



**FILED**

FEB 24 1995

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

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

GLADYS LILLY NORMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FIBREBOARD CORPORATION, et )  
 al., )  
 )  
 Defendants, )

No. 89-C-834-E

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 24<sup>th</sup> day of February, 1995.

ENTERED ON DOCKET  
DATE FEB 28 1995

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

29

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF OKLAHOMA**

**CLERK'S OFFICE**

**UNITED STATES COURT HOUSE**

**333 West Fourth Street, Room 411**

**TULSA, OKLAHOMA 74103-3881**

**RICHARD M. LAWRENCE**  
CLERK

(918) 581-7796  
(FTS) 745-7796

February 27, 1995

TO: Counsel/Parties of Record

RE: Case No. State Farm v. Larry Nation and Michael George  
85-C-761-C

This is to advise you that Judge H. Dale Cook entered the following Minute Order this date in the above case:

Upon notice of settlement of the above captioned appeal from the Tenth Circuit Court of Appeal, the Clerk of the District Court is directed to close this case as all matters raised herein are rendered moot.

Very truly yours,

RICHARD M. LAWRENCE, CLERK

By: 

Deputy Clerk

EOD 2-28-95

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

**FILED**

FEB 27 1995

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

BRICHET D. ZEFF,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN  
SERVICES,

Defendant.

93-C-43-B

ENTERED ON FILE

DATE FEB 28 1995

ORDER

On December 29, 1994, the United States Court of Appeals For The Tenth Circuit reversed and remanded the instant case with instructions to remand to the Secretary of Health and Human Services. Therefore, the Court remands the case to the Secretary for further proceedings consistent with the Tenth Circuit's December 29, 1994 Order and Judgment.

SO ORDERED THIS 27<sup>th</sup> day of Feb., 1995.

Jeffrey S. Wolfe  
JEFFREY S. WOLFE  
UNITED STATES MAGISTRATE JUDGE

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

~~DATE FEB 28 1995~~

ALBERT SANDERS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WAREHOUSE MARKET, )  
 )  
 Defendant. )

Case No. 94-C-136-K

**FILED**

FEB 28 1995

**STIPULATION OF DISMISSAL**

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

Pursuant to the provisions of Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure,  
the parties jointly dismiss with prejudice the above-styled cause of action.

Albert Sanders  
ALBERT SANDERS, *pro se*

STEPHEN L. ANDREW & ASSOCIATES  
A Professional Corporation  
Attorneys for Defendant  
WAREHOUSE MARKET, INC.  
Suite 100, Tulsa Union Depot  
111 East First Street  
Tulsa, Oklahoma 74103  
(918) 583-1111

By: Stephen L. Andrew  
Stephen L. Andrew, OBA #294

ENTER ON DOCKET

DATE FEB 28 1995

**FILED**

FEB 28 1995

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

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

ALEXANDER & ALEXANDER, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
COBURN INSURANCE AGENCY, INCORPORATED,	)	
Defendant.	)	

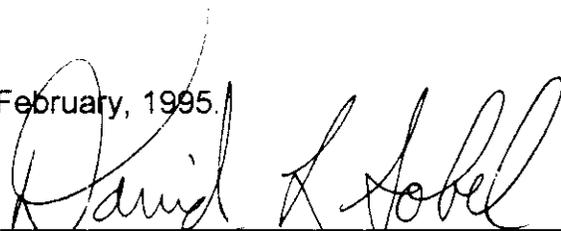
Case No. 94-C-270-K

**STIPULATION OF DISMISSAL**

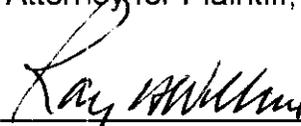
IT IS HEREBY STIPULATED by and between the Plaintiff, Alexander & Alexander, Inc., and the Defendant, Coburn Insurance Agency, Incorporated, by and through the undersigned counsels, that the above entitled action be discontinued and dismissed with prejudice, each party to bear its own attorney fees and costs.

This stipulation is entered into, because the parties have settled the above entitled action.

DATED this 28 day of February, 1995.

By: 

DAVID L. SOBEL, OBA #8444  
Holliman Langholz Runnels Holden  
Forsman & Sellers, a P.C.  
Ten East Third Street, Suite 500  
Tulsa, Oklahoma 74103  
(918) 584-1471  
Attorney for Plaintiff, Alexander & Alexander, Inc.

By: 

RAY WILBURN  
Wilburn, Masterson & Smiling  
7134 South Yale, Suite 560  
Tulsa, Oklahoma 74136  
Attorney for Defendant, Coburn Insurance Agency

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

**F E D**

FEB 28 1995 *RL*

TERRY LEWIS,  
Plaintiff,  
vs.  
PUBLIC SERVICE COMPANY OF  
OKLAHOMA,  
Defendant.

Case No. 94-C-949-BU ✓

Deputy Clerk  
DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE FEB 28 1995

**ORDER**

On October 11, 1994, the defendant, Public Service Company of Oklahoma, removed the above-entitled action to this Court from the District Court of Tulsa County, Oklahoma. In their notice of removal, the defendant asserted that the plaintiff's action was founded on a claim or right under the laws of the United States, specifically, 29 U.S.C. § 141, et seq., 29 U.S.C. § 651, et seq., and 29 U.S.C. § 185, and that removal was proper under 28 U.S.C. § 1441(a) and (b). On that same date, the defendant also filed a motion seeking to dismiss the above-entitled action on the basis that the plaintiff's action is preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, et seq. The plaintiff, Terry Lewis, in response, filed a motion seeking to remand this action to the District Court of Tulsa County, Oklahoma. In his motion, the plaintiff asserts that his claim does not arise under the laws of the United States; rather, it arises solely and exclusively under Oklahoma common law. The defendant has objected to the plaintiff's motion.

Upon review of the parties' submissions and the plaintiff's

petition, the Court concludes that the plaintiff's claim for wrongful discharge in violation of public policy under Burk v. K-Mart, 770 P.2d 24, 28-29 (Okla. 1989), is not preempted by the LMRA. The Court finds that a determination of whether or not the plaintiff was terminated in retaliation for disclosing to the Occupational Safety and Health Administration certain unsafe practices in the defendant's workplace may be made without interpreting any provisions of the collective bargaining agreement. See, Davies v. American Airlines, Inc., 971 F.2d 463, 465 (10th Cir. 1992), cert. denied, 113 S.Ct. 2439 (1993) (wrongful termination claim under Burk based upon the plaintiff's unionizing activities did not require interpretation of collective bargaining agreement and was not preempted under the Railway Labor Act); Marshall v. TRW, Inc., Reda Pump Division, 900 F.2d 1517 (10th Cir. 1990) (resolution of wrongful discharge claim based upon filing a workers compensation claim did not depend on interpretation of collective bargaining agreement and was not preempted under the LMRA). Because the plaintiff's claim is not preempted under the LMRA and the plaintiff's claim does not confer original federal court jurisdiction, the Court finds that it lacks subject matter jurisdiction over this action. The Court therefore finds that removal by the defendant was improper and that remand to the District Court of Tulsa County, Oklahoma is required pursuant to 28 U.S.C. § 1447(c).<sup>1</sup>

---

<sup>1</sup>By remanding this action to the state court, the Court has not made a determination as to the merits of the plaintiff's claim against the defendant. The Court believes that such determination

Accordingly, the plaintiff's Motion to Remand (Docket No. 5) is GRANTED. The defendant's Motion to Dismiss (Docket No. 2) and Cross-Application to Dismiss (Docket No. 11) are declared MOOT. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 21<sup>st</sup> day of February, 1995.



MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

---

should be made by the state court.

**FILED**

FEB 28 1995

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

MICHAEL WAYNE CATO, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STEPHEN LEWIS, et al., )  
 )  
Defendants. )

No. 94-C-755-B

**ORDER**

Plaintiff, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983 against three Tulsa County District Attorneys for malicious prosecution, for assault with a dangerous weapon, and for refusing to file criminal charges against Gene Sweeden for the August 1991 shooting of the Plaintiff. The Defendants have moved to dismiss and/or for summary judgment on the basis of absolute prosecutorial immunity. The Plaintiff has objected to Defendants' motion and has moved for leave to amend the complaint to add Gene Sweeden as a defendant in this case. For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be granted and Plaintiff's motion to amend the complaint to add Gene Sweeden as a defendant should be denied.

**I. BACKGROUND AND PROCEDURAL HISTORY**

In August 1991, following a fight between Plaintiff and his girlfriend, Plaintiff allegedly began backing up his car toward his girlfriend's mother. Mr. Gene Sweeden, a bystander and neighbor of Plaintiff's girlfriend and her mother, fired several shots toward

the back of Plaintiff's automobile to prevent the Plaintiff from overrunning the girlfriend's mother. One of the bullets struck the Plaintiff in his back, leaving him permanently paralyzed. The Tulsa County District Attorney's Office charged Plaintiff with assault with a dangerous weapon for attempting to overrun the girlfriend's mother with his automobile. The District Attorney's Office, however, refused Plaintiff's repeated requests to file criminal charges against Mr. Sweeden for shooting at Plaintiff's automobile. Plaintiff was found guilty following a trial and is presently serving his sentence in the Oklahoma Department of Corrections.

In August 1994, Plaintiff filed the instant civil rights action against David Moss, Tulsa County District Attorney, Sam Cox, Assistant District Attorney for Tulsa County, and Vicki Sousa, former Assistant District Attorney for Tulsa County. He alleged that the Tulsa County District Attorney's Office "is prejudiced and biased" and "used selective prosecution" because charges were filed against the Plaintiff but not against Mr. Sweeden. (Doc. #1 at 2.) Plaintiff alleged that the Defendants maliciously prosecuted him under the laws of the State of Oklahoma for assault with a dangerous weapon although there was no evidence that he ever attempted to overrun his girlfriend's mother with his automobile. Plaintiff sought compensatory damages, the filing of formal charges against Mr. Sweeden, and an apology from the Tulsa County District Attorney's Office. (Doc. #1.)

## II. ANALYSIS

### 1. Motion to Dismiss for Failure to State a Claim

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A Court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be

presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Defendants have moved to dismiss this action on the basis of absolute prosecutorial immunity. State prosecutors, such as the Defendants in this case, are entitled to absolute immunity from suits for civil damages when such suits are based on the prosecutor's performance of functions "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Gagan v. Norton, 35 F.3d 1473, 1475 (10th Cir. 1994) (quoted case omitted). Of course, "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993) (quoting Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2615 (1993)). Indeed, the Tenth Circuit has repeatedly found investigative and administrative actions taken by state prosecutors to be adequately protected by the doctrine of qualified, rather than absolute immunity. Gagan, 35 F.3d at 1475.

In making the often "difficult distinction" between prosecutorial and non-prosecutorial activities (i.e., absolute and qualified immunity), we have held "the determinative factor is "advocacy" because that is the prosecutor's main function." Pfeiffer, 929 F.2d at 1490 (quoting Rex, 753 F.2d at 843); Spielman v. Hildebrand,

873 F.2d 1377, 1382 (10th Cir. 1989). Finally, we have applied a continuum-based approach to these decisions, stating "the more distant a function is from the judicial process and the initiation and presentation of the State's case, the less likely it is that absolute immunity will attach." Pfeiffer, 929 F.2d at 1490 (citing Snell, 920 F.2d at 687).

Id. at 1476.

Applying these principles to the case at hand, the Court concludes that the Defendants' actions in deciding to file charges against the Plaintiff but not against Mr. Sweeden are the type of conduct protected by absolute immunity. A prosecutor's exercise of discretion in deciding whether to initiate a prosecution concerns the judicial phase of the criminal process. Imbler, 424 U.S. at 430. "Moreover, because the immunity depends not upon the defendant's status as a prosecutor but upon 'the functional nature of the activities' of which a plaintiff complains, immunity for performance of inherently prosecutorial functions is not defeated by allegations of improper motivation such as malice, vindictiveness or self-interest." Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1989) (quoted case omitted), cert. denied, 484 U.S. 828 (1987). Similarly, Plaintiff's allegations of "selective prosecution," must fail because they represent an attempt to impose damages for acts encompassed in the initiation of a criminal prosecution.

As to Plaintiff's malicious prosecution claim, the Court concludes that it also fails to state a claim upon which relief can be granted. Even assuming that Plaintiff could allege an adequate constitutional foundation for his malicious prosecution claim under

section 1983, see Albright v. Oliver, 114 S.Ct. 807 (1994), Plaintiff cannot prove any set of facts in support of at least one of the essential elements of malicious prosecution. See Anthony v. Baker, 808 F. Supp. 1523, 1526 (D.Colo. 1992) (in order to establish malicious prosecution a plaintiff must allege and prove all the elements of malicious prosecution under state law); see also Torres v. Superintendent of Police, 893 F.2d 404, 409 (1st Cir. 1990). Under Oklahoma law, a plaintiff bears the burden of affirmatively showing the following elements to establish a claim of malicious prosecution: 1) initiation of a civil or criminal action against the plaintiff, 2) want of probable cause in procuring the action, 3) the successful termination of the action in favor of the plaintiff, 4) malice on the part of the defendants, and 5) damages as a result of the action. Meyers v. Ideal Basic Industries, Inc., 940 F.2d 1379, 1383 (10th Cir. 1991), cert. denied, 112 S.Ct. 935 (1992); Linsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1124 (10th Cir. 1979); Page v. Rose, 546 P.2d 617, 620 (Okla. 1975).

Because Plaintiff's conviction for assault with a dangerous weapon is presently on direct appeal, as alleged in the complaint, Plaintiff can prove no set of facts in support of his claim that the criminal proceedings were resolved in his favor. See also Heck v. Humphrey, 114 S.Ct. 2364 (1994) (money damages premised on an unlawful conviction cannot be recovered under section 1983 unless the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to

make such determination, or called into question by federal court's issuance of a writ of habeas corpus); Parris v. United States, \_\_\_ F.3d \_\_\_, 1995 WL 17554 (10th Cir. Jan. 17, 1995) (same). Accordingly, after liberally construing Plaintiff's pro se pleadings in accord with his pro se status, see Haines v. Kerner, 404 U.S. 519, 520 (1972), and construing all the allegations in the light most favorable to the Plaintiff, the Court concludes that Defendants's motion to dismiss for failure to state a claim should be granted and that Plaintiff's civil rights action should be dismissed with prejudice.

## **2. Plaintiff's Motion to Add Mr. Sweeden as a Defendant**

In support of his motion for leave to add Mr. Sweeden as a party defendant, Plaintiff alleges that state action is present because Mr. Sweeden, a private citizen, conducted a "citizen's arrest" under state law. The Court disagrees. Although Plaintiff correctly states that private individuals may be held liable under section 1983 in certain cases, the Plaintiff overlooks the fact that "to hold a private individual liable under § 1983, it must be shown that the private person was jointly engaged with state officials in the challenged action, or [that he] obtained significant aid from state officials, or that the private individual's conduct is in some other way chargeable to the State." Lee v. Town of Estes Park, Colorado, 820 F.2d 1112, 1114 (10th Cir. 1987).

Applying these standards to the instant case, the Court

determines that Mr. Sweeden's actions in firing shots at Plaintiff's car to prevent him from running over the victim were not as a private citizen jointly acting with state officials. The Court does not believe that Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982), supports Plaintiff's position in this case. Lugar concerned a prejudgment attachment obtained by a private party availing himself of state law and jointly acting with state officials. Here there is no allegation or suggestion that Mr. Sweeden had a prearrangement with state police officers or the Defendants in this case to arrest the Plaintiff. Nor do Plaintiff's allegations that Mr. Sweeden testified at his trial suffice to establish any such agreement.

Accordingly, even liberally construing Plaintiff's motion for leave to amend to add Mr. Sweeden as a defendant, the Court concludes that Plaintiff's amended complaint would not withstand a motion to dismiss or for summary judgment on state action grounds. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992) (futility of amendment is an adequate justification to refuse to grant leave to amend). Therefore, Plaintiff's motion to add Mr. Sweeden as a Defendant in this case must be denied. The Court also denies any attempt on the part of the Plaintiff (in conjunction with his motion to add Mr. Sweeden as a defendant) to amend the complaint to allege state law claims now that the Court has fully disposed of Plaintiff's federal claims. 28 U.S.C. § 1367(c)(3); see United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

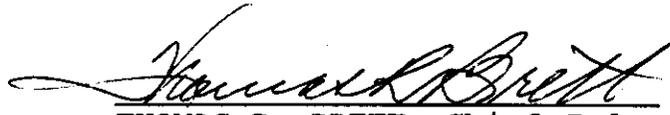
### III. CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Defendant's motion to dismiss for failure to state a claim should be granted and that Plaintiff's motion to add Mr. Sweeden as a Defendant should be denied.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Defendant's motion to dismiss for failure to state a claim (doc. #4) is **granted** and Defendants' motion for summary judgment (doc. #4) is **denied as moot**;
- (2) Plaintiff's civil rights action is **dismissed with prejudice**; and
- (3) Plaintiff's "motion to add party" (doc. #5) is **denied**.

SO ORDERED THIS 27 day of Feb., 1995.

  
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**

FEB 27 1995

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

LARRY R. GRAHAM, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONNA E. SHALALA, SECRETARY OF )  
 HEALTH AND HUMAN SERVICES, )  
 )  
 Defendant. )

Case No. 92-C-702-E ✓

ENTERED ON DOCKET

DATE FEB 27 1995

O R D E R

Now before the Court is the appeal of Plaintiff Larry Graham (Graham) of the Secretary's denial of his application for Social Security Disability and Supplemental Security Income benefits.

After a hearing, the Administrative Law Judge denied Graham's claim for Social Security disability benefits on August 26, 1991. The Appeals Council denied Graham's request to review the ALJ's decision on May 11, 1992. Graham submitted supplemental evidence of disability to the Appeals Council seven days after the filing of its decision denying review. The Appeals Council stated in a letter to Plaintiff that it did examine his supplemental evidence, but would not reverse its decision denying review.

Graham appealed to this Court, and the matter was heard before Magistrate Judge Jeffrey S. Wolfe. The magistrate filed a Report and Recommendation on June 7, 1994, which upheld the Secretary's denial of benefits. Graham filed an objection to the Report and Recommendation on June 21, 1994. A hearing was held before the

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Court on January 27, 1995.

### Legal Analysis

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 at 750 (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.

Plaintiff asserts that the magistrate erred in his finding that the evidence of Plaintiff's hospitalization in January and February of 1992 was not material. In his report, the magistrate stated that "[e]vidence is material if it relates to the time period for which benefits were denied." Report and Recommendation at 2, citing Haywood v. Sullivan, 888 F.2d. 1463, 1471 (5th Cir. 1989). The magistrate further stated that "[n]ewly submitted evidence is not material if it relates to a *later-acquired disability or subsequent deterioration of the previously non-disabling condition*." Report and Recommendation at 2, citing

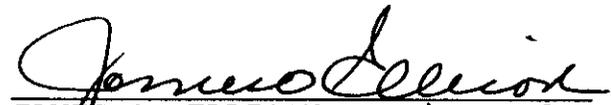
Haywood, 888 F.2d at 1463, and Hargis v. Sullivan, 945 F.2d 1482, 1493 (10th Cir. 1991)(emphasis in original).

The magistrate correctly noted that Plaintiff's evidence must relate to the time period of June 7, 1990 (his onset date) to August 26, 1991 (the date of the ALJ's decision). As described above, Plaintiff's proffered evidence related to his condition in 1992. Plaintiff's argument that the 1992 evidence related to a disabling condition before August 26, 1991, is not well taken. The ALJ found that Plaintiff did not suffer from a disability as of August 26, 1991; therefore, subsequent evidence relating to that non-disabling condition is not material.

The magistrate judge's suggestion in his Report and Recommendation -- that Plaintiff's appropriate remedy is to file a new disability application -- is also the suggestion of this Court. Therefore, the Magistrate's Report and Recommendation is adopted by the Court.

The decision of the Secretary to deny benefits is affirmed.

IT IS SO ORDERED this 27<sup>th</sup> day of February, 1995.

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

**FILED**

FEB 27 1995

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

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

GLENN E. MORRIS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LOUIS SULLIVAN, SECRETARY OF )  
 HEALTH AND HUMAN SERVICES, )  
 )  
 Defendant. )

Case No. 93-C-522-E ✓

ENTERED ON DOCKET  
FEB 27 1995  
DATE \_\_\_\_\_

O R D E R

Now before the Court is the appeal of Plaintiff Glenn Morris (Morris) of the Secretary's denial of his application for Social Security Disability and Supplemental Security Income benefits.

The Administrative Law Judge denied Morris's claim on September 25, 1990, and the Appeals Council remanded for a supplemental hearing. The second hearing addressed Plaintiff's updated medical records, the significance of a limited range of motion, a muscle spasm, a recurrent hernia, and mental impairment. After the hearing, the ALJ again denied Morris's claim, finding that Plaintiff did not have a mental impairment sufficient to render him disabled, and the Appeals Council affirmed on April 8, 1993. The ALJ found that Morris retained the residual functional capacity "for the full range of sedentary work" after February 12, 1992, and that prior to that date, "he could perform light work." Tr. at 20.

There are two issues presented on appeal: (1) if Plaintiff is

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found to be illiterate, is illiteracy grounds for a finding of disability; and (2) does Plaintiff's low I.Q. preclude reliance by the ALJ on the Medical-Vocational Guidelines, and thus mandate testimony from a vocational expert?

### Legal Analysis

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 at 750 (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.

The evidence in this case is that Morris is 47 years old and has a high school education. He has not worked since 1989, and has not worked regularly since 1984. Prior to 1989, he had been employed as a car detailer, custodian, security guard, store clerk, and lot boy at an automobile dealership.

**(1) Is illiteracy grounds for a finding of disability?**

Plaintiff asserts that he is illiterate, and should be found disabled under Rule 201.17, Table 1 of Appendix 2. Plaintiff's illiteracy impairment must be medically determinable. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). Literacy is present if a person can read and write simple messages such as instructions or inventory lists. 20 C.F.R. § 404.1564(b)(1). The burden of proof of Plaintiff's literacy is on the Secretary. Dixon v. Heckler, 811 F.2d 506, 511 (10th Cir. 1987).

In reviewing his finding that Plaintiff is literate, the ALJ had before him evidence that Plaintiff graduated from high school (not in special education classes)(Tr. at 77, 119, 164); that Plaintiff could understand and respond to oral questioning (at his administrative hearings)(Tr. at 76-97, 109-26) and written questioning (his I.Q. tests)(Tr. at 490, 519); that he could read a newspaper with reasonable comprehension (Tr. at 300); that he read books pertaining to hobbies (Tr. at 303); and that his past work required him to perform writing duties and complete reports. Tr. at 317-18, 326, 338, 341, 347.

Plaintiff rebuts this evidence by emphasizing his statement that he cannot read. Tr. at 333. Plaintiff's counsel states that "a cursory examination of the handwriting in the record reveals that most of the forms were obviously prepared by someone else and merely signed by Mr. Morris." Plaintiff's Opening Brief at 8, citing Tr. at 221, 237, 251, 261, 265, 278. "The few forms actually filled out by Mr. Morris himself contain egregious spelling and grammatical errors which in an (sic) of themselves

raise the question of whether Mr. Morris would have the ability to read and understand written instructions." *Id.*, citing Tr. at 271, 330-35.

The ALJ found that Plaintiff has the ability to communicate in the English language. Tr. at 13. Although Plaintiff is a poor speller (Tr. at 271, 330, 333, 335), the Record is without compelling evidence that Plaintiff is unable to communicate either orally or in writing. The Court finds that there is ample evidence in the record to support the ALJ's conclusion that Plaintiff is literate. Therefore, the Court need not address whether illiteracy constitutes grounds for a finding of disability.

**(2) Does Plaintiff's low I.Q. preclude reliance by the ALJ on the Medical-Vocational Guidelines, and thus mandate testimony from a vocational expert?**

Plaintiff's I.Q. has been twice tested; his Full Scale results were 76 and 77. Tr. at 490 and 519. The ALJ found that Plaintiff suffers from "borderline mental retardation." Tr. at 19-20. Plaintiff notes that this condition is a recognized nonexertional impairment. 20 C.F.R. § 404.1545(c). Plaintiff then states, "the grids 'cannot be used when a nonexertional impairment... limits a claimant's ability to perform the full range of work in a particular RFC.'" Plaintiff's Opening Brief at 5, citing Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987) (quoting Teter v. Heckler, 775 F.2d 1104, 1105 (10th Cir. 1985)). Plaintiff phrases the issue as "whether Mr. Morris' mental impairment by

itself is severe enough to limit the range of jobs available to him," Plaintiff's Opening Brief at 5.

Plaintiff submits that his I.Q. scores, in combination with his other impairments, result in his being "nearly disabled per se." Id. at 6. The Court must stress the obvious: "nearly disabled" is neither the literal nor functional equivalent of "disabled." The Secretary found that Plaintiff is capable of sedentary work:

[t]he Administration recognizes approximately 200 jobs at the sedentary exertional level, in eight broad categories, each of which represents numerous jobs at the unskilled entry level which can be performed after a short demonstration or within 30 days. Thus, the claimant's age and education would not preclude performance of such adjustment to other work.

Tr. at 19.

The ALJ applied the Medical-Vocational Guidelines, rule 201.24, upon finding that Plaintiff has the residual functional capacity for the full range of sedentary work. Tr. at 20. The ALJ based his finding upon his conclusion that "the claimant's borderline mental retardation does not impose significant limitations and would be considered non-severe within the meaning of the regulations." Tr. at 17. The ALJ reached this conclusion following his consideration of the evidence (but only that evidence found accurate by the ALJ) of Plaintiff's abilities and disabilities. In denying benefits, the Secretary made the required showing that all jobs within the grid level relied upon are available to Plaintiff. Plaintiff has not rebutted that showing in

a manner that surmounts the substantial evidence put forth by the Secretary. Instead, Plaintiff has only made a common-sense assertion that a person with borderline mental retardation cannot perform the full range of sedentary work. See Channel, 747 F.2d at 579.

The decision of the Secretary to deny benefits is affirmed.

IT IS SO ORDERED THIS 24<sup>th</sup> DAY OF FEBRUARY, 1995.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**FILED**

FEB 27 1995

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

MARCUS W. ENGLISH, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STANLEY GLANZ, et al., )  
 )  
Defendants. )

No. 93-C-1142-E ✓

ENTERED ON DOCKET

DATE FEB 27 1995

JUDGMENT

In accord with the Order granting Defendant's motion for summary judgment, the Court hereby **enters judgment** in favor of Defendant, Dr. Margaret Stripling and against the Plaintiff, Marcus W. English. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 24<sup>th</sup> day of February, 1995.

  
JAMES C. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

FEB 27 1995

*LC*

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

MARCUS W. ENGLISH, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STANLEY GLANZ, et al., )  
 )  
Defendants. )

No. 93-C-1142-E ✓

ENTERED ON DOCKET  
FEB 27 1995  
DATE \_\_\_\_\_

**ORDER**

In this prisoner's civil rights action filed on December 27, 1993, Plaintiff, pro se and in forma pauperis, sues Tulsa County Sheriff Stanley Glanz for permitting a violent atmosphere to exist and flourish at the Tulsa County Jail, for enabling various inmates to assault him on December 16, 1991, and for forcing Plaintiff to live in constant fear for his safety from January through December of 1992. Plaintiff also sues Doctor Margaret Stripling for the inadequate medical treatment he received following the December 16, 1991 assault and for authorizing his premature release from the medical ward. Both Defendants have moved to dismiss on statute of limitations grounds. Dr. Stripling has, in the alternative, moved for summary judgment in her favor. The Plaintiff has objected to both motions.

For the reasons stated below, the Court concludes (1) that Plaintiff's assault and denial of medical care claims are barred by the statute of limitations; (2) that Plaintiff's claims against Defendant Glanz for failure to protect and for fear for his safety from December 1991 through December 1992 survive the statute of limitations; and (3) that Dr. Stripling is entitled to summary judgment on the claim that

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Plaintiff was prematurely released from the medical ward.

## I. ANALYSIS

### A. Motion to Dismiss for Failure to State a Claim

#### 1. Standard

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to the plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

#### 2. Eighth Amendment Claims

Because Plaintiff was a pretrial detainee during the events at issue, he is not entitled to relief under the Eighth Amendment. The Fourteenth Amendment Due Process Clause, not the Eighth Amendment's protections against cruel and unusual punishment, protects a pretrial detainee such as the Plaintiff. See Bell v. Wolfish, 441 U.S. 520 (1979); Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977); see also

Berry v. City of Muskogee, 900 F.2d 1489, 1493-94 (10th Cir. 1990); Goka v. Bobbitt, 862 F.2d 646, 649-50 n.2 (7th Cir. 1988); Anderson v. Gutschenritter, 836 F.2d 346, 348-49 (7th Cir. 1988). Therefore, Plaintiff can show no set of facts entitling him to relief under the Eighth Amendment and that claim must accordingly be dismissed. The Court will, however, liberally consider Plaintiff's claims under the Fourteenth Amendment in accordance with his pro se status.

### 3. Statute of Limitations

Next the Court addresses whether Plaintiff's claims under the Fourteenth Amendment are barred by the statute of limitations. Because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988); Okla. Stat. tit. 12, § 95(3). In such cases the cause of action accrues at the time the injury occurred. Id. Thus, a plaintiff must bring an action within two years of the date of that occurrence. The statute of limitations may be excused or tolled where the complaining party was not aware that the facts could not have been discovered at an earlier date through the exercise of reasonable diligence. Id.

Defendants allege that Plaintiff's claims against Sheriff Glanz and Dr. Stripling for the events which occurred on December 16, 17, and 26, 1991, were brought

more than two years after the alleged actions, and therefore are barred by the statute of limitations. Plaintiff does not dispute that he was assaulted and injured on December 16, 1991. He acknowledges, however, that he does not remember when he was released from the medical ward and transferred to the City/County jail. With regard to the latter date, he directs the Court to disregard his allegations in the complaint and to rely instead on Defendants' records which reveal that he was released from the medical ward on January 8, 1992. (Doc. 18.) Plaintiff further argues that he should be entitled to some latitude in filing this action outside the statute of limitations because he is a pro se litigant and was not transferred to the Oklahoma Department of Corrections until February of 1993.

Plaintiff's inmate/pro se status is an insufficient justification for tolling the statute of limitations. Oklahoma has no tolling provision for civil lawsuits filed by prisoners. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989). Accordingly, the Court must conclude that Plaintiff's claims for the initial placement in cell D-3 on December 14 or 15, 1991, the assault on December 16, 1991, and the alleged denial of medical care following the assault, are barred by the two-year statute of limitations. The allegations in the complaint establish that the two-year statute of limitations has clearly expired as to these claims and that Plaintiff knew or could have discovered the facts upon which his current claims are based within the limitations period. See Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (where a complaint shows on its face that the applicable statute of limitations has expired, a motion to dismiss for failure to state a claim is appropriate). Therefore,

Defendants Glanz's and Stripling's motions to dismiss should be granted as to Plaintiff's claims for the assault, failure to protect, and the alleged denial of medical care on December 16 and 17, 1991.

**B. Dr. Stripling's Motion for Summary Judgment**

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be

admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

## 2. Premature Release from the Medical Ward

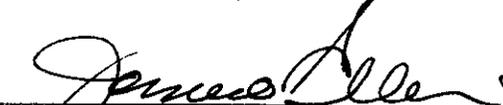
Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test set out in Estelle v. Gamble, 429 U.S. 97 (1976). See Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

After reviewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Plaintiff has failed to make any showing that Dr. Stripling possessed the requisite culpable state of mind in releasing him from the medical ward. At most Plaintiff differs with the medical judgment of Dr. Stripling that he was capable of returning to the general population. It is well established, however, that a difference of opinion between the prison's medical staff and the inmate does not

**granted;**

- (3) Defendant Glanz shall **file a dispositive motion**, on or before forty (40) days from the date of filing of this order, addressing Plaintiff's failure to protect claims from January through December of 1992.

SO ORDERED THIS 27<sup>th</sup> day of February, 1995.

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

support a claim of cruel and unusual punishment. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); McCraken v. Jones, 562 F.2d 22 (10th Cir. 1977), cert denied, 435 U.S. 917 (1978); Smart v. Villar, 547 F.2d 112 (10th Cir. 1976). Nor do Plaintiff's allegations that Dr. Stripling was negligent in recommending that he could be released from the medical ward amount to a constitutional violation. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle, 429 U.S. at 104-05; Ramos, 639 F.2d at 575. Thus, Dr. Stripling is entitled to judgment as a matter of law on this claim.

### III. CONCLUSION

After liberally construing Plaintiff's complaint, the Court determines (1) that Plaintiff's assault and denial of medical care claims are barred by the statute of limitations; (2) that Plaintiff's claims against Defendant Glanz for failure to protect from January through December of 1992, survive the statute of limitations; and (3) that Dr. Stripling is entitled to summary judgment on Plaintiff's claim that he was prematurely released from the medical ward.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Defendants Glanz's and Stripling's motions to dismiss on statute of limitations grounds (docs. #14-1 and #16) are **granted in part**;
- (2) Defendant Stripling's motion for summary judgment (doc. #14-2) is

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

SHARON WILSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UTICA PARK CLINIC, INC., )  
 )  
 Defendant. )

No. 94-C-147-B ✓

**FILED**

FEB 24 1995

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

J U D G M E N T

In keeping with the order sustaining Defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56, Judgment is hereby entered in favor of the Defendant, Utica Park Clinic, Inc., and against the Plaintiff, Sharon Wilson; and Plaintiff's action is hereby dismissed. If timely applied for pursuant to Local Rule 54.1, costs are taxed against the Plaintiff and the parties are to pay their own respective attorneys fees.

DATED this 24<sup>th</sup> day of February, 1995.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE FEB 27 1995

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

**FILED**

FEB 24 1995  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

SHARON WILSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UTICA PARK CLINIC, INC., )  
 )  
 Defendant. )

No. 94-C-147-B

ORDER

The Court has for decision the motion for summary judgment of the Defendant, Utica Park Clinic, Inc. ("Utica Park") (Docket No. 26), in the claim of Plaintiff, Sharon Wilson ("Wilson"), for alleged violation of 42 U.S.C. § 1981 for racial discrimination in her employment and termination thereof.

After considering the issue presented by the pleadings, the record, the arguments of counsel and the applicable legal authority, the Court concludes no material issue of fact remains because of a lack of evidence that Utica Park's legitimate non-discriminatory business reasons (excessive tardiness and absences) for Plaintiff's employment termination was pretextual. The basis for such a conclusion stems from the following uncontroverted facts and legal analysis:

UNCONTROVERTED FACTS

1. Utica Park Clinic is an Oklahoma corporation in Tulsa, Oklahoma, which provides various medical and health-related services in the Northern District of Oklahoma. (Defendant's Ex. A, Affidavit of Helen Stopp).

2. Plaintiff is an African-American and is a member of a

protected class for purposes of filing suit under 42 U.S.C. § 1981. (Defendant's Exhibit B, Plaintiff's Complaint and Demand for Jury Trial, filed 2-17-94).

3. On or about March 26, 1990, Plaintiff was hired as a radiography technician by Jamie Price, Director of the Radiology Department of Utica Park Clinic. (Defendant's Ex. C, Plaintiff's Responses to Defendant's First Set of Interrogatories, Answer to Interrogatory No. 7, p. 9, and Personnel Action Form dated March 19, 1990, attached as Ex. No. 4 to Affidavit of Helen Stopp). Although individual department supervisors had the authority to fill an open position in their departments with the approval of Helen Stopp, department directors did not have the authority to terminate individual employees. Termination decisions are made by Helen Stopp or the Executive Director of Utica Park Clinic, Scott Abbott. (Defendant's Ex. A, Affidavit of Helen Stopp).

4. Helen Stopp, Associate Director/Operations of Utica Park Clinic, was the person who decided Plaintiff should be discharged because of her poor attendance record. (Defendant's Ex. A, Affidavit of Helen Stopp). On or about February 17, 1992, after receiving both verbal and written counselings, Plaintiff was discharged from her employment and was advised that she was being discharged because of her excessive tardiness and absenteeism. The Plaintiff had been tardy to work which commenced at 8 A.M. more than 200 times, of which 88 were in excess of 15 minutes, and had a total of 11 occurrences of absence. (Defendant's Ex. C, Plaintiff's Responses to Defendant's First Request for Admissions

and Second Set of Interrogatories, Request for Admission No. 7; Personnel Action Form dated 2-17-92, Attached as Ex. No. 13 to Affidavit of Helen Stopp; Defendant's Ex. D, Plaintiff's Responses to Defendant's First Request for Admissions and Second Set of Interrogatories, Response to Request for Admission No. 7, p. 4; Written Counseling Report dated 2-17-92 attached as Ex. 12 to Affidavit of H. Stopp; and Summary of Plaintiff's Tardies and Absences attached as Ex. 5, supported by Ex. 6, to Affidavit of Helen Stopp).

5. The written policies of Utica Park Clinic provide that an employee who takes an unauthorized absence or who is unavailable for work on any occasion is deemed to be absent. (Attendance Policy, Section III, p. 1, attached as Defendant's Ex. No. 1 to Affidavit of Helen Stopp; and Defendant's Ex. "A", Affidavit of Helen Stopp, ¶¶ 9-10). A holiday, military leave, maternity leave, approved leave of absence (whether for a short term or long disability, or for medical reasons requiring the employee to be gone in excess of two (2) weeks), jury duty, and vacations are not considered unauthorized absences. However, sick time, even though paid and/or supported by a doctor's statement, does constitute an unauthorized absence for purposes of discipline. In the case of an employee requiring a medical absence in excess of two weeks pursuant to the recommendation of their physician, such employee could obtain a medical leave without being subject to discipline. An "occurrence" of absence begins the moment that the employee fails to appear for work at the time he or she is scheduled to

appear, and continues until the employee returns to work. Thus, a given "occurrence" of absence could mean that an employee failed to come to work for any portion of one day or for two or more consecutive days.

6. The Attendance Policy provides that an employee having five "occurrences" or more of absence during any one year period is subject to disciplinary action, up to and including termination, for excessive absenteeism. (Attendance Policy, Sections III(C) and V(D), attached as Defendant's Ex. No. 1 to Affidavit of Helen Stopp, and Ex. A, Affidavit of Helen Stopp, ¶11).

7. The Attendance Policy provides that two (2) tardies are equal to one occurrence of absence for disciplinary purposes. (Attendance Policy, Section V(B), p. 3, attached as Defendant's Ex. 1 to Affidavit of Helen Stopp; and Ex. "A", Affidavit of Helen Stopp, ¶12). "Tardiness" is defined in the Attendance Policy as being late beyond five minutes. (Attendance Policy, Section III(D), p. 2, attached as Defendant's Ex. No. 1 to Affidavit of Helen Stopp, and Ex. "A", Affidavit of Helen Stopp, ¶12).

8. The written policies of Utica Park Clinic provide the following recommended guideline for progressively disciplining an employee who is repeatedly absent from work: (1) issue a verbal counseling for the initial two occurrence of absence within a given six-month period, (2) issue a first written counseling report on the third occurrence of absence if it happens within six months from the initial occurrence, (3) issue a second written counseling report on the fourth occurrence of absence if it happens within one

year from the initial occurrence, and (4) issue a third written counseling report on the fifth occurrence of absence if it happens within one year from the initial occurrence, and take further disciplinary action, up to and including termination. (Attendance Policy, Section V(D), p. 4, attached as Defendant's Ex. No. 1 to Affidavit of H. Stopp; and Exhibit "A", Affidavit of Helen Stopp, ¶3). Thus, five (5) or more occurrences of absence are deemed excessive and result in a major violation of the Attendance Policy warranting disciplinary action up to and including termination.

9. According to the Sick Leave Policy in effect at the time of Plaintiff's termination, an employee will be paid for up to six (6) sick days per year. (Sick Leave Policy, Section V(B), p. 4, attached as Defendant's Ex. No. 2 to Affidavit of Helen Stopp, and Ex. "A", Affidavit of Helen Stopp, ¶ 14). The same policy makes it clear that even though a given sick day is paid, the sick day will be counted as an absence for purposes of discipline. Thus, unless an employee has applied for and been granted an unpaid leave of absence, all nonconsecutive sick days count as an occurrence of absence. In the event an employee has a disability covered by the Americans with Disabilities Act, then the employee is obligated to notify the employer of the disability and to request an accommodation accordingly. In this case, Plaintiff never sought a medical leave of absence nor requested an accommodation. (Defendant's Ex. "A", Affidavit of Helen Stopp, ¶15.).

10. On or about July 3, 1991, Plaintiff received her first verbal warning about her repeated and continued absence from work.

(Counseling Report dated July 3, 1991, attached as Defendant's Ex. No. 8 to Affidavit of Helen Stopp; and Exhibit "A", Affidavit of Helen Stopp, ¶16).

11. Less than one month later, on or about July 30, 1991, Plaintiff received her first written counseling report at which time she was informed that further occurrences of absence would result in progressive disciplinary action. (Counseling Report dated 7-30-91, attached as Defendant's Ex. 9 to Affidavit of Helen Stopp, and Exhibit "A", Affidavit of Helen Stopp, ¶17).

12. On or about October 23, 1991, Plaintiff received another verbal warning regarding her continued tardiness and practice of conducting personal business during work hours. (Counseling Report dated 10-23-91, attached as Exhibit No. 10 to Affidavit of Helen Stopp, and Exhibit "A", Affidavit of Helen Stopp. ¶18).

13. On January 23, 1992, Plaintiff received a second written counseling report about her excessive absenteeism and repeated tardiness. (Counseling Report dated January 23, 1992, attached as Defendant's Exhibit No. 11 to Affidavit of Helen Stopp, and Exhibit "A", Affidavit of Helen Stopp, ¶19).

14. On the 17th day of February, 1992, after two hundred eighty-eight (288) tardies (45 of which were in excess of one hour) and eleven (11) occurrences of absence within a period of twenty-three (23) months, Plaintiff received her third and final written counseling report which resulted in her termination by Helen Stopp. (Counseling Report dated 2-17-1992, attached as Defendant's Exhibit No. 12 to Affidavit of Helen Stopp; Personnel Action Form dated

February 17, 1992, attached as Exhibit No. 13 to Affidavit of Helen Stopp; and Exhibit A, Affidavit of Helen Stopp, ¶20).

15. Throughout the period of Plaintiff's employment, no other white or nonwhite employee working in the Radiology Department incurred as many tardies or absences as Plaintiff. (Chart of Radiology Department Employees, attached as Defendant's Exhibit No. 14 to Affidavit of Helen Stopp; and Exhibit "A", Affidavit of Helen Stopp, ¶21). In order to obtain a raise for Ms. Wilson, her supervisor disregarded her excessive tardiness on an occasion. (Plaintiff's Exhibit 7, Depo. of Jamie J. Rumfield, pp. 23-25).

16. Two Caucasian employees, Julie Bennett and Amy Foster, both of whom had fewer tardies and absences than Plaintiff, were also disciplined for their poor attendance. (Chart of Radiology Department Employees, attached as Defendant's Exhibit No. 14 to Affidavit of Helen Stopp). Gus Estrada, a Hispanic employee, was the only other nonwhite employee who was disciplined for repeated absences and tardiness. Based on the times recorded on the employee time clock cards, the remaining seven (7) employees in the Radiology Department had zero (0) tardies, and zero(0) occurrences of absence. In sum, two white employees (Julie Bennett and Amy Foster), one Hispanic (Gus Estrada), and one black employee (Sharon Wilson) were disciplined for their poor attendance.

17. Over a two-month period from September through November of 1990, Julie Bennett, a Caucasian employee, was tardy on fifteen (15) occasions (equal to 7.5 absences for discipline purposes), had three (3) occurrences of absence, and received one (1) verbal

counseling regarding her attendance. (Chart of Radiology Department Employees, attached as Defendant's Exhibit No. 14 to Affidavit of Helen Stopp). On the next occurrence of absence, Ms. Bennett was terminated for job abandonment.

18. Amy Foster, a white Caucasian employed from the time period of March, 1991, through March, 1992, was tardy on six (6) occasions, had a total of five (5) occurrences of absence, and received a verbal counseling and two written counselings regarding her attendance. (Chart of Radiology Department Employees, attached as Defendant's Exhibit 14 to Affidavit of Helen Stopp). Before further disciplinary action could be taken, Amy resigned.

19. From December, 1990, to January, 1992, Gus Estrada, a male Hispanic, was tardy on eighteen (18) occasions, and had a total of eight (8) occurrences of absence. (Chart of Radiology Department Employees, attached as Defendant's Exhibit No. 14 to Affidavit of Helen Stopp). He received two verbal counselings regarding his attendance, and was subsequently terminated for falsifying his time cards.

20. During Plaintiff's employment, seven (7) white employees were terminated for violation of various policies and rules of the Utica Park Clinic. (List of Utica Park Clinic Employees, attached as Defendant's Exhibit No. 15 to Affidavit of Helen Stopp; and Exhibit "A", Affidavit of Helen Stopp, ¶22). Only one nonwhite employee, in addition to Plaintiff was terminated by the Utica Park Clinic during the period of Plaintiff's employment.

21. On Thursday and Friday, February 13 and 14, 1992,

Plaintiff was absent from work upon recommendation of her physician due to illness during her pregnancy. This was her eleventh occurrence of absence since her employment. (Summary of Plaintiff's Tardies and Absences, attached as Defendant's Exhibit No. 5 to Affidavit of Helen Stopp; and Exhibit "A", Affidavit of Helen Stopp, ¶23). On Plaintiff's first day back to work, Monday, February 17, 1992, Plaintiff was tardy to work.

22. After an independent review of Plaintiff's overall attendance record, as of February 17, 1992, and as reflected above, Helen Stopp determined that Plaintiff should be and was terminated. (Defendant's Exhibit "A", Affidavit of Helen Stopp, ¶¶ 24 and 26).

23. The record reveals no evidence of racially oriented slurs or conduct that would support a contention of a racially harassing environment or that was related to Plaintiff's termination.

24. The evidence reveals that when Plaintiff, Wilson, was present and on the job she was a capable radiography technician.

**The Standard of Fed.R.Civ.P. 56**  
**Motion for Summary Judgment**

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

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

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

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

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

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

movant. (citations omitted). *Id.* at 1521."

Summary judgment is appropriate where, as here, at the close of discovery, the claimant has presented no evidence to create a factual issue for the trier of fact concerning an essential element of her claim. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 796 (10th Cir. 1993), *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Herein, Plaintiff has presented no evidence, other than her conclusory allegations, establishing that she was treated different than the other white employees when she was discharged for excessive tardiness and absenteeism.

#### LEGAL ANALYSIS AND CONCLUSION

In Plaintiff's statement of disputed material facts, she raises an issue of entitlement to sick pay. The gravamen of the termination herein, which is uncontroverted, is excessive tardiness and absences. The accrual of sick pay is a separate unrelated issue. Sick pay allows an employee to be paid for accrued days of sick leave when absent due to illness, but does not permit an employee excessive tardiness or absences under Utica Park's attendance policy.

With the exception of February 13 and 14, 1992, Plaintiff's physician, Dr. Martha Dannenbaum, testified that none of Plaintiff's excessive tardiness or absences was related to Plaintiff's pregnancy. (Defendant's Exhibit 1 to Defendant's Reply filed 2-1-95). Plaintiff had no disability during her pregnancy that required accommodation. (Defendant's Exhibit 1 to Defendant's

Reply filed 2-1-95). The evidence revealed that Plaintiff would have received the same leave benefits as other pregnant employees had she remained in Utica Park's employment. Plaintiff does not contend, nor does the record reveal, that she requested sick pay or vacation pay for the numerous occurrences of tardiness or absence. Had she done so, to the extent accrued, it would have been granted. (Helen Stopp Deposition, lines 7-24, p. 32).

The record does not reveal that Plaintiff was permitted to clock in late to balance with overtime as she was paid for any overtime. (Defendant's Exhibit 2 to Defendant's Reply filed 2-1-95, p. 7, line 17 through p. 12, line 24; p. 44, lines 11-23, Vol. II, Deposition of S. Wilson attached as Exhibit 12 to Plaintiff's Response Brief; and p. 48, lines 12-17, Vol. II, Plaintiff's Deposition attached as Exhibit 12 of Plaintiff's Response Brief). The record does not reveal that Plaintiff was treated disparately concerning her excessive tardinesses and absences.

In a case similar to the instant matter, Thompson v. Rockwell Int'l Corp., 811 F.2d 1345 (10th Cir. 1987), the court upheld a finding by the trial court that excessive unapproved absences from work constitute a legitimate nondiscriminatory business reason for employment termination.

Conclusory allegations of general racial bias do not establish discriminatory intent. Clark v. Atchison, Topeka & Santa Fe Ry. Co., 731 F.2d 698, 702 (10th Cir. 1984); Jafee v. Barber, 689 F.2d 640, 643 (7th Cir. 1982); Flagg v. Control Data, 806 F.Supp. 1218, 1223 (E.D.Pa. 1992); Davis v. Frapolly, 717 F.Supp. 614, 616 (N.D.

Ill. 1989). To establish a case of discriminatory intent under 42 U.S.C. § 1981, the Plaintiff's evidence must demonstrate disparate treatment, departures from procedural norms, a history of discriminatory actions, and such relevant facts. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68, 97 S.Ct. 555, 562-65, 50 L.Ed.2d 450 (1977).

For the reasons stated herein, the Defendant, Utica Park Clinic, is entitled to summary judgment pursuant to Fed.R.Civ.P. 56 and a separate Judgment evidencing same is filed contemporaneous herewith.

IT IS SO ORDERED this 24<sup>th</sup> day of February, 1995.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

FEB 23 1995 *RL*

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

RUSSELL McINTOSH,  
Plaintiff,  
vs.  
BANCOKLAHOMA MORTGAGE CO.,  
et al.,  
Defendants.

No. 94-C-929-B ✓

**STIPULATION OF DISMISSAL WITH PREJUDICE  
AS TO HARRY MORTGAGE**

Comes now the Plaintiff, Russell McIntosh, by and through his attorney's, Braswell & Associates, Inc., and the Defendant, Harry Mortgage, and files a stipulation of dismissal with prejudice, pursuant to Rule 41 (a)(1), Federal Rules of Civil Procedure.

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For the Firm

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Oklahoma City, OK 73112  
Attorney for Harry Mortgage

ENTERED ON DOCKET  
DATE FEB 24 1995

ENTERED ON DOCKET  
FEB 24 1995  
DATE \_\_\_\_\_

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

**FILED**

FEB 24 1995

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

GEOGAS, INC., )  
)  
)  
Plaintiff, )  
)  
vs. )  
)  
PETRO GAS TRADING, S.A., )  
WESTERN ENERGY TRANSPORT, )  
S.A., TRANSWORLD GAS & OIL, )  
LTD., and EDUARDO ZARAGOZA, )  
)  
Defendants. )

Case No. 95-C-0025-K

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff Geogas, Inc., by and through its attorney of record, Randolph L. Jones, Jr., and Defendants Petro Gas Trading, S.A., Western Energy Transport, S.A., Transworld Gas & Oil, Ltd., and Eduardo Zaragoza, by and through their attorney of record, Victor M. Firth, hereby stipulate to the dismissal without prejudice of the above styled cause pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

Respectfully submitted,

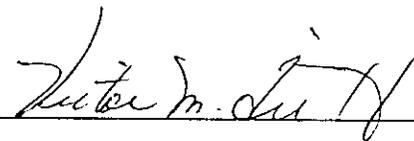
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LTD., and EDUARDO ZARAGOZA



controlling issue of law over which there is a substantial basis for disagreement and for which immediate appeal will advance the ultimate termination of the litigation. In re Blinder, 135 B.R. 899, 900-901 (D. Colo. 1992).

The remedy of mandamus is drastic and should be invoked only in extraordinary circumstances. In re Weston, 18 F.3d 860, 864 (10th Cir. 1994). A party seeking such a writ must show a clear and undisputable right to its issuance, by demonstrating a "clear abuse of discretion." Id. The Tenth Circuit has stated that the writ should be available only where the party seeking it "has no other adequate means to attain the relief he desires." In re Kaiser Steel, 911 F.2d 380, 386 (10th Cir. 1990).

This case does not present a situation meriting such emergency relief. No abuse of discretion has been demonstrated. In addition, this appeal will not advance the ultimate termination of the litigation. The Bankruptcy Court has set a hearing on the Debtor/Appellant's Motion/Notice to Convert to Chapter 12, and on other issues, for February 28, 1995 at 9:30 A.M. At this hearing the Bankruptcy Court can evaluate the merits of the Debtor/Appellant's arguments, including his argument that In re Calder, 973 F.2d 862 (10th Cir. 1992), provides the debtor with an "unqualified right" to convert from a chapter 7 to a chapter 12 case.

In anticipation of the hearing before the Bankruptcy Court, the Debtor seeks a stay to prevent the Trustee from liquidating certain assets and rejecting certain contracts. The Bankruptcy

Court had previously granted such a stay but lifted it on February 16, 1995. Again, there has been no showing of an abuse of discretion, and the Bankruptcy Court may address this issue again on February 28, 1995.

The Debtor has failed to provide any persuasive reasons why this Court should interfere with the rulings of the Bankruptcy Court. At the hearing on February 28, 1995, the Bankruptcy Court may take whatever actions it deems appropriate with regard to additional stays, if justified, as well as the issue of conversion from chapter 7 to chapter 12.

For the reasons discussed above, the Application is denied.

ORDERED this 22 day of February, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**FILED**

FEB 23 1995

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

HELEN GREY TRIPPET, )  
 )  
 Plaintiff(s), )  
 )  
 v. )  
 )  
 CAMERON DEE SEWELL, )  
 )  
 Defendant(s). )

93-C-1144-BU ✓

ENTERED ON DOCKET  
DATE FEB 23 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

At issue is Defendant's Motion For Summary Judgment (docket #27). The Motion comes in the wake of a legal action following a failed take-over attempt of two "Home-Stake" companies. The failure prompted the Plaintiff, Helen Gray Trippet, to file this lawsuit against Mr. Sewell, her attorney and purported business partner, alleging fraud, breach of fiduciary duty, breach of contract, rescission and negligence

Defendant's Motion raises two issues. Defendant first contends that the fraud, breach of fiduciary duty, breach of contract and negligence claims are time-barred under Oklahoma's two-year statute of limitations. Defendant also argues that Plaintiff is not the "real party in interest" and does not have standing on the breach of contract claims. After examining the record, however, the United States Magistrate Judge recommends the motion be granted in part and denied in part.

I. Summary of Facts

This chapter of the Home-Stake litigation begins in the mid-1980s. Ms. Trippet and her family owned substantial stock in Home-Stake Oil & Gas Co. and Home-Stake Royalty

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Corporations ("Home-Stake"). During the late 1970s and in the early 1980s, escalating oil prices boosted the companies' profits and the Home-Stake stockholders, including Ms. Trippet, were satisfied with their investments.

Once oil prices plummeted, Home-Stake stock declined. In 1986, Robert Trippet ("Mr. Trippet"), the husband, agent and financial advisor for Ms. Trippet, began to look for ways to get his wife out of what he described as the "Home-Stake disaster". Of particular concern to Mr. Trippet was what he perceived as serious problems in management of the company. At that time, 77-year-old Strother Simpson, Ms. Trippet's brother, was the chief executive officer.

After some three years of attempting to gain control of Home-Stake, Mr. Trippet contacted Defendant Cameron Sewell ("Mr. Sewell"), a Texas attorney who had handled tax work for the Trippets in the past. Discussions eventually led to the formation of a takeover plan ("Plan"). The Plan's purpose was to acquire by proxy, option, or actual purchase, sufficient shares to gain control of the Home-Stake companies. Neither party takes credit for developing the Plan. The facts show that Mr. Sewell and Mr. Trippet both played major roles in the takeover attempt.

The terms of the Plan are disputed. Ms. Trippet provided Sewell a written option agreement that both gave the AG companies an option to buy all the Trippets' stock and a proxy to vote the Trippet stock until December 1991. The balance of the agreement, however, was oral. Ms. Trippet asserts that Mr. Sewell promised her a 40.48 percent partnership interest in AG and LP. Sewell's recollection, however, is that Ms. Trippet was to receive 40.48 percent of anything realized from the Plan and that she was required to

pay 40.48 percent of the Plan expenses. In addition, Mr. Trippet paid \$40,500 for proxy expenses from his checking account. He made no notations on the checks, but says the money came from Ms. Trippet's accounts. Ms. Trippet claims the money was a "loan" from her to Sewell, which he never paid back. Sewell, however, claims the money was to be "repaid" from any profits of the takeover attempt.

The Plan began in 1989 when Sewell formed two Texas corporations named AGR Corporation and AGO Company ("AGO/AGR") in 1989. That same year he formed the AGO/AGR Limited Partnership ("Limited"). The stockholders of each company were primarily Sewell's law partners. Sewell and his group (the AG Companies and LP) agreed to exercise best efforts to gain control of the Home-Stake companies. According to a memorandum circulated by Mr. Sewell to his law partners, the takeover, if successful, could net an \$11 million profit.

During the takeover attempt, Sewell spent some \$660,000. Of that money, Ms. Trippet contributed \$252,672 and 10 shares of each Home-Stake company. As discussed above, Ms. Trippet says the money was for the purchase of partnership units. Mr. Sewell contends the money was a "nonrecourse loan." Notwithstanding her claims, a paper trail shows how the \$252,672 was paid to Mr. Sewell.<sup>1</sup> In 1989, Ms. Trippet sent Mr. Sewell several checks totaling \$50,000. Sewell then received \$58,672 on January 3, 1990. Two \$80,000 payments were made to Mr. Sewell on February 28, 1990 and on April 10, 1990 respectively. Sewell then refunded the last \$80,000 payment. In exchange, Prime Factors Corporation paid Mr. Sewell \$64,000 in return for 150,656 shares of unregistered Tri-

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<sup>1</sup> In addition, Ms. Trippet paid some to Sewell for the legal services he performed for her on estate planning, trust and tax matters.

Texas stock. Prime Factors Corporation was owned by Mr. Trippet. Reply, Exhibit A (docket #44) Ms. Trippet says she paid Prime Factors \$64,000 and that the company merely acted as an intermediary in the transaction. Appendix, Exhibit 20 (docket #41).

At some point, both Mr. Trippet and Mr. Sewell realized the takeover attempt would fail. Illustrative of this was a March 2, 1991 letter written by Mr. Trippet to a Mr. Wiener. In the letter, discussed further below, Mr. Trippet accused Mr. Sewell of double-crossing, betraying and lying to him concerning the takeover attempt. Once Mr. Trippet realized that Mr. Sewell would be unable to "pull off" the takeover, he later turned to Charles Christopher of Tri-Texas, Inc. Exactly how Christopher came to be a player in the takeover attempt is disputed by the parties, but Christopher, in effect, stepped into Sewell's shoes. Christopher, however, could not turn the tide and the takeover attempt eventually failed. Ms. Trippet later sued Christopher in this Court on March 4, 1992 and was awarded full rescission for breach of obligation.

It appears that Ms. Trippet had not intended to sue Mr. Sewell initially, but she claims additional information discovered in the Christopher suit alerted her to Mr. Sewell's improprieties. Ms. Trippet says that she first learned during the Christopher suit that Mr. Sewell had treated her \$252,672 investment as a "non-recourse loan." She also says she first learned about what she describes as Mr. Sewell's "theft of tax deduction". Mr. Sewell took nearly \$200,000 in tax deductions from the failed venture, \$133,000 of which were the property of Ms. Trippet. She also said she learned that Mr. Sewell failed to disclose information about Christopher prior to her agreement with Tri-Texas -- a venture in which

she says she lost some \$700,000. On December 27, 1993 Ms. Trippet filed the instant suit.<sup>2</sup>

## II. Legal Analysis

The genesis of Mr. Sewell's Motion For Summary Judgment is whether Ms. Trippet is time-barred from filing her claims for fraud, breach of fiduciary duty, breach of contract and negligence. Mr. Sewell also contends that, in regard to the \$64,000 and \$40,500 claims, that Ms. Trippet is not the real party in interest and does not have standing.

Summary judgment may be granted if the party seeking summary judgment demonstrates that no genuine issue of material fact exists for trial and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(e). The evidence is examined in a light most favorable to the non-moving party and all reasonable inferences are drawn in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

If the parties dispute the facts, as is the case here, they must produce proper documentary evidence to support their contentions. The parties cannot rest on mere allegations in the pleadings, *Boruski v. United States*, 803 F.2d 1421, 1428 (7th Cir. 1986),

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<sup>2</sup> The anatomy of the case resembles a hotly contested ping-pong match where both participants refuse to let the other have the final shot. Unfortunately, the plethora of paperwork has needlessly complicated the task of reviewing the summary judgment motion. Ms. Trippet asserts six claims against Mr. Sewell: (1) Breach of Fiduciary Duty, (2) Deception and Fraud, (3,4) Breach of contract, (5) Rescission and (6) Negligence. On April 4, 1993, after Sewell filed his Answer, Trippet filed a Motion For Partial Summary Judgment (docket #7). In the motion, Trippet asserted that her agreements with Sewell should be rescinded (claim #5). Mr. Sewell responded on May 4, 1994 (docket #21). On May 23, 1994, Trippet filed a Reply (docket #25). The undersigned recommended this motion be denied. See February 8, 1995 Report and Recommendation concerning this motion on February 8, 1995. Four days later, on May 27, 1994, Sewell filed his own Motion For Partial Summary Judgment (docket #27). In the motion, Sewell argues that claims 1,2 and 6 are time-barred. He contends claim 4 is barred by the statute of limitations and that the other claims are not brought by the real party in interest. On July 12, 1994, Trippet filed a Response (docket #40). On July 21, 1994, Sewell filed a Reply (docket #44). Sewell's Reply likely should have been the last volley fired, but the parties continued to inundate the Court with paperwork. On August 19, 1994, Trippet filed a Trippet's Surreply To Sewell's Reply (docket #51). Five days later, Sewell countered by filing a Response To Trippet's Surreply In Support of Sewell's Motion For Partial Summary Judgment (docket #52). On November 30, 1994, Trippet then filed a Supplemental Objection and Response To Sewell's Motion For Summary Judgment (docket #56). Sewell filed a Response To Trippet's Supplemental Objection And Response to Sewell's Motion For Summary Judgment (docket #59). Five days later, Trippet filed a Reply To Sewell's Response to Trippet's Supplemental Objection (docket #62). Sewell then filed an Objection To Trippet's Application to File Fourth Reply Brief (docket #63).

or upon conclusory allegations in affidavits. *First Commodity Traders, Inc. v. Heinold Commodities*, 766 F.2d 1007, 1011 (7th Cir. 1985). It also should be noted that, even if the parties do not dispute basic facts, summary judgment may still be inappropriate if the parties disagree about the inferences to be drawn from those undisputed facts.

Before discussing the specific issues raised by Mr. Sewell, a brief discussion of the circumstances surrounding this case illustrates why summary judgment should not be granted. First, the parties vehemently dispute many of the facts and, in effect, blame one another for the Plan's failure. They disagree as to who masterminded the Plan, the roles each party played in the Plan, the terms they "agreed upon" and why the Plan failed.<sup>3</sup> Each party points to evidence supportive of their version of what happened. These disputes are genuine and concern material questions of fact.

The second circumstance hampering the grant of summary judgment is the relationship between Ms. Trippet, Mr. Trippet and Mr. Sewell. For example, the parties agree that, during the same time as the takeover, Ms. Trippet and Mr. Sewell had an attorney-client relationship. Ms. Trippet says that Mr. Sewell acted as her attorney/advisor from "time to time" in 1989 and thereafter for legal services such as tax issues, estate planning and trust matters. Trippet also states that Mr. Sewell consulted with her on "legal matters associated with...the AGO/AGR Limited Partnership in their attempt to obtain voting control of Home-Stake." Ms. Trippet also describes Mr. Sewell as a "purported business partner" and "fiduciary." See, First Amended Complaint. While no question exists

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<sup>3</sup> This is illustrated by simply perusing the briefs. Defendant lists 25 "undisputed" facts in his Brief In Support of Summary Judgment (docket #27). Ms. Trippet admits or otherwise agrees with 12 of them, but disputes the remaining 13. In an earlier summary judgment motion, the same scenario took place.

that Mr. Sewell and Ms. Trippet had an attorney-client relationship, details of that relationship are blurred at best. When does one become a "business partner", leaving behind the role of counselor at law? The Code of Professional Responsibility clearly places that burden on counsel. As discussed *infra*, this complicates the statute of limitations analysis on summary judgment.<sup>4</sup>

*A. Claims 1 and 2: Are They Time-Barred?*

In her Complaint<sup>5</sup>, Ms. Trippet alleges that Mr. Sewell breached his fiduciary duty by "repudiating" her interest in the partnership and by "theft of tax deduction." Trippet contends that Sewell's actions were contrary to her best interests and, as a result, constitute a breach of fiduciary duty. The fraud claim asserts basically the same allegations.

The issue raised by Mr. Sewell is whether the two claims should be dismissed under 12 O.S. §95(3), which provides that a cause of action for fraud and/or breach of fiduciary duty must be filed within two years after it is discovered. Fraud is deemed to be discovered when, by the exercise of reasonable diligence, it could have been discovered. *Walker v. Walker*, 310 P.2d 760 (Okla. 1957).<sup>6</sup>

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<sup>4</sup> Another perplexing circumstance is Mr. Trippet's role in this dispute. Despite being the Plaintiff in this lawsuit, Ms. Trippet appears to know little about the Plan or about what took place with Mr. Sewell. Mr. Trippet, on the other hand, was involved in nearly every aspect of this dispute and the only one (with the exception of Mr. Sewell) intimately involved in the takeover attempt. Is Ms. Trippet a "figurehead" for her husband? The facts clearly suggest such an arrangement.

<sup>5</sup> Trippet has requested leave to file an Amended Complaint and to join an additional party defendant (See docket # 30). A ruling on that request has been deferred by the undersigned pending a ruling on this summary judgment motion (See August 19, 1994 Minutes).

<sup>6</sup> A Plaintiff's "discovery" of fraud is a question of fact. *Horn v. Daniel*, 315 F.2d 471 (10th Cir. 1962)(time of discovery of existence of fraud is a question of fact). Consequently, summary judgment is inappropriate if the record supports more than two plausible conclusions as to when the fraud could have, or should have, been discovered. *Robertson v. Seidman v. Seidman*, 609 F.2d 583, 591-592 (2nd Cir. 1979). However, when the facts regarding discovery of fraud are not in dispute, the date of accrual is a question of law. *Galindo v. Stoodly Co.*, 793 F.2d 1502, 1508 (9th Cir. 1986).

Ms. Trippet filed the instant action on December 27, 1993. Sewell maintains that the lawsuit should have been filed no later than March 2, 1993. His reasoning is based on a March 2, 1991 letter written by Mr. Trippet to Mr. Weiner. Part of the letter reads:

**We wouldn't be here if my last year Take-Over partner, Cameron Sewell, my tax lawyer in Dallas, had not betrayed my trust. He double-crossed me and lied to me and as a result his proxy battle last year failed. Since then he has been delaying and delaying as to whether he'd take another swing at it this year with stock purchases...The result of his delay, is that, now, our time is short...**

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**Instead of performing, however, he let me down, double-crossed me and lied to me. He tried to buy stock on the cheap and largely failed....I told him at least dozen times, ad nauseam, that he had to establish his credibility, and could only do it with personal visits to 30 to 40 stockholders. That mail would fail. He kept promising to go see the people and look 'em in the eye, but he never did. That's what I mean by his betrayal, double-cross and lies. Instead, he made this enclosed paper case (proxy statement) and failed miserably last June at the postponed Annual meeting.**

The Magistrate Judge has found no "test" for these facts under Oklahoma law. Guidance on the issue can be taken from "equitable tolling" decisions concerning security fraud claims. *See, generally, Maggio v. Gerard Freezer & Ice, Co.*, 824 F.2d 123, 130 (1st Cir. 1987)(discussing similarity of state's discovery rule with federal tolling doctrine). One decision in particular helps the Court examine the issue. In *Hill v. Equitable Bank*, 655 F.Supp. 631 (D.Del. 1987), *aff'd* 851 F.2d 691 (3d Cir. 1988), the court wrote:

**Determining whether the Plaintiff should have known about the fraud is a highly fact-based decision. In making this determination, the court must answer two questions: (1) When did Plaintiff know enough to excite further inquiry? and (2) Once Plaintiff knew enough to excite inquiry, was the investigation Plaintiff undertook the fraud reasonable?**

Some courts describe the first question as whether a Plaintiff had "sufficient storm warning" of the fraud in question. *Harner v. Prudential Securities, Inc.*, 785 F.Supp. 626 (E.D. Mich. 1992). That terminology applies here: Did Ms. Trippet have a sufficient storm warning of Sewell's alleged misconduct? More specifically, do the undisputed facts show that Trippet should have begun an investigation in light of the March 2 letter?

Ms. Trippet attempts to sidestep the March 2 letter, asserting that the alleged "actual fraud" (i.e., the tax treatment, partnership issue) could not have been discovered until 1993 or later. However, a First Circuit court chops away at that argument: [Plaintiff] need not discover the nature and extent of the fraud before they were on notice that something may have been amiss. Inquiry notice is triggered by evidence of the possibility of fraud, not full exposition of the scam itself. *Kennedy v. Joesphthal and Co.*, 814 F.2d 798, 802 (1st Cir. 1987).

The March 2, 1991 letter, as Ms. Trippet claims, did not put her on notice of the so-called "theft of tax deduction" or the partnership issue. However, the letter shows that Ms. Trippet either was, or should have been, on notice as to Sewell's alleged misconduct. Mr. Trippet minces no words: he accuses Mr. Sewell of betraying, double-crossing and lying to him. While he did not know about the tax deduction or the way in which Sewell handled the partnership issue, the letter clearly shows that Ms. Trippet (through her husband-agent) knew Mr. Sewell's conduct was potentially amiss. Consequently, the Magistrate Judge finds that Ms. Trippet meets the first prong of the *Hill* analysis.

The next question is whether Trippet's "investigation" is a reasonable one under the circumstances. Unlike the first question, the determination of whether a plaintiff actually

exercised reasonable diligence is a subjective inquiry. As a general rule, such an inquiry focuses on the circumstances of the particular case such as the existence of a fiduciary relationship, the nature of the fraud alleged, the opportunity to discover the fraud and the subsequent actions of the defendants. *Maggio v. Gerard Freezer Inc.*, 824 F.2d 123, 128 (1st Cir. 1987).

At first blush, the answer seems clear. Neither Ms. Trippet nor her husband, a veteran financier, and intimately aware of Mr. Sewell's actions, conducted any further inquiry. They simply shifted gears and relied on Christopher to pull off the takeover attempt. *See, generally, Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988) (Plaintiff is not permitted a "leisurely discovery of the full details of an alleged scheme" but must proceed with a reasonable and diligent investigation"). However, despite the absence of an investigation, the Magistrate Judge finds that genuine issues of material fact remain on this question.

Oklahoma law provides that, when a confidential relationship exists between the parties at the time of the fraud, the statute of limitations is tolled until the defrauded party has actual notice of the fraud." *Ruther v. La Renovista Estates*, 603 F.Supp. 533 (W.D. Okla. 1984), *citing Thomas v. Wilson*, 185 P.2d 473 (Okla. 1947).<sup>7</sup> In this case, Ms. Trippet and Mr. Sewell had a confidential relationship (i.e., attorney-client) during most, if not all, of the events in question. In addition, it is unclear as to when Ms. Trippet had actual notice

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<sup>7</sup> Jurisdictions treat this issue differently. Some courts hold that, if a fiduciary or confidential relationship exists between the parties, the failure to exercise reasonable diligence to discover the fraud may be excused. Other courts note that such a relationship is one of the circumstances to be considered in determining whether fraud should have been discovered by the exercise of reasonable diligence. Another line of authority does not require as prompt or as searching of an inquiry into the conduct of the other party when such a relationship exists. However, a federal court case interpreting Oklahoma law follows the position that the statute of limitations does not run until the actual discovery of the fraud. *See, generally, 54 C.J.S. § 196.*

of the alleged fraud and breach of the fiduciary duty. Material facts also remain as to whether (and to what extent) Mr. Sewell concealed his actions from Ms. Trippet. Answering these questions hinge, in part, on determining the credibility of the witnesses. Therefore, summary judgment on these claims should be denied.

***B. Claim 6: The Negligence Claim***

The issue raised by Sewell is that Trippet's negligence claim is barred under 12 O.S. §95(3). The negligence claim, which appears to be one for legal malpractice, is also governed by 12 O.S. §95(3). This limitation period begins to run from the date the negligent act occurred or from the date Ms. Trippet should have known of the act complained. *Funnel v. Jones*, 737 P.2d 105, 107 (Okla. 1985). The period also may be tolled by the attorney's fraudulent concealment. *Id.*

In the Complaint, Ms. Trippet accuses Sewell of "neglect of duty, conflict of interest and breach of his professional obligations as a lawyer." *Complaint, page 10 (docket #1)*. This appears to be based on the tax deduction, the partnership issue and an allegation that Sewell did not disclose pertinent information about Christopher to Ms. Trippet.

The Magistrate Judge reaches a similar finding on the "negligence" claims. A genuine issue of material fact remains as to when Ms. Trippet learned of the tax deduction, the partnership issue and Mr. Sewell's alleged nondisclosure. This finding is made, in part, because of questions surrounding the on-going attorney-client relationship and the extent Mr. Sewell concealed or disclosed his actions. These questions, coupled with the requirement that Ms. Trippet, as the nonmoving party, shall have all reasonable inferences drawn in her favor, prevent the granting of summary judgment.

***C. Claim 3: Breach of Contract***

The issues raised on summary judgment by Sewell are: (1) whether Ms. Trippet is the "real party in interest" as to the \$64,000 purchase of Tri-Texas shares and (2) whether Ms. Trippet has standing on the claim.

Fed.R.Civ.P. 17(a) states that "every action shall be prosecuted in the name of the real party in interest." Mr. Sewell contends that Prime Factors Corporation is the "real party in interest" because it -- not Ms. Trippet -- paid him \$64,000 in exchange for the Tri-Texas shares. Ms. Trippet, however, points to evidence that she paid \$64,000 to Prime Factors and the company then paid Mr. Sewell. Evidence indicates that Mr. Trippet owns Prime Factors.

The purpose behind Fed.R.Civ.P. 17(a) is to protect individuals from harassment and multiple suits by persons who would not be bound by the principles of claim preclusion if they were not prevented from bringing subsequent actions by a real party in interest rule. *6A Federal Practice and Procedure §1541*. Given the prior history of the Home-Stake litigation, the facts involved here and the policy behind the rule, the Magistrate Judge finds that Ms. Trippet is not the "real party in interest" on this claim. Instead, Mr. Trippet, who owns Prime Factors Corporation, is the "real party in interest." Therefore, summary judgment should be granted on this claim.<sup>8</sup>

***D. Claim 4: Breach of Contract***

The issues raised by Sewell are: (1) Ms. Trippet is not the real party in interest on the \$40,500 repayment; (2) Ms. Trippet lacks standing; and (3) the alleged oral agreement

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<sup>8</sup> Also, as noted in Rule 17(a), "no action should be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for...substitution of...the real party in interest."

to repay the \$40,500 is barred under 12 O.S. § 95(2).

After reviewing the record, the Magistrate Judge recommends that summary judgment be granted on this issue. The record shows the agreement between Mr. Sewell and Ms. Trippet was an oral one. No written agreement is found in the record. Consequently, pursuant to 12 Okla. Stat. §95(2), this claim is time-barred.

#### IV. Conclusion

Simply put, the Court's task on summary judgment is to decide whether there are issues to be tried -- not to try the issues. *Bowyer v. U.S. Department of Air Force*, 804 F.2d 428, 429 (7th Cir. 1986). Therefore, after reviewing the record, the United States Magistrate Judge recommends that Defendant's Motion For Summary Judgment (docket #27) be **DENIED** as to claims 1, 2 and 6. The Magistrate Judge recommends that the motion be **GRANTED** as to claims 3 and 4.

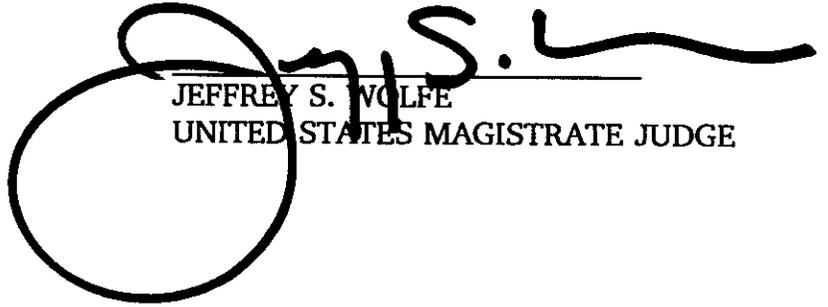
On August 19, 1994, several rulings (numbers 30, 35, and 36) were deferred until after this summary judgment motion was examined. The parties should notify the undersigned as to the most efficient way to address these pending issues. A status report shall be filed in the next ten (10) calendar days.

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.<sup>9</sup>

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<sup>9</sup> See *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991).

Dated this 29<sup>th</sup> day of Feb., 1995.



JEFFREY S. WOLFE  
UNITED STATES MAGISTRATE JUDGE

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

FEB 21 1995

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

GREGORY MASON, and ERVIN L. POOL, JR. and ARLENE POOL,  
NEXT OF KIN OF ERVIN L. POOL, III  
DECEASED,

Plaintiff,

vs.

FORD MOTOR COMPANY,

Defendant.

Case No. 94-C-887B

ENTERED ON DOCKET

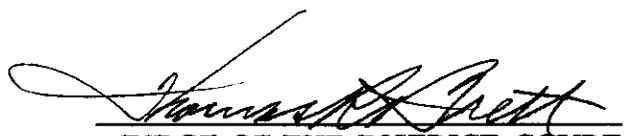
DATE FEB 23 1995

AGREED ORDER REMANDING CASE

On January 20, 1995 Plaintiffs moved the Court to remand this case claiming the Court lacked subject matter jurisdiction in that the Amended Petition in the state court action named an unserved non-diverse defendant. The Defendant, not conceding lack of subject matter jurisdiction, responded to Plaintiffs' motion indicating no objection to remand. Accordingly, the Court hereby finds this case should be remanded to the district court in and for Washington County, Oklahoma.

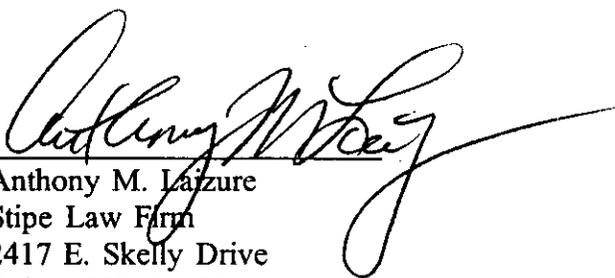
The Court therefore ORDERS this case remanded to the district court in and for Washington County.

Dated February 21, 1995

  
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Elsie C. Draper  
David E. Keglovits  
GABLE & GOTWALS, INC.  
2000 Fourth National Bank Bldg.  
Tulsa, OK 74119  
(918) 582-9201  
ATTORNEY FOR DEFENDANT

  
\_\_\_\_\_  
Anthony M. Lazure  
Stipe Law Firm  
2417 E. Skelly Drive  
Tulsa, OK 74105  
ATTORNEY FOR PLAINTIFFS

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

**FILED**  
FEB 23 1995

LINDSEY K. SPRINGER, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
COLLECTOR OF INTERNAL REVENUE, )  
et al., JOHN DOES 1 through 10, )  
 )  
Defendants. )

Case No. 94-C-350-BU

ENTERED ON DOCKET

DATE FEB 23 1995

Lawrence, Clerk  
DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

This matter comes before the Court upon the motion of the defendants to dismiss this action pursuant to Rule 12(b)(1) and Rule 12(b)(6), Fed. R. Civ. P. Based upon the parties' submissions, the Court makes its determination.

On April 8, 1994, the plaintiffs filed a "'Class Action' - Complaint for Refund" against the defendants, Collector of Internal Revenue and John Does 1 through 10. In their complaint, the plaintiffs seek damages for certain alleged unauthorized collection actions by the defendants. The plaintiffs allege that they are nonresident alien individuals who at no time during the taxable year are engaged in a trade or business in the United States. The plaintiffs contend that all income received by the plaintiffs is gross income from sources "without the United States" as that phrase is defined in 26 CFR 1.862-1. The plaintiffs claim that the defendants have refused to allow the plaintiffs to revoke all 1040 Form "elections" which stated they were to be treated as residents of the United States and their real property income was to be treated as effectively connected with the United States. The

plaintiffs allege that in refusing to do so, the defendants have recklessly and intentionally disregarded the provisions of 26 U.S.C. §§ 6013 and 871 and the regulations promulgated thereunder. The plaintiffs seek damages against the defendants and a refund of their taxes. The plaintiffs contend that the Court has jurisdiction over their action pursuant to 28 U.S.C. § 1340 and 26 U.S.C. § 7433.

In their motion to dismiss, the defendants contend that the plaintiffs' complaint should be dismissed on the basis that the Court lacks subject matter jurisdiction over the plaintiffs' action and the plaintiffs' complaint fails to state a claim upon which relief may be granted. In regard to subject matter jurisdiction, the defendants argue that the United States of America is the real party in interest to this action and that it is immune from suit under the doctrine of sovereign immunity. Even though 28 U.S.C. § 1340 grants the Court original jurisdiction over claims arising under any Act of Congress providing for internal revenue, the defendants maintain that section 1340 is not a waiver of sovereign immunity. The defendants also maintain that 26 U.S.C. § 7433 provides no basis of relief against the United States of America because the plaintiffs failed to exhaust their administrative remedies as required by that section. To the extent the plaintiffs seek a refund of federal income taxes under 26 U.S.C. § 7422, the defendants further claim that such action is barred for the plaintiffs' failure to file a claim for refund with the Internal Revenue Service. Finally, the defendants contend to the extent the

plaintiffs' complaint may be construed as seeking injunctive relief, it fails to state a claim for which relief may be granted. The defendants state that the Anti-Injunction Act, 26 U.S.C. § 7421, specifically precludes injunctive relief against the United States of America if such relief interrupts the flow of revenue to the United States of America.

In response, the plaintiffs contend that the Collector of Internal Revenue is a proper party to this action and may be sued under 28 U.S.C. § 1340. The plaintiffs also contend that the defendants must initially move to have the United States of America added as party defendant before the Court can determine whether the United States of America is the real party of interest in this action. However, assuming the United States of America is the real party in interest, the plaintiffs assert that the United States of America has waived its sovereign immunity under 26 U.S.C. § 7433. Contrary to the defendants' allegations, the plaintiffs assert that they have exhausted their administrative remedies as shown by the "(2nd) Second Codicils" attached to their supplemental response. The plaintiffs also maintain that the United States of America has waived its immunity under section 3772 [I.R.C. 1939]. The plaintiffs further contend that the Anti-Injunction Act does not apply to their action.<sup>1</sup>

At the outset, the Court finds that the United States of

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<sup>1</sup>In light of the fact that the "'Class Action' - Complaint for Refund" does not indicate any request for an injunction against the defendants and the plaintiffs maintain that they do not seek to enjoin any collection of taxes, the Court finds it unnecessary to address the application of the Anti-Injunction Act.

America should be substituted as the defendant in this action. The plaintiffs in their complaint seek a refund of taxes. They also seek monetary damages under section 7433. An action seeking the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected is to be maintained against the United States of America. 26 U.S.C. 7422(f)(1). In addition, section 7433 provides for an action against the United States of America when any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of the Internal Revenue Code or any regulation thereunder in connection with the collections of federal taxes. In light of the plaintiffs' claims, the Court finds that the United States of America is the proper party to this action.<sup>2</sup> Although the defendants have not formally moved to substitute the United States of America as the defendant, the Court construes their motion as seeking such relief and hereby substitutes the United States of America as defendant.

As previously stated, Section 7433(a) authorizes a taxpayer to bring a civil action for damages against the United States of America when any officer or employee of the Internal Revenue

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<sup>2</sup>In addition, the general rule is that a suit is against the United States of America if the judgment sought would expend itself on the public treasury or domain or if the effect of the judgment would be to restrain the United States of America from acting, or to compel it to act. Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963). The effect of the instant action, if successful, would be to expend itself on the public treasury for there is little doubt that a refund of taxes or a recovery of monetary damages would have to come from the public treasury. Therefore, this action is one against the United States of America rather than the federal officers nominally named.

Service recklessly or intentionally disregards any provision of the Internal Revenue Code or any regulation promulgated thereunder. Subsection 7433(d)(1), however, precludes an award against the United States of America "unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." 26 U.S.C. § 7433(d)(1). The Department of Treasury has promulgated the specific requirements which must be adhered to prior to bringing a civil action against the United States of America. 26 CFR 301.7433-1(e)(1) provides that an administrative claim shall be sent in writing to the district director of the district in which the taxpayer currently resides. 26 CFR 301.7433-1(e)(2) provides that the administrative claim shall include:

"(i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claims;

(ii) The grounds, in reasonable detail, for the claim (includes copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iii) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

(iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and

(v) The signature of the taxpayer or duly authorized representative.

For purposes of this paragraph, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal

Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney who has a written power of attorney executed by the taxpayer."

Although the "(2nd) Second Codicils" of the plaintiffs are addressed to the Tulsa, Oklahoma City and Austin directors of the Internal Revenue Service, the Court finds that the "(2nd) Second Codicils," "Affidavits in Support of Codicils" and "Constructive Notices of Non-taxpayers" fail to meet the specific requirements of section 301.7433-1(e)(2) and are inadequate to trigger administrative review. None of the documents include a phone number or convenient time to be contacted. The documents include no indication of the dollar amount of the plaintiffs' claim. Finally, the documents never specifically mention a claim for damages in relation to the alleged illegal collection activities.

Because the plaintiffs have failed to adhere to the statutory prerequisite of section 7433(d)(1), the Court finds that it lacks subject matter jurisdiction over the plaintiffs' action under section 7433. Confonte v. U.S., 979 F.2d 1375 (9th Cir. 1992).

Even if the Court were to find that the plaintiffs did exhaust their administrative remedies, the Court concludes that the plaintiffs' complaint fails to state a claim for which relief may be granted under section 7433. Section 7433 applies to acts of officers and employees of the Internal Revenue Service "in connection with any collection of Federal tax. . . ." The plaintiffs' complaint does not allege that collection procedures were instigated or activated by the Internal Revenue Service. The allegations reveal that the plaintiffs paid the federal taxes at

issue. Because no collection activities were instigated by the Internal Revenue Service, the Court finds that the plaintiffs do not state a claim for relief under section 7433. V-1 Oil v. U.S., 813 F.Supp. 730, 731 (D. Idaho 1992) (Section 7433's waiver of sovereign immunity limited to actions involving wrongful conduct during collection of federal taxes).

In their complaint, the plaintiffs also seek a refund of taxes paid. The Court, however, concludes that the Court lacks subject matter jurisdiction over the plaintiffs' action. Section 7422(a) provides that no suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been duly filed with the Secretary. In the instant case, there has been no claim of refund filed with Secretary by any of the plaintiffs. Therefore, the Court finds that the action against the United States of America for a refund of taxes cannot be maintained.

Finally, the plaintiffs cite other statutes such as 28 U.S.C. § 1340 and section 3772 [I.R.C. 1939] as conferring jurisdiction over their action. Sovereign immunity, however, is not waived by the general jurisdictional statute of 28 U.S.C. § 1340. Guthrie v. Sawyer, 970 F.2d 733, 735 n. 2 (10th Cir. 1992). In addition, section 3772 [I.R.C. 1939] is now 26 U.S.C. §§ 6532 and 7422. Section 6532 pertains to statute of limitations on suits for the recovery of income tax and section 7422 pertains to actions for tax refunds. The plaintiffs, as stated above, have not complied with

the jurisdictional prerequisite of section 7422 of filing a tax refund claim. Therefore, the Court lacks subject matter jurisdiction over the plaintiffs' action.

Based upon the foregoing, Defendants' Motion to Dismiss (Docket No. 22) is **GRANTED**. This action is **DISMISSED**. In light of the Court's ruling, Plaintiffs' Motion for Summary Judgment - With Prayer Request for Hearing Before Unbiased Referee to Issue Refunds and to Assess Damages (Docket No. 35) is declared **MOOT**.

ENTERED this 22<sup>nd</sup> day of February, 1995.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

FEB 22 1995

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JERRY M. YORK aka JERRY YORK; )  
 PHOENICIA L. YORK aka PHOENICIA )  
 YORK; BILL YORK; JACKSON LOAN )  
 CO., INC.; CITY OF SAPULPA, )  
 Oklahoma; COUNTY TREASURER, )  
 Creek County, Oklahoma; BOARD OF )  
 COUNTY COMMISSIONERS, Creek )  
 County, Oklahoma, )  
 )  
 Defendants. )

RECEIVED  
DATE FEB 22 1995

Civil Case No. 94-C 1089BU

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 22 day of Feb, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma**, appear by Michael Loeffler, Assistant District Attorney, Creek County, Oklahoma; the Defendant, **Bill York**, appears not having previously filed his disclaimer; and the Defendants, **Jerry M. York aka Jerry York, Phoenicia L. York aka Phoenicia York, Jackson Loan Co., Inc., and City of Sapulpa, Oklahoma**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Jerry M. York aka Jerry York**, will hereinafter be referred to as ("**Jerry M. York**"); the Defendant, **Phoenicia L. York aka Phoenicia York**, will hereinafter be referred

to as ("**Phoenicia L. York**"). The Defendants, **Jerry M. York and Phoenicia L. York** are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, **Jerry M. York and Phoenicia L. York**, each acknowledged receipt of Summons and Complaint via Certified Mail on December 30, 1994; that the Defendant, **Bill York**, acknowledged receipt of Summons and Complaint via Certified Mail on January 21, 1994; that the Defendant, **Jackson Loan Co., Inc.**, acknowledged receipt of Summons and Complaint via Certified Mail on November 28, 1994; that the Defendant, **City of Sapulpa, Oklahoma**, acknowledged receipt of Summons and Complaint via Certified Mail on November 29, 1994; that Defendant, **County Treasurer, Creek County, Oklahoma**, acknowledged receipt of Summons and Complaint via Certified Mail on November 29, 1994; and that Defendant, **Board of County Commissioners, Creek County, Oklahoma**, acknowledged receipt of Summons and Complaint via Certified Mail on or about November 28, 1994.

It appears that the Defendants, **County Treasurer, Creek County, Oklahoma**, and **Board of County Commissioners, Creek County, Oklahoma**, filed their Answer on December 8, 1994; that the Defendant, **Bill York**, filed his Disclaimer on January 26, 1995; and that the Defendants, **Jerry M. York, Phoenicia L. York, Jackson Loan Co., Inc., and city of Sapulpa, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

**LOT NUMBERED SEVEN (7), IN DIANE HOMES'S ADDITION TO THE CITY OF SAPULPA, IN CREEK COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF. A/K/A 914 SOUTH DIANE, SAPULPA, OKLAHOMA 74066.**

The Court further finds that on September 26, 1988, Johnny S. Bratt and Kit Bratt, executed and delivered to LEADER FEDERAL MORTGAGE INC. their mortgage note in the amount of \$32,550.00, payable in monthly installments, with interest thereon at the rate of eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, Johnny S. Bratt and Kit Bratt, Husband and Wife, executed and delivered to LEADER FEDERAL MORTGAGE, INC. a mortgage dated September 26, 1988, covering the above-described property. Said mortgage was recorded on October 7, 1988, in Book 240, Page 1216, in the records of Creek County, Oklahoma.

The Court further finds that on January 10, 1990, LEADER FEDERAL MORTGAGE, INC. assigned the above-described mortgage note and mortgage to LEADER FEDERAL BANK FOR SAVINGS, F/K/A LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was recorded on February 2, 1990, in Book 259, Page 360, in the records of Creek County, Oklahoma.

The Court further finds that on January 10, 1990, LEADER FEDERAL BANK FOR SAVINGS, formerly known as Leader Federal Savings and Loan Association assigned the above-described mortgage note and mortgage to UNION PLANTERS

NATIONAL BANK. This Assignment of Mortgage was recorded on February 2, 1990, in Book 259, Page 362, in the records of Creek County, Oklahoma.

The Court further finds that on August 2, 1991, UNION PLANTERS NATIONAL BANK assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington D.C., his successor and assigns. This Assignment of Mortgage was recorded on August 14, 1991, in Book 280, Page 898, in the records of Creek County, Oklahoma.

The Court further finds that the Defendants, Jerry M. York and Phoenicia L. York, are the current title owners of the property by virtue of a Joint Tenancy Warranty Deed dated October 11, 1990, and recorded on October 17, 1990 in Book 269, Page 588, in the records of Creek County, Oklahoma. The Defendants, Jerry M. York and Phoenicia L. York, are the current assumptors of the subject indebtedness.

The Court further finds that on July 15, 1991, the Defendants, Jerry M. York and Phoenicia L. York, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose

The Court further finds that the Defendants, Jerry M. York and Phoenicia L. York, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Jerry M. York and Phoenicia L. York, are indebted to the Plaintiff in the principal sum of \$46,081.12, plus interest at the rate of 11 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, Creek County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$163.67, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Jerry M. York, Phoenicia L. York, Jackson Loan Co., Inc. and City of Sapulpa, Oklahoma**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Bill York**, disclaims any right, title or interest in the subject property.

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Jerry M. York and Phoenicia L. York**, in the principal sum of \$46,081.12, plus interest at the rate of 11 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 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, Creek County, Oklahoma**, have and recover judgment in the amount of \$163.67, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Jerry M. York, Phoenicia L. York, Bill York, Jackson Loan Co., Inc., City of Sapulpa, Oklahoma and Board of County Commissioners, Creek 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, **Jerry M. York and Phoenicia L. York**, 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 Defendant, County Treasurer, Creek County, Oklahoma, in the amount of \$163.67, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

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

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

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

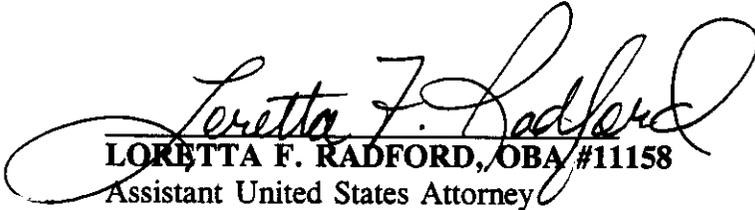
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

**s/ MICHAEL BURRAGE**

**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



*Loretta F. Radford*

**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney

3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



*M Loeffler*

**MICHAEL LOEFFLER, OBA #12753**

Assistant District Attorney

P.O. Box 567

Bristow, Oklahoma 74010

(918) 367-3331

Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Creek County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 94-C 1089BU

LFR:lg



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

ENTERED ON DOCKET  
DATE ~~FEB 23~~ 1995

RUSSELL McINTOSH, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BANCOKLAHOMA MORTGAGE CO., )  
 et al., )  
 )  
 Defendants. )

No. 94-C-929-B

**FILED**

FEB 22 1995

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

**STIPULATION OF DISMISSAL WITH PREJUDICE  
AS TO MORTGAGE CLEARING CORPORATION**

Comes now the Plaintiff, Russell McIntosh, by and through his attorney's, Braswell & Associates, Inc., and the Defendant, Mortgage Clearing Corporation, and files a stipulation of dismissal with prejudice, pursuant to Rule 41 (a)(1), Federal Rules of Civil Procedure. The Court shall retain jurisdiction to supervise the settlement until February 28, 1996.

BRASWELL & ASSOCIATES, INC.  
For the Firm



Michael T. Braswell, OBA# 1082  
3621 N. Kelley, Suite 100  
Oklahoma City, OK 73111  
(405) 232-1950



Jack I. Gaither  
701 Beacon Building  
406 South Boulder  
Tulsa, OK 74103-3825

ENTERED ON DOCKET  
DATE FEB 23 1995

FILED

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

FEB 22 1995

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

IMATCO INCORPORATED, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 SNELSON COMPANIES, INC., )  
 )  
 Defendant. )

Case No. 93-C-959-K

**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW the Plaintiff, IMATCO Incorporated, and the Defendant, Snelson Companies, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and stipulate that all claims filed by both parties herein are hereby dismissed, with prejudice.

Respectfully submitted,

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

By: Richard A Paschal  
Richard A. Paschal, OBA #6927  
James E. Green, Jr., OBA #3582  
3700 First National Tower  
15 East 5th Street, Suite 3700  
Tulsa, Oklahoma 74103-4344  
(918) 599-9400

ATTORNEYS FOR PLAINTIFF

- and -

FRAZIER, SMITH & PHILLIPS

By: [Signature]  
Phil Frazier, OBA #3112  
1424 Terrace Drive  
Tulsa, Oklahoma 74104-4626  
(918) 744-7200

ATTORNEYS FOR DEFENDANT

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

**FILED**

TOM WEBSTER, Personal )  
Representative of the Estate )  
of John Raymond Webster, )  
deceased, and DOROTHY EUSTANE )  
WEBSTER, individually, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
MUTUAL OF OMAHA and UNITED OF )  
OMAHA, )  
 )  
Defendants. )

FEB 21 1995

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

Case No. 94-C-1177-BU

ENTERED ON DOCKET

DATE FEB 22 1995

**ORDER**

This is an action originally commenced in the District Court of Creek County, Oklahoma, and subsequently removed to this Court by Defendants pursuant to 28 U.S.C. § 1441(a), wherein Plaintiffs seek to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress. In their notice of removal, Defendants have asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

Plaintiffs have now filed a motion seeking to remand this action to Creek County pursuant 28 U.S.C. § 1447(c). Plaintiffs contend that the amount in controversy in this action is less than \$50,000 as Plaintiffs' Petition prays for a judgment against Defendants in "an amount in excess of \$10,000 not in excess of \$50,000." In response to the motion, Defendants assert that the amount in controversy exceeds \$50,000 because Plaintiffs seek both

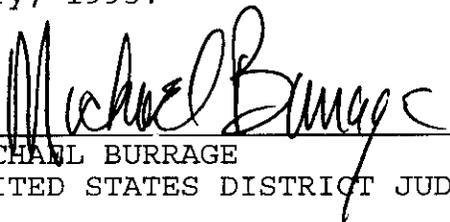
actual and punitive damages on their bad faith and intentional infliction of emotional distress claims and a survey of Oklahoma cases involving bad faith claims reveals that jury awards exceed \$50,000 when a plaintiff prevails on such claim. Defendants further assert that it is "not apparent to a legal certainty" that Plaintiffs' claims would fail to meet the jurisdictional limit.

Ordinarily, the amount in controversy is to be determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Lonquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970). The sum claimed by a plaintiff in the complaint controls if the claim is apparently made in good faith. St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). An action in which the complaint seeks less than the federal jurisdictional amount is not removable even if the pleadings clearly allege a greater injury. 14A Wright, Miller & Cooper, Federal Practice and Procedure §§ 3702 and 3725 (1985).

In the instant case, Plaintiffs in their Petition have prayed for damages "in excess of \$10,000 not in excess of \$50,000." Because the sum of damages claimed by Plaintiffs control and Defendants have failed to prove that such claim which does not exceed \$50,000 is not made in good faith and because Defendants have failed to show to a legal certainty that Plaintiff's claims exceed \$50,000, see, St. Paul Indemnity Co., 303 U.S. at 288-289, the Court finds that this case does not satisfy the \$50,000 jurisdictional amount requirement of 28 U.S.C. § 1332.

Accordingly, the Court GRANTS Plaintiffs' Motion to Remand (Docket No. 4). Plaintiffs' request for attorney's fees and costs, is DENIED. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Creek County, Oklahoma.

ENTERED this 21 day of February, 1995.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

FEB 21 1995

SHERRY CLOUTIER,

Plaintiff,

vs.

STATE FARM INSURANCE COMPANIES,

Defendant.

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

Case No. 93-C-912-B

ENTERED ON DOCKET

DATE 2/23/95

ORDER

THIS MATTER comes before the Court on the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 21 day of Feb., 1995.

S/ THOMAS R. BRETT

U.S. DISTRICT JUDGE

Prepared by:

JOHN A. GLADD OBA #3398  
Attorney for Defendant  
2642 East 21st, Suite 150  
Tulsa, Oklahoma 74114-1739  
(918) 744-5657

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

GROVER D. WIND aka GROVER DEAN )  
WIND; GEORGIA S. WIND aka )  
GEORGIA SUE WIND; STATE OF )  
OKLAHOMA, ex rel. OKLAHOMA TAX )  
COMMISSION; TULSA ECONOMIC )  
DEVELOPMENT CORP.; BENEFICIAL )  
OKLAHOMA, INC. fka BENEFICIAL )  
FINANCE COMPANY OF OKLAHOMA; )  
PRO-FAB, INC.; CITY OF BIXBY, )  
Oklahoma; COUNTY TREASURER, )  
Tulsa County, Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )

Defendants. )

**FILED**

FEB 21 1995

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

ENTERED ON DOCKET

DATE 2/22/95

FEB 03 1995  
U.S. ATTORNEY  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 309B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 21<sup>st</sup> day  
of Feb, 1995. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Loretta F. Radford, 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, **Pro-Fab, Inc.**,  
appears by its Attorney, John D. Singleton; the Defendant, **State  
of Oklahoma ex rel Oklahoma Tax Commission**, appears by Assistant  
General Counsel Kim D. Ashley; the Defendant, **Tulsa Economic  
Development Corp.**, appears not having previously filed its  
Disclaimer; the Defendant, **City of Bixby, Oklahoma**, appears not  
having previously filed its Disclaimer; and the Defendants,

Grover D. wind aka Grover Dean Wind, Georgia S. Wind aka Georgia Sue Wind, and Beneficial Oklahoma, Inc. fka Beneficial Finance Company of Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court filed finds that the Defendant, Grover D. Wind aka Grover Dean Wind, will hereinafter be referred to as ("Grover D. Wind"); and the Defendant, Georgia S. Wind aka Georgia Sue Wind will hereinafter be referred to as ("Georgia S. Wind"). The Defendants, Grover D. Wind and Georgia S. Wind are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, Grover D. Wind and Georgia S. Wind, were each served with process on August 24, 1994; the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on April 21, 1994; that the Defendant, Beneficial Oklahoma, Inc. fka Beneficial Finance Company of Oklahoma, was served with process on May 4, 1994; that the Defendant, Pro-Fab, Inc., acknowledged receipt of Summons and Complaint on or about April 27, 1994; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 8, 1994; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 31, 1994.

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, State of Oklahoma ex rel Oklahoma Tax Commission,

filed its Answer on April 25, 1994, and filed its Answer and Cross-Claim on May 9, 1994; that the Defendant, **Tulsa Economic Development Corp.**, filed its Disclaimer on June 8, 1994; that the Defendant, **Pro-Fab, Inc.**, filed its Answer on May 3, 1994; that the Defendant, **City of Bixby, Oklahoma**, filed its Disclaimer on April 14, 1994; and that the Defendants, **Grover D. Wind, Georgia S. Wind, and Beneficial Oklahoma, Inc. fka Beneficial Finance Company of Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Twelve (12), Block Three (3), AMENDED DEER RUN ESTATES, an Addition to the City of Bixby, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on July 16, 1986, Bruce Wayne Weeks, executed and delivered to SOUTHWESTERN MORTGAGE CORPORATION his mortgage note in the amount of \$67,950.00, 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, Bruce Wayne Weeks, a single person, executed and delivered to Southwestern Mortgage Corporation a mortgage dated July 16, 1986, covering the above-described property. Said mortgage was recorded on July 18, 1986,

in Book 4956, Page 1555, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 16, 1986, Southwestern Mortgage Corporation assigned the above-described mortgage note and mortgage to Shawmut Mortgage Corporation. This Assignment of Mortgage was recorded on July 23, 1986, in Book 4957, Page 1812, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 31, 1988, SHAWMUT MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to LOMAS & NETTLETON COMPANY. This Assignment of Mortgage was recorded on August 2, 1988, in Book 5118, Page 2067, in the records of Tulsa County, Oklahoma. This assignment was re-recorded on December 26, 1990, in Book 5295, Page 1979, in the records of Tulsa County, Oklahoma, to properly describe the mortgage instrument.

The Court further finds that on November 7, 1990, LOMAS MORTGAGE USA, INC. formerly LOMAS & NETTLETON COMPANY assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on November 13, 1990, in Book 5288, Page 658, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Grover D. Wind and Georgia S. Wind, currently hold record title to the property by virtue of a General Warranty Deed dated April 28, 1989, and recorded on May 2, 1989 in Book 5181, Page 229, in the records of Tulsa County, Oklahoma. The Defendants, Grover D.

Wind and Georgia S. Wind, are the current assumptors of the subject indebtedness.

The Court further finds that on November 1, 1990, the Defendants, Grover D. Wind and Georgia S. Wind, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that on August 14, 1989, the Defendants, Grover D. Wind and Georgia S. Wind, filed a Chapter 7 Bankruptcy in the Northern District of Oklahoma, Case Number 89-2418-C. A discharge was granted on December 5, 1989, but the subject debt was reaffirmed. This case was closed on January 17, 1994.

The Court further finds that the Defendants, Grover D. Wind and Georgia S. Wind, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Grover D. Wind and Georgia S. Wind**, are indebted to the Plaintiff in the principal sum of \$93,709.83, plus interest at the rate of 9.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$25.20, fees for service of Summons and Complaint.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property

which is the subject matter of this action by virtue of personal property taxes in the amount of \$28.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$27.00 which became a lien as of June 25, 1993; and a lien in the amount of \$38.00 which became alien as of June 26, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Pro-Fab, Inc.**, has a lien on the property which is the subject matter of this action by virtue of a judgment, case number CS 90-5625, rendered January 3, 1991, and recorded on January 25, 1991, in Book 5300, Page 1696, in the records of Tulsa County, Oklahoma, in the amount of \$6,500.00, plus costs of \$73.40, plus attorney fees of \$975.00. 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 a tax warrant in the amount of \$2,687.67, plus interest, penalties, and costs, which became a lien as of June 19, 1985; a tax warrant in the amount of \$2,975.32, plus interest, penalties, and costs, which became a lien as of September 6, 1985; a tax warrant in the amount of \$951.09 which became a lien as of September 6, 1985; and a tax warrant in the amount of \$1,256.70 which became a lien as of July 30, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Tulsa Economic Development Corp. and City of Bixby, Oklahoma**, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, **Grover D. Wind, Georgia S. Wind, and Beneficial Oklahoma, Inc. fka Beneficial Finance Company of Oklahoma**, are in default, and have no right, title or interest in the subject real property.

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Grover D. Wind and Georgia S. Wind**, in the principal sum of \$93,709.83, plus interest at the rate of 9.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$25.20, fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$93.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Pro-Fab, Inc.**, have and recover judgment in the amount of \$7,548.40, plus penalties and interest, for a judgment 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 judgement in rem in the amount of \$7,780.78, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Grover D. Wind, Georgia S. Wind, Beneficial Oklahoma, Inc. fka Beneficial Finance Company of Oklahoma, Tulsa Economic Development Corp., City of Bixby, Oklahoma, and the 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, **Grover D. Wind and Georgia S. Wind**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without

appraisement the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$6,614.08, plus accrued and accruing interest, for state taxes which are currently due and owing.

**Fourth:**

In payment of Defendant, Pro-Fab, Inc., in the amount of \$7,548.40, for a judgment.

**Fifth:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$38.00, for personal property taxes which are currently due and owing.

**Sixth:**

in payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$1,256.70, plus accrued and accruing interest, for state taxes

which are currently due and owing.

**Seventh:**

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

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

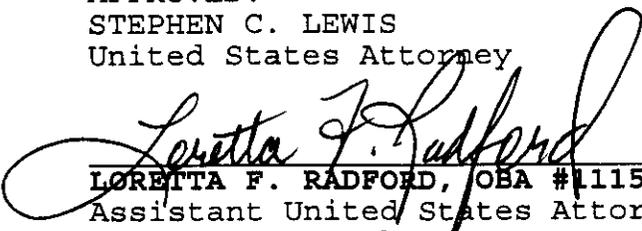
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

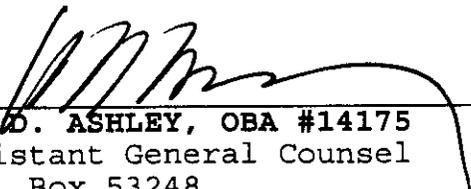
**S/ THOMAS R. BRETZ**

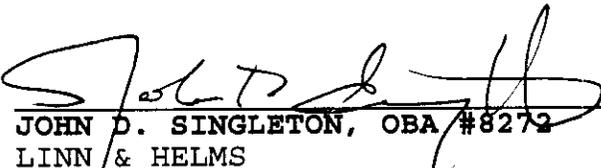
**UNITED STATES DISTRICT JUDGE**

APPROVED:  
STEPHEN C. LEWIS  
United States Attorney

  
\_\_\_\_\_  
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

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

  
KIM D. ASHLEY, OBA #14175  
Assistant General Counsel  
P.O. Box 53248  
Oklahoma City, Oklahoma 73152-3248  
(405) 521-3141  
Attorney for Defendant,  
State of Oklahoma ex rel  
Oklahoma Tax Commission

  
JOHN D. SINGLETON, OBA #8272  
LINN & HELMS  
1200 Bank of Oklahoma Plaza  
201 Robert S. Kerr Ave.  
Oklahoma City, Oklahoma 73102-4289  
(405) 239-6781  
Attorney for Defendant,  
Pro-Fab, Inc.

Judgment of Foreclosure  
Civil Action No. 94-C 309B

LFR:lg

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

FILED

FEB 21 1995

*R*

LYNNE R. WALLACE,

Plaintiff,

v.

INTERNATIONAL TESTING SERVICES,  
INC., a Delaware corporation;  
EDWARDS PIPELINE TESTING, INC.,  
an Oklahoma corporation; and  
DON EARL EDWARDS, individually,

Defendants.

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

Case No. 94 C 917 BU

ENTERED ON DOCKET  
DATE FEB 22 1995

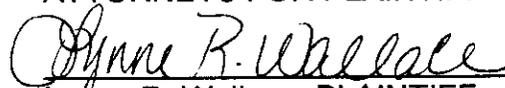
**STIPULATION FOR DISMISSAL WITH PREJUDICE AS TO  
EDWARDS PIPELINE TESTING, INC. AND INTERNATIONAL  
TESTING SERVICES, INC., ONLY**

Pursuant to Federal Rule 41(a)(1)(ii) of Civil Procedure, Plaintiff, Lynne R. Wallace, and Defendants, Edwards Pipeline Testing, Inc, and International Testing Services, Inc., hereby stipulate for the dismissal of the Complaint as against these Defendants only, **with prejudice** to the refiling of same, and each of these parties to bear its own respective attorney fees and costs.

Respectfully submitted,



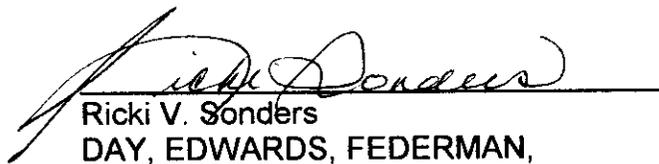
Brent W. Wright  
WRIGHT & WRIGHT  
701 Beacon Building, 406 S. Boulder  
Tulsa, Oklahoma 74103-3825  
Telephone: (918) 582-7223  
ATTORNEYS FOR PLAINTIFF

  
Lynne R. Wallace, PLAINTIFF

*18*

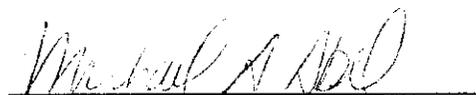
*C*

- AND -



Ricki V. Sonders  
DAY, EDWARDS, FEDERMAN,  
PROPESTER & CHRISTENSEN, P.C.  
210 Park Avenue, Suite 2900  
Oklahoma City, OK 73102-5605  
Telephone: (405) 239-2121  
ATTORNEYS FOR DEFENDANTS,  
INTERNATIONAL TESTING SERVICES,  
INC., and EDWARDS PIPELINE  
TESTING, INC.

NO OBJECTION:



Michael A. Abel, Esquire  
P.O. Box 33190  
Tulsa, Oklahoma 74153  
Telephone: (918) 742-9832  
ATTORNEY FOR DEFENDANT,  
DON EARL EDWARDS

ENTERED ON DOCKET

DATE FEB 22 1995

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

**FILED**

FEB 22 1995

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

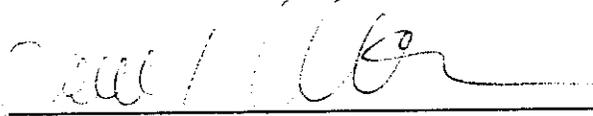
DENISE LIANE GRODEN, )  
 )  
 PLAINTIFF, )  
 )  
 VS. )  
 )  
 K.P.I. ARCHITECTS, INC. and )  
 DAVID KINDRED, an individual, )  
 )  
 DEFENDANTS. )

CASE NO. 94-C 367K

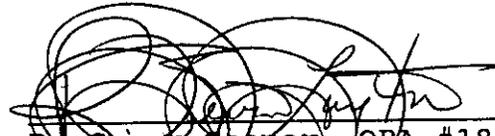
STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Denise Liane Groden and the Defendants, KPI Architects, Inc. and David Kindred and pursuant to Fed. R. Civ. P. 41(a)(1) stipulate to the Dismissal of the this action with prejudice to its refiling with each and every party to bear its own costs and fees herein.

Respectfully submitted,



Patrick Malloy III  
OBA # 5647  
1924 South Utica, Suite 810  
Tulsa, Oklahoma 74104  
ATTORNEY FOR PLAINTIFF,  
DENISE LIANE GRODEN



R. Casey Cooper, OBA #1897  
R. Kevin Dayton, OBA #11900  
Boesche, McDermott & Eskridge  
800 ONEOK Plaza  
100 West Fifth Street  
Tulsa, OK 74103  
(918) 583-1777  
ATTORNEYS FOR DEFENDANTS,  
KPI ARCHITECTS AND  
DAVID KINDRED

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )

vs. )

LINDA SUSAN ADAMS; )  
BARBARA C. MARSHALL; OTASCO, INC. )  
a Nevada Corp.; )  
PERFORMANCE MATERIALS; )  
CITY OF TULSA, Oklahoma )  
STATE OF OKLAHOMA, ex rel. )  
OKLAHOMA TAX COMMISSION )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma )

Defendants. )

**F I L E D**

FEB 22 1995

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

ENTERED ON DOCKET

DATE FEB 22 1995

CIVIL ACTION NO. 93-C-344-E

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this \_\_\_\_\_ day of \_\_\_\_\_,  
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern  
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the  
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant  
District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex  
rel. OKLAHOMA TAX COMMISSION, appears not having previously filed a Disclaimer;  
the Defendant, OTASCO, INC., a Nevada Corporation, appears by its attorney, Dan Webb,  
Esq.; the Defendant, PERFORMANCE MATERIALS, appears by its attorney, B. Jack  
Smith, Esq.; the Defendant, CITY OF TULSA, Oklahoma, appears by Alan L. Jackere,

Assistant City Attorney, Tulsa, Oklahoma; and the Defendants, LINDA SUSAN ADAMS and BARBARA C. MARSHALL, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LINDA SUSAN ADAMS, acknowledged receipt of Summons and Complaint on April 29, 1993; that the Defendant, BARBARA C. MARSHALL, acknowledged receipt of Summons and Complaint on April 17, 1993; that the Defendant, OTASCO, INC., a Nevada Corporation, acknowledged receipt of Summons and Complaint on April 20, 1993; that the Defendant, PERFORMANCE MATERIALS, acknowledged receipt of Summons and Complaint on April 19, 1993; the Defendant, CITY OF TULSA, Oklahoma, acknowledged receipt of Summons and Complaint on April 19, 1993; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 23, 1993; that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 19, 1993; and that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on September 1, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 11, 1993; that the Defendant, OTASCO, INC., a Nevada Corporation, filed its Answer on April 21, 1993; that the Defendant, PERFORMANCE MATERIALS, filed its Answer on April 20, 1993; that the Defendant, CITY OF TULSA, Oklahoma, filed its Answer on May 10, 1993 and its Amended Answer on September 9, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX

COMMISSION, filed its Disclaimer on January 17, 1995; and that the Defendants, LINDA SUSAN ADAMS and BARBARA C. MARSHALL, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that Ray E. Adams and Linda Susan Adams, became the record owners of the real property involved in this action by virtue of a certain Joint Tenancy Deed, dated August 22, 1986, from Samuel R. Pierce, Jr. as the Secretary of Housing and Urban Development, of Washington D.C., to Ray E. Adams and Linda Susan Adams, husband and wife, as joint tenants and not tenants in common, with the survivor to take the whole in the event of the death of either, which Joint Tenancy Deed was filed of record on August 26, 1986, in Book 4965, Page 1189 in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that Ray E. Adams died on March 20, 1993, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 7492 was issued by the Oklahoma State Department of Health Certifying Ray E. Adams' death.

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

**Lot Twenty-seven (27), Block Six (6), MEADOWOOD, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Ray E. Adams; and of judicially terminating the joint tenancy of Ray E. Adams and the Defendant, LINDA SUSAN ADAMS.

The Court further finds that on August 22, 1986, Ray E. Adams and the Defendant, LINDA SUSAN ADAMS, executed and delivered to Commonwealth Mortgage Corporation of America, a mortgage note in the amount of \$36,335.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9½%) per annum.

The Court further finds that as security for the payment of the above-described note, Ray E. Adams and the Defendant, LINDA SUSAN ADAMS, husband and wife, executed and delivered to Commonwealth Mortgage Corporation of America, a mortgage dated August 22, 1986, covering the above-described property. Said mortgage was recorded on August 26, 1986, in Book 4965, Page 1170, in the records of Tulsa County, Oklahoma. A Corrected Mortgage was recorded on December 8, 1986, in Book 4965, Page 1170, in the records of Tulsa County Oklahoma, to reflect correct corporate name of mortgagee, and re-recorded on December 10, 1986, in Book 4987, Page 1101, in the records of Tulsa County Oklahoma.

The Court further finds that on July 12, 1987, Commonwealth Mortgage Corporation of America, assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America, L.P. This Assignment of Mortgage was recorded on August 5, 1987, in Book 5305, Page 154, in the records of Tulsa County, Oklahoma. This Assignment was corrected on June 25, 1990, Book 5043, Page 1439, in the records of Tulsa County, Oklahoma, to reflect information of the mortgage. The Corrected

Assignment was re-recorded on February 21, 1991, Book 5260, Page 2384, in the records of Tulsa County, Oklahoma, to reflect the re-recording of the mortgage.

The Court further finds that on February 26, 1988, Commonwealth Mortgage Company of America, L.P., assigned the above-described mortgage note and mortgage to The Lomas & Nettleton Company. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1503, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 25, 1991, The Lomas & Nettleton Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 6, 1991, in Book 5302, Page 1442, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1991, Ray E. Adams and the Defendant, LINDA SUSAN ADAMS, 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 July 1, 1991 and March 1, 1992.

The Court further finds that the Defendant, LINDA SUSAN ADAMS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Linda Susan Adams, is indebted to the Plaintiff in the principal sum of \$44,890.70, plus interest at the rate of Nine and One-Half percent per annum from April 9,

1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Ray E. Adams; and to a judicial termination of joint tenancy of Ray E. Adams and the Defendant, LINDA SUSAN ADAMS.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, and the Defendant, CITY OF TULSA, Oklahoma, have liens on the property which is the subject matter of this action by virtue of cleaning, mowing, and hauling trash and debris, in the amount of \$513.18, plus penalties and interest, for the year of April 27, 1991. Said lien is superior to the interest of the Plaintiff, United States of America, and shall be granted jointly.

The Court further finds that the Defendant, OTASCO, INC., a Nevada Corp., has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$1,591.79 which became a lien on the property as of December 15, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, PERFORMANCE MATERIALS, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$14,886.03 which became a lien on the property as of June 30, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, LINDA SUSAN ADAMS, and BARBARA C. MARSHALL, 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 against the Defendant, LINDA SUSAN ADAMS, in the principal sum of \$44,890.70, plus interest at the rate of Nine and One-Half percent per annum from April 9, 1993 until judgment, plus interest thereafter at the current legal rate of 7.0% 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 THEREFORE ORDERED, ADJUDGED, AND DECREED** that the death of Ray E. Adams be and the same is hereby judicially determined to have occurred on March 20, 1993, in the city of Tulsa, County of Tulsa, State of Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and CITY OF TULSA, Oklahoma, have and recover judgment in the amount of \$513.18, plus penalties and interest, for cleanup, mowing, and hauling of trash and debris, and the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, OTASCO, INC., a Nevada Corp., have and recover judgment in the amount of \$1,591.79 for a judgment granted on December 13, 1989, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; LINDA SUSAN ADAMS and BARBARA C. MARSHALL, 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, LINDA SUSAN ADAMS, 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 Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, and the CITY OF TULSA, Oklahoma, in the amount of \$513.18, plus penalties and interest, for cleanup, mowing and hauling trash and debris,

**Third:**

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

**Fourth:**

In payment of Defendant, OTASCO, INC., A Nevada Corp., in the amount of \$1,591.79

**Fifth:**

In payment of Defendant, PERFORMANCE MATERIALS, in the amount of \$14,886.03

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.

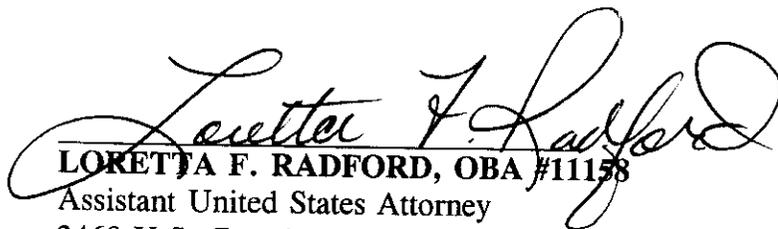
**S/ JAMES O. ELLISON**

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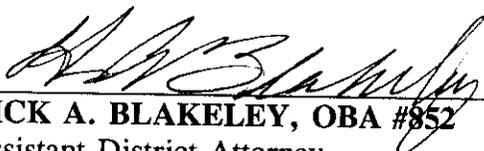
UNITED STATES DISTRICT JUDGE

APPROVED:

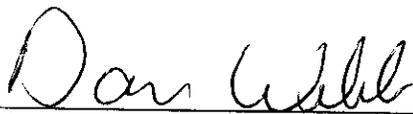
STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
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**DICK A. BLAKELEY, OBA #852**  
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Board of County Commissioners,  
Tulsa County, Oklahoma



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(918) 582-3191  
Attorney for Defendant,  
Otasco, Inc., a Nevada Corp.



---

**B. JACK SMITH, OBA #8317**

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Tulsa, Oklahoma 74119

(918) 582-3191

Attorney for Defendant

Performance Materials



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**ALAN L. JACKERE, OBA #4576**

Assistant City Attorney,

Tulsa, Oklahoma,

200 Civic Center, Room 316

Tulsa, Oklahoma 74103

(918) 596-7717

Attorney for Defendant

City of Tulsa, Oklahoma

Judgment of Foreclosure

Civil Action No. 93-C-344-E

LFR:flv



discrimination and retaliation for filing a charge of race discrimination in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., to the extent that they are not disposed of by the jury's verdict on the Section 1981 claims.

ENTERED this 21 day of February, 1995.

(Signed) H. Dale Cook

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H. DALE COOK  
Senior United States District Judge

APPROVED AS TO FORM:

By: Brian S. Gaskill  
G. Steven Stidham, OBA #8633  
Brian S. Gaskill, OBA #3278  
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Ronald K. Thomas

By: Frank M. Hagedorn  
Frank M. Hagedorn, Esq.  
Judith A. Colbert, Esq.  
J. Patrick Cremin, Esq.  
Hall, Estill, Hardwick, Gable,  
Golden & Nelson, P.C.  
320 South Boston Building, Suite 400  
Tulsa, Oklahoma 74103-3708

Attorneys for Defendant

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

WILLIAM L. CHURCH, JUSTICE )  
KNIGHTS KU KLUX KLAN, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 95-C-122-K  
 )  
STATE OF OKLAHOMA, et al., )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE FEB 22 1995

FILED

FEB 22 1995

Richard M. [unclear]  
U.S. District Court  
Northern District of Oklahoma  
Clerk

ORDER

Before the court are Plaintiff's pro se motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and a civil rights complaint. Plaintiff's motion for leave to proceed in forma pauperis is granted. Upon review of the complaint and for the reasons set forth below, the Court finds that venue is not proper in this district court and that this action should be dismissed without prejudice. See Costlow v. Weeks, 790 F.2d 1486 (12th Cir. 1986) (court has the authority to raise venue issue sua sponte).

The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

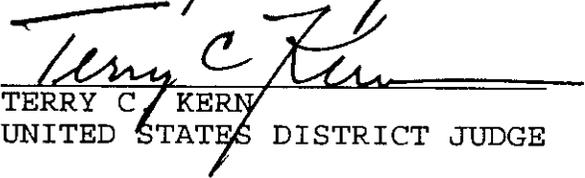
There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general

provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff, an inmate at Oklahoma State Penitentiary (OSP), sues the State of Oklahoma, Lexington Assessment and Reception Center (LARC), the Commonwealth of Virginia, Oklahoma State Penitentiary, and the NAACP. He primarily bases his complaint on allegations that his conditions of confinement at OSP violate his constitutional rights. He also alleges that guards at OSP and at LARC have threatened him on several occasions. According to the complaint, the Defendants (except for the Commonwealth of Virginia and the NAACP who do not reside in Oklahoma) are residents of either the Eastern or the Western District of Oklahoma. Thus, it is clear that venue is not proper before this Court.<sup>1</sup>

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted** and that this action is **dismissed without prejudice**. 28 U.S.C. § 1406(a).

IT IS SO ORDERED this 21 day of February, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup>Even if diversity of jurisdiction were appropriate as Plaintiff alleges in his complaint, venue would not be proper in this District. 28 U.S.C. § 1391(a).

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

FEB 21 1995

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

TIMOTHY B. WELLS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PENNWELL PRINTING COMPANY, )  
 )  
 Defendant. )

Case No. 94-C-334-BK

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now Plaintiff Timothy B. Wells and Defendant PennWell Printing Company, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure hereby dismiss with prejudice the instant action in its entirety and request the Court to enter the Order included as Attachment A.

*Timothy B. Wells*  
\_\_\_\_\_  
Timothy B. Wells, Plaintiff

*JEFF NIX*  
\_\_\_\_\_  
Jeff Nix  
2121 South Columbia, #710  
Tulsa, Oklahoma 74114  
Attorney for Plaintiff

STUART, BIOLCHINI, TURNER & GIVRAY

By: *Robert F. Biolchini*  
\_\_\_\_\_  
Robert F. Biolchini, OBA No. 800  
15 East 5th Street  
3300 Liberty Towers  
Tulsa, Oklahoma 74103

DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON

By: *Charles S. Plumb*  
\_\_\_\_\_  
Charles S. Plumb, OBA No. 7194  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for PennWell Printing Co.

United States District Court  
for Northern District of Oklahoma  
February 21, 1995

Paul F McTighe Jr, Esq.  
717 S Houston  
Suite 408  
Tulsa, OK 74127

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C I V I L M I N U T E S  
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4:92-cv-00111

Hitt v. Sullivan

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DOCKET ENTRY  
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MINUTE ORDER: By Chief Judge Thomas R. Brett remanding case to Secretary pursuant to Mandate filed in this District on 2/17/95. Further the Clerk is directed to attach a copy of the Mandate to this minute order., EOD 2-21-95 (cc: all counsel)

Hon. Thomas R. Brett, Judge

cc: Paul McTighe, Phil Pinnell, DHHS, Bureau of Hearing & Appeals of SSA,  
U.S. Attorney General  
THIS NOTICE SENT TO ALL COUNSEL

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**FILED**  
United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEC 23 1994

**FILED**

PATRICK FISHER  
Clerk

*[Handwritten Signature]*  
FEB 17 1995

WILBURN A. HITT,

Plaintiff-Appellant,

v.

DONNA E. SHALALA, Secretary of Health  
and Human Services,

Defendant-Appellee.

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

NO. 93-5245  
(D.C. No. 92-C-111-B)  
(N.D. Okla.)

A true copy

Teste

Patrick Fisher  
Clerk, U. S. Court of  
Appeals, Tenth Circuit

ORDER AND JUDGMENT\* By

*[Handwritten Signature]*  
Deputy Clerk

Before BALDOCK and MCKAY, Circuit Judges, and VRATIL,\*\* District Judge.

\*\*Honorable Kathryn H. Vratil, District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

process, where he denied benefits because he found plaintiff could perform other jobs that existed in significant numbers in the economy.

The Appeals Council denied review, making the ALJ's decision the final decision of the Secretary. The district court affirmed the decision that plaintiff was not disabled before his fifty-fifth birthday, but remanded for reevaluation of the evidence in light of 20 C.F.R. § 404.1563(d) as to all matters subsequent to his fifty-fifth birthday. On remand the ALJ found plaintiff has been disabled since his fifty-fifth birthday on April 4, 1989.

The Secretary moved to dismiss the appeal, arguing the district court's order is not final and appealable under 28 U.S.C. § 1291 because it remanded part of the case to the Secretary for further proceedings. The Secretary later withdrew her motion. However, we still have a duty to inquire into our own jurisdiction. City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1045 n.8 (10th Cir. 1994).

The two exclusive methods for remanding a Social Security case to the Secretary are set forth in sentences four and six of 42 U.S.C. § 405(g). Shalala v. Schaefer, 113 S. Ct. 2625, 2629 (1993); Pettyjohn v. Shalala, 23 F.3d 1572, 1573 (10th Cir. 1994). A sentence four remand occurs when the district court enters "a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." § 405(g). A sentence four remand is a final judgment under § 1291 for purposes of appellate jurisdiction. Sullivan v. Finkelstein, 496 U.S. 617, 629 (1990).

factors, Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988), they do not support plaintiff's claim of disabling pain.

The Secretary found that plaintiff takes no pain medication other than possibly aspirin or Tylenol on an as-needed basis. She further found that he is able to walk up to a quarter of a mile which he does for exercise, stand and sit one hour at a time, lift ten pounds, drive a car, go to the store and shop, take care of his personal needs without assistance, and could garden and do yard work as recently as 1989. She also found that as recently as October 22, 1990, one of the examining physicians had observed callouses on plaintiff's hands, small abrasions over his arms, and grime under his fingernails, several of which were broken, leading that doctor to conclude that plaintiff was using his hands for rather heavy work in the recent past.

Contrary to plaintiff's claim that he has persistently sought medical attention for his back pain, the undisputed medical evidence shows that he was seen in 1978 for back pain following a work-related injury, and a laminectomy and discectomy were performed. He reinjured his back at work in late 1983 and saw a physician who diagnosed lumbosacral strain and gave him medication. He was examined in September 1984 by Dr. Richard Cooper, apparently for purposes of a Worker's Compensation claim. Plaintiff's next medical visit was in October 1985, when his complaint was arm and chest pain possibly associated with chemical fumes. He was hospitalized in April 1987 for alcohol-related symptoms. There is no mention in the hospital notes of back pain. The remaining medical reports and opinions appear to have arisen

should reweigh the medical evidence. "[T]his we cannot do." Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1498 (10th Cir. 1992).

Finally, plaintiff claims error in the ALJ's questioning of the vocational expert (VE). The VE identified several light and sedentary jobs that a person of plaintiff's age, skills, and education could perform if he had no restrictions. Then, the ALJ asked the VE to consider whether a series of restrictions, each of which was presented separately and without regard for any other restriction, would preclude a person from performing any of these jobs.

Plaintiff argues the ALJ should have included all the restrictions in one question, citing the Secretary's obligation to "consider the combined effects of impairments that may not be severe individually, but which in combination may constitute a severe medical disability." Hargis v. Sullivan, 945 F.2d 1482, 1491 (10th Cir. 1991). The district court apparently agreed. It noted that "he [the ALJ] appeared to consider [plaintiff's] alleged impairments individually instead of in combination. This, too, is in error." Appellant's App. Vol. I at 9. However, the district court failed to consider the implications of this error when it affirmed the denial of benefits for the period of time before plaintiff's fifty-fifth birthday. This failure undermines our confidence in the correctness of its affirmance of the denial of that claim.

We agree that the ALJ's questioning of the VE was error. The VE ruled out certain jobs that a hypothetical person with only one

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

**FILED**  
FEB 17 1995  
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ROBERT LEE WILLIAMS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
TULSA POLICE DEPARTMENT, )  
et al., )  
 )  
Defendants. )

No. 94-C-0015-B

ENTERED ON DOCKET  
DATE FEB 21 1995

**ORDER**

In this prisoner's civil rights action, Plaintiff, proceeding pro se and in forma pauperis, alleges that three Tulsa Police officers conspired to use excessive force in the course of his arrest. The Defendants have moved to dismiss and/or for summary judgment to which the Plaintiff has objected. The Plaintiff has also moved for leave to supplement the complaint with pendent state law claims. For the reasons stated below, the Court concludes that Defendants' motion should be granted and that Plaintiff's motion for leave to amend should be denied.

**I. BACKGROUND AND PROCEDURAL HISTORY**

The following facts are undisputed.

On February 22, 1992, Tulsa Police officer Nicholas Cory received a radio assignment for a protective-order violation at the Grapevine Restaurant in Tulsa, Oklahoma. Upon arrival, officer Cory interviewed Ms. Sheryl Baldwin, Plaintiff's wife, and Paul Webster, an employee of the Grapevine Restaurant. Both individuals informed the officer that Plaintiff had walked into the Grapevine

Restaurant where Ms. Baldwin worked in spite of protective order #FD 91-6883. Mrs. Baldwin also informed the officer that Plaintiff had their two-year-old daughter with him.<sup>1</sup> A computer check revealed that Plaintiff was an ex-con, that his file had warning indicators for armed and dangerous and career criminal, and that he had been arrested on numerous occasions. Thereafter officers Cory and Gina Hamlett located Plaintiff on the sidewalk next to the Grapevine Restaurant with his two-year-old daughter in his arms. Upon reviewing a birth certificate, which revealed that Ms. Baldwin was the mother but which left the name of the father blank, the officers decided to arrest the Plaintiff for violation of the protective order and to leave the child with the mother.

Although the Plaintiff initially agreed to go with the officers, he turned away and squeezed the child in his arms as soon as the officers attempted to take him into custody. A confrontation then ensued whereby officers Cory and Hamlett sought to free the child from Plaintiff's arms. At one point officer Hamlett reached down to a pressure point area in Plaintiff's groin and applied pressure, but this did not have any effect upon the Plaintiff. Afraid that the situation would get out of control, given Plaintiff's violent background, the officers stepped back and attempted to calm down the Plaintiff. Officers Shockey and Cory then convinced the Plaintiff to get into the patrol car. Once in

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<sup>1</sup>The trial transcript attached to Plaintiff's response further reveals that Plaintiff had picked-up the child two days before at the day care and that Ms. Baldwin knew she was with him. (Plaintiff's motion to Supplement, doc. #17 at 10 and attachments.)

the car, the officers again attempted to persuade the Plaintiff to turn the child over to the mother and to put handcuffs on. The Plaintiff, however, refused. The officers then tried to remove the child by pulling Plaintiff's arms away from the child. Officer Hamlett sat in the back seat of the patrol car in an attempt to reach over the top of the Plaintiff and lift the child out of his arms. However, the Plaintiff squeezed his legs around the child and pushed his body forward on top of the child. Officer Hamlett then applied pressure to Plaintiff's head and neck in an attempt to force the Plaintiff to release the child. Nevertheless, the Plaintiff continued to squeeze the child with his legs. Fearing for the child's safety, officer Hamlett reached over the Plaintiff to apply a groin hold. Plaintiff, however, reacted by biting officer Hamlett on the left arm just below the elbow. Officer Hamlett released the Plaintiff's groin and pushed the Plaintiff's forehead away. Officer Cory then reached over and placed the Plaintiff in a headlock. In the meanwhile officer Hamlett asked for additional assistance to control the Plaintiff. Officer Elliot arrived and pried the Plaintiff's legs apart, releasing the child and lifting her out of the patrol car.

The Plaintiff was arrested for violation of a protective order, injury to a minor child, and aggravated assault and battery to a police officer. On May 12, 1992, a jury convicted Plaintiff of violating the protective order but found Plaintiff not guilty of assault on a police officer and resisting arrest.

On January 6, 1994, Plaintiff filed the instant civil rights

action against officers Hamlett, Cory, and Shockey. He alleged that Defendants

did form a 'conspiracy' to initiate undue and unreasonable force against Plaintiff motivated by a racial-discriminatory animus to deprive me of the custody of my minor child, and to therefor deprive me of (equal rights) privileges and immunities secured by the laws and constitution, in reckless disregard of Plaintiff's Fourth, Fifth, Eighth, and Fourteenth Amendment rights, with malicious intent to injure Plaintiff, traumatize Plaintiff and the minor child, and cause Plaintiff to be arrested and charged for alleged[] violation of a protective order, injury to a minor child, assault and battery to a police officer, and . . . with resisting an arrest.

(Doc. #1.) Plaintiff sought compensatory and punitive damages.

## II. ANALYSIS

### A. Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

In his complaint, Plaintiff alleges that Defendants joined in one conspiracy to deprive him of his civil rights. The Court liberally construes the Plaintiff to allege a conspiracy under section 42 U.S.C. § 1983 as well as under 42 U.S.C. § 1985(3). To establish a prima facie case of a conspiracy to violate constitutional rights, "a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights." Snell v. Tunnel, 920 F.2d 673, 701 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991) (quoting Dixon v. City of Lawton, 898 F.2d 1443, 1449 (10th Cir. 1990)); see also Scherer v. Balkema, 840 F.2d 437, 441 (7th Cir.), cert. denied, 486 U.S. 1043 (1988). The gist of a civil conspiracy is the deprivation and not the conspiracy. The conspiracy is merely the mechanism by which to obtain the necessary state action or to impose liability on one defendant for the acts of the others performed in pursuance of the conspiracy.

Even assuming for purposes of Defendants' motion to dismiss that Plaintiff has adequately alleged an agreement among the police officers, the Court concludes the Plaintiff has failed to state a violation under the Fifth, Eighth, and Fourteenth Amendments. Cf. Vukadinovich v. Zentz, 995 F.2d 750, 756 (7th Cir. 1993) (court properly directed verdict on civil conspiracy claims where jury found officers did not violate plaintiff's constitutional rights); Landrigan v. Warwick, 628 F.2d 736, 742 (1st Cir. 1980). Plaintiff's reliance on the Cruel and Unusual Punishment Clause of the Eighth Amendment is misplaced as the actions in questions relate to a period when Plaintiff was outside of the jail. See

Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (the Cruel and Unusual Punishment Clause is applicable to conditions of confinement while in jail). Similarly, the Plaintiff improperly relies on the Due Process Clause of the Fifth and Fourteenth Amendments. A claim that a law enforcement used excessive force in the course of an arrest must be analyzed under the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 395 (1989). Accordingly, Defendants' motion to dismiss should be granted as to Plaintiff's claims that Defendants conspired to deprive him of his Fifth, Eighth, and Fourteenth Amendment rights.

**B. Summary Judgment**

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at

summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

2. Conspiracy under Section 1983

As noted above, to establish a prima facie case of a conspiracy to violate his Fourth Amendment rights under section 1983, Plaintiff "must plead and prove not only a conspiracy, but also an actual deprivation of rights." Snell, 920 F.2d at 701 (quoted case omitted).

After carefully reviewing the record in this case, the Court concludes that the Plaintiff has failed to demonstrate that the Defendants "reached an understanding' to violate his rights." Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988) (quoted case omitted). Plaintiff's claim that the cumulative effect of Defendants' actions constituted a conspiracy is unsupported by any

description of particular overt acts suggesting a meeting of the minds among the alleged co-conspirators. See Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (an implied agreement cannot be garnered from the nature of the conspiracy itself). Even assuming Plaintiff could establish an agreement among the officers, there remain no genuine issues of material fact that the Plaintiff cannot establish a violation of his Fourth Amendment rights.

The Fourth Amendment "reasonableness" standard balances the public interest in effective law enforcement against the intrusiveness of the challenged police action in light of all the circumstances disclosed by the evidence. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397 (1989). This Court must examine the particular facts and circumstances of the case, to determine whether the force used exceeded "the . . . force . . . necessary" to effect the arrest from the perspective of an objectively reasonable officer at the scene, with due "allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving." Id. at 397. This inquiry must be made "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and with "careful attention to the facts and circumstances of each particular case." Id. at 396.

Three criteria have been identified as relevant to this inquiry: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Id. at 396.

Construing the evidence in the light most favorable to the Plaintiff, the Court concludes that Plaintiff has not demonstrated a factual issue as to whether the force applied by officers Cory, and Hamlett was excessive. The officers were faced with an individual who had violated a protective order and was a known convicted felon. In addition, the officers were aware that the Plaintiff could be armed and dangerous and that he had been arrested for numerous crimes. Lastly, the officers had decided to arrest the Plaintiff for violation of the protective order and to leave the child with the mother.

Based on these circumstances, it is clear that officer Hamlett's acts of applying pressure to Plaintiff's groin and later to his head and neck, in an attempt to remove the child from the Plaintiff, were reasonable. The Plaintiff had repeatedly resisted arrest and squeezed the child with both his arms and legs. Similarly, the Court concludes that officer Cory acted reasonably in placing Plaintiff in a head lock after he had bitten officer Hamlett's arm and continued squeezing the child with his legs.

Plaintiff does not raise any genuine issues of material fact in his response with regard to the alleged use of force. Nor do Plaintiff's repeated contentions--that he did not violate the terms

of the protective order--raise any issues of material fact. In any case, Plaintiff is collaterally estopped from relitigating in this civil rights action whether he violated the protective order as that issue was fully adjudicated at Plaintiff's state trial. See Dixon v. Richer, 922 F.2d 1456, 1459 (10th Cir. 1991) (collateral estoppel precludes litigation of an issue fully litigated in a state criminal trial). Therefore, the Court concludes the Plaintiff has not met his burden of showing a genuine issue of fact regarding the reasonableness of the officers' conduct and thus, summary judgment is appropriate as to Plaintiff's claim that Defendants conspired to use excessive force in violation of the Fourth Amendment.

3. Sections 1985(3)

Plaintiff's claim under section 1985(3) fares no better. Assuming again that the Plaintiff has adequately established an agreement among the Defendants to deprive him of his civil rights, the Plaintiff has failed to prove any racial or class-based discriminatory animus. See Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (in addition to proof of a conspiracy, a plaintiff seeking relief under section 1985(3) must show "some racial, or perhaps other class-based invidiously discriminatory animus behind the conspirator's action"). Accordingly, Defendants' motion for summary judgment should be granted as to this claim as well.

C. **Motion for Leave to Amend to Add State Law Claims**

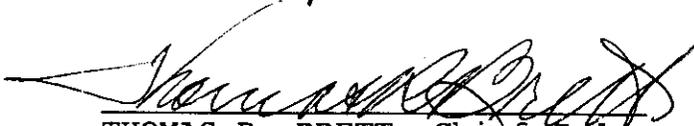
In view of the disposition of Plaintiff's federal claims, the Court denies Plaintiff's motion for leave to amend the complaint to allege numerous pendent state law claims. 28 U.S.C. § 1367(c)(3); see United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992) (futility of amendment is an adequate justification to refuse to grant leave to amend).

**III. CONCLUSION**

After liberally construing Plaintiff's complaint, the Court concludes that Defendant's motion to dismiss for failure to state a claim should be granted with regard to Plaintiff's claims under the Fifth, Eighth, and Fourteenth Amendments. As to Plaintiff's Fourth Amendment claim, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law. **ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Defendant's motion to dismiss and for summary judgment (doc. #6) is **granted**; and
- (2) Plaintiff's motion for leave to amend the complaint (doc. #17) is **denied**.

SO ORDERED THIS 17<sup>th</sup> day of Feb., 1995.

  
THOMAS R. BRETT, Chief Judge  
UNITED STATES DISTRICT COURT

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

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

TIMOTHY B. WELLS,  
  
Plaintiff,  
  
vs.  
  
PENNWELL PRINTING COMPANY,  
  
Defendant.

Case No. 94-C-334-*B*

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now Plaintiff Timothy B. Wells and Defendant PennWell Printing Company, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure hereby dismiss with prejudice the instant action in its entirety and request the Court to enter the Order included as Attachment A.

*Timothy B. Wells*  
\_\_\_\_\_  
Timothy B. Wells, Plaintiff

*[Signature]*  
\_\_\_\_\_  
Jeff Nix  
2121 South Columbia, #710  
Tulsa, Oklahoma 74114  
Attorney for Plaintiff

ENTERED ON DOCKET  
DATE FEB 21 1995

STUART, BIOLCHINI, TURNER & GIVRAY

By: *[Signature]*  
\_\_\_\_\_  
Robert F. Biolchini, OBA No. 800  
15 East 5th Street  
3300 Liberty Towers  
Tulsa, Oklahoma 74103

DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON

By: *[Signature]*  
\_\_\_\_\_  
Charles S. Plumb, OBA No. 7194  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for PennWell Printing Co.

THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 21 1995

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

SHIRLEY AIKINS, )  
)  
Plaintiff, )  
)  
v. )  
)  
CIMARRON TELEPHONE CO., )  
)  
Defendant. )

Case No. 94-C-536B K

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties have settled the captioned matter and hereby request that this Court enter the attached Order of Dismissal With Prejudice.

Respectfully submitted,

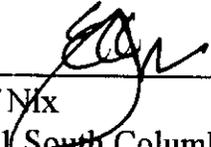
BOONE, SMITH, DAVIS, HURST & DICKMAN

*Kimberly Lambert Love*

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Attorneys for the Defendant, Cimarron Telephone  
Company

ENTERED ON DOCKET  
DATE FEB 21 1995



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Jeff Nix  
2121 South Columbia  
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Tulsa, Oklahoma 74114

Attorneys for the Plaintiff, Shirley Aikins



ENTERED ON DOCKET  
DATE FEB 21 1995

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

**FILED**

FEB 17 1995

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

PATRICIA WILLOUGHBY,

Plaintiff,

vs.

RESOLUTION TRUST CORPORATION,  
an agency of the United  
States Government and ALBERT  
V. CASEY, President and Chief  
Executive Officer of the  
Resolution Trust Corporation,

Defendant.

No. 94-C-59-K ✓

ORDER

Now before the Court is the Motion of Defendants Resolution Trust Corporation and its CEO, Albert Casey, ("Defendants") for summary judgment against Plaintiff Patricia Willoughby ("Plaintiff"). Plaintiff brought suit against the Defendants for handicap discrimination and for breach of her employment contract.

The Plaintiffs' handicap discrimination complaint arises from her former status as a federal employee and was brought pursuant to the Rehabilitation Act of 1973. 29 U.S.C. § 794. Despite the fact that it was brought pursuant to the Rehabilitation Act, employment discrimination cases filed by employees of the United States government are analyzed under the same rubric as Title VII complaints. Milbert v. Koop, 830 F.2d 354, 355 (D.C.Cir. 1987).

I. Facts

Plaintiff was employed by the Resolution Trust Corporation under a temporary appointment (not to exceed one year) as a

secretary in the Claims Settlement Department in the Tulsa office. She was hired on August 13, 1991 and was terminated effective April 3, 1992.

After less than one month on the job, complaints surfaced about Plaintiff's job performance. In a memo dated September 9, 1991, Nathan Combs, Department Head of the Claims Settlement Department memorialized a meeting he had with Plaintiff about problems with her performance. He then sent a letter to his supervisor, requesting advice on how to replace her. Nathan Combs issued Plaintiff a Letter of Warning on November 26, 1991 following complaints he heard from claims specialists about Plaintiff's performance.

Plaintiff says she is a handicapped person due to effects on her physical health caused by osteoarthritis. As a result of this medical problem, Plaintiff developed the need for surgical correction of a painful foot deformity in her left foot. The Plaintiff says she first advised Nathan Combs of prospective foot surgery by way of a letter from her doctor on the same day she received the November 26 Letter of Warning. The doctor's letter indicated that the prospective foot surgery would be of an outpatient type without the need for hospitalization. The doctor also wrote that Plaintiff would need to remain off work for 6-8 weeks if she was required to be on her feet for 8 hours a day. However, she could return to work as early as two weeks after the operation on a part-time or light duty basis if she could spend most of her time sitting with her foot elevated. Id.

Plaintiff had her foot surgery in February of 1992 and returned to work in March of 1992. When Plaintiff returned to work, she required the use of a wheel-chair.

By memo dated December 12, 1991, Nathan Combs recommended dismissal of the Plaintiff and summarized his reasons for the recommendation. A notice of termination dated March 20, 1992 was mailed to Plaintiff.

## II. Breach of Employment Contract

Title VII is the exclusive remedy for discrimination by the federal government on the basis of race, religion, sex, or national origin. Brown v. General Services Administration, 425 U.S. 820 (1976); Boyd v. United States Postal Service, 752 F.2d 410, 413-414 (9th Cir. 1985). Likewise, Congress would not have wanted the courts to interpret the Rehabilitation Act to allow the handicapped--alone among federal employees complaining of discrimination--to bypass the administrative remedies and limiting provisions of Title VII. Boyd at 414; Shirley v. DeVine, 670 F.2d 1188, 1191 n.7 (D.C.Cir 1982). Therefore, Plaintiff cannot also bring an action for breach of employment contract in addition to her discrimination claim. Plaintiff, in her Response, never rebuts the argument by the Defendants that the Rehabilitation Act provides the exclusive remedy for her wrongful termination claim.

## III. Handicap Discrimination

In setting forth the standard of review in a handicap

discrimination case, the Tenth Circuit has established an analytic framework that tracks the presumptions and shifting burdens of McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Tenth Circuit has expressed this framework as applied in a handicap discrimination case in the following way:

- 1) The plaintiff must establish a prima facie case by showing that he was an otherwise qualified handicapped person *apart from his handicap*, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap;

- 2) Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements *in spite of his handicap*, or that his rejection from the program was for reasons other than his handicap;

- 3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.

Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1387 (10th Cir. 1981).

Defendants assert that the Plaintiff has not satisfied the elements of a prima facie case because Plaintiff has not shown she is "a person with a handicap" according to EEOC regulation 29 C.F.R. § 1614.203(a)(1). The EEOC defines an individual with a handicap for the purposes of the Rehabilitation Act as one who: has a physical impairment which substantially limits one or more of such person's major life activities; has a record of such an impairment; or is regarded as having such an impairment. The term,

"major life activities," refers to functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203

Although there is very little evidence that Plaintiff suffers from a handicap as defined in the regulations, there is a sufficient question of fact to preclude summary judgment on this issue. After all, Plaintiff in her Complaint stated that she suffers from the degenerative disease of osteoarthritis. In her Response to the Motion for Summary Judgment, she says her osteoarthritis affects her ability to walk and stand and also requires her to use a permit for handicapped parking spaces. Moreover, her doctor corroborates the degenerative nature of the osteoarthritis in his letter detailing her surgical needs. Defts.' Mot. Exh. A, Tab 2, at p.7. In light of this conflict in the Record, this Court chooses not to grant summary judgment based on Defendants' argument, albeit reasonable, that Plaintiff did not suffer from a handicap under the regulations.

The more persuasive aspect of the Motion for Summary Judgment involves the failure of the Plaintiff to show the requisite relationship between the RTC's decision to terminate the Plaintiff and her alleged handicap. Rather, the Defendants have presented substantial evidence to demonstrate that Plaintiff was terminated solely due to unsatisfactory performance.

To defeat a summary judgment in a Title VII discrimination case, as well as in a case under the Rehabilitation Act, the Plaintiff must present evidence establishing a reasonable inference

that the employer's proffered, nondiscriminatory explanation is pretextual. Shapolia v. Los Alamos National Laboratory, 992 F.2d 1033, 1039 (10th Cir 1993). Even if the Plaintiff crossed the threshold established by the first hurdle of the three-part Pushkin analysis, there is no explanation by Plaintiff suggesting that Defendants' reasons for terminating her were a mere pretext for handicap discrimination.

Less than one month after Plaintiff was hired, her supervisor noticed that Plaintiff was having difficulty performing her responsibilities. In fact, Nathan Combs requested advice from a supervisor on September 16, 1991 about how to replace Plaintiff, saying he faced a serious problem with her and that no amount of training would be enough. Defts.' Mot., Exh. A, Tab 21, at p.7. Fellow workers of the Plaintiff have also commented on Plaintiff's poor performance: she did not properly maintain control over record settlement jackets; she could only copy one page at a time because she would fail to copy all parts requested or make extra copies of other parts; she would fail in even the simplest tasks; she did not take proper phone messages; and she could not learn in an efficient manner. Defts.' Mot for Summ. J., Exh. A, Tabs 9-11, 13, and 21.

On August 28, 1991, Ken Meyer, a claims settlement specialist, wrote a memorandum to Nathan Combs detailing numerous errors that Plaintiff made in copying and assembling two copies of his "closing book." Mr. Meyer ended the memorandum by adding that most of the errors could have been avoided by checking the copies against the original and the table of contents. Id., Exh. A, Tab 21, p 1-2.

In a September 16, 1991 memorandum, Nathan Combs noted several comments made by claims settlement specialists during a staff meeting that reflected quite poorly on Plaintiff's job performance. The specialists noted that Plaintiff: never volunteered to help; did not pick up mail; did cross word puzzles at her work station; could not be relied upon; and made it clear that she wanted someone else to do the job she had been assigned. Id., p. 5-6. In short, Nathan Combs reported that many viewed Pat as "lazy" and "not oriented to do the work necessary." Id.

Although Plaintiff had conferences and received counseling to discuss these problems throughout the course of her employment, it appears that no improvement was made. See Exh. A, Tab 21, at p. 4. According to the Defendant's Brief, the conduct only got worse after Nathan Combs issued a Letter of Warning dated November 26, 1991 which advised the Plaintiff of her poor performance. Defts.' Brief for Summ. J. at p. 13. This assertion is not rebutted in Plaintiff's Objection.

Clearly, the Defendants have provided a strong argument that they terminated Plaintiff for her incompetence, not for any discriminatory motive. The standard set forth in McDonnell Douglas requires the Plaintiff to put forth some evidence which shows the Defendants' proffered reasons were a pretext for illegal discrimination. Shapolia, 992 F.2d at 1039.

In order to demonstrate pretext, Plaintiff tries to argue that she was intentionally denied adequate training as a result of discrimination. Thus, she appears to admit unsatisfactory

performance but explains that the source of those problems came as a result of a discriminatory failure to train. Pl.'s Obj. to Mot. for Summ. J. at 7-8. However, there is no evidence that Defendants even knew she had any handicap until she notified them that she would need surgery. Defendants could not have discriminatorily failed to train her if they had no knowledge of any handicap and did not even know of the surgery until November 26, 1991 at the earliest. By the time Defendants learned of her need for surgery, Plaintiff had been on the job for a few months and already received numerous complaints about her job performance. Defendants' lack of knowledge is also supported by the fact that Plaintiff indicated that she suffered from no handicap whatsoever when applying for the position. Plaintiff failed to note any disability or physical limits when filling out standard government personnel forms at the time she assumed her position at the FDIC. She indicated "no handicap" on the SF 256 and did not show any limitations on the SF 177, except for a preference to avoid working in severe cold, around smoke fumes, or with solvents. Defts.' Reply to Pl.'s Obj., Exh. A. Finally, the letter from Plaintiff's doctor would not necessarily indicate to the Defendants that Plaintiff's medical problem constituted a handicap. While the Record reflects that Nathan Combs may well have failed to provide adequate training, the Record shows no relationship between lack of training and any alleged handicap of the Plaintiff.

In attempting to draw such a relationship, Plaintiff points to comments allegedly made by Nathan Combs when Plaintiff requested

leave for surgery. According to Plaintiff's affidavit, Combs remarked that her surgery would mean she would not be able to do her job. Pl.'s Obj., Exh. A, Statement of Willoughby. Plaintiff also says that soon after receiving notice of the surgery, Combs presented her with a Letter of Warning and made the comment that he expected her to quit. Pl.'s Obj., Exh. E., Aff. of Willoughby, Page 4, Lines 19-22. Since these comments are out of context, isolated, and ambiguous, they merely constitute "stray remarks" and cannot be relied upon to support a finding of handicap discrimination. Cone v. Longmont United Hospital Association, 14 F.3d 526, 531 (10th Cir. 1994). These comments do not cast doubt on the Defendants' explanation that Plaintiff was terminated for incompetence, rather than discrimination.

#### IV. Conclusion

For the reasons discussed above, the Defendants' Motion for Summary Judgment is granted.

ORDERED this 16<sup>th</sup> day of February, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE FEB 21 1995

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

ROGER D. WARD, JR.,  
Plaintiff,  
vs.  
DONNA E. SHALALA, SECRETARY  
OF HEALTH AND HUMAN SERVICES,  
Defendant.

No. 93-C-558-K

FILED  
FEB 21 1995

O R D E R

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

Roger D. Ward, Jr. ("Plaintiff"), seeks judicial review of the Secretary's denial of disability benefits under authority of 42 U.S.C. §405(g). Plaintiff alleges the Secretary's decision is not supported by substantial evidence.

Plaintiff was born on April 22, 1963, is currently 31 years of age, has a twelfth grade education, and is married with one child. For the past 14 years, he has worked as a professional race jockey. On September 10, 1990, Claimant was thrown from his horse, and kicked in the head by another horse. He suffered a closed head injury with left peri-orbital ecchymosis, a right superior oblique palsy and a cerebral concussion. As a result, he experienced double vision, slurred speech, and an unstable gait. Plaintiff last worked on September 10, 1990. He subsequently filed for disability insurance, and his claim was denied initially and upon reconsideration. Plaintiff requested a hearing before an Administrative Law Judge (ALJ). When the Appeals Council denied review, the ALJ's decision on October 8, 1992 became the final decision of the Secretary.

The ALJ received and considered medical evidence from nine of

Plaintiff's treating and examining physicians, two consulting physicians, psychiatric and medical assessments of Claimant's ability to do work-related activities, testimony of a vocational expert, and the testimony of Plaintiff himself. Plaintiff's physicians determined that he sustained a closed head trauma with a 4th nerve palsy on the right side. However, all laboratory tests, e.g. EEG, CAT scan, BAEP, VEP, proved to be normal, and as time progressed, Claimant continued to improve.

The ALJ determined that Plaintiff could not return to horse racing. However, based on Claimant's testimony and the medical evidence, the ALJ concluded Mr. Ward could perform the full range of light work activities except for work involving moving machinery or unprotected heights. Using the "grids" as a framework for decision-making and relying upon the testimony of the vocational expert, the ALJ determined that Mr. Ward could perform a significant number of jobs existing in the national economy, and, therefore found Mr. Ward "not disabled" within the meaning of the Act.

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 this case, Plaintiff asks the Court to reverse or remand the Secretary's decision denying his claim for disability benefits based on several points of error. Mr. Ward claims the ALJ erred by: (1) improperly discrediting the opinion of his treating psychiatrist without giving valid reasons; (2) failing to consider the combined effect of his impairments; and (3) failing to include all of Claimant's impairments in the hypothetical posed to the vocational expert.

First, Plaintiff argues the ALJ failed to give proper weight to the opinion of his treating psychiatrist, Dr. Losacco, and failed to give specific reasons for doing so. This argument is not supported by the Record. Plaintiff testified that his impairments included visual disability, nerve and muscle damage, double vision, equilibrium problems, difficulty in judging distances, slurred speech and depression. (Tr. 48). Whereas the Record is replete with treatment for the visual acuity problems and the resulting speech and equilibrium difficulties, there is no objective evidence to establish a severe mental impairment. Despite the contentions of Plaintiff, the ALJ has enumerated specific, legitimate reasons for giving less weight to the opinion of Dr. Losacco. See Bernal

v. Bowen, 851 F.2d 297, 301 (10th Cir. 1988). The ALJ correctly rejected the opinion of Dr. Losacco because it was brief, conclusory and unsupported by objective findings. Id. at 301. The conclusory nature lessened whatever persuasive weight it might otherwise have carried.

The ALJ observed that a careful review of Dr. Losacco's notes submitted in support of this opinion revealed (a) Claimant's statements were not volunteered but elicited; b) no significant objective findings were expressed; and (c) Claimant had been seen by Dr. Losacco only two times (July 14 and July 28) prior to the completion of the PRT form on August 6. (Tr. 19, 256-262). The Tenth Circuit has consistently held that an acceptable medical opinion must contain more than conclusory statements and must be supported by clinical or laboratory findings. William v. Bowen, 844 F.2d 748 (10th Cir. 1988). Moreover, a claimant's "statements alone are not enough to establish that there is a physical or mental impairment." 20 CFR 404.1528.

Furthermore, under authority of 20 CFR 404.1526, the ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion. The ALJ relied more heavily on objective findings of the consulting psychiatrist, Dr. Inbody. The ALJ found much more inherent validity to facts brought out in a normal psychiatric interview than from facts elicited from a form in an attempt to gain monetary benefits. (Tr. 20) Dr. Inbody noted Plaintiff was "not sure" why he had been sent to a psychiatrist. Claimant related he had been involved in a horse racing injury, and

had suffered loss of consciousness, double vision, slurred speech and loss of equilibrium as a result. Doctor Inbody said Plaintiff became depressed "at times" because he was unable to work or drive, his wife was pregnant, and the bills were accumulating. However, Plaintiff had no history of severe psychiatric problems, no history of psychotic behavior or thoughts. Mr. Ward denied any suicidal ideation. Dr. Inbody found Claimant to be alert, pleasant and cooperative. Mr. Ward evidenced some problems with stammering but, it improved as he relaxed. His speech was logical, coherent and sequential. There were no affective disturbances or associational defects in thinking. No psychotic symptomatology was noted. Mr. Ward was oriented in all spheres and appeared to be of average intelligence. There were no disturbances in sleep pattern or appetite; no signs of clinical anxiety or of clinical depression; no disturbances in recent or remote memory; no disturbances in attention and concentration; and his judgment seemed intact. Even though he diagnosed Mr. Ward as having moderate depression, Dr. Inbody felt this was reactive to the head injury rather than psychotic in nature. Plaintiff was taking no medication at that time. (Tr. 218-220).

Except for Dr. Losacco, none of the other doctors indicated Mr. Ward had any suicidal ideations, or that he tired easily or that he suffered from appetite loss. In fact, the Record indicates Mr. Ward weighed about 126 pounds, up from his 114-116 jockey weight. The medical evidence and Plaintiff's testimony support the conclusion that Mr. Ward did not suffer from a severe mental

impairment. While Claimant "seems to have some emotionability and some impairment of his impulse control," the ALJ deemed this to be insignificant. (Tr. 21). Thus, the Court finds there is sufficient evidence to support the ALJ's conclusion that Claimant is not suffering from a mental disorder that is disabling *per se*. (Tr. 20-21).

Plaintiff next argues that the ALJ failed to consider the combined effect of his impairments when determining his residual functional capacity (RFC). This argument, too, is unavailing. Even a cursory review of the ALJ's opinion reveals deliberate consideration of Plaintiff's visual acuity, speech deficit, dizziness, loss of balance, and depression or anxiety. The ALJ "placed specific emphasis" upon Section 2.02 (impairment of central visual acuity), 2.03 (contraction of peripheral visual fields in the better eye), 12.04 (affective disorders), and 12.06 (anxiety-related disorders) in determining whether Claimant's impairments met or equaled the criteria established in the "Listings." (Tr. 15). The ALJ remarked, "In arriving at a residual functional capacity all of claimant's impairments are assessed." (Tr. 22). The ALJ determined that "while Claimant's impairments are severe, they do not singly or jointly, meet or equal one listed in Appendix 1, Subpart P, Regulations No. 4." There is no evidence the ALJ failed to properly evaluate their effect in combination. Owens v. Heckler, 770 F.2d 1276 (5th Cir. 1985).

Lastly, Plaintiff contends the ALJ failed to include all of his impairments in the hypothetical posed to the vocational expert.

As established above, there is adequate evidence to conclude that Plaintiff is not suffering from a mental disorder that is disabling *per se*. The ALJ is required only to include those impairments which he finds are credible and supported by the record. See Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). Since this Court has affirmed the ALJ's conclusions regarding the Claimant's impairments, the hypothetical posed by the ALJ accurately reflects those impairments and restrictions substantiated by the Record. (Tr. 67-68). Although Plaintiff questions whether he could perform a full range of light and/or sedentary work if he has hallucinations, delusions or paranoid thinking, opinions premised on unsubstantiated assumptions clearly would not bind the ALJ. Id. at 1341, citing Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Moreover, the ALJ, in posing his hypothetical to the vocational expert, included limitations in standing and walking capabilities. In turn, the vocational expert incorporated such limitations in determining the appropriate occupational base. When questioned by the ALJ about the number of jobs existing in the national and regional economy which Mr. Ward could perform given his RFC, the vocational expert properly included the Plaintiff's limitations in his calculation. (Tr.69). Finally, the presence of the vocational expert throughout the course of an administrative hearing minimizes any erroneous effect, if any, of the ALJ's hypothetical questions. Diaz v. Secretary, 898 F.2d 774, 777 (10th Cir. 1988).

Based on the above, the Court determines there is sufficient

relevant evidence to support the ALJ's findings that Mr. Ward is able to perform other jobs within the national economy. Thus, Claimant is not disabled within the meaning of the Act. Therefore, the decision of the Secretary is AFFIRMED.

SO ORDERED THIS 16 DAY OF February,  
1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE FEB 21 1995

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DANNY L. GREGORY; TERESA F. )  
 GREGORY; GRAYSON BLAKE SCHILL;) )  
 MARILYN SCHILL AKA MARLYN )  
 SCHILL; OKLAHOMA GAS AND )  
 ELECTRIC COMPANY; COUNTY )  
 TREASURER, Creek County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Creek County, )  
 Oklahoma, )  
 Defendants. )

FILED  
FEB 21 1995  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C-705-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day of February, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, appear not, having previously disclaimed any right, title or interest in the subject property; the Defendant, Oklahoma Gas and Electric Company, appears not, having previously disclaimed any right, title or interest in the subject property; and the Defendants, Danny L. Gregory, Teresa F. Gregory, Grayson Blake Schill, and Marilyn Schill aka Marlyn Schill, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Grayson Blake Schill, executed a Waiver of Service of Summons on or about July 20, 1994 (misdated 6-20-94 by same Defendant), which was filed August 3,

1994; that Defendant, Marilyn Schill aka Marlyn Schill, executed a Waiver of Service of Summons on July 30, 1994, which was filed August 3, 1994; that Defendant, Oklahoma Gas and Electric Company, executed a Waiver of Service of Summons, through Robert D. Stewart, Jr., its attorney, on July 25, 1994, which was filed on July 26, 1994; that Defendant, County Treasurer, Creek County, Oklahoma, was served by certified mail, restricted delivery, on July 21, 1994, the return filed on August 31, 1994; that Defendant, Board of County Commissioners, Creek County, Oklahoma, was served by certified mail, restricted delivery, on July 21, 1994, the return filed on August 31, 1994.

The Court further finds that the Defendants, Danny L. Gregory and Teresa F. Gregory, were served by publishing notice of this action in the Sapulpa Legal News, a newspaper of general circulation in Creek County, Oklahoma, once a week for six (6) consecutive weeks beginning November 17, 1994, and continuing to December 22, 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, Danny L. Gregory and Teresa F. Gregory, 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, Danny L. Gregory and Teresa F. Gregory. 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 on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, 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, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, filed their Disclaimer on July 29, 1994; that the Defendant, Oklahoma Gas and Electric Company, filed its Disclaimer and Withdrawal of Answer on September 27, 1994; and that the Defendants, Danny L. Gregory, Teresa F. Gregory, Grayson Blake Schill, and Marilyn Schill aka Marlyn Schill, 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 Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fifteen (15), Block Twelve (12), BUSINESS MEN'S ADDITION to the City of Sapulpa in Creek County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on November 30, 1984, the Defendants, Danny L. Gregory and Teresa F. Gregory, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$27,000.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Danny L. Gregory and Teresa F. Gregory, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated November 30, 1984, covering the above-described property. Said mortgage was recorded on December 3, 1984, in Book 177, Page 103, in the records of Creek County, Oklahoma.

The Court further finds that the Defendants, Danny L. Gregory and Teresa F. Gregory, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has

continued, and that by reason thereof the Defendants, Danny L. Gregory, Teresa F. Gregory, Grayson Blake Schill, and Marilyn Schill aka Marlyn Schill, are indebted to the Plaintiff in the principal sum of \$25,714.48, plus interest at the rate of 7 percent per annum from September 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$230.65 (\$222.65 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Oklahoma Gas and Electric Company, and County Treasurer and Board of County Commissioners, Creek County, Oklahoma, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, Danny L. Gregory, Teresa F. Gregory, Grayson Blake Schill, and Marilyn Schill aka Marlyn Schill, are in default and have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendants, Danny L. Gregory and Teresa F. Gregory, in the principal sum of \$25,714.48, plus interest at the rate of 7 percent per annum from September 1, 1993 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$230.65 (\$222.65 publication fees, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance,

abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Oklahoma Gas and Electric Company, and County Treasurer and Board of County Commissioners, Creek County, Oklahoma, disclaim any right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

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

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

**S/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
\_\_\_\_\_  
PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
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Judgment of Foreclosure  
USA v. Danny L. Gregory, et al.  
Civil Action No. 94-C-705-K

PP/esf

ENTERED ON DOCKET

DATE FEB 21 1995

FILED

FEB 17 1995

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

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

DELBERT HARRY DEAN, III, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PAPER CONVERTING MACHINE )  
 COMPANY and FLUOR DANIEL, )  
 INC., )  
 )  
 Defendants. )

Case No. 94 CV 559-K

JOINT STIPULATION OF DISMISSAL OF FLUOR DANIEL, INC.  
WITH PREJUDICE

Plaintiff and Flour Daniel, Inc. jointly stipulate and agree, pursuant to Fed. R. Civ. P. Rule 41(a)(1), through their respective counsel, that this cause should be dismissed as against Fluor Daniel, Inc., only, with prejudice, each party to bear its own costs and attorneys' fees. Nothing herein shall be deemed to dismiss Paper Converting Machine Company.

BUFOGLE & ASSOCIATES

By: RHReno  
Richard H. Reno, OBA #10454  
3105 E. Skelly Dr., Suite 600  
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LIPE, GREEN, PASCHAL,  
TRUMP & BRAGG

By: Tim Trump  
Timothy T. Trump  
15 East 5th St., Ste. 3700  
Tulsa OK 74103-4344

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of Feb,  
1995, a true and correct copy of the foregoing document was hand  
delivered or placed in the U.S. mail, postage prepaid, to:

Mr. Thomas E. Brown  
2400 Milwaukee Center  
111 East Kilbourn Ave.  
Milwaukee WI 53202

  
\_\_\_\_\_

dean.del\stip.dis