1000 light exertional positions in Oklahoma as a ticket taker and 400,000 nationally. (Tr. 137-138). The ALJ appropriately used the grids only as a framework and accurately concluded that claimant retained the capacity for the full range of light work within the limitations specified.

V. CONCLUSION

Based on the Record as a whole, the ALJ had substantial evidence to conclude that Plaintiff has the residual functional capacity to perform the physical exertion requirements of work except for those aspects over and above those set forth for light exertional activity and limited by restrictions on claimant's ability to sit or stand more than 30 minutes at a time without changing position, walking more than 30 minutes at a time without resting, and restricted excessive use of the right upper extremity. Therefore the decision of the ALJ that, based on claimant's application filed on September 20, 1989, the claimant is not entitled to a period of disability or disability insurance benefits is supported by sufficient relevant evidence. The Secretary's decision is, therefore, AFFIRMED.

Dated this 30 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
W. E. WALKER, III aka WALTER E.)
WALKER, III; CITY OF BIXBY,)
Oklahoma; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE DEC 29 1994

F I L E D

DEC 28 1994

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

Case No. 94-C-1022K

ORDER

THIS matter comes on for hearing before this Court on this 28 day of ~~November~~ December, 1994, upon the CITY OF BIXBY'S Disclaimer of any right, title or interest in this matter, and further, upon the CITY OF BIXBY'S request for an Order granting its dismissal and withdrawal from further appearances or pleadings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the CITY OF BIXBY, having filed its Disclaimer in the above styled and captioned matter, is dismissed, without costs, from these proceedings, and further, that it is permitted to withdraw from further obligation or responsibility with respect to other appearances or pleadings.


UNITED STATES DISTRICT JUDGE

6

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

JONES TRUCK LINES, INC.,)
)
 Plaintiff,)
)
 v.)
)
 BLITZ U.S.A., INC.,)
)
 Defendant.)

ENTERED ON DOCKET
DATE DEC 29 1994

Case No. 94-C-421-K

FILED
DEC 28 1994

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

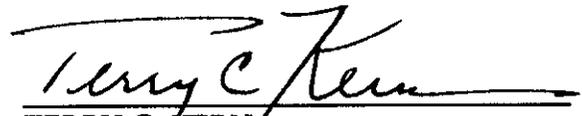
ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed November 21, 1994, in which the Magistrate Judge recommended that Defendant's Motion for Summary Judgment (Docket #6) be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment (Docket #6) is granted.

Dated this 28 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

15

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

BARBARA NICHOLS,

Plaintiff,

v.

SUMMERS GROUP, INC., d/b/a
NELSON ELECTRIC,

Defendant.

§
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§
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§
§
§

ENTERED ON CLERK'S OFFICE

DATE DEC 29 1994

CASE NO. 94-C-507-K ✓

FILED

DEC 28 1994

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

AGREED ORDER OF DISMISSAL WITH PREJUDICE

Before the Court is the parties' Agreed Motion to Dismiss with Prejudice. The court is of the opinion that the motion should be GRANTED.

IT IS THEREFORE ORDERED that Plaintiff's lawsuit is dismissed with prejudice and each party shall bear its or her own costs.

SIGNED this 28 day of December 1994.


UNITED STATES DISTRICT JUDGE

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

DEC 29 1994 *ll*

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

LEO B. MUCKERHEIDE,)
)
 Plaintiff,)
)
 vs.)
)
 HAZEL O'LEARY, Secretary of)
 the United States Department)
 of Energy,)
)
 Defendant.)

Case No. 93-C-994-BU ✓

ENTERED ON DOCKET
DATE 12-29-94

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 60 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 28th day of December, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

CRYSTAL BAY ESTATES, INC.,)
)
 Plaintiff,)
)
 v.)
)
 CRYSTAL BAY MARINA, INC.,)
)
 Defendant.)

ENTERED ON DOCKET

DATE 12-29-94

Case No. 94-C-967-K ✓

FILED

DEC 28 1994

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

ORDER

Plaintiff, Crystal Bay Estates, Inc., requests the Court to remand this action to the District Court of Osage County, State of Oklahoma. Plaintiff originally filed this action in the state court, seeking to enjoin defendant, Crystal Bay Marina, Inc., from constructing pads for a recreational vehicle park on land adjacent to plaintiff's residential development. In its state court petition, plaintiff alleged that defendant's construction violated zoning ordinances promulgated by the Osage County Commission.

In response to plaintiff's state court petition, defendant removed this action to this Court, alleging that a federal question exists because the land on which the alleged zoning violations occurred was leased by defendant from the U.S. Army Corp of Engineers. Defendant argues that this Court has jurisdiction over this action because the zoning ordinances violate the Constitution of the United States.

In Caterpillar Inc. v. Williams, 482 U.S. 389 (1987), the U.S. Supreme Court outlined the requirements for removing an action from

a state court to a federal court.

Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. 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.

Id. at 392. The Supreme Court further noted in Caterpillar that "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, 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." Id. at 393 (emphasis original).

Here, plaintiff's state court petition recognized that defendant subleases the land in issue from the Corps of Engineers. The mere recognition of the sublease does not raise a federal question on the face of plaintiff's petition. Defendant has raised the sublease status as a defense to plaintiff's petition. That defense is an insufficient basis for removal to this federal district court.

The Supreme Court also acknowledged in Caterpillar that there is an "independent corollary" to the well-pleaded complaint rule known as the "complete pre-emption" doctrine. This doctrine applies when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" Id. Once an area of state law has

been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. Id.

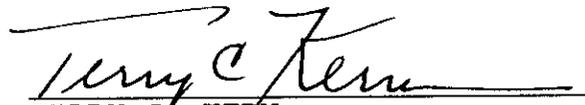
In this action, defendant has not specifically raised a "complete pre-emption" argument, although it relies on the Property Clause (Article IV, Section 3, Clause 2) in claiming that the zoning ordinances violate the U.S. Constitution. Defendant has not cited any statute, regulation, or decision that indicates that the Property Clause grants leases and subleases of the Corps of Engineers complete pre-emptive powers over state and local zoning regulations.

The U.S. Supreme Court has determined that the Property Clause does not automatically conflict with all state regulation of federal land. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987). In Kleppe v. New Mexico, 426 U.S. 529 (1976), the Supreme Court held that a state is free to enforce its criminal and civil laws on federal land so long as those laws do not conflict with federal law. Defendant has not shown that the zoning ordinances are in conflict with the Property Clause or any other law to an extent that would demonstrate Congressional intent to completely pre-empt the area of lands leased or subleased by the U.S. Army Corps of Engineers.

As the party seeking removal, defendant has the burden of establishing federal jurisdiction. Westinghouse Elec. v. Newman & Holtzinger, P.C., 992 F.2d 932, 934 (9th Cir. 1993). The Court finds that defendant has not demonstrated that federal jurisdiction

exists in this action. From the Court's review of plaintiff's state court petition, the Court does not find a federal question, creating federal jurisdiction, to be apparent from the face of that petition. Accordingly, the Court will **GRANT** plaintiff's motion and remand this case to the District Court of Osage County, State of Oklahoma.

IT IS SO ORDERED this 28 day of December, 1994.


TERRY C. KERN
U.S. District Judge

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

JAMES FLOYD PRICE,)
)
 Petitioner,)
)
 vs.)
)
 JACK COWLEY, et al.,)
)
 Respondents.)

ENTERED ON DOCKET

DATE DEC 29 1994

No. 92-C-835-E
(Base File)

FILED

DEC 28 1994

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

ORDER

On November 10, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). The Court further advised Petitioner that his failure to comply with the order would result in the dismissal of this action.

As of the date of this order, Petitioner has not responded to the November 10, 1994 order. Accordingly, Petitioner's petition for a writ of habeas corpus is hereby **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have.

SO ORDERED THIS 27th day of December, 1994.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

114

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

ENTERED ON DOCKET
DATE 12-29-94

ROLLIE A. PETERSON, an individual,)
and SUSAN P. PETERSON,)
an individual,)

Plaintiffs,)

v.)

Case No. 93-C-399-K

NANCY VALENTINY; HUGH V. RINEER;)
C. MICHAEL ZACHARIAS; SHARON L.)
CORBITT; N. SCOTT JOHNSON;)
RINEER ZACHARIAS & CORBITT;)
a partnership; JEAN A. HOWARD;)
MARIAN B. HOWARD; SHARON DOTY;)
ROBERT W. BLOCK, M.D.; and the)
UNIVERSITY OF OKLAHOMA,)

Defendants.)

FILED

DEC 28 1994

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

O R D E R

Before the Court is the motion for summary judgment of defendant Jean A. Howard ("Howard"). In the Second Amended Complaint, filed July 12, 1993, plaintiffs allege causes of action against Howard of (1) malicious prosecution, (2) slander per se, (3) libel and (4) intentional, reckless or negligent infliction of emotional distress. The basic background facts have been related in a previous Order, but will be repeated.

Rollie Peterson and Jean Howard were married October 30, 1971, in Tulsa, Oklahoma. In 1983, the couple moved to Sacramento, California. Two children were born of the marriage, Brett Peterson in 1984 and Kristen Peterson in 1987. During the fall of 1988, Peterson and Howard were divorced in the Superior Court of California. Joint legal custody and visitation of the two minor children was modified on July 19, 1990, by Stipulation and Order

when Howard relocated to Tulsa, Oklahoma.

In August, 1990, Howard took Kristen to Ann Harrington Ward, a Tulsa pediatrician for a school physical. In October, 1991, Jean Howard requested of Harriet Fisher, the Howard family therapist since the mid-1960's, a referral for the children for a sexual abuse evaluation. Jean Howard had begun to suspect that Kristen, age 4, may have been sexually abused, based upon various sex-related and suggestive remarks made by Kristen. On various occasions between late 1991 and April, 1992, Kristen was seen and examined by defendant Nancy Walentiny, a clinical social worker, by Defendant Block, by Ward and by Fisher. Most of the time when Kristen mentioned sexual abuse she referred to "Uncle Duke" (a male friend of her mother's) and only infrequently mentioned her father, the plaintiff, in such counseling sessions. Plaintiffs contend that defendant Walentiny led Kristen to accuse her father by Walentiny's questioning techniques.

In April, 1992, Tulsa Police Department Detective Randy Lawmaster and Walentiny conducted a videotaped interview of Kristen on the subject of sexual abuse. No conclusive evidence was obtained indicating Peterson had committed an instance or instances of sexual abuse with or upon Kristen, nor that Peterson ought to be or was considered as a suspect.

On April 24, 1992, Jean Howard, by and through her attorneys, the firm of Rineer, Zacharias & Corbitt, brought an action to modify the California divorce decree in the District Court of Tulsa County, alleging Peterson had sexually abused Kristen. Howard and

her attorneys obtained a temporary injunction suspending Peterson's visitation with both minor children. However, the trial court sustained Peterson's motion for summary judgment and motion to vacate, opposed by Howard through her counsel, by Order entered February 19, 1993 in Case No. FD 92-02561, vacating the emergency temporary order and reinstating Peterson's unsupervised visitation rights. Plaintiffs commenced this action on April 30, 1993. Howard now seeks summary judgment as to all causes of action alleged against her.

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).

Malicious prosecution actions are not favored under Oklahoma law and the elements of the action are narrowly construed. Glasgow v. Fox, 757 P.2d 836, 838-39 (Okla.1988). Such an action only accrues when five elements exist: the bringing of an action, successful termination in favor of the plaintiff, lack of probable

cause, malice and damages. Meyers v. Ideal Basic Industries, 940 F.2d 1379, 1383 (10th Cir.1991). The present motion only addresses the element of probable cause. The definition of the term is established: "Probable cause for an action does not mean legal cause. . . Probable cause has been defined as reasonable cause that of an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong to warrant the average person in believing the charge to be true." Lewis v. Crystal Gas Co., 532 P.2d 431, 433 (Okla.1975). The issue of what constitutes probable cause in a malicious prosecution action is a mixed question of law and fact; where the evidence is conflicting, the court should submit the issue to the jury. Powell v. LeForce, 848 P.2d 17, 19 (Okla.1992).

More particularly, Howard stands upon the "reliance on counsel" aspect of the probable cause defense. As set forth in Williams v. Frey, 78 P.2d 1052, 1055 (Okla.1938), the test is:

Where a full and fair disclosure of the material facts has been made to reputable attorneys and the affiant acted on their advice, it negatives the absence of probable cause.

The advice of reputable counsel, honestly sought and acted on in good faith, is alone a complete defense to an action for malicious prosecution. (citations omitted)

Howard's position is that she reasonably believed Walentiny's twin conclusions that Kristen had been sexually abused and the likely perpetrator was Mr. Peterson. Then, Howard contends she made a full and fair disclosure of the available facts to attorney Sharon Corbitt, who filed the state court action. Accordingly, Howard

argues, she established a complete defense to the malicious prosecution claim.

Plaintiffs' response is two-pronged: (1) Howard did not act upon counsel's advice "in good faith"; (2) Howard did not make a full and fair disclosure of all facts within her knowledge to attorney Corbitt prior to commencement of the state court action. The following facts appear in the record. After the session of January 16, 1992, it was "pretty primary" in Walentiny's mind that Uncle Duke was the perpetrator of sexual abuse on Kristen. (Walentiny depo. p. 214:10-21). Sometime after January 30, 1992, Walentiny concluded it was not Uncle Duke based, according to Howard, upon Uncle Duke not having sufficient access to Kristen. (Howard depo. p. 229:17-21). The information regarding access came from Howard herself.

On March 16, 1992, Kristen was taken to be examined by Dr. Block, a pediatrician who specializes in child sexual abuse. Dr. Block testified he could "say nothing definite either way" as to sexual abuse based upon the physical examination. (Block depo. p. 48:6-8). Howard reported the matter of suspected abuse to Detective Lawmaster of the Tulsa Police Department. On April 1, 1992, Detective Lawmaster and Walentiny jointly conducted a videotaped interview of Kristen which lasted approximately 40 minutes. Detective Lawmaster testified he learned nothing in the interview which would verify Mr. Peterson had committed sexual abuse upon Kristen or lead Lawmaster to believe Mr. Peterson was a suspect or should be considered a suspect. (Lawmaster depo. p.

79:7-17). On April 3, 1992, Howard met with Corbitt to discuss the commencement of civil proceedings. Howard gave Corbitt a chronological background and further told her "Ms. Walentiny had advised [Howard] that Kristin had implicated a male friend of Ms. Howard's and that Ms. Walentiny suspected Mr. Peterson based on interviews of Kristin." (Corbitt affidavit, ¶7). On April 24, 1992, Howard's Petition to Modify Foreign Divorce Decree was filed in the state court action, containing the allegation of child abuse against Rollie Peterson.

Based on the present record, the Court finds a factual inference could be drawn that Walentiny shifted her focus from Uncle Duke to Rollie Peterson based upon statements received from Howard, who was the instigator of the civil action. In reply, Howard has noted Walentiny's deposition testimony that she found Peterson to be the most likely perpetrator because "Kristin was more consistent with it being dad . . . [and the naming of others was] likely her way of not wanting to jeopardize her relationship with her dad. . . ." (Walentiny depo. p.374-75). The deposition was taken September 9, 1992, months after the civil custody proceeding was filed and after the present case was filed. A fact finder must resolve the possibility of subsequent rationalization with Walentiny's testimony that initially Uncle Duke was "pretty primary" as the perpetrator and Howard's testimony that the shift of focus to Rollie Peterson came about because of Howard's statements to Walentiny concerning access to Kristen. Further, it is unclear from the present record whether Howard disclosed to

attorney Corbitt the neutrality of the findings of Dr. Block and Detective Lawmaster. Viewing the record in the light most favorable to the nonmoving party, the Court finds the issue of probable cause should be submitted to the jury. Howard's motion for summary judgment on the malicious prosecution claim is denied.

Howard next contends plaintiff Rollie Peterson's claims for slander per se and libel are barred by the applicable statute of limitation. Plaintiff commenced this action April 30, 1992. The Second Amended Complaint alleges the slander took place in March and April, 1992; it alleges the libel took place on or about March 13, 1992 and on or about March 18, 1992. Howard argues that the one-year statute of limitation on defamation actions in 12 O.S. §95(4) bars these claims. In response, plaintiff argues for application of the discovery rule to defamation claims. The Supreme Court of Oklahoma has not addressed the issue. It appears to be the case that "[t]he great majority of courts in other jurisdictions have held that the discovery rule does not alter the general rule that the time period begins to run when the words are uttered." Quality Auto Parts Co. v. Bluff City Buick, 876 S.W.2d 818, 821 (Tenn.1994). See also Rinsley v. Brandt, 446 F.Supp. 850, 852 (D.Kan.1977); Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action, Annot. 35 A.L.R. 4th 1002.

In Lovelace v. Keohane, 831 P.2d 624, 628 (Okla.1992), the Supreme Court of Oklahoma quoted approvingly from Moore v. Delivery Services, Inc., 618 P.2d 408, 409 (Okla.Ct.App.1980) as follows:

Mere ignorance of the existence of a cause of action constituting such on the part of a person in whom a cause of action lies will not toll the running of the statute of limitations. This rule applies unless a statute specifically provides that the limitations do not begin to run until the person in whom the cause of action lies has actual knowledge of it, or unless there has been fraudulent concealment of the cause of action on the part of the person against whom it lies.

No showing of fraudulent concealment has been made, and no Oklahoma statute specifically imposes an "actual knowledge" standard in defamation cases. Peterson simply argues for judicial application of the discovery rule because he did not know of the alleged defamation until he was served with the state court petition on May 1, 1992, and therefore his claims are timely filed. This Court is persuaded the Supreme Court of Oklahoma, if faced with the issue, would hold the discovery rule does not apply to defamation actions. The defamation claims alleged against defendant Howard are thus time-barred.¹ In view of this ruling, the Court need not address Howard's argument, improperly raised for the first time in her reply brief (see N.D. LR 7.2(C)), that the statements regarding Peterson being suspected of sexual abuse, were true and thus not slanderous.

Next, Howard seeks summary judgment as to plaintiffs' Fourth

¹As noted, the allegedly libelous statements were made in March, 1992 and are clearly barred. The allegedly slanderous statements were made "[o]n or about March and April, 1992." If Peterson can offer evidence that slander against him by Howard was published on April 30, 1992, such a claim would survive the one-year statute of limitation. If such evidence is available, plaintiff may ask the Court to revisit the issue.

Cause of Action, denominated in the Second Amended Complaint as "Intentional, Reckless or Negligent Infliction of Emotional Distress." Both named plaintiffs seek recovery under this claim. Specifically, it is alleged Howard "insisted that Peterson sexually molested the Minor Children and repeatedly insisted to Walentiny, Corbitt and others that Peterson had molested his children and instigated the filing of sexual abuse reports with the University of Oklahoma and the Tulsa Police Department and filed of public record a civil petition in Tulsa, Oklahoma charging Peterson with the same" (Second Amended Complaint at 21, ¶6.2). Howard first argues the publications were privileged.² She cites 21 O.S. §847, which provides:

Any person participating in good faith and exercising due care in the making of a report pursuant to the provisions of Section 846 or 846.1 of this title, or any person who, in good faith and exercising due care, allows access to a child by persons authorized to investigate a report concerning the child shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report.

A rather obvious difficulty with this argument appears when one examines 21 O.S. §846, which refers to a child having "physical injury or injuries. . . ." No assertion has been made that Kristen sustained any physical injury from the alleged abuse. Further, §846 contemplates a report to the "county office of the Department

²Howard also raised privilege in regard to the defamation claims. The discussion which follows is equally applicable to those claims.

of Human Services. . . ." Howard made no such report. The immunity provided by §847 is unavailable to her. Contrary to Howard's argument, the reference in §847 to one who "allows access to a child by persons authorized to investigate a report concerning the child" clearly contemplates a report has already been made. No report, no immunity.

Howard also asserts immunity under §587 of the Restatement (Second) of Torts, which provides:

A party to a private litigation. . . is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Here, the communications in question were preliminary to the judicial proceeding of the Petition to Modify Foreign Divorce Decree. Comment e of §587 states:

As to communications preliminary to a proposed judicial proceeding, the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

In Kirschstein v. Haynes, 788 P.2d 941, 954 (Okla.1990), the Supreme Court of Oklahoma held the privilege bars not only a defamation action, but one for intentional infliction of emotional distress. The court in Kirschstein noted under the facts before it no proceeding had ever been commenced. Id. at 948. It is

therefore plain one need not be a "party" to an ongoing proceeding at the time the communication is made in order for the privilege to apply. The communication must however be relevant or have some relation to a proposed proceeding, and it must be determined if the occasion of the utterance should be considered within the privilege. These are questions for the Court. Id. at 951 & n.23. Plaintiff lists the following persons as having been told by Howard "that Peterson sexually abused Kristin: Belva Howard, Marian Howard, Sherrie Walters, Sandy Cortez, Laura Kilpatrick-Revard, Margaret Kennedy, Gary Turner, Marsha Gray, Jon Van Wagenen, and Steven Dolmseth." (Plaintiffs' Response Brief at 11, ¶42). The Court has reviewed the excerpts from Howard's deposition to which the parties have referred, and finds only one instance in which Howard connects the communication to the contemplated lawsuit. Howard testified she discussed the allegations of sexual abuse with Margaret Kennedy after the lawsuit had been filed "[b]ecause we were going to need some deposition testimony." (Howard depo., p.108:19-20). In no other instance is the proper relationship established between the communication and the lawsuit. "Although the Restatement standard of 'relation' to the proceedings is broad, and does not require legal relevance, even that liberal standard is not met merely by showing that the defamatory comments were triggered by some pending lawsuit or the facts involved therein." Brown v. Collins, 402 F.2d 209, 213 (D.C.Cir.1968) (footnote omitted). Only the communication to Margaret Kennedy seems to fall within the asserted privilege.

This does not mean all the other challenged communications are admissible. Contrary to plaintiffs' assertion in their brief, Howard's deposition does not demonstrate all the named people were told of the allegations of sexual abuse regarding Rollie Peterson. Howard specifically denies telling Belva Howard this. (Howard depo., p.92:22-24). Howard responds affirmatively that she told Sandy Cortez about "this matter", apparently meaning the lawsuit. (Howard depo., p.103). The testimony does not definitively establish Howard told Cortez about the allegations of sexual abuse. At trial, only statements which are not privileged and which are relevant to plaintiff's claim of tortious infliction of emotional distress will be admitted. Summary judgment on the grounds of privilege is denied with the sole exception of the statement by Howard to Margaret Kennedy.

Howard requests judgment on the plaintiffs' claim for intentional infliction of emotional distress. She cites the well-known statement concerning this tort in Eddy v. Brown, 715 P.2d 74, 77 (Okla.1986): "Conduct which, though unreasonable, is neither 'beyond all possible bounds of decency' in the setting in which it occurred, nor is one that can be 'regarded as utterly intolerable in a civilized community,' falls short of having actionable quality." Howard argues her actions recited in the Second Amended Complaint fail to meet this standard. In their brief filed in response to the present motion, plaintiffs do not address this

argument.³ Upon review, the Court concurs with Howard's position; even viewing the facts in the light most favorable to plaintiffs, Howard's conduct does not violate the extremely high standard set forth in Eddy v. Brown. Summary judgment is appropriate.

Finally, Howard moves for summary judgment on plaintiffs' claim for negligent infliction of emotional distress. Howard argues Oklahoma does not recognize an independent action for mental anguish, citing Seidenbach's, Inc. v. Williams, 361 P.2d 185, 187 (Okla.1961). However, the same court has stated a plaintiff may recover for mental anguish where it is caused by physical suffering and may also recover for mental anguish which inflicts physical suffering. Ellington v. Coca-Cola Bottling Co., 717 P.2d 109, 111 (Okla.1986). Plaintiff Rollie Peterson has sufficiently established by affidavit a factual question as to his experiencing physical suffering as a result of Howard's actions; summary judgment is denied.

Howard also seeks judgment as to Susan Peterson's claim for emotional distress. Howard argues that any actions she took were directed at Rollie Peterson and therefore Susan Peterson as a third party may not recover. The Court agrees. In Van Hoy v. Oklahoma Coca-Cola Bottling Co., 235 P.2d 948, 949 (Okla.1951), the Supreme Court of Oklahoma quoted with approval the rule that "a husband or

³In their brief in response to the present motion, plaintiffs adopt by reference pages 13-17 of a brief (#45) in response to another motion, and pages 9-19 of a brief (#62) in surreply to the same motion. Both passages discuss only negligent infliction of emotional distress. This Court has ruled in its Order of October 5, 1994, that Oklahoma law applies to the claims of tortious infliction of emotional distress.

wife cannot recover for mental suffering caused by his or her sympathy for the other's suffering." Such is the nature of Susan Peterson's claim, as exemplified by her affidavit attached plaintiffs' surrebuttal brief (#62): "I have suffered from depression, worry, and fearfulness since these false accusations were brought against my husband." (§3). Accordingly, she may not recover.

It is the Order of the Court that the motion of defendant Jean A. Howard for summary judgment is hereby DENIED as to plaintiff Rollie Peterson's claim of malicious prosecution, is hereby GRANTED as to plaintiff Rollie Peterson's claim for slander per se and libel, is hereby GRANTED as to plaintiff Rollie Peterson's claim for intentional infliction of emotional distress, is hereby DENIED as to plaintiff Rollie Peterson's claim of negligent infliction of emotional distress and is hereby GRANTED as to plaintiff Susan Peterson's claim of negligent infliction of emotional distress.

ORDERED this 28 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EMPORIA MOTOR FREIGHT, Debtor
and EMPORIA MOTOR FREIGHT,
THOMAS M. MULLINIX, TRUSTEE
ON BEHALF OF THE BANKRUPTCY
ESTATE OF EMPORIA MOTOR FREIGHT

Plaintiff,

vs.

Case No. CIV-91-C-461-E

EVANS BOX MANUFACTURING CORPORATION

Defendant.

FILED

DEC 28 1994

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

ORDER OF DISMISSAL WITH PREJUDICE

ENTERED ON DOCKET
DATE 12-29-94

ON THIS 28th day of Dec DEC 28 1994, 1994,
came on to be heard Plaintiff's and Defendant's motion for
dismissal with prejudice and the Court being of the opinion
that it should be in all respects granted, It Is Therefore;

ORDERED, ADJUDGED AND DECREED this cause of action filed
by THOMAS M. MULLINIX, Trustee on Behalf of the Bankruptcy
Estate of EMPORIA MOTOR FREIGHT, Plaintiff against EVANS BOX
MANUFACTURING CORPORATION, Defendant be dismissed with
prejudice to the refiling of same, with each party to bear
their own costs incurred herein.

S/ JAMES G. EUSON

United States District Judge

Dated: DEC 28 1994

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

ENTERED ON DOCKET
DATE 12-28-94
FILED

JUDITH F. SORRELL,
Plaintiff,

v.

KQLL RADIO and
TRUTH PUBLISHING COMPANY, INC.,
an Indiana corporation,

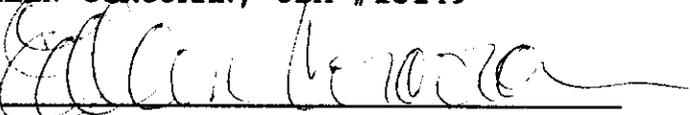
Defendants.

Case No. 94-Q-80-B
Court Clerk
COURT

JOINT STIPULATION FOR
DISMISSAL WITH PREJUDICE

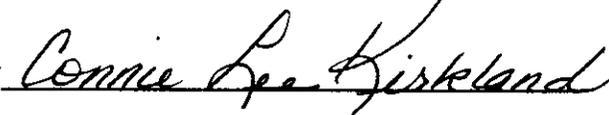
The Plaintiff Judith Sorrell and the Defendants, KQLL Radio and Truth Publishing Company, Inc., an Indiana corporation, represent to the Court that they have reached a full and final settlement of the claims asserted in this action and thereby jointly stipulate for its dismissal with prejudice, each side to bear her or its own costs, expenses and attorneys' fees.

WARREN GOTCHER, OBA #3495
ELLEN CORCORAN, OBA #15149

By 

GOTCHER, BROWN, BLAND & BELOTE
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McAlester, Oklahoma 74502
Attorneys for Plaintiff

DAVID E. STRECKER, OBA No. 8687
CONNIE LEE KIRKLAND, OBA No. 14262

By 

SHIPLEY, INHOFE & STRECKER
3600 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4307
(918) 582-1720
Attorneys for Defendants

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

FILED

DEC 27 1994

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

HARTMAN MITCHELL,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

Case No. 94-C-68-K

UNRECORDED COPY

DATE 12-28-94

STIPULATION FOR DISMISSAL

It is hereby stipulated and agreed that the Complaint and the United States' Counterclaim filed against plaintiff Hartman Mitchell and counterclaim defendant Howard L. Raskin are dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.



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COUNSEL FOR PLAINTIFF



JOHN T. MCGUIRE
Trial Attorney
Department of Justice
Tax Division
P.O. Box 7238
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COUNSEL FOR UNITED STATES



KENNETH F. BRUNE
Brune and Neff, P.C.
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230 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 599-8600

ENTERED ON DOCKET
DATE 12-28-94

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

DEC 28 1994

Court Clerk
U.S. DISTRICT COURT

DOLLAR SYSTEMS, INC.,)
a Delaware corporation,)

Plaintiff,)

vs.)

Case No. 92-1118-E

BLUEWATER LEASING, INC.,)
a Michigan corporation;)

JAY M. MONTROSE, an)
individual; and ROSS E. LINDSAY,)
an individual,)

Defendants.)

STIPULATION OF DISMISSAL OF COUNTERCLAIMS WITH PREJUDICE

Defendants, Bluewater Leasing, Inc., Jay M. Montrose, and Ross E. Lindsay, dismiss with prejudice all their counterclaims against Plaintiff, Dollar Systems, Inc., in their entirety, with each party to bear its or his own costs and attorney's fees with respect to the dismissed counterclaims.

Respectfully submitted,

BLUEWATER LEASING, INC.

By: [Signature]
Name: JAY MONTROSE
Title: CEO

[Signature]
JAY M. MONTROSE, INDIVIDUALLY

[Signature]
ROSS E. LINDSAY, INDIVIDUALLY



Michael J. Gibbens, OBA # 3339

- Of the Firm -

CROWE & DUNLEVY
321 S. Boston, Suite 500
Tulsa, Oklahoma 74103-3313
(918) 592-9800

ATTORNEYS FOR DOLLAR SYSTEMS, INC

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

CAROL W. BYRD and JAMES E. HUGHES, individually and derivatively on behalf of Mid-Continent Associates.)

Plaintiffs,)

vs.)

PAINWEBBER, INC.; MIDTOWN ASSOCIATES LIMITED PARTNERSHIP, FOURTH STREET ASSOCIATES; and MID-CONTINENT ASSOCIATES,)

Defendants.)

ENTERED ON DOCKET
DATE 12-28-94

Case No. 94-C-1139-K

State Court Case No. CJ-94-01387

FILED
DEC 27 1994

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

AGREED ORDER OF REMAND

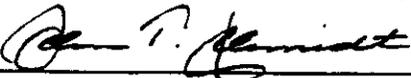
Based upon the Stipulations of the Parties, it is

ORDERED that this case is remanded to the District Court in and for Tulsa County, State of Oklahoma, No. CJ-94-01387.

ORDERED this _____ day of December, 1994.

AGREED AND APPROVED: 

James M. Sturdivant
ATTORNEY FOR PLAINTIFFS



John T. Schmidt
ATTORNEY FOR DEFENDANTS

U.S. District Judge

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

AVTECH, INC., an Oklahoma corporation,)
and DONALD A. McCANCE,)
)
Plaintiffs,)
)
vs.)
)
E. MISHAN AND SONS, INC., a New York)
corporation, PUBLISHERS CLEARING HOUSE,)
a New York corporation, and HANOVER)
HOUSE, a Pennsylvania corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE 12-28-94

Case No. 94 C 105 K ✓

F I L E D

DEC 27 1994

SA

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

ORDER

Upon Plaintiffs' and Defendant Publishers Clearing House's Joint Motion to Dismiss and to Strike Answer filed in this case, the Court finds that for good cause shown, the same should be granted.

IT IS THEREFORE ORDERED, that the Answer filed by Defendant Publishers Clearing House on June 10, 1994, in the above case, be and the same is hereby ordered stricken.

IT IS FURTHER ORDERED that Plaintiffs' claim in this case be dismissed as against Defendant Publishers Clearing House, with both parties to be responsible for and to bear their own respective costs and attorneys fees.

Dated this 27 day of December, 1994.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

FILED
DEC 23 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

RESOLUTION TRUST CORPORATION,)
)
Plaintiff,)
)
vs.)
)
LOUIS W. GRANT, JR., CHARLES B.)
GRANT, J. LAWRENCE MILLS, JR., KEITH)
R. GOLLUST, PAUL E. TIERNEY, JR.,)
EDWARD L. JACOBY, ROD L. REPPE,)
DONALD BERGMAN, WILLIAM M. BRUMBAUGH,)
EDWARD H. HAWES, JAMES R. MALONE,)
ROBERT B. RISS, ROBIN K. BUERGE,)
W.R. HAGSTROM and DAVID M. MOFFETT,)
)
Defendants.)

Case No. 92-C-1043-K

ENTERED ON DOCKET
DATE DEC 28 1994

CERTIFICATE FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA
PURSUANT TO 20 O.S. 1981 SECTIONS 1601-1612

To the Supreme Court of the State of Oklahoma and the
Honorable Justices thereof:

It appears to the United States District Court for the
Northern District of Oklahoma that the above-filed case currently
before this Court involves a question or proposition concerning the
policy and law of the State of Oklahoma which may be determinative
of the cause, and there appears to be no clear, controlling
precedent in the reported decisions of Supreme Court of the State
of Oklahoma. Accordingly, the United States District Court for the
Northern District of Oklahoma hereby certifies the following
question of law to the Supreme Court of the State of Oklahoma for
instructions concerning said question of law, based on the facts
recited herein, pursuant to 20 O.S. 1981 Sections 1601-1612.

Question of Law to be Answered

In order to accurately resolve this dispute, this Court hereby certifies the following questions to the Oklahoma Supreme Court.

1. Under Oklahoma law, does the theory of adverse domination operate to toll the statute of limitations?
2. If so, would the doctrine delay accrual or toll the statute of limitations on claims of negligence, gross negligence, breach of fiduciary duty, or breach of contract against corporate officers and directors while the wronged corporation is controlled by a majority of culpable directors and officers?

Factual Background

This action was brought by the Resolution Trust Corporation ("RTC") against former directors and/or officers of Sooner Federal Savings & Loan Association. The RTC has asserted claims for negligence, gross negligence, breach of contract, and breach of fiduciary duty against the Defendants arising out of their acts and omissions relative to numerous loan transactions funded during the period from 1982 through 1988.

Pending now before this Court are motions for summary judgment filed by Defendants based on the grounds that Plaintiff's claims are barred by the statute of limitations. Defendants argue that the doctrine of adverse domination does not apply to toll the applicable limitations period. Plaintiff, in contrast, argues that the adverse domination doctrine delayed the accrual of its claims. If recognized in this case, the adverse domination theory could delay the accrual of this cause of action and thereby toll the statute of limitations while wrongdoers functioned as officers

and/or directors of Sooner Federal Savings & Loan Association.

The RTC brought this action on November 13, 1992, against the Grants, Gollust, Tierney, Mills, Jacoby, Hagstrom, and Reppe, among others, alleging that as previous Officers and Directors of the failed Sooner Federal Savings and Loan Association ("Sooner"), they allowed Sooner to engage in unsafe and unsound banking practices which resulted in a loss to Sooner of approximately \$50 million. The Second Amended Complaint includes claims for breach of fiduciary duty, negligence and/or gross negligence and breach of contract and covers alleged improper acts occurring from 1982 through 1988. The Second Amended Complaint contains a list of some 35 loans as "examples" of the improper loans authorized by the Defendants.

The Grants, Gollust, Tierney, Mills, Jacoby, Hagstrom, and Reppe each filed motions for summary judgment, arguing that the claims are barred by the statute of limitations. While the Defendants are unified in contending that the doctrine of adverse domination does not toll the statute of limitations, they vary in their presentation of this argument. For instance, certain defendants argue that the limitations period begins to run as soon as two or three new directors join a board composed of culpable directors, regardless of the culpability of the majority. Similarly, Defendants Gollust and Tierney believe that Oklahoma does not recognize the adverse domination theory in the absence of fraud or concealment and argue that the doctrine would require a plaintiff to show that a non-culpable director could not have

induced the corporation to sue.

The Court asks for discussion of these questions in light of the recent decision of O'Melveny & Myers v. Federal Deposit Insurance Corporation, 114 S.Ct 2048, 1994 WL 249558, (1994). In O'Melveny, the Court stated:

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.

* * * * *

It is hard to avoid the conclusion that §1821 (d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

O'Melveny, at 2054-2055. This language has put into doubt the applicability of Farmers & Merchants National Bank v. Bryan, 902 F.2d 1520 (10th Cir. 1990), which adopted the adverse domination doctrine as part of the federal common law of the Tenth Circuit. Without recourse to the federal common law on this subject, it is necessary to examine state law for guidance.

The Oklahoma Supreme Court has never specifically addressed whether the adverse domination doctrine is recognized in Oklahoma law. The only reported Oklahoma case addressing the tolling of the statute of limitations with respect to the conduct of corporate directors is Bilby v. Morton, 247 P. 384 (Okla. 1926). In Bilby, the defendant committed fraudulent acts and then deliberately concealed his fraud. The applicability of Bilby in the current

situation is clouded by the fact that Bilby involved fraud, an area in which courts have traditionally tolled the statute until the fraud was discovered. No Oklahoma authority provides guidance on the question of whether the fraud analysis in Bilby would apply to situations such as the one at hand.

Defendants point to the fact that Oklahoma courts have not expanded Bilby-styled exceptions to the tolling of the statute of limitations. Because the courts have not expanded the exceptions, Defendants argue that no additional exceptions should be added to toll the statute of limitations. While this argument carries weight, it is not convincing in light of the strong policy arguments weighing in favor of a theory of adverse domination. Moreover, Oklahoma courts might be more likely to recognize the doctrine now, since O'Melveny has placed into doubt the recognition of the doctrine in Bryan.

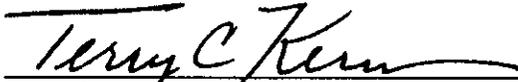
The authority for the Oklahoma Supreme Court to accept questions certified to it by this Court is found at 20 O.S. § 1602. This section provides:

The Supreme Court . . . may answer questions of law certified to it by . . . a United States District Court. . . when requested. . . if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause of action then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court. . . of this state.

With regard to the application of adverse domination theory in tolling a statute of limitations, there is no Oklahoma controlling authority. Moreover, resolution of this issue may very well be determinative of the case at bar. Therefore, the above-mentioned

questions are certified for resolution in the Supreme Court of the State of Oklahoma.

IT IS SO ORDERED THIS 22 DAY OF DECEMBER, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE DEC 27 1994

SABRE INTERNATIONAL, INC.,)
JOHNNY M. CAMP, MARY K. CLAXTON,)
JOSEPH P. DAWSON, PATRICK J. HAGA,)
LOYD J. KILLGORE, GEORGE A. LEHMAN,)
MERLE L. PECK, ANDREW J. SOLOMON)
CARLA D. SOLOMON, JAMES M. SOLOMON,)
WILLIAM R. BUNTING, BILL DAVIS,)
CLYDE HIGEONS, EDDIE R JARMAN,)
ANTHONY M. KOWALESKI,)
and G. ALVIN LEHMAN)

Plaintiffs,

v.

STEVE D. WRIGHT and)
VANGUARD PROFESSIONALS, INC.,)

Defendants.)

FILED
DEC 23 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-480 *HK*

ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the Application for Agreed Order of Dismissal with Prejudice.

It is ordered that this action be dismissed, with prejudice, each of the parties to bear his, her or
its own costs herein.

Terry C. Kern
Honorable Terry C. Kern, Judge

5

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

FIRST FINANCIAL INSURANCE)
COMPANY, an Illinois)
corporation,)
)
Plaintiff,)
)
vs.)
)
DEVLIN WAYNE FIELDS and JAC)
INCORPORATED, an Oklahoma)
corporation, d/b/a DENIM &)
DIAMONDS)
)
Defendant.)

No. 94-C-677-K

ENTERED ON DOCKET
DEC 27 1994

FILED
DEC 23 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

Now before the Court is Plaintiff's Request for Entry of Default against Defendant Devlin Wayne Fields and JAC Incorporated. The Clerk of the United States District Court has searched the record and entered the default of the Defendants. It further appears to this Court that the Defendants are in default and that a judgment of default is appropriate.

Plaintiff has also requested that this Court enter a Declaratory Judgment against Defendants stating that Plaintiff has no duty to defend JAC, Inc. in the underlying action of Devlin Wayne Fields v. JAC, Inc., d/b/a Denim and Diamonds. Furthermore, Plaintiff requests this Declaratory Judgment to state that Plaintiff has no liability to Devlin Wayne Fields or JAC Incorporated.

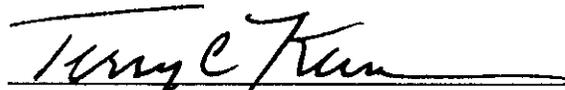
Although this Court readily agrees to an order of default against the Defendants, it would be premature to grant the Declaratory Judgment sought by Plaintiff. If Plaintiff seeks a

7

Declaratory Judgment against Defendants, Plaintiff must make a proper application before this Court for a hearing to evaluate the merits of such a Judgment.

Therefore, this Court enters a judgment of default but declines to also issue a Declaratory Judgment going to the merits of the dispute.

ORDERED this 22 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 23 1994

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

ARKOMA BASIN MINERALS, INC.,)
a Nevada corporation, and)
MARK S. KELLDORF, d/b/a)
ARKOMA BASIN EXPLORATION COMPANY,)
a sole proprietorship,)

Plaintiffs,)

vs.)

Case No. 94-C-74-B

PAUL A. ROSS,)

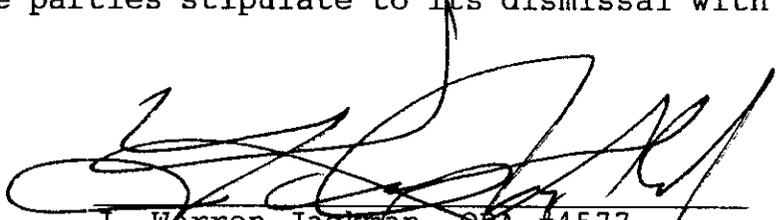
Defendant.)

ENTERED IN COURT

DATE DEC 27 1994

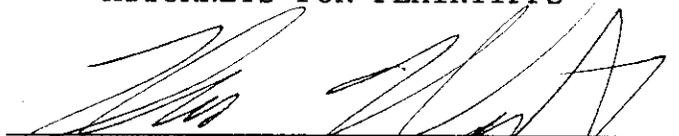
STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed. R. Civ. P., this case having been amicably settled, the parties stipulate to its dismissal with prejudice to refiling.



J. Warren Jackman, OBA #4577
Kevin M. Abel, OBA #104
William A. Caldwell, OBA #11780
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
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ATTORNEYS FOR PLAINTIFFS



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(918) 581-8200

ATTORNEY FOR DEFENDANT

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

ENTERED ON DOCKET
DATE 12-27-94

GEOFFREY, INC.,)
)
Plaintiff,)
)
v.)
)
RICHARD SMITH, an individual,)
MARGI SMITH, an individual,)
and THE PARTY PEOPLE, INC.)
d/b/a PARTIES R US,)
)
Defendants.)

FILED

DEC 23 1994

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

Civil Action No. 94-C-803-K

CONSENT JUDGMENT

Plaintiff, GEOFFREY, INC. ("GEOFFREY") having filed a Complaint demanding a permanent injunction and other relief, and GEOFFREY and Defendants RICHARD SMITH, MARGI SMITH, and THE PARTY PEOPLE, INC. d/b/a PARTIES R US, having agreed to the entry of a Consent Judgment herein, it is hereby:

ORDERED, ADJUDGED AND DECREED that final judgment in favor of GEOFFREY and against Defendants is hereby granted and entered in this action as follows:

1. That, effective February 28, 1995, Defendants, their officers, agents, servants, employees, attorneys and all those persons in active concert or participation with them, are hereby permanently enjoined and restrained from:

(a) Using the name or marks or any colorable imitation of GEOFFREY's TOYS "R" US, KIDS "R" US and PARTIES "R" US marks and/or any other mark, the dominant

GEOFFREY's "R US" marks or the term "R" US, and shall provide GEOFFREY's counsel with copies of Defendants' written communication(s) sent in compliance with the provisions of this paragraph.

5. By February 28, 1995, Defendants shall have effectuated a change of their corporate and/or fictitious name with the Secretary of State of the State of Oklahoma or other appropriate authority, by filing articles of amendment, completing all necessary forms and reports and paying the required fee(s). Defendants' new name shall not be confusingly similar to GEOFFREY's "R" US marks or the terms "R" US. Defendants shall notify GEOFFREY's counsel in writing that they have complied with the provisions of this paragraph.
6. By February 28, 1995, Defendants shall send a letter to the editor of the *TULSA WORLD* newspaper substantially in the form attached hereto as Exhibit 1, requesting correction of an article entitled *Planning, Not Luck, Key to Successful Business*, which appeared in the October 16, 1994 edition of *TULSA WORLD*, in which Defendants provided ~~information~~ information concerning Plaintiff and this action. Defendants shall provide GEOFFREY's counsel with copies of Defendants' written communication(s) sent in compliance with the provisions of this paragraph.
7. As of February 28, 1995, Defendants shall be prohibited from using or displaying the term PARTIES R US or any

other term that is confusingly similar to GEOFFREY's "R US" marks or the term "R" US either alone or in combination with other words as a trademark, service mark, trade name, trade name component, corporate name, corporate name component or otherwise to market, promote, distribute, advertise or identify any goods or services of Defendants. Defendants shall not create any likelihood of confusion with or dilute the distinctiveness or public recognition of GEOFFREY's "R US" marks.

8. By February 28, 1995, Defendants, their agents, servants, employees, franchisees, licensees, and attorneys and all others in active concert or participation with Defendants are required in accordance with 15 U.S.C. §118 to deliver up for destruction all labels, signs, prints, packages, wrappers, receptacles and advertisements in their possession bearing the name or mark PARTIES R US or any other reproduction, counterfeit, copy or colorable imitation of GEOFFREY's registered TOYS "R" US, KIDS "R" US and/or PARTIES "R" US trademarks or any other of GEOFFREY's trademarks and service marks and all plates, molds, matrices and other means of making the same.
9. Defendants are required in accordance with 15 U.S.C. §1116 to file with the Court and serve on GEOFFREY by March 15, 1995, a report in writing under oath setting forth in detail the manner and form in which the

Defendants have complied with the terms of this injunction.

10. The Court shall retain jurisdiction over this cause of action and the parties hereto for the purpose of enforcing the provisions of this Judgment.

Dated:

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

DATED:

9/19/84

HEAD & JOHNSON
228 West 17th Place
Tulsa, Oklahoma 74119
(918) 587-2000

By

Mark G. Kachigian
MARK G. KACHIGIAN
R. ALAN WEEKS

OF COUNSEL:

PAUL FIELDS
ALEXANDRA D. MALATESTINIC
DARBY & DARBY
805 Third Avenue
New York, New York 10022
(212) 527-7700
ATTORNEYS FOR PLAINTIFF.

DATED:

Richard B. Smith
RICHARD SMITH

DATED:

Margi Smith
MARGI SMITH

DATED:

THE PARTY PEOPLE, INC.
dba PARTIES R US

By

R.B. Smith

DEFENDANTS.



EDITOR
TULSA WORLD NEWSPAPER

GENTLEMEN:

THIS IS IN REGARD TO AN ARTICLE APPEARING IN THE OCTOBER 16, 1994 EDITION OF THE TULSA WORLD ENTITLED, "PLANNING, NOT LUCK, KEY TO SUCCESSFUL BUSINESS. DURING MY INTERVIEW FOR THAT ARTICLE I MENTIONED THE IMPORTANCE OF TRADEMARKING YOUR COMPANY NAME AND THAT PARTIES-R-US HAS PENDING LITIGATION FROM AN AFFILIATE OF TOY'S, "R" US FOR DISCONTINUING THE USE OF OUR NAME.

THEIR SUIT WAS BASED ON THEIR CONCERN THAT THE PUBLIC MIGHT THINK THAT OUR BUSINESS WAS SOMEHOW AFFILIATED WITH TOYS "R" US AND NOT BECAUSE THEY ARE OPENING PARTY SUPPLY STORES WITH THE NAME PARTIES "R" US. THEY SAY THEY OWN A FAMILY OF NAMES "R" US AND NOW HOLD A FEDERAL TRADEMARK FOR THE NAME PARTIES "R" US.

WE DO NOT KNOW WHO WOULD HAVE PREVAILED IN THE ACTION AGAINST US BUT, IT WAS IN OUR BEST INTEREST TO SETTLE THE MATTER, RATHER THAN FIGHT.

OUR NEW NAME IS PARTIES PLUS AND WE ARE STILL SERVING TULSA COMPANIES AND THE PUBLIC FROM OUR LOCATION BETWEEN PEORIA AND LEWIS ON 51ST STREET.

I WOULD APPRECIATE IF YOU WOULD TAKE STEPS TO CORRECT THE MISSTATEMENTS IN THE ARTICLE BY PRINTING THIS LETTER OR PRINTING A CORRECTION IN YOUR NEWSPAPER.

SINCERELY,

MARGI SMITH
PARTIES PLUS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 12-27-94

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CURTIS RAY HADDOCK;
DIANA FAYE HADDOCK;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
CHARLES W. HATHAWAY, JR.;
COUNTY TREASURER, Rogers County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Rogers County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-692-K

FILED

DEC 23 1994

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day
of Dec., 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, Rogers County,
Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County,
Oklahoma, appear by Michele L. Schultz, Assistant District
Attorney, Rogers County, Oklahoma; the Defendant, STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D.
Ashley, Assistant General Counsel; and the Defendants, CURTIS RAY
HADDOCK, DIANA FAYE HADDOCK and CHARLES W. HATHAWAY, JR., appear
not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, CURTIS RAY HADDOCK, was
served with process of Summons and Complaint on August 30, 1994;
that the Defendant, DIANA FAYE HADDOCK, was served with process a

NOTE: THIS ORDER IS TO BE FILED
BY BRINGING TO THE CLERK AND
PRO SE LITIGANT IMMEDIATELY
UPON RECEIPT.

copy of Summons and Complaint on August 30, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on July 18, 1994 by Certified Mail; that the Defendant, CHARLES W. HATHAWAY, JR., was served a copy of Summons and Complaint on October 21, 1994, by Certified Mail; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, was served a copy of Summons and Complaint on July 18, 1994, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, was served a copy of Summons and Complaint on July 18, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on July 22, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on August 9, 1994; and that the Defendants, CURTIS RAY HADDOCK, DIANA FAYE HADDOCK, and CHARLES W. HATHAWAY, JR., 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 Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Twelve (12), Block One (1), SHADOW VALLEY
SUBDIVISION to the City of Catoosa, Rogers
County, Oklahoma, according to the recorded
Plat thereof.**

The Court further finds that on November 4, 1980, the Defendants, CURTIS RAY HADDOCK and DIANA FAYE HADDOCK, executed and delivered to Western Pacific Financial Corporation, their mortgage note in the amount of \$38,000.00, payable in monthly installments, with interest thereon at the rate of Thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, CURTIS RAY HADDOCK and DIANA FAYE HADDOCK, husband and wife, executed and delivered to Western Pacific Financial Corporation, a mortgage dated November 4, 1980, covering the above-described property. Said mortgage was recorded on November 7, 1980, in Book 588, Page 816, in the records of Rogers County, Oklahoma.

The Court further finds that on November 20, 1980, Western Pacific Financial Corporation, assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on January 13, 1981, in Book 592, Page 702, in the records of Rogers County, Oklahoma.

The Court further finds that on November 29, 1989, Shearson Lehman Hutton Mortgage Corporation, Attorney in Fact for Federal National Mortgage Association, 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 8, 1989, in Book 821, Page 330, in the records of Rogers County, Oklahoma. This Assignment was re-recorded on August 8, 1990, in

Book 836, Page 491, in the records of Rogers County, Oklahoma, to show proper Legal Description.

The Court further finds that on December 1, 1989, the Defendants, CURTIS RAY HADDOCK and DIANA FAY HADDOCK, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1991.

The Court further finds that the Defendants, CURTIS RAY HADDOCK and DIANA FAY HADDOCK, 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, CURTIS RAY HADDOCK and DIANA FAYE HADDOCK, are indebted to the Plaintiff in the principal sum of \$60,828.38, plus interest at the rate of 13 percent per annum from June 16, 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, 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 \$116,101.65, plus accrued and accruing interest, which became a lien on the property as of November 4, 1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CURTIS RAY HADDOCK, DIANA FAYE HADDOCK and CHARLES W. HATHAWAY, JR., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, CURTIS RAY HADDOCK and DIANA FAYE HADDOCK, in the principal sum of \$60,828.38, plus interest at the rate of 13 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,

have and recover judgment In Rem in the amount of \$116,101.65, plus accrued and accruing interest, costs and penalties, for state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, CURTIS RAY HADDOCK, DIANA FAYE HADDOCK and CHARLES W. HATHAWAY, JR., 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, CURTIS RAY HADDOCK and DIANA FAYE HADDOCK, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the

amount of \$116,101.65, 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.

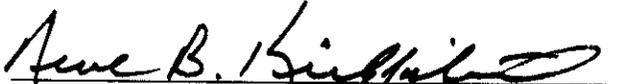
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

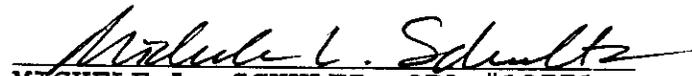
W/ TERRY C. KERN

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


MICHELE L. SCHULTZ, OBA #13771
Assistant District Attorney
219 S. Missouri, Room 1-111
Claremore, Oklahoma 74017
(918) 341-3164
Attorney for the Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-692-K

NBK:flv

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

FILED

DEC 27 1994

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

IN RE: ASBESTOS PRODUCTS)
LIABILITY LITIGATION (NO. VI))
_____)
_____)

This Document Relates to:)

UNITED STATES DISTRICT COURT)
FOR THE NORTHERN DISTRICT)
OF OKLAHOMA)
(See Attached List))
_____)

Civil Action No. MDL 875

M-1417

6707
ENTERED ON DOCKET

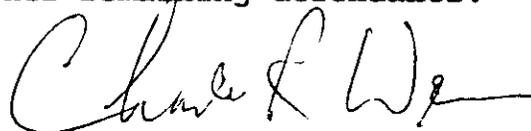
DATE DEC 27 1994

STIPULATION AND ORDER DISMISSING WITH PREJUDICE
DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs and Defendant Owens-Illinois, Inc., by their respective counsel, stipulate and agree that the causes on the attached list have been settled and compromised as to Defendant Owens-Illinois, Inc. only, and that Plaintiffs' causes are dismissed with prejudice as to Defendant Owens-Illinois, Inc. only, with each party to bear its own costs. These causes are to remain pending against all other remaining defendants.

IT IS SO ORDERED.

Date: 11/21/94

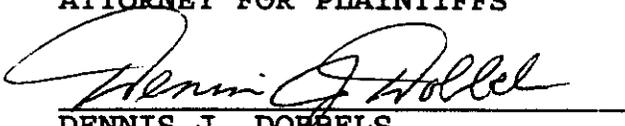


CHARLES R. WEINER
U.S. DISTRICT COURT JUDGE

APPROVED:



MARK H. IOLA
ATTORNEY FOR PLAINTIFFS



DENNIS J. DOBBELS
JOSEPH W. LAMPO
ATTORNEYS FOR DEFENDANT
OWENS-ILLINOIS, INC.

Client Last Name	Client First Name	Social Security #	Case #
Aaron	Clinton Thomas	456-03-6469	92-C-219-E
Adrean	William Oliver	452-18-0911	92-C-91-E
Allen	Benny Richard	448-34-8185	88-C-87-B
Allred	Edward Lee	447-30-7798	90-C-259-E
Ambler	Wayne L.	511-16-9982	89-C-486-E
Babcock	Rowland Earl	442-05-7226	88-C-139-B
Baker	Harold D.	441-20-4636	91-C-399-B
Baker	James Edward	430-54-8898	91-C-314-B
Baldridge	Henry	446-28-2555	88-C-497-E
Benigar	Garland W.	441-12-6827	89-C-438-C
Besser	Darrell	444-05-1633	91-C-932-B
Blankenship	Bobby F.	447-24-0578	88-C-293-E
Bowman	William Corbin	442-30-6048	91-C-893-E
Boydston, Jr.	Frank Densmore	443-14-5886	92-C-222-E
Boyer	Delva L.	441-20-4637	91-C-473-E
Branham	Jerold T.	448-05-3458	90-C-537-E
Braselton	Wilburn	430-30-3607	90-C-538-B
Bristol	Gene	444-24-2138	90-C-256-E
Bryce	Rudell R	446-18-6201	89-C-132-C
Burgess	Roy O.	453-07-6399	87-C-404-C
Cantrell	Marion Clinton	446-34-9334	88-C-109-C
Case	Oles E.	455-26-4850	89-C-125-C
Casey, Jr.	Levi	445-22-6199	90-C-1055-E

Client Last Name	Client First Name	Social Security #	Case #
Choate	John E.	441-34-7017	90-C-539-E
Clark	Louis O.	446-07-4055	92-C-62-E
Clark	Shelby Lee	446-20-7755	88-C-206-E
Claypool Sr.	Edward Frank	444-16-3977	87-C-519-C
Collier	Leonard	526-05-8055	88-C-495-B
Crawford	Jack Presson	444-32-1078	88-C-136-E
Culp	Leonard Dewaine	444-32-6745	88-C-212-E
Cunningham	Homer	432-28-0640	89-C-81-E
Deatherage	Joe E.	441-28-4765	91-C-474-C
Edwards	Leonard	440-20-0906	91-C-69-C
Elliott	Clyde L.	440-22-7086	91-C-699-B
Ellis	Robert L	444-34-6205	88-C-496-C
Emerson	Carroll	003-24-9379	90-C-410-E
Fletcher	Marion Joe	447-16-0515	88-C-218-E
Flickinger	Herbert Eugene	515-09-8890	90-C-260-C
Frakes	Perry W.	515-22-8247	88-C-299-E
Franklin	Henry	447-01-7806	90-C-0069-E
French	Jack Reynolds	448-28-6728	91-C-735-B
Frost	Jim	443-30-7700	88-C-498-B
Glasgow	James Ray	442-12-7353	90-C-278-C
Glasgow	Thomas Charles	442-20-5181	89-C-1042-C
Goss	J. B.	570-32-5480	93-C-0251-B
Goss	L. D.	522-34-6863	89-C-127-E
Gourley	Raymond Floyd	440-14-7042	88-C-137-E
Groden	Don	440-20-9154	90-C-649-B
Hadden	Teddy G	440-28-1158	88-C-925-E

Client Last Name	Client First Name	Social Security #	Case #
Hammick, Jr.	Fred M.	510-22-9333	89-C-569-B
Hardison	Leonard M.	440-28-5844	91-C-472-E
Hargrove	Bettis L.	429-40-0283	91-C-400-C
Haskins	Andy A.	521-12-9340	88-C-918-E
Heffley	Earney LeRoy	447-36-1820	88-C-138-B
Hill	Billy Richard	448-14-1523	92-C-95-B
Hill	Elic Tarvin	444-05-2400	88-C-88-B
Holcomb	Paul N.	444-10-8383	90-C-1052-B
Hopkins	Morris A.	442-26-7086	88-C-300-C
Hurst	Jesse Ray	444-07-0858	89-C-133-E
Ingalls	Hugh H.	444-09-4724	87-C-381-B
Ingram	Marsalette	545-34-5649	89-C-988-E
Isenberg	Raymond Lee	542-24-7761	91-C-730-E
Jackson	Arthur	440-16-0126	87-C-520-B
Johannesen	Harold A.	443-01-2155	89-C-490-C
Johnson	Ona M.	446-32-3502	88-C-301-E
Jones	Charley Orville	702-18-8753	90-C-275-E
Jones	Homer	442-09-2230	91-C-470-E
Jones	William C.	444-24-9266	90-C-292-E
Jones, Sr.	Bobby L.	445-22-5108	89-C-488-B
Juby	Garrett (Babe)	446-28-4127	88-C-302-B
Kayser	John C.	475-09-2629	89-C-337-B
Kelly	Oran L.	445-12-7018	90-C-542-B
Kosier	Dockie O.	447-40-1986	88-C-923-C
La Foret.	Bernard Stanley	722-03-9031	92-C-92-E
Lee	Samuel Bert	447-26-2919	92-C-220-B
Legan	Jack L.	329-12-1427	88-C-500-B

Client Last Name	Client First Name	Social Security #	Case #
Lewis	Jesse G.	440-34-6099	90-C-263-C
Little	Homer Lee	465-22-5198	91-C-734-C
Little	William H.	311-12-3048	88-C-303-E
Lovett	Donald	447-30-2957	89-C-335-C
Lovett	Martha	448-36-8964	89-C-987-E
Lowry	Mary Ann	443-34-0692	91-C-0062-C
Lynch	Jesse W.	460-10-0263	89-C-984-B
Lyons	Jeff	439-54-3404	92-C-993-E
Makinson	Kenneth Monroe	442-28-2697	88-C-89-B
Markham	Robert L.	441-20-5805	89-C-568-E
Martin	Virgil E.	440-20-0272	91-C-401-B
Mathewson	Ben H.	441-09-4104	89-C-985-B
Mayhew	Thomas D.	513-18-7846	88-C-922-B
McCord	David L.	487-28-6903	88-C-494-C
McCorkle	Charles O	448-32-8243	89-C-126-B
McGough	Bill	416-32-6647	90-C-543-E
McKnight	James H.	440-20-0010	89-C-982-B
McNatt	William S.	440-12-0285	88-C-493-C
McVicker	Eldon Laverne	440-30-3876	92-C-90-E
Miller	Paul Ray	442-28-6582	90-C-280-E
Newton	Eston	557-20-3149	90-C-544-E
Nicholson	Ira E.	446-28-4584	90-C-291-B
Norcross	Lee	566-16-6492	89-C-567-B
Norman	George	441-05-8420	89-C-834-E
Orpin	Edwin Charles	511-28-7793	88-C-221-B
Osborne	Teddy	467-34-4374	88-C-211-B
Parker	Ernest L.	447-03-6292	89-C-487-B

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Client Last Name	Client First Name	Social Security #	Case #
Pertain	Grady	444-03-4226	89-C-844-C
Pavey	Marvin R.	445-20-1638	88-C-391-B
Pittman	William E.	447-18-7107	91-C-471-B
Prewitt	Charley Joe	442-34-7240	88-C-386-E
Pryor	Irvin E.	443-05-2381	89-C-489-E
Ralls	Dock Martin	444-22-8409	92-C-194-B
Ray	Cecil J	452-18-9698	88-C-926-B
Ray	Robert C	465-42-7812	88-C-920-C
Reinhard	Bill James	447-16-5424	90-C-279-B
Richardson	Cecil E.	441-20-5168	88-C-388-B
Richardson	Raymond Dewain	454-38-9243	92-C-93-B
Robinson	Jack C.	440-20-4499	91-C-402-B
Rogers	Walter S.	444-32-3356	91-C-732-B
Romine	William Floyd	447-12-9156	88-C-107-E
Rose	Shriver Malvin	442-16-2895	90-C-648-C
Rozell	Jim Alex	442-16-4991	88-C-140-E
Rush	Martin L	442-18-4751	88-C-921-E
Seefeldt	Warren Dale	445-34-4503	92-C-94-E
Shanks	Alva Ray	548-40-5886	88-C-213-B
Shrum	Jiles Dean	444-30-1200	90-C-1031-B
Silver	Clifton Emery	440-12-8749	88-C-220-B
Six	Connie Calvin	445-22-4306	88-C-207-B
Smith, Jr.	C. B.	447-24-3979	90-C-1053-C
Smith, Sr.	David Franklin	447-32-9841	88-C-135-E
Smyers	Robert Eugene	445-26-1940	88-C-91-E

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Client Last Name	Client First Name	Social Security #	Case #
Stamper	George Frank	460-28-7381	92-C-332-E
Starks	J. C.	448-26-1662	89-C-334-E
Stimson	Nolen E.	444-07-3469	90-C-545-B
Strome	Donald Oscar	444-38-2726	92-C-1005-E
Swank	Herman L.	550-05-3032	88-C-1477-E
Sweepston	Homer F.	448-16-3481	88-C-204-B
Thompson	Ernest J.	432-18-8317	90-C-471-C
Thompson	Philip Marion	441-16-7875	91-C-475-E
Thurmond	Burton A.	445-22-1407	90-C-1050-E
Tracy	Hubert G.	511-07-0103	88-C-1623-B
Van Gilder	Claude W.	444-16-3531	90-C-0072-E
Walton	Ronald Robert	444-38-6521	88-C-205-C
Watkins	Paul Jack	441-20-8188	87-C-379-E
Weatherford	Calvin H.	447-28-7232	89-C-986-C
Webb	Jack Lee	448-10-6344	88-C-208-C
Welch	Travis H.	421-03-5892	90-C-546-B
West	Charles J.	445-14-0180	88-C-390-C
Woodard	Ernest E.	440-24-0436	87-C-401-E
Wooten	Nathan L.	427-54-0323	90-C-276-B
Worsham	J. B.	446-20-2423	90-C-293-B
Yarbrough	Ray Vernon	447-32-2762	89-C-131-E
Yoachum	Robert L.	445-18-4993	89-C-128-E
Young	Henry L.	440-24-5019	90-C-1051-B

23

SERVICE LIST

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

Mark H. Iola, Esq.
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300
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McKinney, Stringer & Webster
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Oklahoma City, OK 73102
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Donnelly, Baskerville &
Schaenebaum
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Baysinger & Green
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FIBERGLAS

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Abowitz & Welch
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Oklahoma City, OK 73101
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Leslie Rinn, Esq.
Shipley & Inhofe
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Tulsa, OK 74103
and
Elizabeth Meyers, Esq.
Brobeck, Phleger & Harrison
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CORPORATION

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Comfort, Lipe & Green
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COUNSEL FOR CELOTEX
CORPORATION

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Sanders & Carpenter
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Tulsa, OK 74119
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L. Dru McQueen, Esq.
Doerner, Stuart, Saunders,
Daniel & Anderson
320 South Baston Avenue,
Suite 500
Tulsa, OK 74103
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One Leadership Square
Oklahoma City, OK 73102
COUNSEL FOR COMBUSTION ENGI-
NEERING

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

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

FILED

DEC 27 1994

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

IN RE: ASBESTOS PRODUCTS)
LIABILITY LITIGATION (NO. VI))
_____)

This Document Relates to:)

UNITED STATES DISTRICT COURT)
FOR THE NORTHERN DISTRICT)
OF OKLAHOMA)
(See Attached List))
_____)

Civil Action No. MDL 875

M-147

67076

ENTERED ON DOCKET

DATE DEC 27 1994

STIPULATION AND ORDER DISMISSING WITH PREJUDICE
DEFENDANT OWENS-ILLINOIS, INC. ONLY

Plaintiffs and Defendant Owens-Illinois, Inc., by their respective counsel, stipulate and agree that the causes on the attached list be dismissed with prejudice as to Defendant Owens-Illinois, Inc. only, with each party to bear its own costs. These causes are to remain pending against all other remaining defendants.

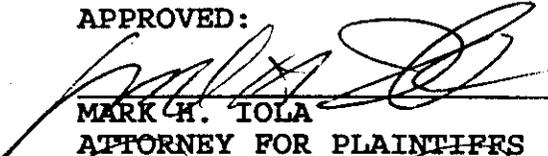
IT IS SO ORDERED.

Date: 11/21/94



CHARLES R. WEINER
U.S. DISTRICT COURT JUDGE

APPROVED:


MARK H. IOLA
ATTORNEY FOR PLAINTIFFS


DENNIS J. DOBBELS
JOSEPH W. LAMPO
ATTORNEYS FOR DEFENDANT
OWENS-ILLINOIS, INC.

Last Name	First Name	Social Security #	Case #
Apple	Donald B.	447-36-2475	91-C-736-B
Brown	Ronald E.	446-50-6002	90-C-264-B
Caughman	Larry J.	440-44-0831	88-C-210-E
Chapman	Theodore Dale	510-03-1896	90-C-265-E
Chronister	Harry Lee	430-86-6650	90-C-257-B
Dickerson	James William	491-56-6956	89-C-336-E
Ellis	David W.	440-56-0549	88-C-298-E
Hamlin	Arthur Leon	442-30-1838	87-C-523-C
Hathcoat	Thomas K.	444-46-0890	88-C-924-C
Haver	William Dale	191-28-8828	88-C-86-B
Howard	Robert Lee	442-46-0820	92-C-221-E
Junk	Eddie M.	448-40-6779	88-C-223-C
Manning	Leaun C.	442-22-6898	88-C-917-E
Marble	Fred	443-30-7356	89-C-130-B
McCorkle	Jimmy Wayne	436-62-9309	88-C-499-B
McDonald	Dale	447-52-2915	89-C-129-E
Riddle	Sherman F.	442-42-0339	91-C-733-C
Roper	Harley Gene	447-36-2018	88-C-491-E
Ross	John Edward	440-16-1961	91-C-731-B
Russell	Jack Lee Roy	441-34-8605	88-C-219-E
Watkins	Harmon Lynn	440-60-8995	90-C-1054-B
York	Charles W.	442-42-0007	93-C-0252-B

SERVICE LIST

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

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Donnelly, Baskerville &
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FIBERGLAS

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COUNSEL FOR COMBUSTION ENGI-
NEERING

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

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

FILED

DEC 22 1994

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

CHERYL L. REEDER,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN ECONOMY INSURANCE)
 COMPANY, a foreign corporation,)
)
 Defendant.)

Case No. 93-C-991-B

ENTERED ON DOCKET

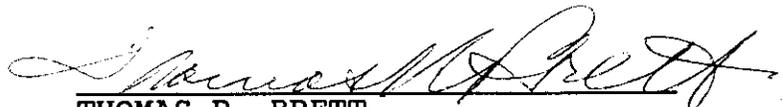
DATE DEC 23 1994

J U D G M E N T

In accord with the Court's Order dated August 26, 1994, the Court hereby enters partial summary judgment in favor of Plaintiff Cheryl L. Reeder, and against the Defendant, American Economy Insurance Company, on the issue that the Defendant is liable on the insurance contract between Reeder and American Economy Insurance Company.

The Court also enters summary judgment, in accord with the same Order, in favor of the Defendant, American Economy Insurance Company, and against Plaintiff Cheryl L. Reeder, on the issue of bad faith.

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



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

28

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

DEC 23 1994

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

DEBORAH MARIE COUCH, et al.,)
)
Plaintiffs,)
)
vs.)
)
MAYES EMERGENCY SERVICE, et al.,)
)
Defendants.)

Case No. 94-C-82-BU

ENTERED ON DOCKET

DATE DEC 23 1994

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 21 day of December, 1994.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DEC 23 1994
DATE _____

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CHARLES B. RAUS aka CHARLES)
BRADLEY RAUS; LORI M. RAUS aka)
LORI MICHELLE RAUS aka)
LORI MICHELE RAUS aka LORI)
MICHELLE HARRISON-RAUS; BANK IV,)
OKLAHOMA, N.A.; STATE OF)
OKLAHOMA, ex rel. OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma)
)
)
Defendants.)

FILED

DEC 22 1994

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

CIVIL ACTION NO. 94-C 330E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day
of Dec, 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**, appears not, having previously claimed no right, title,
or interest in the subject property; the Defendant, **Bank IV,
Oklahoma, N.A.** appears by G. Lawrence Fox, General Counsel; the
Defendant **State of Oklahoma ex rel Oklahoma Tax Commission**
appears not having previously filed its disclaimer; and the
Defendants, **Charles B. Raus aka Charles Bradley Raus and Lori M.
Raus aka Lori Michelle Raus aka Lori Michele Raus aka Lori
Michelle Harrison-Raus**, appear not, but make default.

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

The Court being fully advised and having examined the court file finds that the Defendants, **Charles B. Raus aka Charles Bradley Raus and Lori M. Raus aka Lori Michelle Raus aka Lori Michele Raus aka Lori Michelle Harrison-Raus**, acknowledged receipt of Summons and Complaint on April 7, 1994; that the Defendant, **Bank IV, Oklahoma, N.A.**, acknowledged receipt of Summons and Complaint on or about April 26, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint on April 8, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 15, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 8, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 25, 1994; that the Defendant, **Bank IV, Oklahoma, N.A.**, filed its Answer on May 18, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission** filed its Answer and Cross-Claim on May 2, 1994, and on May 16, 1994 filed its Motion to Withdraw Answer and Counterclaim and to Issue a Disclaimer; and that the Defendants, **Charles B. Raus aka Charles Bradley Raus and Lori M. Raus aka Lori Michelle Raus aka Lori Michele Raus aka Lori Michelle Harrison-Raus**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage

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

Lot Three (3), Block Two (2), MILES ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on June 25, 1986, the Defendants, Charles B. Raus and Lori M. Raus, executed and delivered to First Security Mortgage Company their mortgage note in the amount of \$75,774.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Charles B. Raus and Lori M. Raus, husband and wife, executed and delivered to First Security Mortgage Company a mortgage dated June 25, 1986, covering the above-described property. Said mortgage was recorded on August 21, 1986, in Book 4964, Page 948, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1986, First Security Mortgage Company assigned the above-described mortgage note and mortgage to Associates National Mortgage Corporation, its successors and assigns. This Assignment of Mortgage was recorded on September 17, 1986, in Book 4970, Page 1187, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 20, 1988, Associates National Mortgage Corporation assigned the above-described 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 October 25, 1988, in Book 5136, Page 55, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 1, 1988, the Defendants, Charles B. Raus and Lori M. Raus, 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 November 1, 1989, October 1, 1991, and October 1, 1992.

The Court further finds that the Defendant, Charles B. Raus filed a Chapter 7 Bankruptcy on September 24, 1986, in the United States Bankruptcy Court for the Northern District of Oklahoma, Case # 86-2457, In Re: RAUS, CHARLES BRADLEY d/b/a CHARLES BRADLEY RAUS, INC. and d/b/a CHAUS INTERIORS. The personal liability of the Defendant, Charles B. Raus, on the debt represented by the subject note and mortgage was discharged on January 5, 1987, and closed on June 24, 1987.

The Court further finds that the Defendant, Lori M. Raus, filed a Chapter 7 Bankruptcy on May 20, 1993 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case # 93-1681-C, In Re: RAUS, CHARLES BRADLEY and RAUS, LORI MICHELLE. The personal liability of the Defendant, Lori M. Raus, on the debt represented by the subject note and mortgage was discharged on December 20, 1993.

The Court further finds that the Defendant Charles B. Raus in one and the same person as, and is sometimes known as, Charles Bradley Raus.

The Court further finds that the Defendant, Lori M. Raus, is one and the same person as, and is sometimes known as, Lori Michelle Raus, Lori Michele Raus and Lori Michelle Harrison-Raus.

The Court further finds that the Defendants, Charles B. Raus and Lori M. Raus, 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, **Charles B. Raus and Lori M. Raus**, are indebted to the Plaintiff in the principal sum of \$113,899.15, plus interest at the rate of 10.5 percent per annum from March 21, 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, **Bank IV, Oklahoma, N.A.** claims an interest in the subject property by virtue of a mortgage dated April 2, 1985, in Book 4854, Page 2239, in the records of Tulsa County, Oklahoma.

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

The Court further finds that the Defendants, **Charles B. Raus and Lori M. Raus**, 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 against the Defendants, **Charles B. Raus and Lori M. Raus**, in the principal sum of \$113,899.15 plus interest at the rate of 10.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.22 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Bank IV, Oklahoma, N.A.**, have and recover judgment in the amount of \$16,267.27, plus penalties and interest, for a subordinated mortgage.

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

First:

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

Second:

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

Third:

In payment of Defendant, Bank IV, Oklahoma, N.A., in the amount of \$16,267.27, for an outstanding mortgage.

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

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

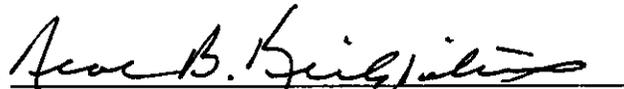
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ JAMES O. ELLISON

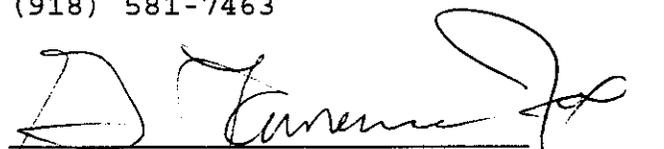
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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



G. LAWRENCE FOX, OBA# 10301
Vice President and General Counsel
BANK IV Oklahoma, N.A.
P.O. Box 2360
Tulsa, OK 74101
(918) 591-8503

Judgment of Foreclosure
Civil Action No. 94-C 330E
NBK:lg

blc

OBA #8382

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

WILLIS BOYD FRIEND)
)
 Plaintiff,)
)
 vs.)
)
 FARMER'S INSURANCE GROUP)
 OF COMPANIES, INC.)
)
 Defendant.)

Case No. 93-C-0990-E

ENTERED ON DOCKET

FKV
FILED

DEC 22 1994

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

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 21 day of December, 1994, the Joint Application for an Order of Dismissal With Prejudice came on before the court for hearing. The court finds that the parties have settled all claims between them and that the Application should be, and is, hereby sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the above captioned matter is dismissed with prejudice to refiling.

Terry C. King
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Gary W. Wood
GARY W. WOOD,
Attorney for Plaintiff

Dennis King
DENNIS KING,
Attorney for Defendant

ENTERED ON DOCKET
DATE DEC 23 1994

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

JOHN GRANT,)
)
Petitioner,)
)
vs.)
)
MIKE ADDISON,)
)
Respondent.)

No. 94-C-864-BU

FILED

DEC 22 1994

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

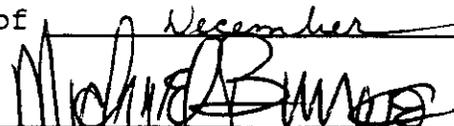
ORDER

At issue before the court are Petitioner's motions for discovery pursuant to Rule 6, to amend the petition, and for ruling on his motion for discovery. Respondent has not objected.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motions (doc. #3, #4, and #8) are **granted**.
- (2) Respondent shall **submit** to the Court, on or before thirty (30) days from the date of filing of this order a copy of the transcript of the hearing held between March 18, and April 29, 1991, and a copy of the application to withdraw plea of guilty filed on May 16, 1991, in the district court for Ottawa County.
- (3) The Clerk shall **file and docket** Petitioner's "amended 2254 petition" (attached to his motion for leave to amend 2254 petition, doc. #4) as a supplement to his petition for a writ of habeas corpus (doc. #1).

SO ORDERED THIS 21st day of December, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

STEVE JOE BROWN,)
)
 Petitioner,)
)
 vs.)
)
 DAN REYNOLDS,)
)
 Respondent.)

No. 93-C-337-K

DEC 21 1994

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

ENTERED ON DOCKET

DATE DEC 22 1994

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections at Oklahoma State Penitentiary, challenges the judgment and sentence for unlawful possession of a controlled substance, after former conviction of a felony in Tulsa County District Court, Case No. CRF-87-3085. The Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below, the Court concludes that the petition should be denied.

I. BACKGROUND

On August 16, 1987, Officer Mark Whittington observed Petitioner involved in what was described as a "drug transaction." Shortly thereafter Petitioner and another man drove away. Determining that he had probable cause to arrest the men, Officer Whittington radioed to other officers the direction in which Petitioner and the other man were traveling. Officer Brady Eby spotted Petitioner's car pulling in a parking lot at a Church's

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Chicken Restaurant. Petitioner exited the car and tried to enter the restaurant. Realizing the doors were locked, he returned to the car. When Petitioner sat down in the car, Officer Eby observed him reach behind as though he was trying to stuff something down between the seat back and the seat cushion.

Officer Alan Panke, who had arrived to assist Eby and had been advised that Petitioner had stuck something in the seat, later observed cellophane, partially exposed, stuffed in the middle of the back seat cushion. After retrieving the cellophane bag, the officer observed a crumpled plastic baggie containing a small rock similar to what he observed in the past to be rock cocaine. Petitioner was arrested and the substance was later analyzed to be cocaine, a Schedule II narcotic. The forensic chemist, however, did not test the substance to determine what isomer of cocaine the substance contained.

In November 1987, Petitioner was found guilty by a jury of Possession of Cocaine, after former conviction of two or more felonies, and was sentenced to thirty years imprisonment. The Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in an unpublished opinion.

In April 1993, Petitioner filed the instant petition for a writ of habeas corpus, alleging the same five grounds for relief which he had raised on direct appeal along with two additional grounds not previously raised before the Oklahoma Court of Criminal Appeals. In October 1993, this Court dismissed the petition for failure to exhaust state remedies. Following the filing of a

motion for reconsideration, this Court agreed to reinstate the petition if the Petitioner wished to amend his petition to present only his five exhausted claims. In its order, the Court reminded Petitioner that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions."

On January 6, 1994, Petitioner filed an amended petition raising only his previously exhausted grounds. He alleged that there was insufficient evidence to support his conviction because the State did not prove beyond a reasonable doubt that the isomer found in the car was controlled by the Statute of which the Petitioner was found guilty at trial, and that the Petitioner had actual or constructive possession of the illegal substance. Petitioner also alleged that irrelevant and prejudicial testimony was admitted through Officer Whittington; that prosecutorial misconduct denied him a fair trial; and that the State failed to properly prove his former convictions.

II. ANALYSIS

At the outset the Court finds 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).

A. Sufficiency of the Evidence

In his first and second grounds for relief, Petitioner argues

that there was insufficient evidence to support his conviction for possession of a controlled substance.

Petitioner's sufficiency of the evidence claim is controlled by the analysis set forth in Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). Sufficient evidence exists to support a conviction if any rational trier would accept the evidence as establishing each essential elements of the crime beyond a reasonable doubt. Id. at 319. In reviewing a sufficiency claim, the Court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 113 S.Ct. 1255 (1993). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993). Additionally in federal habeas proceedings, a state court's findings on the sufficiency issue are entitled to a presumption of correctness unless challenged by convincing evidence that the factual determination in the state court was erroneous. 28 U.S.C. § 2254(d); Sumner v. Mata, 455 U.S. 591, 597 (1982).

The Court will review first whether the isomer found was "controlled by the statute" under which the Petitioner was found guilty, and second whether the Petitioner had either actual or constructive possession of the drugs.

1. Isomer Test

At the time of the crime in question, Okla. Stat. tit. 63, § 2.206(4) (Supp. 1987) provided that only certain types of cocaine were illegal.¹ The statute prohibited the possession of the following:

A. Any of the following substances except those narcotic drugs listed in other schedules whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical analysis:

4. Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

Prior to Petitioner's trial, the Oklahoma Court of Criminal Appeals held in Moore v. State, 740 P.2d 731 (Okla. Crim. App. 1987), that not all isomers of cocaine are illegal substances, and the failure of the State to prove the substance in question was an illegal isomer of cocaine is fundamental error requiring reversal of the conviction. Because the forensic chemist at Petitioner's trial did not test which isomer of cocaine was present, Petitioner argued on direct appeal that he was entitled to a reversal of his conviction because the State had failed to prove an essential element of the crime--i.e., that the rock contained a L-cocaine isomer.

In rejecting Petitioner's argument, the Court of Criminal

¹In 1988, the Oklahoma Legislature amended section 2-206 to include ". . . cocaine, its salts, optical and geometric isomers, and salts of isomers."

Appeals first noted that they were not bound by Moore as it was not a majority opinion citing the Court Rules. (Doc. #13, ex. D at 3.) The Court then reviewed the testimony of the forensic chemist (that he performed chemical tests that were accepted by the scientific community and determined the substance to be cocaine) and found the "evidence sufficient to prove that the substance was an illegal narcotic under the inclusive language of Section 2-206." (Doc. #13, ex. D at 4.)

Petitioner has not demonstrated that any of the seven exceptions to the presumption of correctness set forth in section 2254(d)(1)-(7) apply to the above findings, or that the factual determinations made by the Oklahoma Court of Criminal Appeals are not fairly supported by the evidence in the state court record. Petitioner merely contends that the Court of Criminal Appeals selectively applied the holding in Moore v. State and that the State should have tested the substance for a cocaine isomer. (Doc. #15.) Thus, the State Court's findings of fact are entitled to a presumption of correctness.

Based on these findings, the Court concludes that a reasonable juror could have found the evidence sufficient to show that the substance was an illegal narcotic under the all-encompassing language of section 2-206. Therefore, Petitioner's first ground for relief lacks merit.

2. Possession of the Drug

In his second ground for relief, Petitioner argues that the

State failed to prove beyond a reasonable doubt that he had actual or constructive possession of the drugs. He alleges that "when [he was] arrested [he] did not have any drugs on his person; the State did not prove [he] knew of the presence of the alleged controlled substance in the co-defendant's car; [and] the State did not prove [he] had the power and intent to control the disposition or use of the alleged controlled substance." (Amended Petition, doc. #11 at 6 & 10-a.)

Although the Court must apply a federal constitutional standard to determine whether the state presented sufficient evidence, the Court must look to Oklahoma law for the elements the state must prove in order to convict the Petitioner of unlawful possession of a controlled drug. The essential elements of the crime of unlawful possession of a controlled drug are: (1) knowing and intentional; (2) possession; (3) of a controlled dangerous substance. Doyle v. State, 759 P.2d 223, 224 (Okla. Crim. App. 1988); 63 O.S. 1981, § 2-402. As Petitioner only challenges the State court's conclusion that he was in constructive possession of the drug, the Court will focus on that element alone. Hammonds v. State, 739 P.2d 525, 527 (Okla. Crim. App. 1987) (possession may be actual or constructive).

Oklahoma courts recognize that in order to find a person in constructive possession of a controlled substance the State must show that the defendant had knowledge of its presence and the power or intent to control its disposition or use. Doyle, 759 P.2d at 225.

When controlled substances are found in a place where the accused has exclusive access, then knowledge, dominion and control fairly may be inferred from these circumstances alone. . . .

When a controlled dangerous substance is not found on the accused but on premises to which several persons have access, possession cannot be inferred simply because the drugs were found on the premises, but the State must introduce additional facts from which it fairly can be inferred that the accused had dominion and control over the seized substance. Guilty knowledge and control cannot be presumed. The State must introduce some link or circumstances in addition to the presence of the controlled drug which indicates the accused's knowledge and control. Absent this additional factor, the evidence is insufficient to support a conviction.

Doyle, 759 P.2d at 225 (citations omitted).

The Oklahoma courts have also held that

where the State relies on wholly circumstantial evidence to prove possession of a controlled substance, the circumstances shown must, as in all other criminal cases, exclude every other reasonable hypothesis except that of guilt; and proof amounting only to a strong suspicion or a mere probability of guilt is insufficient to sustain a conviction.

Clarkson v. State, 529 P.2d 542, 544-45 (Okla. Crim. App. 1974); accord, e.g., Freeman v. State, 617 P.2d 235, 237 (Okla. Crim. App. 1980); Miller v. State, 579 P.2d 200, 202 (Okla. Crim. App. 1978).

This Oklahoma rule circumscribing convictions for possession of drugs based solely on circumstantial evidence was explained in White v. State, 607 P.2d 713 (Okla. Crim. App. 1980):

The rule on circumstantial evidence has been stated two ways in past cases. We have said that circumstantial evidence must exclude every reasonable hypothesis except that of guilty. . . . We have also said that circumstantial evidence need not exclude every hypothesis other than guilty. . . . These two expressions are not inconsistent. Evidence may exclude every reasonable hypothesis except guilt without excluding absolutely every hypothesis except guilty. . . . [T]he jury must still be satisfied beyond a reasonable doubt that the

appellant was the guilty party. . . .

Id. at 715 (citations omitted). "The burden to prove facts from which knowledge and control can be fairly inferred is upon the State. The defendant does not have the burden of proving his absence of knowledge and control over the substance." Clarkson, 529 P.2d at 454; accord, e.g., Lay v. State, 692 P.2d 567, 568 (Okla. Crim. App. 1984).

In the case at hand, the State established that Petitioner knew of the presence of the drugs, and had both the power and intent to control its disposition or use, through officer Eby's testimony that he saw the Petitioner trying to stuff something into the seat that he was occupying. Eby testified that after the Defendant walked to the closed restaurant, he got back into the car and:

A. When he sat down I noticed him reach behind him in a manner like he was trying to stuff something down between the seat back and the seat cushion where he was seated. At that point I became suspicious. I didn't know if he was trying to stuff a gun or what he was trying to do.

Q. Sir, you described it as a stuffing type motion. Can you tell us a little bit more about that motion?

A. From my observation point it was bucket seats so I could see his arm and his shoulder where it went across the top of the seat. He reached back behind him like this and I could see his arm motions and his shoulder and appeared to be trying to put something in the seat.

Q. All right. From that vantage point were you able to see what it was?

A. No, sir. I could not.

(Trial tr. at 33-34.)

The State also presented testimony that Petitioner was under

the influence of drugs. Officer Panke testified that he suspected the Petitioner was under the influence of drugs. He stated as follows:

A. He opened the door and stepped from the vehicle, stumbled slightly. I asked him to move around and stand to the rear by the rear side of the vehicle away from the door. He looked at me and my recollection was that he looked at me and he appeared to be, in my description, glassy-eyed, and he then moved at my request to the position I had asked him to step to. . . .

Q. Sir, other than the things you have described, the subject stumbling, glassy-eyes, did you notice anything else unusual about his appearance?

A. In my opinion from my own observation, I believe the subject to be in an intoxicated state.

A. He was exhibiting -- he stumbled slightly when he stepped from the car. When I observed his walking as I was driving up, he appeared to be weaving in his manner of walking when he walked up to the restaurant and tried the door and walked back. His responses to my requests were delayed, noticeably delayed. He would look at me, he would look at me with an emotionless stare and then he would comply with my response. There was no apparent act on his part not to comply with what I requested, just a slowness that I observed. I did not, however, observe any odor on his breath.

Q. Specifically, you didn't observe any odor of alcohol?

A. That is correct. I did not observe any odor of alcohol.

[Tr. 51-52 and 53-54.]

Based on the evidence presented at trial, the Court concludes that a reasonable juror could have found the evidence sufficient to prove that Petitioner knew of the presence of the drugs and had both the power and intent to control its disposition or use.

Although the State presented no direct evidence that petitioner exercised any dominion and control over the drug or the premise at which the drug was seized, the State presented sufficient circumstantial evidence from which a rational trier of fact could have concluded that Petitioner possessed the drug.

The Court finds the act of stuffing adequate circumstantial evidence from which knowledge of the presence of the drugs and power to control its disposition may reasonably be inferred. Petitioner has presented no other reasonable explanation for his "stuffing" movement immediately after his return to the car and shortly before his partner left the car.

Moreover, the fact that Petitioner was described as being "under the influence of drugs" provides further circumstantial evidence from which a reasonable juror could infer the power to control of the drug's use or disposition. In Yates v. State, 751 P.2d 740, 741 (Okla. Crim. App. 1988), the Oklahoma Court of Criminal Appeals similarly relied on the fact that a defendant appeared to be under the influence of drugs to conclude that the evidence adduced at trial was sufficient for a rational trier of fact to find that the defendant possessed a controlled substance. In Yates, an officer stopped the defendant after observing that he drove on the wrong side of the road and failed to give a signal when turning. Id. The officer then detected a strong odor of ether, a substance and odor associated with PCP, in the truck and observed that defendant's eyes appeared to be glazed, that he seemed confused and uncertain of what was transpiring, and that he

seemed unsteady on his feet. Id. Cf. Staples v. State, 528 P.2d 1131, 1135 (Okla. Crim. App. 1974) (where the court relied, among other factors, on the fact that there was no evidence that the defendant was under the influence of marijuana at the time of his arrest in reversing his conviction for the unlawful possession of marijuana due to insufficient evidence).

In summary, the Court finds the State met its burden of excluding every other reasonable hypothesis and of presenting evidence sufficient for a rational factfinder to find beyond a reasonable doubt that Petitioner possessed the illegal drug. Therefore, Petitioner is not entitled to habeas corpus relief on this second ground of error.

B. Evidentiary Rulings

In his third ground for relief, Petitioner contends that the trial court improperly admitted evidence of other crimes--i.e., that he was involved in a drug transaction earlier in the day. Petitioner alleges that Officer Whittington testified over the defense objection that "he thought he observed the Petitioner and his co-defendant in a drug transaction in the area, all of which is irrelevant to the charged criminal act of possession of a controlled substance." (Petition, doc. #1.) The Court of Criminal Appeals reviewed for fundamental error because Petitioner raised an objection on direct appeal different from that at trial. The Court then concluded that the evidence of the drug transaction was exempted from the Burks notice requirement because "it incidently

emerge[d] as events [were] revealed in their natural sequence."
(Ex. D.)

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). Thus, a federal habeas court "will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." Hopkins v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

After considering all of the evidence here regarding Petitioner's involvement in a prior drug transaction, the Court concludes that its introduction did not render Petitioner's trial fundamentally unfair. Assuming Petitioner is relying, as he did on direct appeal, on the notice requirement under Burk v. State, 594 P.2d 771 (Okla. Crim. App. 1979), the Court concludes that this argument is misplaced in this case. "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." Hopkinson, 866 F.2d at 1197 n.7.

Accordingly, Petitioner is not entitled to habeas relief on his third ground.

C. Prosecutorial Misconduct

In his Fourth ground for relief, Petitioner contends that the Prosecutor made improper comments about the Petitioner being on drugs because he had used part of the cocaine and about the Petitioner's failure to testify.

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 ___, 1994 WL 588623, 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).

The first instance of alleged misconduct was when the

prosecutor commented that the Petitioner was intoxicated because he had used part of the cocaine:

Now you're going to get this exhibit and you're going to look at it. And you're going to try to find the cocaine in State's Exhibit No. 3. And you're going to find it. When you find it you will say, "Well, that's not very much." It's not very much, ladies and gentlemen, it's not much at all. But, ladies and gentlemen, I submit to you that you know it doesn't take much cocaine --

MR. CLARKE: Objection, Your Honor.

THE COURT: Overruled.

MR. SMITH: It doesn't take much cocaine, ladies and gentlemen, to get high, to do a fix. It doesn't take much.

Ladies and gentlemen, with reason I submit to you there isn't much cocaine here, it's further corroborated by the rest of the evidence, because it was Officer Panke who told you when he got Steve Joe Brown out of that car, somebody wasn't functioning too well. Who was it that wasn't functioning too well? That man Steve Joe Brown. What did he do? He stumbled out of the car, glassy eyed, delayed response. What's interesting though, he probably was under the influence of something, but it wasn't alcohol because there wasn't any alcoholic beverage about his breath. His eyes were glassy-eyed rather than bloodshot. And that, ladies and gentlemen, I submit to you is consistent with one theory and one theory only. And that is he was under the influence of drugs--

MR. CLARKE: Objection, your Honor.

THE COURT: Overruled.

MR. SMITH: Under the influence of drugs. And I submit to you, ladies and gentleman, based on all the evidence, there is only one consistent theory of what he was under the influence of and that's this right there. Some form or previous form of this rock or other rocks of cocaine.

The facts show only one man in that car was stuffing that stuff, Steve Joe Brown. Only one man in that car was intoxicated, Steve Joe Brown. Only one man in that

car was intoxicated by something other than alcohol. Something that's consistent with the use of drugs. Steve Joe Brown.

(Tr. at 77-79, 99).

Petitioner also contends that the prosecutor committed error when he commented that the State had proven dominion and control because the Defendant was intoxicated from drugs in his body:

Specifically I would anticipate Mr. Clarke is going to say that we haven't shown dominion and control. We haven't shown possession. Ladies and gentlemen, I submit to you what greater possession evidence do you want from the fact that the stuff is in his system and the fact --

MR. CLARKE: Objection, your Honor.

THE COURT: I will overrule.

MR. CLARKE: Counsel is testifying.

THE COURT: Give you an exception. Let's proceed.

MR. SMITH: Thank you, your Honor. Based upon the evidence that you have, ladies and gentlemen, I submit to you that that's what it was in his system.

(Tr. at 81.)

The Court of Criminal Appeals concluded that, while the first comment concerning the amount of cocaine needed "to get a high" fell outside of the record, it did not influence the verdict against the Petitioner. The Court of Criminal Appeals further concluded that the comment that Petitioner was under the influence of drugs was a proper comment on the evidence.

While it is improper for a prosecutor to comment on evidence outside of the record, the Court cannot conclude that the comments about the amount of cocaine needed "to get a high" individually or in summation constitute prosecutorial misconduct. At any rate, in

the context of the entire trial, the Court finds that the comments about the amount of cocaine and the comments that Petitioner was under the influence 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 the following comment:

. . . Further, ladies and gentlemen, he had it. He's the only one that's going to testify to stuffing it. He's the only one who tried to hide it. . . .

Why didn't Officer Whittington see anything because it was concealed. They were huddled together. You don't hear the play called in a football play huddle, do you? No, it's concealed. You don't want to let the other team know and neither did Steve Joe Brown and James Maurice Cooper and those other people that want anybody to know what was going on. Sometimes you can see through the huddles, through the heads of the huddles things being rolled around. Just a little glimpse of what's going on. That is the reason for the explanation. Do they have something to hide? One man in this courtroom has something to hide, ladies and gentlemen, had something to hid on August 16, 1987. Tried but failed. It wasn't smart, but it was shrewd. It wasn't an innocent man doing that, ladies and gentlemen, but a guilty one. A man who had drugs in his system, a man who had cocaine in his pocket.

MR. CLARKE: Objection, your Honor.

THE COURT: Overruled.

MR. SMITH: Mr. Clarke, I submit to you (sic) has given to you an explanation based on the evidence the defendant would state.

MR. CLARKE: Objection, your Honor. Calling for a defendant to testify.

THE COURT: Overruled. Let's proceed.

(Tr. at 101-102.)

Petitioner alleges that the above closing statements

improperly commented on Petitioner's failure to testify at trial. Although Petitioner states a cognizable claim under Griffin v. California, 380 U.S. 609, 614 (1965) (prosecutor's comment on defendant's failure to testify violates the Fifth Amendment), a review of the transcript convinces this Court that the claim is unsubstantiated. The transcript reveals that the prosecutor's comments were not addressed to Petitioner's silence at trial, but merely pointed out a lack of circumstantial evidence. Taken out of context, the propriety of the remarks is subject to question. But reviewing the record in its entirety, the Court concludes that the comments were not intended to bear upon Petitioner's failure to testify or any improper presumption of guilt arising therefrom.

Accordingly, the Court concludes that Petitioner is not entitled to habeas relief on the basis of prosecutorial misconduct as alleged in his fourth ground for relief.

D. Enhancement Proceedings

In his last ground for relief, Petitioner challenges the enhancement of his sentence. He argues that the introduction of certified copies of his prior judgments and sentences was insufficient to prove his identity because the birth dates listed on the prior judgments and sentences differed. The Court of Criminal Appeals rejected Petitioner's contention finding that identity of names between the defendant and the person previously convicted on the judgment and sentence was prima facie evidence of identity of person. The Court noted that Petitioner's name was not

so common as to defeat the establishment of the prima facie case under Cooper v. State, 810 P.2d 1303, 1306 (Okla. Crim. App. 1991), and that the difference in birth dates was no more than a typographical error. Lastly, the Court noted that Petitioner had not objected to the judgments and sentences nor presented any rebutting testimony.

Respondent has objected to this last claim for relief on the ground that enhancement issues are matters of state law not reviewable by a federal court in a habeas corpus action. This Court agrees. A federal court's power is not unlimited. When reviewing a state court conviction, a federal court is limited to violations of federal constitutional and statutory law. A federal court has no authority to review a state's interpretation or application of its own laws. Estelle v. McGuire, 502 U.S. 62, ___, 112 S.Ct. 475, 480 (1991); Lujan v. Tansy, 2 F.3d 1031, 1036 (10th Cir. 1993), cert. denied, 114 S.Ct. 1074 (1994).

Petitioner's argument in support of his last ground for relief in his petition and reply contain absolutely no mention or citation to any article or amendment of the United States Constitution. Petitioner's discussion of this claim rests instead on the interpretation of Oklahoma law. Cf. Johnson v. Cowley, ___ F.3d ___, 1994 WL 643904, No. 91-6401 (10th Cir. Nov. 16, 1994) (claim that trial court failed to make an independent determination of the voluntariness of the stipulation to the prior convictions raised a federal constitutional claim); Carr v. Reynolds, 9 F.3d 116, 1993 WL 432572 (10th Cir. 1993) (unpublished opinion) (claim that state

had improperly shifted the burden of proving that petitioner was not the person convicted of prior felony to the petitioner raised a federal constitutional question); Camillo v. Armontrout, 938 F.2d 879 (8th Cir. 1991) (when enhanced punishment depends on evidence of prior criminal convictions, defendant has due process right to be personally present at the proceeding).

At any rate, the Court concludes that the Judgements and Sentences which the State introduced during the second stage proceeding were sufficient to sustain the State's burden of proving the prior convictions under Oklahoma law. In Cooper v. State, 810 P.2d 1303, the Court of Criminal Appeals held that in proving prior felony convictions the State has the burden of establishing more than mere identity of name between the accused and the person listed as the defendant on the prior Judgment and Sentence. Although the better practice would be for the prosecution to introduce other supporting evidence, the Oklahoma Court of Criminal Appeals has recognized that identity of name is sufficient when the defendant's name is unique. Battenfield v. State, 826 P.2d 612, 614 (Okla. Crim. App. 1991), cert. denied, 112 S.Ct. 1491 (1992). In the case at hand, Petitioner's name was not so common and the prior offenses were perpetrated in the same county. Moreover, it is important to note that Petitioner did not object to the introduction of the judgments and sentences thus waiving the allegation of error on appeal except for fundamental error. West v. State, 764 P.2d 528 (Okla. Crim. App. 1988).

Accordingly, Petitioner is not entitled to habeas corpus

relief on his last ground of error.

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 21 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DEC 22 1994

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

DATE THE

FILED

DEC 19 1994

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

CLARA LEANNE CASEBEAR)
ALLRED (HUGHES),)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

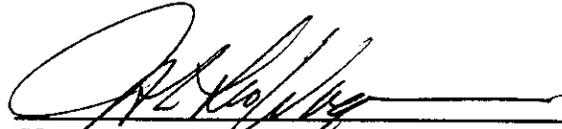
Case No. 94-C-103-E

REPORT AND RECOMMENDATIONS OF U. S. MAGISTRATE JUDGE

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 and for supplemental security income benefits under §§ 1602 and 1614 of the Social Security Act, as amended. Plaintiff filed a motion for summary judgment on July 7, 1994 (Docket #5)¹. The Tenth Circuit has concluded that any type of summary proceeding, whether it be by motion for judgment on the pleadings, motion for affirmance or reversal, or motion for summary judgment, is improper in a social security case. Hamilton v. Secretary of Health and Human Services, 961 F.2d 1495, 1501 (10th Cir. 1992). Plaintiff's Motion for Summary Judgment (Docket #5) should be denied, and the court should limit its review to a determination of whether the record as a whole contains substantial evidence to support the Agency's decision.

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

Dated this 19th day of December, 1994.

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Allred.ss

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 22 1994

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
 vs.)
)
 HAROLD R. THOMPSON; REBECCA)
 THOMPSON; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

DEC 21 1994

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

Civil Case No. 94-C 939E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20th day of Dec.,

1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Harold R. Thompson and Rebecca Thompson aka Rebecca F. Thompson**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Rebecca Thompson aka Rebecca F. Thompson**, is one and the same person and will hereinafter be referred to as ("**Rebecca F. Thompson**").

The Court being fully advised and having examined the court file finds that the Defendant, **Harold R. Thompson**, waived service of Summons on October 10, 1994, which was filed on October 13, 1994; and that the Defendant, **Rebecca F. Thompson**, waived service of Summons on October 9, 1994, which was filed on October 13, 1994.

NOTE: THIS DOCUMENT IS TO BE FILED BY MAIL TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answer on October 19, 1994; and that the Defendants, **Harold R. Thompson and Rebecca F. Thompson,** have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot One (1), Block Four (4), BOMAN ACRES 2nd. ADDITION, a subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on September 26, 1978, Bennie D. Smith and Betty J. Smith, executed and delivered to MAGER MORTGAGE COMPANY their mortgage note in the amount of \$25,500.00, 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, Bennie D. Smith and Betty J. Smith, husband and wife, executed and delivered to MAGER MORTGAGE COMPANY a mortgage dated September 26, 1978, covering the above-described property. Said mortgage was recorded on September 28, 1978, in Book 4355, Page 1835, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 29, 1990, Brumbaugh & Fulton Company, formerly Mager Mortgage Company assigned the above-described mortgage note

and mortgage to the Secretary of Housing & Urban Development its successors and assigns. This Assignment of Mortgage was recorded on March 30, 1990, in Book 5244, Page 1045, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Harold R. Thompson and Rebecca F. Thompson, husband and wife, are the current title owners of the property by virtue of a General Warranty Deed dated June 29, 1989, and recorded on June 29, 1989 in Book 5191, Page 2028, in the records of Tulsa County, Oklahoma. The Defendants, Harold R. Thompson and Rebecca F. Thompson, are the current assumptors of the subject indebtedness.

The Court further finds that on March 19, 1990, the Defendants, Harold R. Thompson and Rebecca F. Thompson, 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 27, 1991 and April 1, 1992.

The Court further finds that the Defendants, Harold R. Thompson and Rebecca F. Thompson, 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, **Harold R. Thompson and Rebecca F. Thompson**, are indebted to the Plaintiff in the principal sum of \$34,713.32, plus interest at the rate of 9.5 percent per annum from August 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 \$31.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$31.00 which became a lien on June 25, 1993; and a lien in the amount of \$36.00 which became a lien on June 26, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Harold R. Thompson and Rebecca Thompson**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Harold R. Thompson and Rebecca Thompson**, in the principal sum of \$34,713.32, plus interest at the rate of 9.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.12 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure

action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$98.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

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

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$98.00, personal property taxes which are currently due and owing.

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

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

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

S/ JAMES O. ELISON
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

Judgment of Foreclosure
Civil Action No. 94-C 939E

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DENNIS J. ADAIR,)
 JEANNE MARIE ADAIR ROBISON;)
 TULSA DEVELOPMENT)
 AUTHORITY; STATE OF OKLAHOMA)
 ex rel. OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

ENTERED)
)
 DATE DEC 22 1994)

F I L E D

DEC 21 1994

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

CIVIL ACTION NO. 93-C-660-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day of Dec,
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 TULSA DEVELOPMENT
AUTHORITY, appears by its attorney, Doris L. Fransein, Esq.; the Defendant, STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley,
Assistant General Counsel; and the Defendants, DENNIS J. ADAIR and JEANNE MARIE
ADAIR ROBISON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the
Defendant, TULSA DEVELOPMENT AUTHORITY, acknowledged receipt of Summons
and Complaint on July 27, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel.

CLERK
COUNSEL AND
IMMEDIATE
RECEIVED

OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on July 23, 1993; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 26, 1993; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 23, 1993.

The Court further finds that the Defendants, DENNIS J. ADAIR and JEANNE MARIE ADAIR ROBISON, 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 September 8, 1994, and continuing through October 13, 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, DENNIS J. ADAIR and JEANNE MARIE ADAIR ROBISON, 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, DENNIS J. ADAIR and JEANNE MARIE ADAIR ROBISON. 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 August 10, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on August 12, 1993; and that the Defendant, TULSA DEVELOPMENT AUTHORITY, filed its Answer and Cross-Claim on August 3, 1993 and an Amended Answer and Cross-Claim on July 6, 1994; and the Defendants, DENNIS J. ADAIR and JEANNE MARIE ADAIR ROBISON, 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:

THE SOUTH FIFTEEN (15) FEET OF LOT ONE (1), AND ALL OF LOT TWO (2), BLOCK SIX (6), ABDO'S ADDITION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF A/K/A 402 S. XANTHUS, TULSA, OK 74104

The Court further finds that on August 18, 1986, the Defendants, DENNIS J. ADAIR and JEANNE M. ADAIR, husband and wife, executed and delivered to Firstier Mortgage Co., a mortgage note in the amount of \$33,650.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DENNIS J. ADAIR and JEANNE M. ADAIR, husband and wife, executed and delivered to Firstier Mortgage Co., a mortgage dated August 18, 1986, covering the above-described property. Said mortgage was recorded on August 20, 1986, in Book 4964, Page 426, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, Firstier Mortgage Co., assigned the above-described mortgage note and mortgage to Leader Federal Savings & Loan Association, its successors and assigns. This Assignment of Mortgage was recorded on January 8, 1988, in Book 5073, Page 2688, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 3, 1991, Leader Federal Bank for Savings fka Leader Federal Savings & Loan Association, 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 July 8, 1991, in Book 5333, Page 1140, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1991, the Defendants, DENNIS J. ADAIR and JEANNE M. ADAIR, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1992; and between the Plaintiff and Defendant, DENNIS J. ADAIR, alone on December 1, 1993.

The Court further finds that the Defendant, DENNIS J. ADAIR, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DENNIS J.

ADAIR, is indebted to the Plaintiff in the principal sum of \$42,394.26, plus interest at the rate of 10.5 percent per annum from July 1, 1993 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 \$1.00 which became a lien on the property as of June 20, 1991; a lien in the amount of \$8.00 which became a lien on the property as of June 26, 1992; and a lien in the amount of \$2.00 which became a lien on the property as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, TULSA DEVELOPMENT AUTHORITY, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$2,630.00, with accrued interest at the judgment rate from and after July 1, 1993, which became a lien on the property as of September 29, 1989, plus attorney's fees in the amount of \$395.00. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. 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 \$112.22, plus accrued and accruing interest, which became a lien on the property as of April 14, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DENNIS J. ADAIR and JEANNE MARIE ADAIR ROBISON, are in default, and have no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, DENNIS J. ADAIR, in the principal sum of \$42,394.26, plus interest at the rate of 10.5 percent per annum from July 1, 1993 until judgment, plus interest thereafter at the current legal rate of 7.22 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 \$11.00 for personal property taxes for the years 1990-1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, TULSA DEVELOPMENT AUTHORITY, have and recover judgment In Rem in the amount of \$2,630.00 with accrued interest at the judgment rate from and after July 1, 1993, together with attorney's fees in the amount of \$395.00, 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 \$112.22, 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, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, DENNIS J. ADAIR and JEANNE MARIE ADAIR ROBISON have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, DENNIS J. ADAIR, 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, TULSA DEVELOPMENT AUTHORITY, in the amount of \$2,630.00, with accrued interest, and \$395.00, attorney's fees.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$9.00, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$112.22, state taxes which are currently due and owing.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$2.00, personal property taxes which are currently due and owing.

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

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

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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
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State of Oklahoma, ex rel.
Oklahoma Tax Commission



DORIS L. FRANSEIN

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Attorney for Defendant/Cross-Claimant,
Tulsa Development Authority

Judgment of Foreclosure

Civil Action No. 93-C-660-E

NBK:flv

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

IN RE:)
)
RIDENOUR, STEVEN WAYNE,)
a/k/a Steve Ridenour,)
f/d/b/a Mastercraft Construction)
Inc.,)
f/d/b/a Petrovest Management)
Corp.,)
)
RIDENOUR, JENNIFER BERRY,)
f/d/b/a Mastercraft Construction)
Inc.,)
)
Debtors,)
)
STEVEN WAYNE RIDENOUR,)
a/k/a Steve Ridenour,)
f/d/b/a Mastercraft Construction)
Inc.)
)
Appellant,)
)
v.)
)
RMED INTERNATIONAL, INC.,)
)
)
Appellee.)

DEC 22 1994
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE DEC 22 1994

Case No. 93-C-849-BU ✓

ORDER

On November 14, 1994, this Court entered an Order directing Appellant, Steven Wayne Ridenour, a/k/a Steve Wayne Ridenour f/d/b/a Mastercraft Construction Inc., to assist the Clerk of the Bankruptcy Court for the Northern District of Oklahoma in assembling and transmitting the record for this appeal within fifteen (15) days. The Court stated in its ruling that failure to do so would result in dismissal of this appeal. Thereafter, Appellant filed a motion seeking an extension of time to comply with the Court's Order. On November 23, 1994, this Court granted Appellant's motion and ordered that Appellant would have until

December 19, 1994 to assist the Clerk in assembling and transmitting the record for this appeal.

The Court has reviewed the file and finds that no record has been transmitted by the Clerk for this appeal. Because this appeal has been pending since September 20, 1993 and Appellant has not taken any step other than the filing of a notice of appeal, the Court, pursuant to Rule 8001(a), Fed. R. Bankr. P., finds that dismissal of this appeal is warranted.

Accordingly, this Court hereby DISMISSES WITHOUT PREJUDICE the above-captioned and above-numbered appeal.

ENTERED this 21 day of December, 1994.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

DEC 21 1994

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

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

CHERYL L. REEDER,
Plaintiff,
vs.
AMERICAN ECONOMY INSURANCE
COMPANY, a foreign corporation,
Defendant.

Case No. 93-C-991-B

ENTERED ON DOCKET

DATE 12/22/94

J U D G M E N T

In accord with the jury verdict filed this date in favor of Plaintiff Cheryl L. Reeder, the Court hereby enters judgment in favor of Plaintiff Cheryl L. Reeder, and against the Defendant, American Economy Insurance Company, in the amount of \$612,000. The Plaintiff shall receive pre-judgment interest at a rate of 7.42 percent from November 5, 1993, to December 31, 1993; and at a rate of 6.99 percent from January 1, 1994, to this date. The Plaintiff also shall receive post-judgment interest at a rate of 7.22 percent. Costs are assessed against the Defendant, if timely applied for under Local Rule 54.1, and each party is to pay its own respective attorney's fees.

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



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

67

The Court being fully advised and having examined the court file finds that the Defendant, ELIZABETH A. (BETSY) BARNES, was served a copy of Summons and Complaint on July 27, 1994; that the Defendant, ANGELENE CHALMERS now Angelene Stewart, signed a Waiver of Summons on July 5, 1994; that the Defendant, CITY OF TULSA, Oklahoma, was served a copy of Summons and Complaint on June 17, 1994, by Certified Mail.

The Court further finds that the Defendants, GREGORY A. GUNNELLS and SANDRA K. GUNNELLS, 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 September 30, 1994, and continuing through November 4, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, GREGORY A. GUNNELLS and SANDRA K. GUNNELLS, 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, GREGORY A. GUNNELLS and SANDRA K. GUNNELLS. 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 July 26, 1994; that the Defendant, CITY OF TULSA, Oklahoma, filed its Answer on July 5, 1994; and that the Defendants, GREGORY A. GUNNELLS, SANDRA K. GUNNELLS ELIZABETH A. (BETSY) BARNES, and ANGELENE CHALMERS now Angelene Stewart, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, GREGORY A. GUNNELLS, is also known and sometimes referred to as Greg Gunnells, will hereinafter be referred to as "GREGORY A. GUNNELLS." The Defendant, SANDRA K. GUNNELLS, is also known as and sometimes referred to as Sandra Gunnells, will hereinafter be referred to as "SANDRA K. GUNNELLS."

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:

**THE NORTH HALF OF LOT TWENTY-FIVE (25),
WESTROPE ACRES, AN ADDITION IN TULSA
COUNTY, STATE OF OKLAHOMA, ACCORDING TO
THE RECORDED PLAT THEREOF.**

A/K/A 1148 N. SANDUSKY, TULSA, OK. 74115

The Court further finds that on September 24, 1986, the Defendants, GREGORY A. GUNNELLS and SANDRA K. GUNNELLS, executed and delivered to Firstier Mortgage Co., their mortgage note in the amount of \$43,800.00, 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 A. GUNNELLS and SANDRA K. GUNNELLS, husband and wife, executed and delivered to Firstier Mortgage Co., a mortgage dated September 24, 1986, covering the above-described property. Said mortgage was recorded on October 1, 1986, in Book 4973, Page 1493, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, Firstier Mortgage Co., assigned the above-described mortgage note and mortgage to Leader Federal Savings & Loan Association. This Assignment of Mortgage was recorded on January 8, 1988, in Book 5073, Page 2624-2625, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 6, 1988, Leader Federal Savings & Loan Association, 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 April 12, 1988, in Book 5092, Page 2520, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1988, the Defendants, GREGORY A. GUNNELLS and SANDRA K. GUNNELLS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on December 1, 1988, September 1, 1989, September 1, 1990, and March 1, 1991.

The Court further finds that the Defendants, GREGORY A. GUNNELLS and SANDRA K. GUNNELLS, 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 A. GUNNELLS and SANDRA K. GUNNELLS, are indebted to the Plaintiff in the principal sum of \$72,211.50, plus interest at the rate of Nine and One-Half percent per annum from May 19, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, CITY OF TULSA, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of a lien, cleaning and mowing, in the amount of \$1,260.00, plus interest from September 8, 1993. Said lien is coequal to Ad Valorem taxes and superior to the interest of the Plaintiff, United States of America.

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 \$17.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of \$17.00 which became 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, GREGORY A. GUNNELLS, SANDRA K. GUNNELLS ELIZABETH A. (BETSY) BARNES, and ANGELENE CHALMERS now Angelene Stewart, 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, GREGORY A. GUNNELLS and SANDRA K. GUNNELLS, in the principal sum of \$72,211.50, plus interest at the rate of Nine and One-Half percent per annum from May 19, 1994 until judgment, plus interest thereafter at the current legal rate of 7.22 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, CITY OF TULSA, Oklahoma, have and recover judgment in the amount of \$1,260.00, plus interest, for cleaning and mowing, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$34.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, GREGORY A. GUNNELLS, SANDRA K. GUNNELLS ELIZABETH A. (BETSY) BARNES, and ANGELENE CHALMERS now Angelene Stewart, 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 A. GUNNELLS and SANDRA K. GUNNELLS, 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 Defendant, CITY OF TULSA, Oklahoma, in the amount of \$1,260.00, plus penalties and interest, for cleaning and mowing which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$34.00, personal property taxes which are currently due and owing.

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

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

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

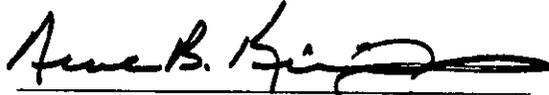
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

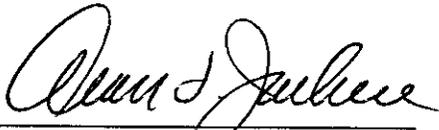
STEPHEN C. LEWIS
United States Attorney



NEAL B. KIRKPATRICK
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DICK A. BLAKELEY, OBA #852
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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



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Attorney for Defendant,
City of Tulsa, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-611-B

NBK:flv

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1994

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

DARRYL MONTGOMERY)

Plaintiff,)

vs.)

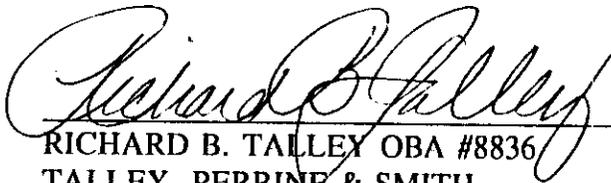
Case No. 94-C-432-B

STATE FARM INSURANCE COMPANIES)

Defendant.)

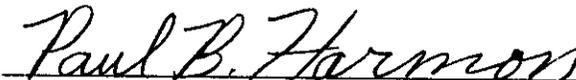
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Darryl Montgomery, by and through his attorney of record, Richard B. Talley, and Defendant, State Farm Fire and Casualty Co., by and through their attorney of record, Paul B. Harmon, and hereby stipulate that this cause should be dismissed with prejudice.



RICHARD B. TALLEY OBA #8836
TALLEY, PERRINE & SMITH
219 East Main
Norman, Oklahoma 73069
(405) 364-8300

ATTORNEY FOR PLAINTIFF



PAUL B. HARMON, OBA #14611
700 Petroleum Club Building
601 South Boulder
Tulsa, Oklahoma 74119
(918) 592-7000

ATTORNEY FOR DEFENDANT

ENTERED ON DOCKET

DATE 12-21-94

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

FILED

DEC 20 1994

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

JOHNATHAN WAYNE NEAL,)
)
 Plaintiff,)
)
 vs.)
)
 B. R. BEASLEY, et al.,)
)
 Defendants.)

No. 94-C-1145-B

ENTERED ON DOCKET

DATE DEC 21 1994

ORDER

Plaintiff, an inmate at the Broken Arrow City Jail, has filed with the Court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. In reliance upon the representations set forth in the motion, the Court concludes that Plaintiff should be granted leave to proceed in forma pauperis. The Court concludes, however, that Plaintiff's claims should be dismissed as frivolous under 28 U.S.C. § 1915(d).

In this civil rights action, Plaintiff sues Judge Beasley, Police Officer T. J. Barrett, and Tulsa County District Judges Bill Musseman and J. Dalton. He alleges as follows:

T. J. Barrett claims that I went off the roadway and struck a telephone pole, lost my rear wheel went in ditch, claims I exhibited odor and actions etc. of alcoholic beverage, slurred speech, bloodshot eyes, unsteady gait and that I refused breath tests and that I said to him you ain't gonna make me do shit as a remark to the breath test and also that I consented to test and that officer affidavit 103404 A was a temporary license. Then I was taken before district judge Musseman and bond was set at \$10,000 for DUI and then later charges were dismissed.

He contends that the above actions violated the following constitutional rights: "I threw [sic] 30 of the const. rights or

3

1 threw [sic] 25." In support of his only count, Plaintiff alleges that "BAPD officer affidavit and notice of revocation number 103404A." Plaintiff seeks \$25,000 in damages. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's general allegations are too vague and conclusory to be sufficient to state a claim arguably based in law or fact. See Frazier v. Dubois, 922 F.2d 560, 562 n.1 (10th Cir. 1990). The Plaintiff has utterly failed to allege any unconstitutional activities of the defendants or what constitutional rights have been violated. Moreover, Judges Musseman, Dalton, and Beasley

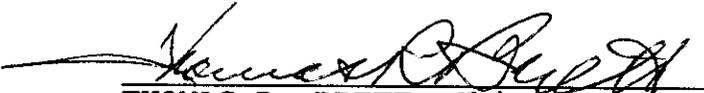
would be entitled to absolute immunity from Plaintiff's suit for actions taken in their judicial capacity. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990).

Accordingly, Plaintiff's complaint must be dismissed as frivolous under 28 U.S.C. § 1915(d).

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted**;
- (2) Plaintiff's civil rights complaint is **dismissed** as frivolous under 28 U.S.C. § 1915(d).

IT IS SO ORDERED this 20th day of Dec, 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

DEC 20 1994

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

FRANCIS E. FAULKNER,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 92-C-316-B

CONFIDENTIAL - UNCLASSIFIED

DATE DEC 21 1994

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 the plaintiff had the residual functional capacity to perform work-related activities, except for work involving lifting more than fifty pounds occasionally and twenty-five pounds frequently, performing only simple tasks, avoiding the public, and relating superficially to supervisors. He found that plaintiff's past relevant work as an egg delivery truck driver and asphalt truck driver did not require the performance of work-related activities precluded by these limitations. Having determined that the plaintiff's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) That the ALJ's decision that the plaintiff is not disabled is not supported by substantial evidence.
- (2) That the ALJ's finding that the plaintiff's allegations of pain were not credible to the extent that they precluded work was in error.
- (3) That the ALJ failed to give proper weight to the treating physician's diagnosis.
- (4) That the ALJ never considered the plaintiff's exertional and non-exertional impairments, including his mental residual functional capacity, in combination.

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).

- (5) That the ALJ did not propound a proper hypothetical question to the vocational expert based on all the evidence.
- (6) That the ALJ failed to meet his burden of proof to show what kind of work plaintiff could do.

It is well settled that the plaintiff 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).

Plaintiff's first assertion is that the ALJ's decision is not supported by substantial evidence. Plaintiff complains that the ALJ "mischaracterized" the evidence and was "non-objective" in his analysis. There is no merit to these allegations.

Plaintiff alleges that he suffers from poorly controlled diabetes complicated by arthritis and general chest pains as a result of a previous heart attack (TR 37-42). Plaintiff also alleges that he exhibits signs of diabetic neuropathy in the form of nerve deafness and burning sensations in his feet and legs (TR 42, 73). Plaintiff alleges that these conditions have given rise to a personality disorder in the form of irritability and mood swings and allow him to stand for only 30 minutes (TR 51, 64). Following these periods, he must sit or lie down with his feet propped up to relieve the pain (TR 51).

The medical evidence establishes that the plaintiff has diabetes, which at times is poorly controlled. Doctors at the Veteran's Administration ("V.A.") Clinic found the plaintiff's condition responsive to a controlled diet and insulin treatments which began in May of 1990 (TR 319-330, 332-343). A visit on August 14, 1990 to the V.A. Clinic indicates that the plaintiff was looking well, although control of the diabetes was questionable. Dr. Singer, the treating physician, questioned whether the plaintiff was

taking the medication as prescribed. The treating physician also suggested that the plaintiff "work for a living" (TR 307). On April 17, 1991, the last visit contained in the record, the plaintiff's diabetes was described as being inadequately controlled (TR 386). The V.A. Clinic noted a "probable" neuropathy, but no expressed diagnosis was made concerning the complaints of burning sensations in plaintiff's feet and legs (TR 386). The treating physician responded to this assessment by increasing the plaintiff's amount of insulin and scheduling a return visit in six months (TR 386).

On October 21, 1987, the V.A. Clinic contemplated the possibility of migratory arthritis, though the examination noted "no particular joint changes" and a good range of motion (TR 382). These findings were consistent with an examination by Dr. Richard E. Cooper in the previous month, finding no "joint deformity, redness, swelling, heat or tenderness" (TR 286). Dr. Cooper went on to state:

The gross and fine manipulation are good. The grip strength is good. I tested adduction and abduction of the fingers, I tested flexion strength of each finger individually . . . and those are all good.

The speed, stability, and safety of the gait are all good. He needs no assistive device. He is able to walk on toes and walk on heels without difficulty.

Plaintiff's complaints of chest pain are mentioned throughout the V.A. Clinic notes but never attributed to a previous heart attack. On September 16, 1986, a treadmill test performed by Dr. Ray was characterized as "normal" (TR 259). Dr. Cooper in September of 1987 stated that the chest pain was generally described as indigestion by the plaintiff brought on by stress (TR 286). Dr. Cooper's physical examination revealed a pulse of 80, regular rhythm, and no murmur, click, rub or snap (TR 287). A second examination by

Dr. Cooper in September of 1990 found the plaintiff in essentially the same condition (TR 300). Both physical and neurological examinations were found to be normal and a cardiac exam revealed a regular rhythm and no murmur (TR 300).

Hearing examinations, performed by the V.A. Clinic throughout the period under consideration, show the plaintiff's hearing to be normal. Examinations were administered in February of 1988 (TR 377) and March of 1991 (TR 387). The last examination indicated that the plaintiff's hearing was normal, and hearing aids were not required. The plaintiff was found to be able to discriminate speech with a 96-percent accuracy rate in his right ear and a 92-percent rate in his left ear (TR 387). These tests confirm plaintiff's earlier statement to Dr. Cooper in September of 1990 denying any deafness (TR 300).

On August 14, 1990, plaintiff was psychiatrically evaluated by Dr. Thomas A. Goodman. Dr. Goodman found the plaintiff to be a "medium height slender young man who is appropriately and cleanly dressed and groomed His sensorium was clear and he was oriented to time, place and person" (TR 294-295). Dr. Goodman went on to note that:

He was in general cooperative during the interview but became frustrated easily and at times said that the examiner was making him angry by asking so many questions about his illness. In reality, it seemed that any time he was really asked why he was not able to work or why he was not looking for a job, he became extremely defensive and angry. He tended to be preoccupied with various aches and pains and physical problems (TR 294-295).

Dr. Goodman summarized the mental examination stating that plaintiff gave "evidence of rather marked irritability and is very harassable and anxious" (TR 295). He found the plaintiff to be probably suffering from a psychological disorder "above and

beyond any particular variation in his blood sugar level" (TR 295). He concluded that plaintiff was "probably suffering from a significant depressive disorder" which the doctor was unable to define (TR 295).

It is significant that Dr. Goodman concluded that plaintiff could work. The doctor stated:

[I]t is my strong recommendation that he consider seeking psychiatric evaluation and treatment if appropriate [H]e has retained his intellectual abilities and with proper treatment which I suppose at this point would be a stabilization of his diabetes plus treatment of his underlying psychological disorder that he should be able to return if not driving trucks to some other type of moderately complicated work activity. He certainly has retained his orientation, memory, ability to calculate and use judgment [H]e is capable of managing his own funds.

(TR 295).

There are no findings of severe mental problems in the record. The disability determinations and assessments of state agencies in 1986, 1987, and 1990 report no significant limitations in most categories (TR 208-220, 230-242). Plaintiff has marked limitations only as far as remembering and carrying out detailed instructions (TR 208, 230) and ability to interact with the general public (TR 209, 230, 231), and was diagnosed with an affective and personality disorder (TR 211, 216, 233, 234, 238) and depression (TR 214, 234, 236). Only moderate restrictions of daily living, difficulty in social functioning, and deficiency in concentration were reported (TR 218, 240). These limitations do not meet the listings for mental impairments in Appendix 1 of the Social Security Regulations, listings 12.02 through 12.09.

There is substantial evidence in the record to support the decision of the ALJ that the plaintiff can perform his past relevant work and therefore is not disabled. The evidence

shows that the plaintiff has a good range of motion unhindered by arthritis. Plaintiff's complaints of pain have been found to be unrelated to an alleged heart attack. Although the plaintiff does suffer from diabetes, he has not been diagnosed with any form of neuropathy.

The plaintiff's assertion that the ALJ mischaracterized the evidence is also without foundation. Plaintiff cites Claassen v. Heckler, 600 F.Supp. 1507 (D.C. Kan. 1985), a case in which the decision of the ALJ was found to be unsupported by substantial medical evidence. In Claassen, the court found the only evidence to support the decision was a seven and one-half minute treadmill test administered by a consultative physician, who had seen the claimant only once. Id. at 1511. In the instant case, the ALJ's informed decision was reached after drawing from many available sources of evidence. The ALJ properly considered the testimony of the plaintiff and the vocational expert in combination with the records of the treating physicians at the V.A. Clinic, the testimony of Dr. Cooper, who had seen the plaintiff on two separate occasions, and Dr. Goodman.

Plaintiff next asserts that the ALJ's finding that the plaintiff's allegations of pain were not credible to the extent that they precluded work was in error. 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).

Because there was some objective medical evidence to show that plaintiff had certain physical problems that might produce 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). However, "the 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 need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

Plaintiff's complaints of disabling pain are not consistent with the record as a whole. Regarding plaintiff's complaints of chest pain related to an alleged heart attack, the ALJ, noting that the V.A. Clinic had not treated the plaintiff as if he had a heart attack, found no medical evidence indicating the alleged heart attack (TR 15).

Plaintiff's complaints of disabling arthritic pain likewise are not supported by the record. Although the ALJ noted that "there has been no medical entry indicating that the claimant has arthritis or that the idea was ever entertained" (TR 15), V.A. Clinic notes indicate a consideration that the plaintiff possibly suffered from migratory arthritis in October and November of 1987 (TR 382-383). However, as stated previously, no joint deformity, redness, swelling, heat, or tenderness was found by Dr. Cooper in September of 1987 (TR 286) and on a visit to the V.A. Clinic the next month plaintiff's range of motion was tested and found to be good (TR 382).

A finding of inflammatory arthritis is a two-part test, according to Social Security regulations. There must be a history of "persistent joint pain, swelling, and tenderness involving multiple major joints . . . with signs of joint inflammation (swelling or tenderness) on a current physical examination," accompanied by a test to corroborate the

diagnosis. 20 C.F.R. § 404, Subpt. P, App. 1. Plaintiff's complaints of pain indicating the possibility of migratory arthritis were considered by physicians, but upon examination no medical evidence was found to support such a diagnosis. While arthritis is a condition known to produce pain, neither the V.A. Clinic nor Dr. Cooper made any specific findings of migratory arthritis.

Plaintiff's claim that he suffered pain from diabetic neuropathy was also properly considered by the ALJ. The ALJ noted that there was no such medical diagnosis in the record and that plaintiff's slight hearing loss was not referable to such a condition (TR 15). The ALJ in evaluating plaintiff's allegations of pain in his legs and feet noted that the plaintiff walks a 1/2 mile to 2 1/2 miles every day and uses a cane only as a "security blanket" when walking fast (TR 14-16). Dr. Cooper noted that the pulses in plaintiff's feet "are full and equal" "without bruit" (TR 287). The ALJ also found a lack of any medical evidence to support the plaintiff's allegations that he must keep his feet elevated due to pain (TR 16). Plaintiff admitted he can lift up to thirty pounds (TR 50), drive to the grocery store, clinic, and post office (TR 54), walk over a mile about three times a week (TR 54), ride a lawn mower (TR 55), do laundry and fix meals (TR 55), and dress and bathe himself (TR 56).

Lastly, it has been recognized that "some claimant's exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987). The ALJ properly considered all of the plaintiff's objective complaints of pain, made specific findings, and stated his reasons for disbelieving plaintiff's testimony.

The plaintiff's third assignment of error is that the ALJ ignored the treating physician rule "despite all significant findings of peripheral neuropathy." The treating physician rule requires the ALJ to give substantial weight to the opinions of the plaintiff's treating physician. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). If the ALJ disregards the opinions of the treating physicians, specific, legitimate reasons must be given for such a finding. Id. There is no merit to this claim. Plaintiff's inference that the treating physicians made significant findings of peripheral neuropathy is without merit. There are no "significant findings of peripheral neuropathy" to disregard. The medical record of the V.A. Clinic contains no expressed medical diagnosis of such a condition. There were no expressed statements by any physician, treating or consultative, that the plaintiff suffered from diabetic neuropathy. Thus the ALJ concluded the plaintiff's slight hearing loss was not referable to such a condition (TR 15).

The plaintiff also asserts that the ALJ ignored the treating physician's assessment and "all evidence showing that the plaintiff did have significant problems in trying to control his blood sugar because of his diabetes." The ALJ considered V.A. Clinic notes indicating that the plaintiff's diabetes was under poor control and the increasing amounts of insulin prescribed in June, July, and August of 1990 (TR 13). However, the ALJ noted that by February 26, 1991 "the claimant was doing well without complaints and that his examination was unremarkable, that is normal" (TR 13-14). The ALJ did indeed consider the evidence of the plaintiff's problem in controlling his blood sugar level, but concluded that the problem was eventually resolved.

There is no merit to the claim that the ALJ "ignored all of the evidence showing that

the plaintiff did have a severe and significant mental and diabetic condition" (Plaintiff's Opening Brief, Docket #10, pg. 7) and did not consider his mental functional capacity and exertional impairments in combination. The ALJ's finding number 3 states:

"The medical evidence establishes that the claimant has severe depression and personality disorder, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4. (emphasis added).

(TR 17).

The ALJ considered the testimony of Dr. Goodman in his finding that the medical evidence established that the plaintiff suffers from depression and personality disorder (TR 12-13). The ALJ noted the general appearance of the plaintiff during the psychiatric evaluation in August of 1990 (TR 12). The ALJ also noted Dr. Goodman's remarks concerning the plaintiff's increased irritability when confronted with questions concerning his illness (TR 13). The ALJ, relying on Dr. Goodman's conclusions, found no indication in the medical evidence that the plaintiff's "changes in his blood sugar readings are referable to any mental problems or depression" (TR 16).

The plaintiff asserts that the ALJ "never analyzed nor considered the plaintiff's mental residual functional capacity" as required by Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991). In Hargis, the Tenth Circuit recognized, pursuant to the Secretary's regulations that:

The "pertinent findings and conclusions" based on the mental evaluation of the claimant's mental impairments must be incorporated into each adjudicative level. 20 C.F.R. § 404.1520a(c)(4).

Id. at 1488.

The Secretary's regulations indicate that "[t]he determination of mental RFC

is crucial to the evaluation of an individual's capacity to engage in substantial gainful work activity when the criteria of the listings for mental disorders are not met or equaled but the impairment is nevertheless severe." 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00(A). The Secretary, pursuant to his own regulations, cannot therefore dismiss a claimant's mental impairment once there is a finding that the claimant does not meet the listings.

Id. at 1491.

The ALJ considered the plaintiff's mental functional capacity at each step of the sequential evaluation. Having found the plaintiff's allegations of pain not credible, his diabetes controlled, and no diagnosed heart problem or diabetic neuropathy, he considered the plaintiff's only significant limitation, namely his mental impairment.

Plaintiff asserts that the ALJ never considered the plaintiff's exertional and non-exertional impairments in combination. When a plaintiff has one or more severe impairments, 42 U.S.C. § 423(d)(2)(c) requires the Secretary to consider the combined effect of the impairments in making a disability determination. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). The ALJ only found one valid impairment, a severe depression and personality disorder, so there is no merit to this claim.

Having reviewed the evidence, the ALJ presented a proper hypothetical to the vocational expert concerning the jobs an individual could perform whose "primary restrictions would be . . . mental . . . only simple task, and that is to avoid the public, and, could relate only superficially with co-workers and employees" (TR 82). The vocational expert found that truck driving jobs could be performed by such a person (TR 82).

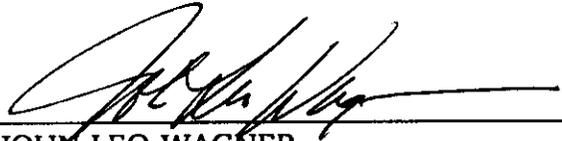
Dr. Singer at the V.A. Clinic, and Dr. Goodman, who did a psychological evaluation, concluded plaintiff could work. The ALJ properly considered plaintiff's mental disorder and the medical evidence concerning his complaints of chest pain and uncontrolled diabetes and

propounded a proper hypothetical question to the vocational expert. There is no merit to plaintiff's fifth claim.

The plaintiff's last assertion that the Secretary failed to meet his burden of proof as to what kind of work the plaintiff can do. Such a burden shifts to the Secretary only when the claimant demonstrates that he is no longer capable of performing his past work. Rivers v. Schweiker, 684 F.2d 1144, 1151 (5th Cir. 1982). Since the ALJ's finding that the plaintiff could perform past relevant work was supported by substantial evidence, the plaintiff failed to meet this burden. Plaintiff's claim has no merit.

The Secretary's decision that the plaintiff was not disabled is supported by substantial evidence and is a correct application of the pertinent regulations. The decision is affirmed.

Dated this 20th day of December, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:faulk.or

FILED

DEC 20 1994

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

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

CARDTOONS, L.C.,)
)
 Plaintiff,)
)
 vs.)
)
 MAJOR LEAGUE BASEBALL)
 PLAYERS ASSOCIATION,)
)
 Defendant.)

No. 93-C-576-E

ENTERED ON DOCKET

DATE DEC 21 1994

O R D E R

The Court granted Plaintiff's Motion for Summary Judgment in this matter on October 25, 1994. Defendant has filed a Motion for Amended Judgment Certifying the Court's Judgment as a Final Judgment for Appeal Under Fed. R. Civ. P. 54(b) (Docket #87). Plaintiff has filed a Motion for Request of Case Management Conference (Docket #86).

Defendant indicated in its Motion that it wishes to appeal the Court's Order and Judgment on the parties' claims for declaratory and injunctive relief. The Court has neither held hearings nor ruled on Plaintiff's claim for tortious interference with contract. The Court construes Defendant's Motion as a request for interlocutory appeal of the Court's rulings on the parties claims for declaratory and injunctive relief. In accordance with Fed.R.Civ.P. 54(b), the Court has weighed the judicial administrative interests and the equities that are involved. The Court finds that there is no just reason for delay. Furthermore, the Court finds that it would be improvident to hasten the

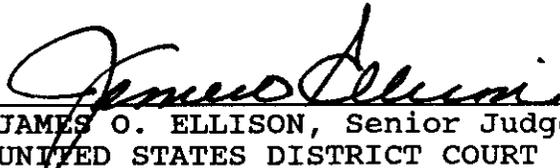
presentation and adjudication of Plaintiff's claim of tortious interference when the remedy of certification is available.

Therefore, the Court stays Plaintiff's claim for tortious interference with contract pending resolution of Defendant's appeal of the Court's Order and Judgment of October 25, 1994. As the Court will not consider Plaintiff's claim for tortious interference at this time, Plaintiff's Motion for a conference to discuss the remaining issues in this matter is denied.

IT IS THEREFORE ORDERED that Defendant's Motion for Leave to File Interlocutory Appeal (Docket #87) is GRANTED. The Court hereby directs the entry of final judgment, for purposes of certification of appeal under 28 U.S.C. §1292(b), with regard to the Court's Order and Judgment of October 25, 1994.

IT IS FURTHER ORDERED that Plaintiff's Motion for Request for Case Management Conference (Docket #86) is DENIED. Plaintiff's claim for tortious interference is stayed pending resolution of the interlocutory appeal.

ORDERED this 19th day of December, 1994.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

federal court, this Court would deny a request to proceed in forma pauperis.

It is the Order of the Court that the above-styled action is hereby dismissed for lack of jurisdiction.

ORDERED this 20 day of December, 1994.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE