

4-30-96

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

**FILED**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

THE HOME-STAKE OIL & GAS )  
COMPANY and THE HOME-STAKE )  
ROYALTY CORPORATION, )

Plaintiffs, )

vs. )

No. 93-C-303-H

HOME-STAKE ACQUISITION )  
CORPORATION, a Delaware )  
corporation, ENVIROMINT )  
HOLDINGS, INC., a Florida )  
corporation f/k/a TRI TEXAS, )  
INC., INTERNATIONAL )  
INSURANCE INDUSTRIES, INC., )  
a Delaware corporation, )  
SUMMIT PARTNERS MANAGEMENT )  
CO., a Texas corporation, )  
MADERA PRODUCTION COMPANY, )  
a Texas corporation, )  
CHARLES S. CHRISTOPHER, an )  
individual, MICHAEL J. )  
EDISON, an individual sometimes )  
d/b/a International Insurance )  
Industries, Inc., AGO COMPANY )  
and AGR CORPORATION, )

Defendants. )

**JUDGMENT**

On this 11th day of April, 1996, **Plaintiffs** The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation's (collectively referred to herein as the "Plaintiffs") Motion for Default Judgment against Defendants **Home-Stake** Acquisition Corporation ("HSAC"), EnvirOmint Holdings, Inc. f/k/a Tri-Texas, Inc. ("EnvirOmint"), Charles S. Christopher ("Christopher"), AGO Company ("AGO") and AGR Corporation ("AGR") (collectively referred

to herein as the "Defaulting Defendants") came on before the undersigned Judge of the United States District Court of the Northern District of Oklahoma. The Plaintiffs appeared and were represented by their attorneys, Tony W. Haynie and P. Scott Hathaway of Conner & Winters, A Professional Corporation. Defendants HSAC, EnvirOmint, Christopher, AGO and AGR did not appear. Having reviewed the Plaintiffs' Motion for Default Judgment (the "Motion"), the testimony and other evidence presented by Plaintiffs, and the court file, the Court finds, pursuant to Rule 55 of the Federal Rules of Civil Procedure, that the Motion is made upon good cause shown, and that the same should be, and is, hereby sustained as to HSAC, EnvirOmint, AGO and AGR.

**THE COURT FURTHER FINDS THAT:**

1. On August 3, 1993, Plaintiffs filed their Second Amended Complaint against, among others, the Defaulting Defendants.
2. On August 30, 1993 HSAC filed its Answer to the Second Amended Complaint.
3. The remaining Defaulting Defendants filed their Answer to the Second Amended Complaint on September 2, 1993.
4. On January 20, 1995, the Court entered its Order Granting Leave for Withdrawal of Counsel (the "Order"). The Order provided in pertinent part:

...that the Clerk of the Court be, and he is hereby, directed to send a copy of this Order to each of the Defendants affected by this Order, certified mail, return receipt requested, to the last known address provided by counsel for such Defendants. Upon return of the return receipt cards from the Defendants to the Court, counsel for such Defendants are granted leave to withdraw effective upon the date such return card is received by the Court for each Defendant. With regard to corporate defendants, the copy of this Order can be addressed to any person eligible to accept service from the corporation pursuant to Fed. R. Civ. P. 4(h).

If the return cards are not returned to the Court, counsel for each Defendant covered by this Order must provide personal service of this Order to each Defendant and provide the Court with proof of personal service. Upon proof of personal service being provided to the Court, counsel for such Defendants are granted leave to withdraw effective upon the date proof of personal service is filed with the Court....

...The Defendants affected by this Order are hereby directed to cause new counsel to enter an appearance in this matter, or, where appropriate, file a statement to proceed *in propria persona*, within twenty (20) days of the date of service. Failure to do so will result in the entry of default judgment as to liability in favor of the Plaintiffs and/or Cross-claimants against the Defendants who fail to comply.

6. On June 6, 1995, the Court entered its Order Granting Leave For Withdrawal of Counsel ("Withdrawal Order #1) finding that counsel for Defaulting Defendant HSAC had met the conditions of the Order by serving a copy of the Order on HSAC through its registered agent in Delaware, Prentice-Hall Corporation System, Inc. Withdrawal Order #1 at p. 1.

6. On July 20, 1995, the Court entered its Order Allowing Withdrawal of Counsel ("Withdrawal Order #2") finding that counsel for Defaulting Defendants Christopher, EnvirOmint, AGO and AGR had met the conditions of the Order by personally serving a copy of the Order on Christopher individually and as agent for EnvirOmint, AGO and AGR on July 11, 1995, through the United States Marshal in the District of Rhode Island. Withdrawal Order #2 at p. 1.

7. The Defaulting Defendants failed to cause new counsel to enter an appearance in the above-styled lawsuit and/or failed to file a statement to proceed *in propria persona*, within twenty days of service of the Order.

8. On March 1, 1996, this Court filed its Order finding that entry of default as to liability against the Defaulting Defendants is proper and setting this matter for a hearing on damages on April 11, 1996 at 4:00 p.m.

9. Plaintiffs have carried out the notice requirements of Rule 55(b)(2) of the Federal Rules of Civil Procedure as required by this Court's March 1, 1996 Order.

10. Defaulting Defendant Charles S. Christopher filed a Chapter 13 bankruptcy petition on April 11, 1996 at 2:43 p.m. in the United States Bankruptcy Court for the Northern District of Texas. Consequently, this Judgment shall not operate against Defaulting Defendant Christopher, pursuant to 11 U.S.C. § 362.

11. There is no just reason to delay entry of default judgment as to liability and damages against the remaining Defaulting Defendants.

12. Plaintiffs should be granted the relief sought in the Second Amended Complaint against HSAC, EnvirOmint, AGO and AGR as follows:

a) A Declaratory Judgment should be entered declaring that the 1993 Tender Offer and Proxy Solicitation initiated by HSAC and EnvirOmint violated the provision of Section 14(e) of the Williams Act.

b) HSAC, EnvirOmint, and all those acting on behalf of or in consent with them should be permanently enjoined from making or announcing future tender offers or proxy solicitations for shares or votes from shareholders of Plaintiffs until the true offeror, including any known assignees and affiliates of the offeror are disclosed, the identity background, amounts and agreements with all financing sources are disclosed, and all material information that a reasonable investor would require to make a prudent investment decision is disclosed to shareholders including, but not limited to all material litigation, bankruptcy and criminal background material related to offerors and financing sources.

c) Judgment in the amount of \$590,906.04 representing actual damages suffered by plaintiffs against EnvirOmint on Plaintiffs' Fourth Claim for Relief for Tortious interference with Contractual Relations.

d) Judgment for actual damages **suffered** by Plaintiff against EnvirOmint on Plaintiffs' Fifth Claim for Relief of Prima Facie Tort in the amount of \$1,555,527.34.

e) Judgment for actual damages **against** EnvirOmint, AGO and AGR on Plaintiffs' Sixth Claim for Relief of Conversion in the amount of \$17,782.00.

f) Because this Court finds **by clear and** convincing evidence that the actions of EnvirOmint, AGO and AGR were malicious and evidence a wanton disregard for the rights of another, the statutory limitation on exemplary damages should be lifted and exemplary damages of \$3,146,618.68 should be awarded **Plaintiffs against** EnvirOmint, AGO and AGR.

g) Because the damages **suffered** as a result of the tortious interference with contractual relations are a portion of the **damages suffered** as a result of the prima facie tort, the amount of damages awarded on these two **claims** for relief should be \$1,555,527.34.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs are granted judgment **against** HSAC, EnvirOmint Holdings, Inc., AGO and AGR as to liability on all claims asserted **against** them in the Second Amended Complaint filed herein; and

2. Plaintiffs have and recover judgment **against** HSAC, EnvirOmint, AGO and AGR as follows:

a. Declaration that the **1993 Tender Offer** and Proxy Solicitation described in Plaintiffs' Second Amended Complaint **violates** Section 14(e) of the Williams Act.

b. Home-Stake Acquisition Corporation and EnvirOmint Holdings, Inc., and their successors, affiliates, representatives **and** all those acting in concert with them are permanently enjoined from making or **announcing** future tender offers or proxy solicitations for shareholders of Plaintiffs until the following **unlawful** omissions and misrepresentations have been corrected, to wit:

i) Who is the offeror? Defaulting Defendants must clearly disclose the true identity of the offerors, all affiliates, including any and all intended assignees of the shares or votes, and their relevant, material background.

ii) The financing to accomplish these purported offers is not disclosed. Defaulting Defendants must clearly set forth the identify, background, amounts, and agreements with any and all financing sources.

iii) The background of the Offerors is not disclosed and/or is misleading. Defaulting Defendants must clearly disclose all affiliations with all entities involved, business background, and all material information a reasonable investor would require to make an investment decision, including, but not limited to, material litigation, bankruptcy and criminal involvement.

c. a money judgment is hereby entered against EnvirOmint Holdings, Inc. in the amount of \$1,555,527.34 for actual damages and \$3,146,618.68 in punitive damages.

d. A money judgment is further entered, jointly and severally, in the amount of \$17,782.00 for actual damages against EnvirOmint Holdings, Inc., AGO Company and AGR Corporation on Plaintiffs' conversion claim.

FOR ALL OF WHICH, LET EXECUTION ISSUE IMMEDIATELY.

IT IS SO ORDERED on this 26 day of April, 1996.

S/ SVEN ERIK HOLMES

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SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

**SUBMITTED BY:**

Tony W. Haynie OBA #11097  
P. Scott Hathaway OBA # 13695  
**CONNER & WINTERS,**  
A Professional Corporation  
2400 First Place Tower  
15 East 5th Street  
Tulsa, Oklahoma 74103-4391  
(918) 586-5711

Attorneys for Plaintiffs  
**THE HOME-STAKE OIL & GAS COMPANY and**  
**THE HOME-STAKE ROYALTY CORPORATION.**

**F I L E D**

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

**APR 29 1996**

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT**

JIM LUMAN,  
Petitioner,  
  
vs.  
  
RON CHAMPION,  
Respondent.

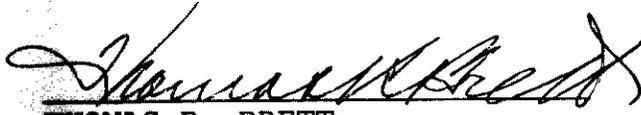
No. 93-C-297-B

ENTERED ON DOCKET  
DATE APR 30 1996 ✓

**ORDER**

In its latest response, the State of Oklahoma informs the Court that Petitioner had a jury trial in CF-90-1277 (Luman II) on April 8, 1996 with the assistance of co-counsel as set out in this Court's order conditionally granting the writ of habeas corpus. The jury found Petitioner not guilty. Accordingly, the petition for a writ of habeas corpus as to CF-90-1277 is hereby DENIED.

SO ORDERED THIS 29<sup>th</sup> day of Apr, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

*ed*

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

ENTERED ON DOCKET  
APR 30 1996

ROBERT LEE DUFFY,  
Petitioner,  
vs.  
RITA ANDREWS, Warden,  
Respondent.

No. 95-C-824 **FILED**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This matter comes before the Court on the State's response to Petitioner's application for a writ of habeas corpus. Petitioner, a pro se inmate, has not filed a reply.

On November 10, 1994, Petitioner pled guilty to Unlawful Possession of Marijuana with Intent to distribute and Possession of Firearm, after former conviction of a felony. The court imposed a ten-year sentence on each count to run concurrent. Petitioner did not appeal, but sought judicial review of his sentence within 120 days and then filed an application for post-conviction relief. The Court of Criminal Appeals declined to review Petitioner's request for post-conviction relief because "Petitioner failed . . . to file a complete, certified copy of the order with his petition in error as required by Rule 5.2, Rules of the Court of Criminal Appeals, 22 O.S.Supp. 1994, Ch. 18, App."

The State contends Petitioner is procedurally barred from raising his ineffective assistance of counsel claim because he failed to raise it in a proper appeal to the Court of Criminal Appeals. This Court agrees. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of

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that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

The state court's procedural bar as applied to Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground as it has been applied evenhandedly in the vast majority of cases. Id. at 986; see Rule 5.2, Rules of the Court of Criminal Appeals. Therefore, Petitioner's ineffective assistance of counsel claim is procedurally barred unless he shows "cause and prejudice" to excuse his procedural default or a fundamental miscarriage of justice.<sup>1</sup>

Petitioner has not shown that the reason for the procedural

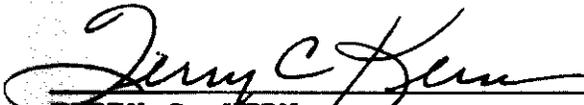
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<sup>1</sup> The cause standard requires a petitioner to show some external objective factor such as interference by officials or unavailability of the factual or legal basis for a claim, which impeded compliance with the state's procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "actual prejudice" resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

default was not something attributable to him. Further, he has made no attempt to show this Court that he is innocent of the crime and that a fundamental miscarriage of justice would result by the Court's refusal to review his petition.

Therefore, the Court hereby DENIES the petition for a writ of habeas corpus as procedurally barred.

SO ORDERED THIS 26 day of April, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE



Petitioner filed an application for post-conviction relief alleging as follows: (1) he was not aware the escape charge was a felony charge; (2) his sentence was to be served concurrently rather than consecutively; and (3) his counsel was ineffective for failing to insure the court honored the plea agreement for concurrent as opposed to consecutive time. On October 28, 1994, the Tulsa County District Court denied relief.<sup>1</sup> On March 30, 1995, the Court of Criminal Appeals denied Petitioner's request for a writ of habeas corpus. The Court noted that Petitioner's arguments "could have and should have been asserted in a timely motion to withdraw his guilty plea and a direct appeal."

In the present petition for a writ of habeas corpus, Petitioner again alleges that it was his understanding his sentence would run concurrent and not consecutive to his present sentence.<sup>2</sup> Respondent contends Petitioner's claim is procedurally barred as it could have been raised in a direct appeal of his conviction. Petitioner replies he did not file a direct appeal because he had filed a civil complaint in federal district court, concerning the ineffective assistance of his court-appointed counsel, and was

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<sup>1</sup> It is unclear whether Petitioner appealed the order denying his application for post-conviction relief.

<sup>2</sup> In ground three, Petitioner argues for the first time the DOC failed to follow its own policies with regard to disciplinary procedures. To the extent Petitioner seeks to challenge his removal from the Pre-parole Conditional Supervision Program (PPCS), see Harper v. Young, 64 F.3d 563 (10th Cir. 1995), the Court will not address that issue in the instant action. Removal from the PPCS programs relates to Petitioner's conditions of confinement and not to his alleged unconstitutional conviction.

awaiting the court's ruling.<sup>3</sup>

## II. ANALYSIS

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claims are barred by the procedural default

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<sup>3</sup> On October 12, 1994, Petitioner filed a second civil rights complaint in the Northern District of Oklahoma. He alleged he had been subjected to double jeopardy and excessive punishment when he was convicted of escaping from custody under Okla. Stat. tit. 21, § 443, although he had been found guilty of the same conduct in a disciplinary proceeding within the Oklahoma Department of Corrections. See Case No. 94-C-963-BU.

doctrine. The state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised in a first request for post-conviction relief. Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "actual prejudice" resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging that he had filed a civil rights action in the Northern District of Oklahoma

and was awaiting a response to his claim of ineffective assistance of counsel. The Court finds this argument unpersuasive. As noted above, the "cause" standard requires some objective factor external to the defense.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 340 (1992). Petitioner, however, does not claim that he is actually innocent of the crime at issue in this habeas action. Therefore, Petitioner's claims is procedurally barred.

### III. CONCLUSION

Accordingly, grounds one and two of the petition are DENIED and ground three is hereby DISMISSED without prejudice to it being asserted in a separated action.

SO ORDERED THIS 29<sup>th</sup> day of April, 1996.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

MICHAEL J. SWAN, Successor to  
BUCHBINDER & ELEGANT, P.A.,  
Receiver of Aikendale Associates,  
a California Limited Partnership,  
ROBERT MARLIN and JACK D. BURSTEIN,

Plaintiffs,

v.

SOONER FEDERAL SAVINGS AND LOAN  
ASSOCIATION, W.R. HAGSTROM,  
EDWARD L. JACOBY, DELOITTE,  
HASKINS & SELLS, PAINWEBBER,  
INCORPORATED and STEPHEN ALLEN,

Defendants.

**F I L E D**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 89-C-843-E

ENTERED ON DOCKET

DATE APR 30 1996

**ORDER**

The court has for consideration the Report and Recommendation of the Magistrate Judge filed March 20, 1996, in which the Magistrate Judge recommended that Plaintiffs' Motion to Strike Discovery Schedule and for Sanctions Against Deloitte be granted in part and denied in part. The parties agree that the Supreme Court's ruling on a certified question in Cray v. Deloitte, Haskins & Sells, Case No. 90-C-682-E, will be instructive on issues in this case. The Magistrate Judge therefore recommended that discovery be extended an additional four months, and the pretrial and trial dates be stricken until the Supreme Court has made its ruling. It was further recommended that the Plaintiff's Motion for Sanctions be denied, with permission to plaintiffs to re-urge the motion if problems in this case escalate. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that

the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Strike Discovery Schedule and for Sanctions Against Deloitte is granted in part and denied in part. Discovery is extended an additional four months, and the pretrial and trial dates are stricken until the Supreme Court has made its ruling on a certified question in Cray v. Deloitte, Haskins & Sells, Case No. 90-C-682-E. Plaintiffs Motion for Sanctions is denied, with permission to plaintiffs to re-urge the motion if problems in this case escalate. The parties are encouraged to notify the court if issues arise that need resolution in upcoming months.

Dated this 26<sup>th</sup> day of April, 1996.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOHN FRANCIS ROURKE,

Petitioner,

vs.

AUDIE W. DAVIS, M.D.,

Respondent.

Case No. 95-C-411-E ✓

ENTERED ON DOCKET

DATE APR 30 1996

**ORDER**

Now before the Court is the Motion to Alter or Amend Judgment (Docket #13) of the Petitioner John Frances Rourke (Rourke).

Rourke originally brought this action seeking the Court to compel Respondent Audie W. Davis to issue him a medical certificate. The Court dismissed this action, finding that it had no jurisdiction over the matter, pursuant to 49 U.S.C. §1153(a). 49 U.S.C. §46110(a) also supports the conclusion that the Court does not have jurisdiction over this matter.

While Rourke argues that the Court should make certain findings in this matter, he does not attempt to establish jurisdiction in this Court, or argue that the ruling regarding jurisdiction is incorrect.

Therefore, Rourke's Motion to Alter or Amend Judgment (Docket #13) is denied.

IT IS SO ORDERED THIS 26 DAY OF <sup>APRIL</sup> ~~AUGUST~~, 1996

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**F I L E D**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CONAGRA FERTILIZER COMPANY, d/b/a )  
THE CATOOSA FERTILIZER TERMINAL, a )  
Nebraska corporation, )

Plaintiff, )

vs. )

TRUCKERS EXPRESS, INC., a Delaware )  
corporation, )

Defendant. )

Case No. 94-C-766-E

ENTERED ON DOCKET  
DATE APR 30 1996

**ORDER**

Now before the Court is the Motion to Alter or Amend Judgment (Docket # 34) of the Defendant Truckers Express, Inc. (Truckers Express) and the Motion to Award Attorney Fees and Interest (Docket #30) of the Plaintiff ConAgra Fertilizer Company (ConAgra).

**Motion to Alter or Amend**

This case was originally brought by ConAgra for the repair, replacement, and diminution of value to its truck weighing scale. ConAgra alleged that its scales were damaged when a truck owned by Truckers Express and operated by one of its employees, utilized the scales despite the fact that the truck weighed more than the 100,000 pound limit for the scales. ConAgra asserted that the scale operator had warned the driver that the scales had a 100,000 pound limit and had stated her belief that the truck clearly weighed more than 100,000 pounds. Truckers Express admitted that the scale broke, but denied that the excessive weight of the truck was the cause of the break. Truckers Express also asserted that ConAgra assumed the risk of the break by opening its scale to the public.

After a bench trial, the Court entered its Findings of Fact and Conclusions of Law, concluding

that Truckers Express was responsible for the damage to the scale, and that ConAgra was damaged in the amount of \$61,843.20. Truckers Express asserts that the damages awarded to ConAgra are excessive. Truckers Express first argues that the proper award of damages would have been the reasonable market value of the damaged scale (\$18,000) plus the difference in value in the old "dump" scale and the new "platform" scale (\$14,000), instead of the cost of the new scale (\$35,589.68) plus the difference in the value. Truckers Express' argument, however, is flawed. The evidence before the court was that only a part of the scale was destroyed, and the finding of the Court was that ConAgra properly repaired the scale, although the repair was resulted in a different scale because a less expensive platform surface was used rather than a dump surface. In light of the Court's finding on this issue, the measure of damages utilized was correct. See Coe v. Esau, 377 P. 2d 815, 820 (Okla. 1963).

Truckers Express' second argument is that the Court erred in awarding damages for the "extra employee labor costs" associated with Dana Stratton's continuing to be employed on a part-time basis after the scale was broken. In fact, ConAgra was not awarded these costs, and the amount paid Ms. Stratton (derived from the pay stubs entered as an exhibit at trial) was subtracted from the incidental damages requested by ConAgra.

#### Motion for Attorney Fees and Prejudgment Interest

ConAgra, as the prevailing party, seeks attorneys' fees in the amount of \$19,525.00, costs in the amount of \$896.43, and prejudgment interest from August 8, 1994, the date of filing the Complaint. ConAgra relies on Okla.Stat.tit. 12, §940 for its request.

Truckers Express does not object to the request for attorneys' fees, but does object to certain costs and to prejudgment interest. With respect to costs, the Court finds that while they

do not fall within the categories of 28 U.S.C. §1920, they are appropriately awarded if they are the type of expenses normally separately charged to clients in this area. Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983). Truckers Express does not dispute that these costs fall within that description.

The issue with respect to prejudgment interest is whether it is provided for by §940. That section provides:

In any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action.

ConAgra admits that there are no cases construing §940 which have addressed this issue, but submits that the only logical reading of the statute would be to provide for prejudgment interest.

Truckers Express argues that in light of the fact that other statutes (Okla.Stat.tit.12, §727) specifically refer to prejudgment interest, the legislature did not intend such an award here.

The Court notes that prejudgment interest is not specifically provided for in the statute, and therefore holds that an award of prejudgment interest is not appropriate in this circumstance.

Defendant's Motion to Alter or Amend Judgment (Docket #34) is denied. Plaintiff's Motion for Attorney Fees and Cost (Docket #30) is granted and Plaintiff's Motion for Prejudgment interest (Docket #30) is denied.

IT IS SO ORDERED THIS 26<sup>th</sup> DAY OF APRIL, 1996.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**F I L E D**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN RE: )

MARGIE MICHAELS, )

Debtor. )

DEBORAH McDANIEL and )  
DALE GLEN McDANIEL, )

Plaintiffs/Appellant, )

v. )

MARGIE MICHAELS d/b/a )  
United Metro Marketing Survey, )

Defendant/Appellee. )

Bky. No. 95-00418-W  
Chapter 7

Adversary No. 95-0167-W

Case No. 95-C-1033-C

**ENTERED ON DOCKET**  
**APR 30 1996**  
**DATE** \_\_\_\_\_

**ORDER**

This order pertains to the appeal of Margie Michaels from the final judgment of the United States Bankruptcy Court for the Northern District of Oklahoma entered on October 3, 1995, finding that she was collaterally estopped from litigating issues determined in an earlier default judgment.

This court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate view of bankruptcy rulings with respect to findings of fact. *In re Morrissey*, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed

questions of law and fact, which are subject to the *de novo* standard of review. *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1266 (10th Cir. 1988). This appeal challenges the legal conclusion drawn from the facts presented at trial, so *de novo* review is proper.

On and before June 6, 1987, Deborah McDaniel ("McDaniel") was a employee of Margie Michaels ("Michaels), who controlled and operated United Metro Marketing Survey ("UMMS"). On July 13, 1987, in response to a subpoena from the State of Oklahoma, which was conducting an investigation against Michaels, McDaniel testified and gave evidence against Michaels. The following day Michaels terminated McDaniel's employment with UMMS. As a result, on October 3, 1988, McDaniel filed a suit in Oklahoma state court against Michaels for wrongful termination. She alleged that Michaels' conduct was wilful and malicious, and that Michaels acted in retaliation for McDaniel's testimony. McDaniel and her husband sought \$312,149.83 in total damages.

Michaels answered *pro se* on November 14, 1988. McDaniel and her husband ("the McDaniels") mailed their first interrogatories, requests for admission, and requests for production to Michaels on April 26, 1989. On September 22, 1989, the court set a scheduling conference for October 18, 1989, and duly notified all parties, but Michaels failed to appear at the scheduling conference. The state court had three unopened envelopes addressed to Michaels' address of record which had been returned, indicating that her post office box was closed and no forwarding address was available. After hearing testimony of the McDaniels and arguments of counsel,

the court entered judgment against Michaels (the "first default judgment). On July 25, 1990, Michaels, represented by counsel, filed a request in state court to vacate the judgment, claiming that the box had been closed without her knowledge. After the McDaniels filed a response, the state court, on January 17, 1991, granted the request to vacate.

After Michaels responded to the McDaniels' interrogatories, requests for admission, and requests for production, the McDaniels sent Michaels' attorney a Notice of Deposition on June 5, 1991; he received it the next day. The Notice called for deposing Michaels on June 13, 1991. On June 12, 1991, Michaels' attorney filed an Application to Withdraw as Counsel of Record. But before doing so, he informed Michaels of the scheduling dates that pertained to her litigation.

On June 12, 1991, Michaels, proceeding *pro se*, sought additional time to obtain new counsel, and filed a Motion to Stay All Proceedings and a Motion to Quash Notice of Deposition, which was scheduled for the next day. She alleged that she did not receive actual notice until June 11, 1991. On June 13, 1991, the day scheduled for the deposition, the McDaniels' attorney received the Motion to Quash, but he appeared at the correct time and place of the deposition and made a record of the proceedings in Michaels' absence.

On June 19, 1991, the McDaniels responded to Michaels' motions, and requested that the court grant sanctions and enter a default judgment. On June 21, 1991, the state court denied Michaels' motions, and set a hearing for the McDaniels' Request for Sanctions and Default Judgment for July 3, 1991. On June 21, 1991,

the Deputy Court Clerk also sent Michaels certified copies of the court order, but Michaels failed to appear at the hearing on July 3, 1991. The state court then granted another default judgment (the "second default judgment") against Michaels pursuant to Okla. Stat. tit. 12, §§ 3237 (B)(2) and 3237 (E). The state court judgment specifically determined:

That [Michaels had] followed a pattern of delay of these proceedings. [And that Michaels] wrongfully terminated Plaintiff Deborah McDaniel in violation of public policy; that [Michaels] intentionally caused her to suffer severe emotional distress and resulting illness; ...that [Michaels] acted with malice, oppression and evil intent against [Deborah McDaniel]; and that the allegations in [McDaniel's] Petition are true.

That Plaintiff Deborah McDaniel suffered actual damages in the amount of \$42,600.00; ...[and] that exemplary damages should be set in the amount of \$250,000.00....

Four years later, on May 15, 1995, the McDaniels filed their complaint commencing an adversary proceeding in Michaels' bankruptcy case, seeking a determination of the dischargeability of the state court judgment for the wrongful termination and related damages. In the motion for summary judgment in the bankruptcy proceedings, the McDaniels asserted that the doctrine of collateral estoppel barred Michaels from challenging the default judgment issued by the Oklahoma district court. The McDaniels relied on Okla. Stat. tit. 12, § 1038, which has a three-year limitation for vacating a judgment. After a hearing on the motion, the bankruptcy court issued an opinion holding that the default judgment deserved collateral estoppel effect.

This court is asked to review whether the bankruptcy court erred in its ruling

that the default judgment in the previous litigation had a collateral estoppel effect. The question is whether the granting of a default judgment under these circumstances is to be considered "actual litigation" of the underlying issue sought to be collaterally estopped.

In accordance with the United States Constitution Article IV § 1, Congress pronounced that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law . . . in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. As a result, a federal court must look to the laws of the state of the court that entered the judgment to determine if collateral estoppel applies. *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985).

With the goal of eliminating unnecessary litigation, fostering reliance on adjudication, and promoting comity between the state and federal courts, the federal courts, in general, have applied collateral estoppel to issues decided by state courts. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The doctrine of collateral estoppel also applies to bankruptcy proceedings. *In re Arguez*, 134 B.R. 55, 58 (Bankr. S.D. Fla. 1991). A default judgment in the state court does not preclude its application. *In re Muir*, 107 B.R. 13, 17 (Bankr. E.D. N.Y. 1989).

In dicta, the United States Supreme Court in *Brown v. Felson*, 442 U.S. 127, 139 n.10 (1979), stated that collateral estoppel applies to bankruptcy proceedings and "treats as final . . . those questions actually and necessarily decided in a prior

suit."<sup>1</sup> In *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991), the Court stated: "[w]e now clarify that collateral estoppel principles do indeed apply to discharge exception proceedings pursuant to § 523(a)."

Furthermore, the United States Supreme Court determined that a default judgment has an estoppel effect in *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691 (1885). In response to the defendant's argument that the judgment was by default and not final, the court in *Last Chance Mining Co.* said:

[A] judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.

The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination? and not, upon what evidence or by what means was it reached? A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission.

*Id.* at 692. Thus, the Court held that a judgment entered by default before the "answer and contest" has the same effect as one entered later in the proceedings.

The Tenth Circuit, at first glance, has set out what appears to be inconsistent elements for determining collateral estoppel. In some cases, the Circuit stated that the focus should be on whether the issue was "actually litigated" by the parties in the prior state action. See, *In re Tsamasfyros*, 940 F.2d 605, 606-607 (10th Cir. 1991),

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<sup>1</sup> In *Brown v. Felson*, the court refused to allow a debtor to use the doctrine of res judicata as a shield to preclude a creditor's challenge to the dischargeability of a debt allegedly incurred through fraud. There, the allegations of fraud in the state court action were never determined by the court, because the case was settled using a stipulated judgment that did not indicate the cause of action on which the debtor's liability was based.

and *In re Wallace*, 840 F.2d 762, 764-65 (10th Cir. 1988). In other cases, the Tenth Circuit has stated that collateral estoppel applies if the parties have "a full and fair opportunity to litigate" the issues. *See, Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 689 (10th Cir. 1992), *cert. denied*, 507 U.S. 1042 (1993), and *In re Lombard*, 739 F.2d 499, 502 (10th Cir. 1984). As the bankruptcy court noted, these two elements do not contradict one another. In essence, "actually litigated" is tantamount to "full and fair opportunity". A case actually litigated means the case was actually and necessarily determined by the judgment in question after a full and fair opportunity to litigate.

Consequently, collateral estoppel precludes the bankruptcy court from relitigating issues decided in previous litigation in a state court if: (1) the prior state action involved the same issue; (2) the prior state action has been finally adjudicated on the merits; (3) the prior state action involved the same parties or their privy; and (4) the prior state action afforded the parties a full and fair opportunity to litigate the issues. *Murdock*, 975 F.2d at 687.

The bankruptcy court's decision is consistent with *Last Chance Mining Co.* and *Murdock*. The state court entered the default judgment well after the answer, and the court made its determination as required by *Last Chance Mining Co.* In accord with *Murdock*, Michaels had an opportunity, in fact, two opportunities, to fully and fairly litigate the issues.

Recently, the Tenth Circuit indicated that a default judgment can be given preclusive effect. *See, Griego v. Padilla*, 64 F.3d 580, 584 (10th Cir. 1995).

In *Griego*, the state court granted a motion for summary judgment for the plaintiff after the defendant's attorney failed to respond to secondary discovery requests or to the pending summary judgment motion. The defendant's counsel also neglected to advise the defendant that discovery requests were outstanding or that the motion for summary judgment was pending.

After new counsel was retained, the defendant unsuccessfully attempted to seek relief from the judgment. She later "commenced a state court action for relief from the judgment, contending it was procured by fraud on the court." *Id.* at 583. The trial court ruled that *res judicata* applied, and the defendant did not appeal. Later, she filed for bankruptcy, and requested a determination that the \$300,000 awarded in the prior litigation was dischargeable. Similar to this case, the defendant in *Griego* claimed that the \$300,000 judgment was not a final decision on the merits. *Id.* at 584. The court disagreed, holding that summary judgment deserves collateral estoppel effect. The court added that "[e]ven if it were a default judgment . . . res judicata would still apply." *Id.* at 584.

In *Griego*, the Tenth Circuit applied New Mexico state law, but the result would be the same in this case applying Oklahoma law. The bankruptcy court noted that in *Tootle v. McClellan*, 103 S.W. 766, 7 Ind. T. 64, 12 L.R.A., N.S. 941 (Okla. Ind. T. 1907), the court found that a judgment by default was conclusive and binding on the parties "as to matters litigated." The bankruptcy court concluded that the court must have meant that "matters litigated" were matters at issue and actually determined by the default judgment. The bankruptcy court also cited *Cashway*

*Lumber Co. v. Langston*, 479 P.2d 582, 585 (Okla. 1978), where the court denied collateral estoppel effect to a default judgment under the peculiar circumstances of that case.<sup>2</sup> In Oklahoma, once a matter has passed to final judgment in a court of competent jurisdiction, it may not be reopened or subsequently considered absent fraud. *In re Laing*, 945 F.2d 354, 358-359 (10th Cir. 1991). The Oklahoma Supreme Court in *Casker v. Dennis*, 252 P.2d 1027, 1030 (Okla. 1952), ruled that a default judgment, from which no appeal is taken, is a final judgment. No appeal from the second default judgment was taken, and Michaels did not seek to vacate it. She allowed four years to pass without any apparent concern, but now wants to challenge it on the merits.

The Oklahoma Supreme Court has held that, "A judgment by default . . . is as conclusive against such defendant, upon every matter admitted by the default, as any other kind of judgment." *Rhodabarger v. Childs*, 250 P. 489, 490 (Okla. 1926). Rhodabarger brought an action to recover money allegedly owed to him by Childs by virtue of his interest in certain drilling tools. Childs claimed the action was barred since the issue was decided in a previous replevin action he had brought against Rhodabarger and his partners. In the former case, Childs had obtained a judgment by default. In the subsequent action Rhodabarger pursued the very same defensive

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<sup>2</sup> In that case, the owners of a house stipulated that default judgment in favor of unpaid materialmen should be entered against their building contractor. The court held, however, that the resulting default judgment was insufficient to establish liability as against the owners, as it had not been established that the materials received by the contractor had, in fact, been used in the construction of their house.

claim he had lost by default in the prior replevin action. The court stated that:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a court of competent jurisdiction is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court, or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

*Id.* at 490 (quoting *Comanche Ice Co. v. Binder & Hillery*, 172 P. 629 (Okla. 1917)).

As the cases have shown and the bankruptcy court stated, the court must have "decided" matters that were actually in issue--even if it reached the final judgment by default.

The court is aware that some courts have refused to give a default judgment preclusive effect. See, *In re Barzegar*, 189 B.R. 864, 873 (Bankr. N.D. Ga. 1995) (interpreting Maryland law); *In re Iannelli*, 12 B.R. 561, 563 (Bankr. S.D.N.Y. 1981), and *In re Hubbard*, 167 B.R. 969, 973 (Bankr. D. N.M. 1994). However, other courts have decided that a default judgment can be preclusive. See, *In re Moore*, 186 B.R. 962, 971 (Bankr. N.D. Cal. 1995); *In re Cornell*, 178 B.R. 45, 49 (Bankr. D. Conn. 1995); *In re Nourbakhsh*, 162 B.R. 841, 844 (9th Cir. BAP 1994) *affirmed*, 67 F.3d 798 (9th Cir. 1995) (interpreting Florida law and finding that a Florida court views a default judgment as "tantamount" to actual litigation); *Ortega v. Board of County Commissioners of County of Castillo*, 683 P.2d 819, 821 (Colo. Ct. App. 1984) (if party had a full and fair opportunity to litigate, then there was actual litigation); *In re Arguez*, 134 B.R. at 58; *In re Seals*, 110 B.R. 331, 333 (M.D. Tenn. 1989) (collateral estoppel allowed for a default judgment finding debtor liable for assault and battery

and imposing compensatory and punitive damages).

The McDaniels rely upon *In re Culp*, 140 B.R. 105 (Bankr. N.D. Okl. 1992) for the proposition that, "[a]ctual trial of the issues is not necessary to satisfy the requirement of "actually litigated" in this circuit."<sup>3</sup>

In turn, Michaels relies on *In re Hall*, 31 B.R. 148 (Bankr. W.D. Okla. 1983), in which the court stated that since "collateral estoppel deals only with those matters actually litigated, a default judgment can not perforce give rise to collateral estoppel." *Id.* at 149.<sup>4</sup>

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<sup>3</sup> In that case, the bankruptcy judge gave preclusive effect to his ruling in a prior case which established the existence of the debt sought to be discharged. Regarding his previous findings, the judge stated:

The findings were based on Culp's own admissions in his answer to a complaint, and were made in the course of ruling on a motion for summary judgment to which no response was filed but which was considered by the Court on its own merits and not merely granted in default of a response, *In re FDR*, 129 R.R. pp. 656-657. Under these circumstances, these issues were "actually litigated" in the prior action, in that Culp was given "a full and fair opportunity to present his case."

Although Judge Wilson is widely recognized and respected by his colleagues on the bench for his bankruptcy acumen, counsel should bear in mind that opinions originating from the district court level do not set circuit precedent.

<sup>4</sup> However, in that case the court gave the default judgment preclusive effect under the doctrine of *res judicata*, stating:

When a debtor comes into bankruptcy court he carries with him certain fixed rights and liabilities. In the instant case, Debtor comes before the Court with a seventeen thousand eight hundred nine dollar and twenty-seven cent (\$17,809.27) judgment against him. That judgment exists. It is there. The fact that it was obtained by default does not concern us for Debtor was at all times accorded due process. There is no overriding federal policy preventing us from accepting the judgment

Given the circumstances of the case under consideration, the court concludes that it is appropriate to adopt an interpretation of "actually litigated" that includes a default judgment entered after the defendant has had a full and fair opportunity to defend.

"[T]he Bankruptcy Court is not a forum for excusing misconduct." *In re Manley*, 135 B.R. 137, 147 (Bankr. N.D. Okla. 1992). Misconduct was the reason that the state court entered the default judgment in the prior litigation. The McDaniels requested sanctions and a default judgment. Since Michaels did not respond to the McDaniels' repeated request for discovery nor appear at the motions hearing, the court granted the default judgment.

Michaels had two opportunities to fully and fairly litigate the issues in her case and her failure twice to make use of her opportunity is not a denial of due process. The second default was entered as part of a sanctions order resulting from her abuse of the discovery and litigation process. In addition, four years passed after the state court entered the default judgment against her before she claimed that it was not binding--well past the most generous limit allowed under Okla. Stat. tit. 12, § 1038 in which to vacate or modify a judgment.

The doctrine of collateral estoppel bars Michaels from attacking the judgment

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at face value. Here we are not dealing with a question of dischargeability and the standards and degree of proof required to prevent the same. Hence, Debtor's reliance on *Brown v. Felsen, supra*, is misplaced. Rather we are asked to set aside a valid default judgment, to give Debtor a second chance. This we decline to do.

by default issued by the state court. The judgment of the United States Bankruptcy Court for the Northern District of Oklahoma is affirmed.

Dated this 29<sup>th</sup> day of April, 1996.

S:\orders\michaels.or

  
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H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

**FILED**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HELEN GRAY TRIPPET,

Plaintiff,

v.

CAMERON DEE SEWELL,

Defendant.

ENTERED ON DOCKET

DATE 4-30-96

Case No. 93-CV-1144-H ✓

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in **his records**, without prejudice to the rights of the parties to reopen the proceedings for good cause **shown** for the entry of any stipulation or order, or for any other purpose required to obtain a **final determination** of the litigation.

If, by May 28, 1996, the Parties **have not** reopened for the purpose of obtaining a final determination herein, this action shall be **deemed** dismissed with prejudice.

IT IS SO ORDERED.

This 26<sup>TH</sup> day of April, 1996.



Sven Erik Holmes  
United States District Judge

98

ENTERED ON DOCKET

DATE 4-30-96

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

**F I L E D**

APR 29 1996 *sa*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RONALD WILLIAMS,

Plaintiff,

v.

Case No. 95-C-614-H ✓

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

Defendants.

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in **his records**, without prejudice to the rights of the parties to reopen the proceedings for good cause **shown** for the entry of any stipulation or order, or for any other purpose required to obtain a **final determination** of the litigation.

If, by May 27, 1996, the Parties **have not** reopened for the purpose of obtaining a final determination herein, this action shall be **deemed** dismissed with prejudice.

IT IS SO ORDERED.

This 26<sup>TH</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

16

ENTERED ON DOCKET

DATE 4-30-96

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

**FILED**

APR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CONTINENTAL ASSURANCE COMPANY,  
a foreign corporation,

Plaintiff,

v.

YASSER ALHAMZAWI,

Defendant.

Case No. 95-CV-834-H ✓

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in **his records**, without prejudice to the rights of the parties to reopen the proceedings for good cause **shown** for the entry of any stipulation or order, or for any other purpose required to obtain a **final determination** of the litigation.

If, by May 23, 1996, the Parties **have not** reopened for the purpose of obtaining a final determination herein, this action shall be **deemed dismissed** with prejudice.

IT IS SO ORDERED.

This 26<sup>TH</sup> day of April, 1996.



Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE 4-30-96

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

HERSHEL PAYTON,  
(SSN: 429-15-9220)

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,

Defendant.

APR 23 1996 *sa*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

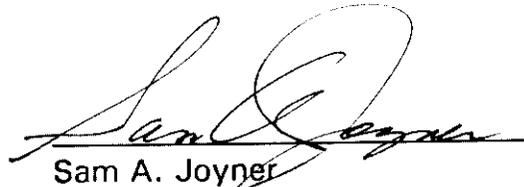
No. 95-C-468-J ✓

**JUDGMENT**

This action came before the Court for consideration and an Order affirming the decision of the Commissioner of Social Security has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

IT IS SO ORDERED.

Dated this 23 day of April 1996.

  
Sam A. Joyner  
United States Magistrate Judge

ENTERED ON DOCKET

DATE 4-30-96

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

HERSHEL PAYTON,  
(SSN: 429-15-9220)

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security,

Defendant.

APR 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 95-C-468-J ✓

**ORDER**<sup>1/</sup>

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying him Disability Insurance and Supplemental Security Income. The Administrative Law Judge ("ALJ"), Henry Ginger, found that Plaintiff was not disabled because (1) Plaintiff retained the Residual Functional Capacity ("RFC") to perform light work, and (2) Rule 202.18 of the Medical-Vocational Guidelines ("the Grids") directed a finding of "not disabled" for a younger individual like Plaintiff with limited education and no transferable skills.

Plaintiff argues that the ALJ erred (1) by failing to find that Plaintiff's depression constituted a severe impairment, (2) by relying on the Grids in light of Plaintiff's non-exertional impairments (i.e., pain and depression), and (3) by failing to give proper weight to the opinions of Drs. James M. Robinette and Jimmy C. Martin. The Court finds, however, that the ALJ applied the correct legal standards and his

<sup>1/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed July 6, 1995.

factual conclusions are supported by substantial evidence. Consequently, the Commissioner's denial of benefits is **AFFIRMED**.

#### **I. PLAINTIFF'S BACKGROUND**

At the time of the hearing below, Plaintiff was a 36 year old male with a 10th grade education. Plaintiff's past relevant work was primarily that of an engine mechanic. Plaintiff also worked in construction, as a tire re-treader, as a deck hand on a boat, and in the oil field. *R. at 23-29, 77-90, 206-208.* On July 14, 1990, Plaintiff injured his back while trying to move a car engine at work. As Plaintiff was moving the engine, he felt something snap in his lower back. Plaintiff worked for another four days and during that time, the pain in Plaintiff's back got worse and it worked itself into Plaintiff's left hip and leg. Plaintiff quit working on July 18, 1990 and has not worked since. *R. at 26-27, 31, 91-100.*

Shortly after his injury, Plaintiff was diagnosed as having a herniated disk in his lumbar spine at the L4-L5 level. Initially, Plaintiff saw a chiropractor and an osteopathic doctor for the pain in his back and left leg. When Plaintiff did not obtain relief after six months of conservative treatment with these doctors, it was determined that surgery was needed. On January 17, 1991, Stephen Eichert, D.O., removed portions of the vertebra at L4-L5 and he removed the herniated disk at L4-L5. *R. at 116-121, 148-68.*

Plaintiff tolerated the surgery well and he recovered adequately. During the three years since his operation, Plaintiff has complained of pain in his lower back and pain and numbness in his left leg and hip. Plaintiff has seen doctors intermittently to

try and manage his pain. These doctors have prescribed various medications to help control the pain. There is no indication in the medical record that additional surgery would alleviate Plaintiff's pain. Plaintiff also alleges that he suffers from depression. According to Plaintiff, it is this pain and depression which causes him to be unable to work.

## II. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>2/</sup>

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<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof at step five to establish that the

(continued...)

The standard of review to be applied by this Court to the Commissioner's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the

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<sup>2/</sup> (...continued)

claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## II. PLAINTIFF'S ALLEGATIONS OF ERROR BY THE ALJ

### A. ALJ's Alleged Failure to Find Plaintiff's Depression Severe

Plaintiff argues that the ALJ did not move past step two's severity requirement while evaluating Plaintiff's depression. Specifically, Plaintiff argues that "[t]he ALJ erred by failing to find that plaintiff's depression for which he has been prescribed medication constitutes a severe impairment." Brief, p. 4.

Step two of the Sequential Evaluation Process is governed by the Commissioner's "severity regulation." Bowen, 482 U.S. at 140-41; Williams, 844 F.2d at 750-51. Pursuant to this regulation, Plaintiff must make a "threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities."<sup>3/</sup> Williams, 844 F.2d at 751. This

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<sup>3/</sup> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1520(b). These abilities and aptitudes include the following:

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of Judgment;
- (5) Responding appropriately to supervision, co-workers and usual work situations; and
- (6) Dealing with changes in a routine setting.

20 C.F.R. § 404.1521(b).

threshold determination is to be based on medical factors alone. Vocational factors, such as age, education, and work experience, are not to be considered. Bowen, 482 U.S. at 153; Williams, 844 F.2d at 750. Plaintiff's burden on the severity issue is *de minimis*. Williams, 844 F.2d at 751.

A review of the ALJ's opinion establishes that in evaluating Plaintiff's alleged depression, he proceeded past step two. The ALJ evaluated the medical evidence and Plaintiff's own testimony as it related to Plaintiff's alleged depression. The ALJ determined that Plaintiff's depression would "impair only his ability to perform work involving complex tasks or high levels of judgment." *R. at 189*. The ALJ concluded by finding that Plaintiff's RFC to engage in light work would not be significantly compromised by his depression. *Id.* The ALJ then applied the Grids to determine that Plaintiff was not disabled. Thus, it is clear that the ALJ's analysis of Plaintiff's depression proceeded to step five and did not stop at step two. Plaintiff's first allegation of error is, therefore, without merit.

**B. ALJ's Alleged Failure to Give Proper Weight to Drs. Robinette and Martin**

Plaintiff was apparently referred to Jimmy Martin, M.D. by his lawyer. Dr. Martin examined Plaintiff once on May 28, 1991 and rendered a written opinion regarding Plaintiff's condition on May 29, 1991. Based on his examination, Dr. Martin opined that Plaintiff "has been 100% temporarily totally disabled from [the date of his accident] until the present time, and will continue to be 100% temporarily totally disabled pending further treatment and evaluation." *R. at 167-68*.

The file also contains two letters from James Robinette, M.D. On July 12, 1994, Dr. Robinette wrote a one sentence letter to "Whom it May Concern." In this letter, Dr. Robinette states that Plaintiff "is totally disabled with Major Depression, Chronic low back and Peripheral Neuropathy, etiology undetermined." *R. at 391*. On August 31, 1994, Dr. Robinette wrote a two paragraph letter to Plaintiff's attorney. In this letter, Dr. Robinette states that Plaintiff "has chronic low back sprain/strain, residuals of shoulder injury with frozen shoulder and atrophy and a neuromuscular disorder, sudden. [Plaintiff] also has inadequate personality." *R. at 393*. Plaintiff argues that Dr. Martin's and Dr. Robinette's reports establish that he is disabled and that the ALJ erred when he failed to give them conclusive weight.

The Court will defer to the ALJ's determinations of witness credibility. Hamilton v. Secretary of H.H.S., 961 F.2d 1495, 1498 (10th Cir. 1992). While evaluating medical evidence, however, more weight will be given to evidence from a treating physician than will be given to evidence from a consulting physician appointed by the Commissioner or a physician who merely reviews medical records without examining the Plaintiff. Williams, 844 F.2d at 757-58; Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). A treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). To determine whether to accept or reject a treating doctor's opinion, the ALJ may weigh it with and balance it against other evidence in the record. Castellano v. HHS, 26 F.3d 1027, 1029 (10th Cir. 1994).

If the ALJ rejects a doctor's opinion, he must give specific and legitimate reasons for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). The ALJ did so in this case. *R. at 186-188*. The ALJ spent three pages in his opinion dealing with and explaining why he **did not** rely conclusively on the opinions of Drs. Robinette and Martin. In particular, **the ALJ** noted that Dr. Robinette's one sentence letters were conclusory and **unsupported** by clinical findings or testing. Also, Dr. Martin only saw Plaintiff once and, **as the ALJ** indicates, it appears as if Dr. Martin simply accepted Plaintiff's complaints without question. As the ALJ demonstrates in his opinion, Dr. Martin's and Dr. Robinette's conclusions were also contrary to inferences which could be drawn from other medical evidence in the record. *R. at 186-189*. It is the ALJ's function, and not this Court's, to resolve any conflicts between the opinions of Plaintiff's **treating** physicians. 20 C.F.R. § 404.1527; Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983). Plaintiff's third allegation of error is, therefore, without merit.

**C. ALJ's Alleged Erroneous Use of and Reliance on the Grids**

The ALJ determined that (1) Plaintiff retained the RFC to perform light work, (2) Plaintiff was a younger individual within the meaning of the Grids<sup>4/</sup>, (3) Plaintiff had limited education, and (4) Plaintiff had skills which were not transferable from his prior work experience. Plaintiff **does not** argue that these conclusions are erroneous. Rather, Plaintiff argues that the ALJ **"erroneously** relied on the vocational-guidelines

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<sup>4/</sup> See 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.00(h).

in light of [his] non-exertional impairments of depression and significant back pain." Brief, p. 4-5. Plaintiff argues that because he has non-exertional impairments, the ALJ should have called a vocational expert and should not have relied on the Grids<sup>5/</sup> to assess Plaintiff's ability to perform work in the national economy.

The ALJ applied Rule 202.18 of the Grids. Rule 202.18 is located in the grid which relates to light work. Based on the findings made by the ALJ, Rule 202.18 directs a finding of "not disabled." Rule 201.19 is located in the grid which relates to sedentary work. Based on the findings made by the ALJ, Rule 201.19 would also direct a finding of "not disabled." Thus, even if the ALJ were incorrect in concluding that Plaintiff retained the RFC to perform light work, the Grids would still direct a finding of not disabled even at the sedentary level.

"The mere presence of a nonexertional impairment does not automatically preclude reliance on the grids. The presence of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant." Gossett v. Bowen, 862 F.2d 802, 807-808 (10th Cir. 1988). See also Ray v. Bowen, 865 F.2d 222 (10th Cir. 1989) ("[T]he ALJ's finding that Miss Ray suffered from no nonexertional impairment severe enough to limit the

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<sup>5/</sup> "The Grids set forth presumptions regarding whether jobs exist in significant numbers in the national economy given the particular limitations possessed by the claimant." Trimjar v. Sullivan, 966 F.2d 1326, 1332 (10th Cir. 1992). "[T]he grids presume an occupational base which reflects the number of jobs in the national economy for each grid. If a claimant fits within a 'not disabled' grid category, the [Commissioner] presumes that sufficient jobs exist in the national economy that the claimant can perform." Id. at 1332, n.21.

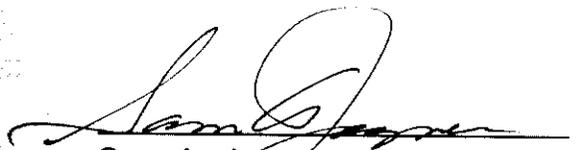
range of jobs available to her, and his consequent reliance on the grids, was supported by substantial evidence.").

The ALJ's use of the Grids was appropriate unless it can be said that Plaintiff's pain or depression prevented him from doing the full range of sedentary or light work. The ALJ's opinion analyzes the relevant medical evidence and Plaintiff's testimony. The ALJ concluded that Plaintiff's pain is not as severe as he alleges. Credibility determinations by the ALJ are given great deference by this Court. See, e.g., Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). The ALJ also concluded that Plaintiff's depression, which is related primarily to the death of his mother (*r. at 223*), would not significantly compromise Plaintiff's ability to engage in either light or sedentary work. The ALJ's conclusions are supported by substantial evidence in the record. Thus, the ALJ's reliance on the Grids was not inappropriate under the circumstances of this case and Plaintiff's second allegation of error is without merit.

The Commissioner's disability determination is, therefore, **AFFIRMED**.

IT IS SO ORDERED.

Dated April 23, 1996.

  
Sam A. Joyner  
United States Magistrate Judge

DATE 4-30-96

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

APR 29 1996

ERIC AND LISA ROPER,  
Individually and as Husband  
and Wife,

Plaintiffs,

vs.

U.S. HOMES, a New York  
corporation, and NORTHWEST  
NATIONAL INSURANCE COMPANY,  
a foreign insurance company,

Defendants.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-1054-H

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs Eric and Lisa Roper, do hereby dismiss their Amended Complaint and all claims and actions in the above styled and numbered case against the Defendants U.S. Home Corporation and Northwestern National Insurance Company, with prejudice.

Defendants, by and through their undersigned counsel of record, do hereby stipulate to the Plaintiffs' dismissal, with prejudice.

DATED this 26<sup>th</sup> day of April, 1996.

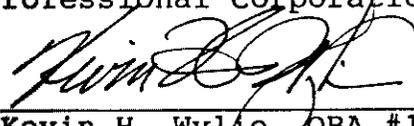
Eric Roper  
ERIC ROPER, PLAINTIFF

Lisa Roper  
LISA ROPER, PLAINTIFF

By: Tom C. Lane  
Tom C. Lane, Sr., OBA #12746  
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Attorney for Plaintiffs Eric  
and Lisa Roper

ELLER AND DETRICH  
A Professional Corporation

By: 

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Tulsa, Oklahoma 74114  
(918) 747-8900

Attorneys for Defendants, U.S. Home  
Corporation and Northwestern  
National Insurance Company

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ENTERED ON DOCKET

DATE 4-30-96

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

APR 26 1996 *SL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FRANKIE FOWLER for PRESIOUS FRANK, a )  
minor, SSN: 441-84-9379, )

Plaintiff, )

vs. )

SHIRLEY S. CHATER, Commissioner of Social )  
Security Administration )

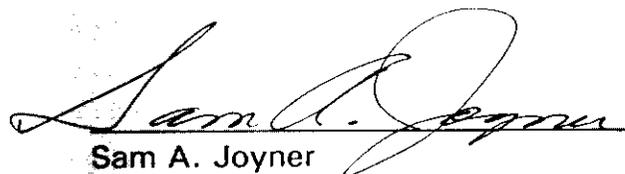
Defendant. )

Case No. 95-C-350-J ✓

**JUDGMENT**

This action has come before the Court for consideration and an Order affirming the decision of the Commissioner has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 26 day of April 1996.



Sam A. Joyner  
United States Magistrate Judge

16

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**APR 25 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
RILANDRA F. BATISE; UNKNOWN )  
SPOUSE OF Rilandra Batise; CITY OF )  
BROKEN ARROW, Oklahoma; COUNTY )  
TREASURER, Tulsa County, Oklahoma; )  
BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
)  
Defendants. )

ENTERED ON DOCKET  
**APR 29 1996**  
DATE \_\_\_\_\_

Civil Case No. 95cv 1192BU

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 24<sup>th</sup> day of April, 1996. 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, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney; and the Defendant, RILANDRA F. BATISE, has appeared, but her default has been entered by the Clerk of this Court..

The Court being fully advised and having examined the court file finds that the Defendant, RILANDRA F. BATISE, signed a Waiver of Summons on January 3, 1996.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on December 12, 1995; that the Defendant, CITY OF BROKEN ARROW,

AND  
UPON RECEIPT

Oklahoma, filed its Answer on December 26, 1995; and that the Defendant, RILANDRA F. BATISE, filed her Affidavit on February 14, 1996.

The Court further finds that the Defendant, RILANDRA F. BATISE, is a single unmarried person, as shown by the Affidavit filed on February 14, 1996.

The Court further finds that on July 2, 1991, Rilandra F. Batise, filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-B-2296 C. On October 22, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on December 30, 1991.

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 TEN (10), MAE MEADOW ADDITION, PART OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER (SW/4 SE/4), SECTION THREE (3), TOWNSHIP SEVENTEEN (17) NORTH, RANGE FOURTEEN (14) EAST OF THE INDIAN BASE AND MERIDIAN, CITY OF BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on June 24, 1987, Herman E. Nichols, Jr. and Cherry C. Nichols, executed and delivered to INLAND MORTGAGE CORP., their mortgage note in the amount of \$73,438.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Herman E. Nichols, Jr. and Cherry C. Nichols, husband and wife, executed and delivered to INLAND MORTGAGE CORPORATION a mortgage dated June 24, 1987, covering the above-described property. Said mortgage was recorded on June 26, 1987, in Book 5034, Page 2212, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 24, 1987, INLAND MORTGAGE CORP., assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORP., of Oklahoma. This Assignment of Mortgage was recorded on September 9, 1987, in Book 5050, Page 1180, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, MORTGAGE CLEARING CORP., assigned the above-described mortgage note and mortgage to TRIAD BANK, N.A. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644-973, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 6, 1990, TRIAD BANK N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on August 9, 1990, in Book 5270, Page 258, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendant, RILANDRA F. BATISE, currently holds the title to the property by virtue of a General Warranty Deed, dated April 27, 1989, and recorded on April 28, 1989, in Book 5180, Page 1244, in the records of Tulsa County, Oklahoma, and is the current assumptor of the subject indebtedness.

The Court further finds that on July 19, 1990, the Defendant, RILANDRA F. BATISE, 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 29, 1991, February 18, 1992, July 10, 1992 and January 13, 1993.

The Court further finds that the Defendant, RILANDRA F. BATISE, 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, RILANDRA F. BATISE, is indebted to the Plaintiff in the principal sum of \$93,016.35, plus interest at the rate of 10.5 percent per annum from September 15, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$998.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right, title or interest in the subject property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendant, RILANDRA F. BATISE, is in default, and has no right, title or interest in the subject real property.

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

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, RILANDRA F. BATISE, in the principal sum of \$93,016.35, plus interest at the rate of 10.5 percent per annum from September 15, 1995 until judgment, plus interest thereafter at the current legal rate of 5.46 percent per annum until paid, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$998.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

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

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

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

**First:**

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

**Second:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$998.00, 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.

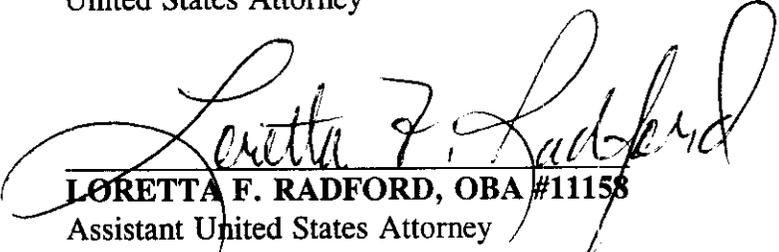
**s/ MICHAEL BURRAGE**  

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**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
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(918) 581-7463

  
**DICK A. BLAKELEY, OBA #882**  
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406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

  
**MICHAEL R. VANDERBURG**  
City Attorney, Broken Arrow, Oklahoma  
220 S. First Street  
Broken Arrow, Oklahoma 74012  
(918) 251-5311  
Attorney for Defendant,  
City of Broken Arrow, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95cv 1192BU

LFR:flv

ENTERED ON DOCKET  
DATE 4-29-96

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

APR 25 1996 *sa*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FRANKIE FOWLER for PRESIOUS FRANK, a )  
minor, SSN: 441-84-9379, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SHIRLEY S. CHATER, Commissioner of Social )  
Security Administration )  
 )  
Defendant. )

Case No. 95-C-350-J ✓

**ORDER<sup>1/</sup>**

Plaintiff, Frankie Fowler, for Presious Frank a minor, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>2/</sup> Plaintiff asserts that the Commissioner's decision that Presious Fowler is not disabled is not based on the record. For the reasons discussed below, the Court affirms the Commissioner's decision.

**I. PLAINTIFF'S BACKGROUND**

Presious Frank was born June 15, 1984, and was ten years old at the time of her hearing. [R. at 202]. According to her grandmother, Ms. Frank has difficulty

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<sup>1/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

<sup>2/</sup> Plaintiff filed an application for disability and supplemental security insurance benefits on January 19, 1993. [R. at 52]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge John Slater (hereafter, "ALJ") was held June 22, 1994 [R. at 197]. By order dated August 11, 1994, the ALJ determined that Plaintiff was not disabled. R. at 36-43. The Plaintiff appealed the ALJ's decision to the Appeals Council. On February 17, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 3].

15

concentrating, performing tasks which require the use of fine motor skills, and suffers from hyperactivity and attention deficit disorder for which she takes medication. [R. at 204, 206-210]. Ms. Frank participates in Girl Scouts and Junior Club (Bible study). [R. at 210-11].

## **II. STANDARD OF REVIEW**

Disability under the Social Security Act is defined as the

inability to engage in **any substantial** gainful activity by reason of any medically **determinable** physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not **only unable** to do his previous work but cannot, **considering his age**, education, and work experience, engage in **any other** kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability **determinations** are reviewed to determine if (1) the correct legal principles have been **followed**, and (2) the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988).

The Court, in determining **whether** the decision of the Commissioner is supported by substantial evidence, **does not** reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d

739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary<sup>3/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

### **III. THE STANDARDS APPLICABLE TO EVALUATION OF DISABILITY IN CHILDREN**

A person may obtain Supplemental Security Insurance ("SSI") benefits if (1) his financial resources are below a certain level, and (2) he is aged, blind or disabled. 42 U.S.C. § 1382. Under the SSI subchapter of the Social Security Act, an individual will be considered disabled

if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of an individual under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

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<sup>3/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

42 U.S.C. § 1382c(a)(3)(A) (emphasis added).

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

42 U.S.C. § 1382c(a)(3)(B). "In **plain words**, [the above-quoted sections establish that] a child is entitled to benefits **if his** impairment is as severe as one that would prevent an adult from working." Sullivan v. Zebley, 493 U.S. 521, 529 (1990).

The Commissioner has **developed** a four-step sequential process for the evaluation of a minor's alleged **disability**. First, the Commissioner determines whether the minor is engaged in **substantial** gainful activity. If he is, the minor is considered not disabled. If the **minor is not** engaged in substantial gainful activity, the Commissioner then determines **whether** the minor's impairment is severe. If the impairment is not severe, the **minor is** considered not disabled. If the minor's impairment is severe, the **Commissioner** then determines whether the minor has an impairment that meets or equals the **severity** of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("**the Listings**"). If the minor's impairment is of Listing severity, the minor is **considered** presumptively disabled. If the minor's impairment is not of Listing severity, **the Commissioner** must determine whether the

impairment is of "comparable severity" to an impairment that would disable an adult.

20 C.F.R. § 416.924(b)-(f).

The Commissioner's regulations define "comparable severity" as follows:

By the term *comparable severity*, we mean that your physical or mental impairment(s) so limits your ability to function independently, appropriately, and effectively in an age-appropriate manner that your impairment(s) and the limitations resulting from it are comparable to those which would disable an adult. Specifically, your impairment(s) must substantially reduce your ability to --

- (1) Grow, develop, or mature physically, mentally, or emotionally and, thus, to attain developmental milestones . . . at an age-appropriate rate; or
- (2) Grow, develop, or mature physically, mentally, or emotionally and, thus, to engage in age-appropriate activities of daily living . . . in self-care, play and recreation, school and academics, community activities, vocational settings, peer relationships, or family life; or
- (3) Acquire the skills needed to assume roles reasonably expected of adults. . . .

20 C.F.R. § 416.924(a)(1)-(3).

To determine whether a child's "impairment" is of comparable severity to that which would disable an adult, the Commissioner conducts an Individualized Functional Assessment ("IFA").<sup>4/</sup> 20 C.F.R. § 416.924(f). While conducting an IFA, the

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<sup>4/</sup> An IFA is similar to the Residual Functional Capacity ("RFC") assessment that is used by the Commissioner in evaluating an adult's claim of disability.

Commissioner "will consider the functions, behaviors, and activities that are appropriate to [the claimant's] age. . . ." 20 C.F.R. 416.924a(a)(4).

For school-age children (age 6 to age 12) like Plaintiff<sup>5/</sup>, the following "domains of development or functioning" are evaluated by the Commissioner in an IFA:

- (1) Cognitive function, e.g., your ability to progress in learning the skills involved in reading, writing, and mathematics;
- (2) Communicative function (includes speech and language), e.g., your ability to communicate pragmatically (i.e. to meet your needs) and conversationally (i.e. to exchange information and ideas with peers and family or with groups such as your school classes) in a spontaneous, interactive, sustained, and intelligible manner;
- (3) Motor function (includes gross and fine motor skills), e.g., your ability to engage in the physical activities involved in play and physical education, appropriate to your age;
- (4) Social function, e.g., your ability to play alone, or with another child, or in a group; to initiate and develop friendships, to respond to your social environments through appropriate and increasingly complex interpersonal behaviors, such as empathizing with others and tolerating differences; and to relate appropriately to individuals and groups (e.g., siblings, parents or caregivers, peers, teachers, school classes, neighborhood groups);
- (5) Personal/behavioral function, e.g., your ability to help yourself and to cooperate with others in taking care of your personal needs and safety; to respond appropriately to authority and school rules; to manifest a sense of responsibility for yourself and respect for others; to adapt to your environment; and to learn new skills;

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<sup>5/</sup> The Secretary's regulations define the following five categories of children: (1) older infants and toddlers, age 1 to attainment of age 3; (2) preschool children, age 3 to attainment of age 6; (3) school-age children, age 6 to attainment of age 12; (4) young adolescents, age 12 to attainment of age 16; and (5) older adolescents, age 16 to attainment of age 18. 20 C.F.R. § 416.924d(f)-(j). Plaintiff was born June 15, 1984 and was ten years old when her application for benefits was filed.

- (6) Concentration, persistence, and pace, e.g., your ability to engage in an activity, such as playing or reading, and to sustain the activity for a period of time and at a **pace** appropriate to your age.

20 C.F.R. § 416.924d(h).

A child, age 3 to age 16, is **considered** disabled (in accordance with the IFA evaluation) if the child has (1) a **"marked"** impairment in one of the six domains (described above) and a **"moderate"** impairment in a second domain, or (2) a **"moderate"** impairment in three of the **six** domains. 20 C.F.R. § 416.924e(c)(2)(i)-(ii). A moderate impairment is not as **severe** as a marked impairment. A **"marked"** impairment is **"more than moderate but less than extreme"** and exists where **"the degree of limitation is such as to interfere seriously with the ability to function (based upon age-appropriate expectations) independently, appropriately, effectively, and on a sustained basis."** 20 C.F.R. § 416.924e(b); 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 112.00C.

#### IV. THE ALJ'S DECISION

In this case, the ALJ **determined** that Plaintiff was not disabled. The ALJ concluded that Plaintiff's **cognitive function**, motor function, social functions, and concentration, persistence and **pace** were less than moderately limited. The ALJ found that there was no evidence of a limitation to Plaintiff's **"communication function,"** but that Plaintiff had a moderate limitation with respect to her personal/behavioral function. **Based on these** findings the ALJ concluded that Plaintiff did not have an impairment or **combination** of impairments comparable in severity to that which would disable an adult and **was** therefore not disabled.

## V. REVIEW

### The Domains

Plaintiff asserts that the record **does** not support the ALJ's determination that Ms. Frank is not disabled. Plaintiff **asserts** that Ms. Frank is moderately impaired in at least three domains and is **therefore** disabled. However, the record contains substantial evidence to support the **ALJ's** conclusion that Ms. Frank is not disabled.

#### **Cognitive Function**

The "cognitive function domain" addresses the individual's "ability to progress in learning the skills involved in **reading, writing, and mathematics.**" 20 C.F.R. § 416.924d(h). The ALJ found that **Ms. Frank's** tests indicated she was in the low-average range intellectually, and **was able** to perform arithmetic within the average range. [R. at 41]. The ALJ noted that Ms. Frank had some "deficits in word knowledge, awareness of basic facts, **social** standards and practical judgment." [R. at 41]. The ALJ additionally **observed** that Ms. Frank earned A's and B's in most of her subjects. The ALJ concluded that **Ms. Frank** had a less than moderate limitation in this domain. [R. at 41].

Plaintiff asserts that Ms. Frank **was** operating below age appropriate behavior, had "failed" at least one grade in **school**, and was therefore more than moderately limited in the "cognitive function domain."

Ms. Frank's grandmother testified at the June 22, 1994 hearing that Ms. Frank had been "held back" in the second grade. [R. at 205-06].<sup>6/</sup> However, simply "repeating" a grade at school does not automatically mean that an individual is not functioning at "age appropriate behavior." The record supports the ALJ's conclusion that Ms. Frank has a less than moderate "cognitive domain" restriction.

Laura K. Taylor, D.O., in her report dated April 27, 1993, noted that Ms. Frank's "grades are good and the reports from school are good. . . ." [R. at 135, 120]. Ms. Frank's progress reports from Children's Medical Center also indicate that her school grades are good. [R. at 123].

A psychological evaluation conducted by Jeffrey Wayne Kramer, M.A., and dated December 15, 1992, noted that "Presious is currently functioning within the low average range of intelligence overall." [R. at 152]. Dr. Kramer concludes, "[w]ith appropriate treatment of her emotional difficulties, continued academic support, and a stable home environment, Presious can be expected to continue to progress academically." [R. at 152]. Tanya Green, Ms. Frank's therapist reported that "[d]evelopmental milestones were said to be achieved at age appropriate times." [R. at 164].

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<sup>6/</sup>Ms. Frank's school reports noted that she was "held back in first grade due to moving and loss of days in school." [R. at 108].

Test scores from first grade indicated that Ms. Frank's performance was "average." [R. at 109]. Ms. Frank's second grade teacher indicated that although Ms. Frank had ADHD,<sup>7/</sup> her medication had assisted her.

Presious was extremely nervous, easily frustrated, and had a very low tolerance level. After she began receiving medication for ADHD, she is much happier and is able to function better in all activities. She is much more confident of her abilities and is able to accept teacher assistance without frustration.

\* \* \*

With the help of her medication, she is able to do the same things as others. Without medication, she becomes easily frustrated and cries frequently and would sometimes hyperventilate when upset.

[R. at 111-12, report dated March 19, 1993]. Ms. Frank's third grade teacher reported that Ms. Frank is capable of completing "on-level" work but sometimes lacks patience. [R. at 173-74].

An IFA completed by Carolyn Goodrich, Ph.D., on December 22, 1993 indicated "no evidence" of a cognitive function limitation. [R. at 66]. Ms. Frank's score on a "Goodenough Draw-A-Person" was at approximately the nine years level, when her chronological age was eight years six months and twenty days. [R. at 142].

### Communicative Function

The "communicative function" addresses an individual's ability to communicate and exchange information and ideas with other individuals. 20 C.F.R. § 416.924d(h).

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<sup>7/</sup> The records indicate that ADHD refers to Attention Deficit Hyperactivity Disorder.

The ALJ concluded that Ms. Frank was able to communicate in school and attain above-average grades which demonstrated that Ms. Frank exhibited no evidence of a "communicative function" limitation.

Plaintiff asserts that Ms. Frank is more than moderately impaired because she attends speech therapy classes. Although the record does indicate that Ms. Frank attends speech therapy, the record does not support a conclusion that Ms. Frank's ability to communicate is impaired.

An IFA completed by Carolyn Goodrich, Ph.D., indicates "no evidence of limitation" with respect to communicative function. An "activities report" completed by Ms. Fowler on April 13, 1993 indicates that Ms. Frank has difficulty with the "s" sound, but that speech class is improving this. Ms. Fowler indicated that Ms. Frank's speech could be understood, and that other people could also understand Ms. Frank's speech. [R. at 95]. In her progress report from Children's Medical Center dated November 9, 1993, Ms. Frank is described as "pleasant, talkative, and bright affect." [R. at 119]. A Developmental and Behavioral Pediatric Assessment indicated that language (the ability to understand and process information) was a relative strength for Ms. Frank. [R. at 157].

#### **Motor Function**

"Motor function" considers the ability of the individual to engage in "age-appropriate" physical activities. 20 C.F.R. § 416.924d(h). The ALJ noted that although Ms. Frank was hyperactive and had difficulty maintaining control and focusing, her medication had permitted her to function properly in class and other

settings. The ALJ concluded that Ms. Frank has a less than moderate limitation in this domain.

Plaintiff asserts that Ms. Frank's treating physician at Children's Medical Center has concluded that Ms. Frank is at least moderately impaired with respect to motor skills.<sup>8/</sup>

Ms. Fowler reported that Ms. Frank helps with household chores and takes out the trash and cleans her room. [R. at 94]. Laura Taylor, D.O., on April 27, 1993, noted that Ms. Frank's grades were good and that she planned on participating in math and English at summer school, and learning how to swim. [R. at 135].

A Developmental and Behavioral Pediatric Assessment completed by Children's Medical Center indicated that "gross motor skills were an area of strength for Presious." "Fine motor skills" were an area of "relative weakness." [R. at 157].

### Social Function

"Social function" examines the ability of an individual to play alone, with another child, or in a group. 20 C.F.R. § 416.924d(h). The ALJ indicated that Ms. Frank was able to function on a normal basis in her age appropriate activities.

Plaintiff does not challenge this finding, and Ms. Fowler reported that Ms. Frank "get[s] along well with everyone," but that she lacks confidence without her medication. [R. at 94]. Ms. Frank is also in Girl Scouts and Junior Club (Bible study). [R. at 210-11].

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<sup>8/</sup> Plaintiff provides no citations to the record or any further support for this statement.

### **Personal/Behavioral Function**

Personal/behavioral function refers to an individual's ability to cooperate with others in taking care of personal needs, to adapt to new environments, and to learn new skills. 20 C.F.R. § 416.924d(h).

The ALJ determined that although Ms. Frank was able to function at an age-appropriate level, her records indicate that her teachers sometimes had difficulty disciplining her. The ALJ noted that Ms. Frank had improved substantially with medication, but still had some problems with self control. According to the ALJ, Ms. Frank has a moderate limitation in this domain. [R. at 42]. Plaintiff does not challenge this finding by the ALJ.

Although Ms. Frank seems to have exhibited some emotional problems, her records indicate that medication has resolved many of her difficulties. Laura K. Taylor, M.D., by report dated February 22, 1993, indicated that Ms. Frank's teacher reported that "since going on the new medication, Presious is much more patient and tolerant and is a happier child. She is less nervous and is much more in control of her actions and emotions." [R. at 138].

### **Concentration, Persistence, and Pace**

"Concentration, persistence, and pace" refers to the individual's ability to engage in an activity and sustain it for a period of time. 20 C.F.R. § 416.924d(h). The ALJ noted that Ms. Frank exhibits some inattentiveness due to emotional factors, but that her deficits do not prevent her from performing well in an age-appropriate

setting. The ALJ concluded that Ms. Frank has a less than moderate limitation in this domain. [R. at 42].

Plaintiff asserts that Ms. Frank's treating physician at Children's Medical Center noted that Ms. Frank is at least moderately impaired with respect to motor skills.<sup>9/</sup>

The Developmental and Behavioral Pediatric Assessment indicates that although Ms. Frank "demonstrated good effort in attending to task during the assessment, . . . she tended to deteriorate in her attention to task over time and displayed somewhat inconsistent performance." [R. at 158]. Ms. Frank's records indicate that she was receiving A's and B's in school (October 1993). [R. at 120]. Ms. Frank's teachers report that with the help of her medication she is "able to do the same things as others." [R. at 112]. Her teacher reported that with medication Ms. Frank was "much more patient and tolerant -- a much happier child!" [R. at 112]. The record supports the ALJ's findings.

#### Summary of the Domains

As noted above, the regulations indicate a child is not disabled if the child is functioning at "age-appropriate" behavior. Generally, a finding of a "moderate" impairment in three domains indicates a disability. In this case, the ALJ found that Ms. Frank had a moderate impairment in only one domain, and was not disabled. The

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<sup>9/</sup> Plaintiff provides no citations to the record or any further support for this statement.

ALJ's finding that Ms. Frank is not disabled is supported by substantial evidence.<sup>10/</sup>

**"Rejecting" the Physicians Reports**

Plaintiff additionally asserts that the ALJ erred by rejecting Ms. Frank's physicians' opinions and concluding, instead, that Plaintiff's condition was controlled with medication. However the ALJ's decision does not indicate that he rejected any of the physicians' reports. Rather, the physicians reported that Ms. Frank's attention deficit disorder was being controlled with medication.

Thomas A. Goodman, M.D., examined Ms. Frank on April 26, 1993. He indicated that Ms. Frank "showed no evidence of hyperactivity or distractibility during the interview." [R. at 114]. Ms. Fowler indicated that Ms. Frank had not been given her medication on the day of the examination. Dr. Goodman concluded that Ms. Frank "seems fairly stable as long as she takes the medication . . . . I think she will do quite well with continued treatment, but will do extremely poorly without the treatment and support of her grandmother." [R. at 115].

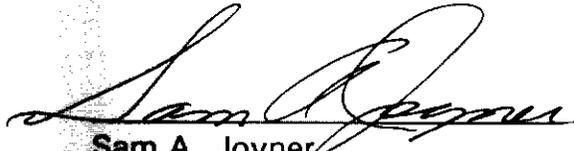
In her progress reports at the Children's Medical Center, Laura K. Taylor, D.O., notes that Ms. Fowler indicated that Ms. Frank had settled down, and undergone a significant change with the new medicine. [R. at 121, 138]. Ms. Fowler indicated that "as long as she is on medication she can cope. . . ." [R. at 95].

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<sup>10/</sup> In addition, Carolyn Goodrich, Ph.D., concluded on December 22, 1993, that although Ms. Frank had some "moderate" restrictions, her "impairments do not substantially reduce her ability to function in an age-appropriate manner." [R. at 69].

Accordingly, the Secretary's decision is AFFIRMED.

Dated this 26 day of April 1996.



Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 25 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )

Plaintiff, )

v. )

RAYMOND C. BELL; )

EASTER JO BELL; )

SEARS, ROEBUCK AND CO.; )

COUNTY TREASURER, Tulsa County, )

Oklahoma; )

BOARD OF COUNTY COMMISSIONERS, )

Tulsa County, Oklahoma, )

ROBERT W. GILES, )

Defendants. )

ENTERED ON DOCKET ✓

CIVIL ACTION NO. 95-C-1024-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 24 day of April,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, 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, Robert W. Giles, appears not, having previously filed his disclaimer; and the Defendants, Raymond C. Bell; Easter Jo Bell; and Sears, Roebuck and Co., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Raymond C. Bell, executed a Waiver of Service of Summons on October 30, 1995 which was filed on November 2, 1995; that the Defendant, Easter Jo Bell, executed a

Waiver of Service of Summons on October 30, 1995 which was filed on November 3, 1995; that the Defendant, **Sears, Roebuck and Co.**, was served by certified mail, return receipt requested, delivery restricted to the addressee on February 9, 1996.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on October 25, 1995; that the Defendant, **Robert W. Giles**, filed his disclaimer on February 28, 1996; and that the Defendants, **Raymond C. Bell; Easter Jo Bell; and Sears, Roebuck and Co.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on April 22, 1994, Raymond C. Bell and Easter Jo Bell filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 94-01218-C. On September 2, 1994, this bankruptcy was converted to a Chapter 7. On June 15, 1995, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action described below.

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

**The West Seventy-eight (78) feet of Lot Six (6), ACME ACRE ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on June 6, 1980, the Defendants, Raymond C. Bell and Easter Jo Bell, executed and delivered to the American Mortgage and Investment Company their mortgage note in the amount of \$30,000.00, payable in monthly installments, with interest thereon at the rate of 11.50 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Raymond C. Bell and Easter Jo Bell, executed and delivered to the American Mortgage and Investment Company a real estate mortgage dated June 6, 1980, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on June 11, 1980, in Book 4479, Page 792, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1987, American Mortgage and Investment Company assigned the above-described mortgage note and mortgage to Eastover Bank For Savings. This Assignment of Mortgages was recorded on July 21, 1987, in Book 5040, Page 1034, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 3, 1989, Eastover Bank For Savings assigned the above-described mortgage note and mortgage to Mortgage Creditcorp, Inc. This Assignment of Mortgages was recorded on August 28, 1989, in Book 5203, Page 1317, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 3, 1989, Mortgage Creditcorp, Inc. assigned the above-described mortgage note and mortgage to Government National Mortgage Assn. This Assignment of Mortgages was recorded on May 26, 1992, in Book 5407, Page 0862, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 17, 1993, Government National Mortgage Association assigned the above-described mortgage note and mortgage to MidFirst

Bank, State Savings Bank. This Assignment of Mortgage was recorded on January 26, 1994, in Book 5588, Page 1383, in the records of Tulsa County, Oklahoma.

2The Court further finds that on August 15, 1994, MidFirst Bank, State Savings Bank assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Mortgage was recorded on September 8, 1994, in Book 5655, Page 1207, in the records of Tulsa County, Oklahoma. On June 1, 1994, the loan was reamortized at the rate of 6.25 percent per annum and the entire debt due on that date was made principal.

The Court further finds that the Defendants, Raymond C. Bell and Easter Jo Bell, 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, Raymond C. Bell and Easter Jo Bell, are indebted to the Plaintiff in the principal sum of \$31,241.60, plus administrative charges in the amount of \$710.00, plus accrued interest in the amount of \$1,156.02 as of January 17, 1995, plus interest accruing thereafter at the rate of 6.25 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Sears, Roebuck and Co., is in default and therefore has no right, title or interest in the subject real property.

The Court further finds that the Defendant, Robert W. Giles, disclaims any right, title or interest in or to the subject real property.

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendants, **Raymond C. Bell and Easter Jo Bell**, in the principal sum of \$31,241.60, plus administrative charges in the amount of \$710.00, plus accrued interest in the amount of \$1,156.02 as of January 17, 1995, plus interest accruing thereafter at the rate of 6.25 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.46 percent per annum until paid, plus the costs of this action in the amount of \$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 and any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Sears, Roebuck and Co.; Robert W. Giles; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

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

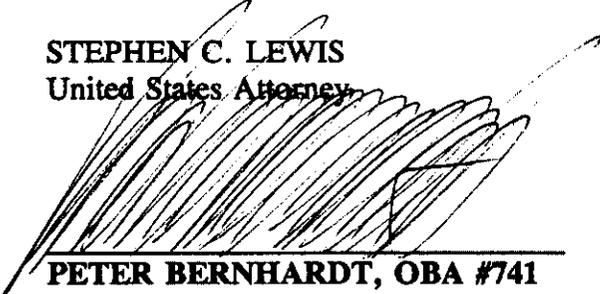
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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

Judgment of Foreclosure  
Case No. 95-C-1024-B (Bell)

FB:cm

**FILED**

APR 25 1996 *ka*

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

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NEVA MARTIN,

Plaintiff,

vs.

AMERADA HESS CORPORATION,

Defendant.

No. 95-C-348-K ✓

ENTERED ON DOCKET

DATE 4-26-96

**JUDGMENT**

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 24 day of April, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

23

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

APR 25 1996 *ja*

NEVA MARTIN,  
  
Plaintiff,  
  
vs.  
  
AMERADA HESS CORPORATION,  
  
Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 95-C-348-K ✓

ENTERED ON DOCKET  
H-26-96

ORDER

Before the Court are the motion of the defendant for summary judgment and the motion of the plaintiff to remand. Plaintiff commenced this action in state court, alleging she was terminated from her employment because of her age. The sole claim set forth in the state court petition is one for wrongful discharge in violation of the public policy of Oklahoma. Defendant timely removed the action to this Court.

On December 8, 1995, after this case had been pending in federal court for over seven months, plaintiff filed a motion to remand. The motion relies upon Laughlin v. K-Mart Corp., 50 F.3d 871 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995). Laughlin holds, when federal subject matter jurisdiction is based upon diversity of citizenship, the burden is on the party requesting removal to set forth in the notice of removal the underlying facts supporting the assertion that the amount in controversy exceeds \$50,000. Upon review, the Court finds defendant satisfied Laughlin in the notice of removal filed in this case. In any event, as explained below, the Court rules plaintiff may not proceed under a "public policy" tort claim. Therefore, plaintiff (1) either has no

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Cy or (2) is proceeding under the ADEA, in which event federal jurisdiction is proper under that Act. Plaintiff's motion to remand is therefore denied.

Initially, the court must acknowledge the existence of List V. Anchor Paint Manuf. Co., 910 P.2d 1011 (Okla. 1996), in which the Supreme Court of Oklahoma refused to find a common law remedy for age discrimination in employment, concluding that statutory remedies are exclusive. Thus, plaintiff may not proceed under the statute. If a ruling, plaintiff has asked to add an ADEA claim.

claim or (2) is proceeding under the ADEA, in which event federal jurisdiction is proper under that Act. Plaintiff's motion to remand is therefore denied.

Initially, the Court must acknowledge the existence of List v. Anchor Paint Manuf. Co., 910 P.2d 1011 (Okla. 1996), in which the Supreme Court of Oklahoma refused to find a common law remedy for age discrimination in employment, concluding that statutory remedies are exclusive. Thus, plaintiff may not proceed under the "public policy" rubric. Anticipating such a ruling, plaintiff has filed a motion to amend complaint, seeking to add an ADEA claim.

Assuming plaintiff were permitted to proceed under the federal Age Discrimination Act, it does not appear from the record plaintiff filed a claim of unlawful discrimination with the EEOC. Such a filing is a prerequisite to bringing a civil action under the ADEA. 29 U.S.C. §626(d). Even if a filing with the state agency alone were sufficient, there is a question of timeliness. Plaintiff submitted her claim to the Oklahoma Human Rights Commission February 21, 1995. Plaintiff's final day on the payroll was November 1, 1994. If this were the accrual date, the filing would be timely. However, it is the date of the adverse personnel action, if communicated to the employee, not the date it takes effect, which is the measuring date. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir.1990). See also Delaware State College v. Ricks, 449 U.S. 250, 257 (1980) ("mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.")

Measured from March 16, 1994, the date plaintiff received the

letter stating she would not be transferred to Houston and outlining her End-of-Service Benefits, the filing of the administrative charge is untimely. Because the proposed amendment to the complaint would be futile, the motion to amend will be denied. However, in the interest of thoroughness, the Court will consider plaintiff's ADEA claim as if it were properly before the Court.

Turning to defendant's motion for summary judgment, the following facts appear in the record. Plaintiff had been employed by defendant since 1967. In January 1994, defendant announced it would be consolidating its exploration and production activities in Houston, Texas. Defendant's immediate boss, for whom she worked as secretary, asked plaintiff if she were interested in moving to Houston and told her she would have a job in Houston if she wanted one. Within a day or two of the offer, plaintiff informed her boss she was not interested in transferring to Houston. Plaintiff refused the offer because she felt her husband would not be able to find a job in Houston in his chosen profession, because she did not want to "uproot her family" and because plaintiff's family could not afford to relocate on her salary.

Defendant offered early retirement packages to those employees who, as of March 1995, were fifty-five years old and had been employed by defendant for ten years. Plaintiff was going to be fifty-two years old in March, 1995 and was therefore not offered an early retirement package in 1994. Defendant maintained plaintiff's employment as long as possible, and plaintiff remained employed

with defendant until November 1, 1994. Plaintiff began a new job two weeks after she left employment with the defendant, a job found for her through the help of the defendant. The new job pays \$13,000 a year less than her job with defendant.

In response, plaintiff contends the oral offer about moving to Houston was conveyed to her without informing her of the possibility of a raise upon moving or of "relocation packages" offered by the defendant, which involved assisting in the sale of employees' homes and other benefits. However, plaintiff testified she did not inquire about any details before giving her negative answer. Plaintiff also testified in her deposition she was replaced by "younger girls."

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

The parties herein agree, in a reduction of force case, plaintiff demonstrates a prima facie case of age discrimination by

showing (1) she was within the protected age group; (2) she was adversely affected by the employment decision; (3) she was qualified for the position at issue; and (4) she was treated less favorably than younger employees during the reduction in force. Rea v. Martin Marietta Corp., 29 F.3d 1450, 1454 (10th Cir.1994). There would seem to be a serious dispute as to the second element, in that defendant contends it was plaintiff's decision not to accept the transfer to Houston. Significantly, plaintiff has offered no evidence she would have accepted transfer even if she had inquired as to details, which she did not, and had been fully advised.

As to the fourth element, plaintiff's unsupported testimony is she was replaced by "younger girls." Plaintiff also points to a statement allegedly made by supervisor Wickett to another employee, after the move to Houston, that "it sure doesn't seem the same down here without the older, more experienced personnel." Finally, plaintiff cites statistics that, of the 162 employees discharged when defendant relocated, 99 of them (or over 60%) were over forty years of age. Of the 272 new employees hired by defendant in Houston, 214 (or nearly 80%) were under forty years of age. Plaintiff's evidence is wafer-thin. However, viewing it in the light most favorable to the nonmoving party, the Court will conclude for purposes of this motion plaintiff has established a prima facie case.

After the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate

nondiscriminatory reason for the adverse employment decision. Rea, 29 F.3d at 1454. Defendant has presented testimony that plaintiff declined an offer to transfer. At this stage defendant need only raise a genuine issue of fact as to whether it discriminated against plaintiff. Id. at 1454-55 (quoting Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 (10th Cir.1993)). Defendant has done so.

Once the defendant meets its burden of production, the burden shifts back to plaintiff to show that the defendant's proffered reasons were a pretext for discrimination. Rea, 29 F.3d at 1455. If the defendant has advanced a facially nondiscriminatory motive for the discharge, to avoid summary judgment the plaintiff must present evidence that the nondiscriminatory reason advanced by the defendant was pretextual -- i.e., unworthy of belief. Marx v. Schnuck Markets, Inc., 76 F.3d 324, 327 (10th Cir.1996) (ADEA claim). This may be done by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. Id.

Plaintiff has failed in her ultimate burden. Plaintiff has provided no names of the "younger girls" who she testified replaced her, or any evidence supporting that allegation. The statistics cited by defendant indicate nothing about plaintiff's treatment being based upon age. As for the early retirement plan, 29 U.S.C. §623(1)(1)(A) expressly states such a plan does not violate the ADEA solely because it "provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement

benefits." Summary judgment is appropriate.

It is the Order of the Court that the motion of the plaintiff to remand (#14) and to amend complaint (#21) are hereby DENIED and the motion of the defendant for summary judgment (#9) is hereby GRANTED.

ORDERED this 24 day of April, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MARIE A. WALKER,  
SSN: 445-44-9152,

Plaintiff(s),

vs.

SHIRLEY S. CHATER, Commissioner,  
Social Security Administration,

Defendant.

Case No. 95-C-354-M

ENTERED ON DOCKET  
DATE APR 26 1996

**JUDGMENT**

Judgment is hereby entered for the Defendant and against the Plaintiff this 24<sup>th</sup>

day of APRIL, 1996.

*Frank H. McCarthy*  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

9

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

FILED

APR 25 1996

*cf*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

U.S.F. & G., )  
)  
Plaintiff, )  
)  
vs. )  
)  
TRI-STATE INSURANCE COMPANY, )  
)  
Defendant. )

No. 95-C-275-K

ENTERED ON DOCKET  
DATE APR 26 1996

ORDER

Now before this Court is the motion by Tri-State Insurance Company for attorneys' fees. On March 22, 1996, this Court entered judgment for the Defendant Tri-State Insurance Company and against the Plaintiff U.S.F. & G. Pursuant to an agreement between Tri-State Insurance Company and U.S.F. & G., Tri-State Insurance Company now moves for reasonable attorneys' fees for the cost of this litigation. Finding no timely objection and Tri-State Insurance Company's compliance with Local Rule 54.2 of the United States District Court for the Northern District of Oklahoma, Tri-State's motion for attorneys' fees is hereby GRANTED. U.S.F. & G. is ORDERED to pay Tri-State Insurance Company \$15,430.00 for attorneys' fees.

IT IS SO ORDERED THIS 25 DAY OF APRIL, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

*25*

FILED  
APR 25 1996

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

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JACK TANNEHILL, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AMERADA HESS CORPORATION, )  
 )  
 Defendant. )

No. 95-C-177-K

SECRET  
APR 26 1996

ORDER

Before the Court are the motions of the parties for summary judgment.<sup>1</sup> Plaintiff commenced this action in state court, alleging wrongful discharge in violation of Oklahoma public policy. Defendant timely removed the action to this Court. By Amended Complaint, plaintiff has further alleged discharge in violation of the Age Discrimination in Employment Act ("ADEA").

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of

<sup>1</sup>Defendant did not file a formal motion for summary judgment. Instead, its brief (#24) in response to plaintiff's motion is styled "in the alternative brief in support of defendant's motion for summary judgment." Plaintiff has responded to defendant's assertions as well as to the supplemental brief (#46) filed by defendant. The Court sees no prejudice to plaintiff in considering defendant's "motion".

44

proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Plaintiff was employed by defendant as an accountant. Defendant consolidated its U.S. Exploration & Production Operations in Houston, Texas and prepared to close its Tulsa office, in conjunction with a reduction in force. Defendant decided to offer an early retirement package to every employee age 55 or older with 10 years of company service. Plaintiff was in this category. Eligible employees were told they had to make an irrevocable decision to participate in the early retirement program by the end of April, 1994. It was further explained an offer of early retirement did not mean an employee had to leave his employment.

Plaintiff received a letter dated March 16, 1994, from Mr. Austin, Vice President of Financial Control, explaining the program. The letter states in capital letters "PLEASE NOTE THAT THIS IS STRICTLY A VOLUNTARY PROGRAM--NO ONE HAS TO RETIRE." The letter does not specify what will happen to an employee who declines early retirement.

Plaintiff testified to a conversation with his manager, Tony Van Meagham, when Van Meagham handed plaintiff the letter outlining the retirement package, in which Van Meagham told him if plaintiff did not accept the early retirement package, plaintiff would not have a job with defendant. Nowhere in the record does defendant dispute the conversation took place. Plaintiff did not ask Van Meagham why the program stated in writing it was voluntary, in

contradiction to what Van Meagham allegedly told plaintiff. Based on this alleged conversation, plaintiff did not believe the program was voluntary, although he did not inquire of anyone else in management. Plaintiff did not advise anyone in management he would prefer to stay with the company and transfer to Houston.

On April 4, 1994, plaintiff executed the documents by which he elected to retire under the special program. The documents, signed by plaintiff, contain passages stating his decision is voluntary. As a result of his acceptance of the package, plaintiff received a higher pension benefit than he would have received had he worked to age 65. He also received 34 weeks severance pay and a "retention bonus" of 18 weeks. Plaintiff was 61 years old when he retired.

After plaintiff began receiving his early retirement benefits, plaintiff informed defendant he claimed his retirement was involuntary based on Van Meagham's alleged statement. Plaintiff also requested additional benefits from defendant. Defendant rejected plaintiff's argument and denied his request for additional benefits. Plaintiff testified in his deposition he would not disavow the early retirement benefits he elected.

In a supplemental brief, defendant seeks dismissal of plaintiff's public policy claim in light of List v. Anchor Paint Manuf. Co., 910 P.2d 1011 (Okla. 1996), in which the Supreme Court of Oklahoma ruled no public policy cause of action exists for age discrimination in light of the available ADEA remedy. Plaintiff does not contest this aspect of the motion and withdraws his public policy claim.

Plaintiff seeks to proceed with an ADEA claim under a constructive discharge theory. The mere offer of early retirement does not establish a constructive discharge. Smith v. World Ins. Co., 38 F.3d 1456, 1461 (8th Cir.1994). Most courts have found an offer of early retirement constitutes a constructive discharge only when the offer is made under terms and conditions where the employee would be worse off whether or not he or she accepted the offer. Id. See also James v. Sears Roebuck & Co., 21 F.3d 989, 993 (10th Cir.1994).

Defendant argues the prominent display of the word "voluntary" throughout the documents provided to plaintiff forecloses any claim he may have as to voluntariness of retirement. The Court disagrees. In Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2nd Cir.1987), the court held, under roughly similar facts, a factual question existed regarding voluntariness, where plaintiffs testified they felt "pressured" to make a quick decision. The use of the word "voluntary" in the announcement and acceptance forms was not found dispositive. Factual disputes exist which preclude the Court from granting either plaintiff's motion or defendant's motion on this basis.

The defendant has raised another issue which must be addressed. 29 U.S.C. §626(d) provides the statute of limitation in ADEA actions. In a state, such as Oklahoma, which by law prohibits age discrimination in employment and has established a government agency with authority to grant or seek relief from such practices, an administrative charge must be filed within 300 days after the

alleged unlawful practice occurred. 29 U.S.C. §626(d)(2).<sup>2</sup>

It is not disputed plaintiff's charge was filed with the Oklahoma Human Rights Commission on March 9, 1995.<sup>3</sup> Defendant offered the early retirement package March 16, 1994 and plaintiff accepted it April 4, 1994. Plaintiff's last work day was November 16, 1994 and his retirement date was December 1, 1994. Plaintiff argues the 300-day period runs from his last day of employment, in which case his charge was timely filed. Defendant contends the accrual date is when plaintiff was notified of the early retirement offer, in which case the charge was untimely filed.

The Court agrees with defendant. In Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir.1990), the court held the Supreme Court decision in Delaware State College v. Ricks, 449 U.S. 250 (1980) "establishes that it is the date of . . . [the] adverse personnel action, not the date on which the action takes effect. . . that--provided it is communicated to the employee, . . . is the date of accrual [for an employment discrimination claim]." Ricks also states "mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for

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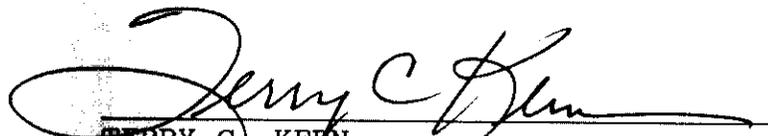
<sup>2</sup>By Order of December 5, 1995, the Court granted plaintiff leave to amend his complaint and add the ADEA claim. Permitting the amendment of a complaint does not preclude a subsequent ruling on the merits disposing of the added claim. Cf. Krug v. Ambrose, Wilson, Grimm & Durand, 845 F.Supp. 516, 520 (E.D.Tenn.1992). See also Morrow v. Air Methods, Inc., 884 F.Supp. 1353, 1355 (D.Minn.1995) ("[T]he issue presented and the standard applied on a motion to amend differ from a motion for summary judgment.")

<sup>3</sup>Moreover, the statute expressly requires the filing of a charge with the EEOC. It appears plaintiff only filed with the state agency.

employment discrimination." 449 U.S. at 257. Accordingly, the Court finds plaintiff's administrative charge needed to be filed within 300 days after, at the latest, the date he accepted the early retirement package. It was not. Plaintiff has made no argument for equitable tolling. The administrative charge being untimely filed, the suit based on the untimely charge should be dismissed.

It is the Order of the Court that the motion of the plaintiff for partial summary judgment (#17) is hereby DENIED and the motion of the defendant for summary judgment (#24) is hereby GRANTED.

ORDERED this 24 day of April, 1996.

  
PERRY C. KERN  
UNITED STATES DISTRICT JUDGE

**F I L E D**

APR 25 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

JACK TANNEHILL,  
Plaintiff,

vs.

AMERADA HESS COMPANY,

Defendant.

No. 95-C-177-K

ENTERED ON DOCKET

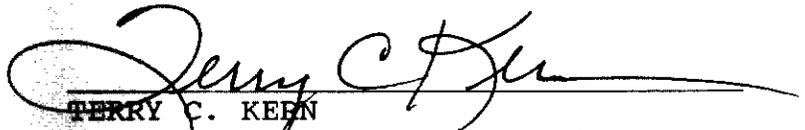
APR 26 1996

**JUDGMENT**

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 24 day of April, 1996.

  
TERRY C. KEEN  
UNITED STATES DISTRICT JUDGE

50

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

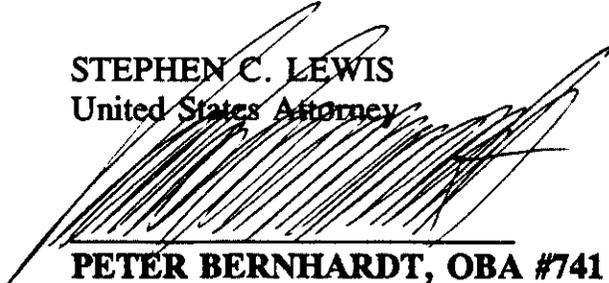
**UNITED STATES OF AMERICA,** )  
 )  
 **Plaintiff,** )  
 )  
 v. ) **CASE NO. 95-C-443-K**  
 )  
 **FOX RUN APARTMENTS, LORRAINE** )  
 **DRAKE, CHRISTINA BROWN,** )  
 **SPRADLIN & ASSOCIATES, INC.,** )  
 **NORTHCORP REALTY ADVISORS,** )  
 **INC.,** )  
 )  
 **Defendants.** )

**F I L E D**  
**APR 25 1996**  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

Plaintiff, **United States of America**, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, **Christina Brown**, represented by legal counsel Marshall Dyer, pursuant to Fed. R. Civ. P. 41(a)(1) hereby stipulate to the dismissal of this civil action without prejudice as between these parties.

**STEPHEN C. LEWIS**  
United States Attorney



**PETER BERNHARDT, OBA #741**  
Assistant United States Attorney  
333 West Fourth Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463



**MARSHALL DYER**  
319 W. Washington  
Broken Arrow, OK 74012  
(918) 451-2711  
Attorney for Christina Brown

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

JANIE E. WOODARD,  
SSN 435-56-5670,

Plaintiff,

v.

SHIRLEY S. CHATER,<sup>1</sup>  
Commissioner, Social Security  
Administration,

Defendant.

NO. 95-C-285-M

RECORDED ON BOOKLET

APR 26 1996

FILED

APR 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Plaintiff, Janie E. Woodard, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits. In accordance with 28 U.S.C. §636(c)(1)&(3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U.S.C. § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary.

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<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

*Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

Ms. Woodard's October 23, 1992 application for disability benefits was denied January 13, 1993, the denial was affirmed on reconsideration, July 28, 1993. A hearing before an Administrative Law Judge ("ALJ") was held April 11, 1994. The ALJ issued a decision finding Plaintiff entitled to a closed period of disability commencing on July 10, 1992 and continuing through July 28, 1993 [R. 34]. The Appeals Council affirmed the ALJ's decision on February 8, 1995. The decision represents the final decision of the Secretary/Commissioner for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Plaintiff does not contest that part of the decision which found her disabled between July 10, 1992 and July 27, 1993, nor does she contest the finding that she was not disabled prior to July 10, 1992. Plaintiff claims that the decision finding her not disabled after July 27, 1993 is not supported by substantial evidence. Specifically, Plaintiff claims: (1) that the ALJ improperly relied on the vocational expert's testimony which she claims failed to take into account the restriction on Plaintiff's ability to reach; (2) that the ALJ's conclusions based on the vocational expert's testimony are erroneous; and (3) that the ALJ's determination that her period

of disability ended July 27, 1993 does not comport with the analysis and requirements set out in 20 C.F.R. §404.1594 which section establishes standards for termination of benefits based upon medical improvement.<sup>2</sup>

The Court finds that the ALJ has adequately and correctly set forth the relevant facts of this case and has properly outlined the required sequential analysis. The Court, therefore, incorporates this information into its Order as the duplication of this effort would serve no useful purpose.

#### **ABILITY TO REACH**

The ALJ found that Plaintiff:

[R]etained the residual functional capacity to perform the physical exertional and nonexertional requirements of work except for no prolonged sitting, over 45 minutes without opportunity to get up, to stand or walk, each no more than an hour at a time, to lift more than 5 pounds frequently or 20 pounds occasionally, to carry more than 5 pounds occasionally, to do any bending, squatting, crawling, climbing or reaching..." [R. 33, Finding 5].

The vocational expert testified that a number of jobs existed which could be performed despite these restrictions, including telephone solicitor, receptionist and information clerk [R.247-48]. On appeal, Plaintiff claims that the vocational expert's testimony is flawed because frequent or occasional reaching is listed among the physical demands for these positions in the Dept. of Labor's publication: *Selected Characteristics of Occupations defined in the Dictionary of Occupational Titles* (1993). According to

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<sup>2</sup> The Court notes with displeasure that instead of addressing the issues raised by Plaintiff, the Secretary's brief addresses the ALJ's pain analysis and use of the grids, matters not raised by the Plaintiff in this appeal.

Plaintiff, the vocational expert's testimony was not responsive to the ALJ's finding that Plaintiff was restricted to **no reaching** and therefore, the testimony cannot constitute substantial evidence upon which to sustain the denial of benefits. The Secretary failed to take a position on **this issue**.

Although not specifically stated in her brief, Plaintiff is apparently taking the position that the ALJ's restriction of **"no reaching"** means that Plaintiff is completely unable to extend her arms and hands to pick up any object. Plaintiff argues that she is therefore unable to perform the **reaching** required for the positions of telephone solicitor, receptionist, or information clerk. After reviewing the record, it is obvious to the Court that the ALJ did not intend such a construction of the no reaching restriction. The ALJ's findings included the ability of Plaintiff to lift 5 pounds frequently, 20 pounds occasionally, and to carry 5 pounds occasionally. In addition, the construction of no reaching advanced by Plaintiff is directly contradicted by the medical evidence.

The Court has not been cited to any definition of the term "reaching" as it is used in the *Selected Characteristics of Occupations defined in the Dictionary of Occupational Titles* (1993), nor has it found a definition in the regulations or the DOT. According to Merriam-Webster, *Webster's Ninth New Collegiate Dictionary* 979 (1983), to reach means "2 a: to touch or grasp by extending a part of the body (as a hand) or an object . . . b: to pick up and draw toward one." The Court has carefully reviewed the medical record and Plaintiff's testimony and finds there is not substantial evidence to support the Plaintiff's interpretation of the "no reaching" restriction.

The diagnosis of "chronic tendinitis, right shoulder" appears in Plaintiff's medical records [R. 114, 127]. The Court notes Plaintiff's testimony that she is right-handed [R. 199], however, in her testimony Plaintiff did not describe reaching as one of her limitations. Actual complaints of **shoulder** pain appear infrequently in Plaintiff's records. On August 1, 1990, the medical notes reflect a complaint of pain in the right shoulder, worse with lifting [R. 127]. On January 9, 1992, Plaintiff called to schedule a doctor's appointment for **shoulder pain** which she later canceled [R. 120]. She testified she has been able to go **fishing five times** in the year prior to her hearing and she bowled twice a week until 1992 **despite** her 1990 diagnosis of chronic tendinitis of the right shoulder [R. 86, 211].

In the letter Plaintiff's treating **physician**, Dr. Battles, sent on August 27, 1993 to the Oklahoma Disability Determination Unit, Dr. Battles mentions sitting, lifting, bending and carrying as limitations **related** to Plaintiff's back condition. There is no mention of reaching as a limitation. [R. 160]. In Dr. Battles' March 15, 1994 response to a Social Security questionnaire concerning Plaintiff's condition, he indicated Plaintiff has the ability **to lift** 0-5 pounds frequently, 6-20 pounds occasionally, and to carry 0-5 pounds **occasionally**. In addition, Dr. Battles' evaluation of Plaintiff indicated Plaintiff can use **both** of her hands for repetitive action, *including* pushing and pulling of arm controls. [R. 180]. The actions and the weight limitations specified by Dr. Battles are not **consistent** with a blanket restriction of no reaching. In fact, the ability to "lift and carry" any weight must include the capability of extending the hand and arm to **grasp and draw** the object toward oneself. Likewise,

the capability of repetitive operation of pushing and pulling arm controls (which capabilities Dr. Battles found Plaintiff to possess) must also include the ability to extend the hand and arm, to "reach".

According to Plaintiff's interpretation of "no reaching," she would have virtually no ability to use her arms, she would be unable to feed herself or provide any care for herself. Plaintiff's testimony about her own activities does not support such a severe restriction and there is no other evidence in the file to support such a restriction. In fact, the actions and the weight limitations specified by Dr. Battles are consistent with the type of reaching involved in the sedentary occupations of telephone solicitor, receptionist and information clerk. Accordingly, the alleged discrepancy between the ALJ's limitation on reaching and the physical requirements listed in the *Selected Requirements* does not afford a basis for reversal of the disability denial.

#### **VOCATIONAL CONSIDERATIONS**

Plaintiff claims the ALJ's vocational findings are erroneous. The vocational expert was asked a series of hypothetical questions in which the degree of physical limitations varied. In response to some of the hypothetical questions, the vocational expert testified that the limitations specified would prevent an individual from working. Plaintiff claims that the most restrictive limitations are taken almost verbatim from the assessment form completed by Plaintiff's treating physician, Dr. Battles [R. 179-81], and that a finding of disability should have followed. Testimony elicited by hypothetical questions that do not relate with precision all of the claimant's impairments, cannot constitute substantial evidence to support the Secretary's

impairments, cannot constitute substantial evidence to support the Secretary's decision. See *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

The ALJ outlined the restrictions Dr. Battles found to exist and determined that "the residual functional capacity for work like activity set out by Dr. Battles is not wholly supported even by his own treatment notes, that is [sic] quite 'generous' to the claimant" [R. 29]. The Court finds that the ALJ properly rejected Dr. Battles' residual functional capacity assessment as not supported by the medical evidence and appropriately relied on the testimony of the medical expert who reviewed the medical record in the case. See *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987).

The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence.

#### **MEDICAL IMPROVEMENT**

On the basis of medical records, and hearing testimony by medical expert, Dr. Karathanos, and a vocational expert, the ALJ found:

"From July 10, 1992 to July 27, 1993, the claimant lacked the residual functional capacity to perform physical exertional and non-exertional requirements of work on a regular sustained basis due to pain."

"From January 31, 1989 [alleged date of onset] through the date of this decision, otherwise, the claimant's medical

non-exertional requirements of work, except..." [R.33, Finding 5].

Plaintiff asserts that the ALJ should have applied the benefit termination standard set out in 20 C.F.R. §404.1594 which requires the ALJ to perform an eight-step evaluation and to point to specific evidence of medical improvement. According to Plaintiff, failure to do so was reversible error. Plaintiff does not cite any case authority to support this assertion; the Secretary completely fails to address it.

The Tenth Circuit has not, in a published opinion, directly addressed whether the so-called medical improvement standard of 20 C.F.R. §404.1594 applies to closed period of disability cases, such as this one. However, there are Tenth Circuit opinions which address the proper use of the medical improvement standards. In *Brown v. Sullivan*, 912 F.2d 1194 (10th Cir. 1990) Plaintiff was awarded benefits in 1972 which were terminated in 1982. The termination was not appealed. Denial of Plaintiff's subsequent application for benefits was appealed. The Tenth Circuit rejected Plaintiff's assertion that the medical improvement standard, rather than the standard for new disability claims, applied to his case. The Court, citing *Richardson v. Bowen*, 807 F.2d 444, 445-46 (5th Cir. 1987), stated "the medical improvement standard applies only in termination cases, not in later applications." *Brown*, 912 F.2d at 1196 [emphasis supplied]. In *Richardson*, the Fifth Circuit determined that the medical improvement standard applies only to termination cases, not new applications.

The instant case is not a benefit termination. A termination case is one in which there has been a previous decision in favor of disability, followed by receipt of

benefits, and further followed by a new proceeding resulting in cessation of benefits. This case is concerned with a new application for benefits, only. The distinction between these situations is well recognized. See *Glen v. Shalala*, 21 F.3d 983, 987 n.1 (10th Cir. 1994) (cases concerning initial benefit determinations not persuasive in termination of benefits case); *Camp v. Heckler*, 780 F.2d 721, 721-22 (8th Cir. 1986) (medical improvement not applicable to closed period); *Taylor v. Heckler*, 769 F.2d 201, 202 (4th Cir. 1985) (distinguishing between termination of currently received benefits and determination of discrete period of disability). Despite the ALJ's determination that Plaintiff was disabled for a while, this case is not a termination case and the medical improvement standards applicable only to termination cases do not apply. See *Ness v. Sullivan*, 904 F.2d 432 (8th Cir. 1990); *Brown v. Chater*, 1995 WL 625915 (10th Cir. (Okla.)). The Court therefore rejects the ALJ's failure to comply with 20 C.F.R. §404.1594 as a basis for reversal.

#### CONCLUSION

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 23<sup>rd</sup> day of April, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

APR 24 1996

JANIE E. WOODARD, )  
SSN 435-56-5670, )

Plaintiff, )

v. )

SHIRLEY S. CHATER, )  
Commissioner, Social Security )

Administration, )

Defendant. )

NO. 95-C-285-M

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

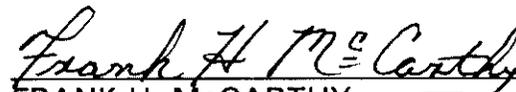
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APR 26 1996

**JUDGMENT**

Judgment is hereby entered for the Defendant and against the Plaintiff this

24<sup>th</sup> day of April, 1996.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

8



Plaintiff's motion to remand this action to the District Court of Tulsa County is therefore GRANTED. 28 U.S.C. § 1447. Defendant is hereby ORDERED to pay costs and expenses, including attorney fees, incurred by Plaintiff as a result of the removal. 28 U.S.C. § 1447. See Daleske v. Fairfield Communities, Inc., 17 F.3d 321, 324 (10th Cir.) (citing Miranti v. Lee, 3 F.3d 925, 928 (5th Cir. 1993)), cert. denied, 114 S. Ct. 1832 (1994). This Court retains jurisdiction over the case solely for the purpose of making a determination of costs and expenses pursuant to this Order.

ORDERED THIS 25 DAY OF APRIL, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )

APR 25 1996

Plaintiff, )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

v. )

RAYMOND C. BELL; )

EASTER JO BELL; )

SEARS, ROEBUCK AND CO.; )

COUNTY TREASURER, Tulsa County, )

Oklahoma; )

BOARD OF COUNTY COMMISSIONERS, )

Tulsa County, Oklahoma, )

ROBERT W. GILES, )

Defendants. )

ENTERED ON DOCKET  
APR 26 1996

CIVIL ACTION NO. 95-C-1024-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 24 day of April,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, 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, Robert W. Giles, appears not, having

previously filed his disclaimer; and the Defendants, Raymond C. Bell; Easter Jo Bell; and Sears, Roebuck and Co., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Raymond C. Bell, executed a Waiver of Service of Summons on October 30, 1995 which was filed on November 2, 1995; that the Defendant, Easter Jo Bell, executed a

Waiver of Service of Summons on October 30, 1995 which was filed on November 3, 1995; that the Defendant, **Sears, Roebuck and Co.**, was served by certified mail, return receipt requested, delivery restricted to the addressee on February 9, 1996.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on October 25, 1995; that the Defendant, **Robert W. Giles**, filed his disclaimer on February 28, 1996; and that the Defendants, **Raymond C. Bell; Easter Jo Bell; and Sears, Roebuck and Co.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on April 22, 1994, Raymond C. Bell and Easter Jo Bell filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 94-01218-C. On September 2, 1994, this bankruptcy was converted to a Chapter 7. On June 15, 1995, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action described below.

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

**The West Seventy-eight (78) feet of Lot Six (6), ACME ACRE ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on June 6, 1980, the Defendants, Raymond C. Bell and Easter Jo Bell, executed and delivered to the American Mortgage and Investment Company their mortgage note in the amount of \$30,000.00, payable in monthly installments, with interest thereon at the rate of 11.50 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Raymond C. Bell and Easter Jo Bell, executed and delivered to the American Mortgage and Investment Company a real estate mortgage dated June 6, 1980, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on June 11, 1980, in Book 4479, Page 792, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1987, American Mortgage and Investment Company assigned the above-described mortgage note and mortgage to Eastover Bank For Savings. This Assignment of Mortgages was recorded on July 21, 1987, in Book 5040, Page 1034, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 3, 1989, Eastover Bank For Savings assigned the above-described mortgage note and mortgage to Mortgage Creditcorp, Inc. This Assignment of Mortgages was recorded on August 28, 1989, in Book 5203, Page 1317, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 3, 1989, Mortgage Creditcorp, Inc. assigned the above-described mortgage note and mortgage to Government National Mortgage Assn. This Assignment of Mortgages was recorded on May 26, 1992, in Book 5407, Page 0862, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 17, 1993, Government National Mortgage Association assigned the above-described mortgage note and mortgage to MidFirst

Bank, State Savings Bank. This Assignment of Mortgage was recorded on January 26, 1994, in Book 5588, Page 1383, in the records of Tulsa County, Oklahoma.

2The Court further finds that on August 15, 1994, MidFirst Bank, State Savings Bank assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Mortgage was recorded on September 8, 1994, in Book 5655, Page 1207, in the records of Tulsa County, Oklahoma. On June 1, 1994, the loan was reamortized at the rate of 6.25 percent per annum and the entire debt due on that date was made principal.

The Court further finds that the Defendants, Raymond C. Bell and Easter Jo Bell, 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, Raymond C. Bell and Easter Jo Bell, are indebted to the Plaintiff in the principal sum of \$31,241.60, plus administrative charges in the amount of \$710.00, plus accrued interest in the amount of \$1,156.02 as of January 17, 1995, plus interest accruing thereafter at the rate of 6.25 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Sears, Roebuck and Co., is in default and therefore has no right, title or interest in the subject real property.

The Court further finds that the Defendant, Robert W. Giles, disclaims any right, title or interest in or to the subject real property.

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendants, **Raymond C. Bell and Easter Jo Bell**, in the principal sum of \$31,241.60, plus administrative charges in the amount of \$710.00, plus accrued interest in the amount of \$1,156.02 as of January 17, 1995, plus interest accruing thereafter at the rate of 6.25 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.46 percent per annum until paid, plus the costs of this action in the amount of \$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 and any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Sears, Roebuck and Co.; Robert W. Giles; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

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

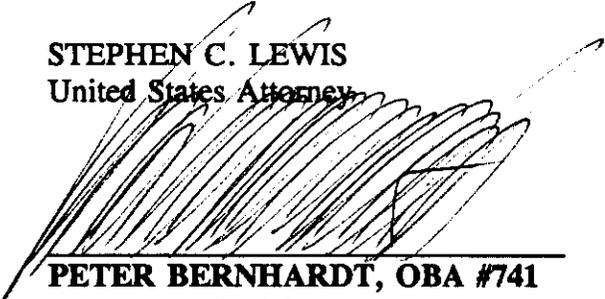
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

**S/ THOMAS R. BRETT**

**UNITED STATES DISTRICT JUDGE**

APPROVED:

**STEPHEN C. LEWIS**  
United States Attorney



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



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

Judgment of Foreclosure  
Case No. 95-C-1024-B (Bell)

PB:cm

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

**F I L E D**

APR 25 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FRAN WOOD, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ST. JOHN MEDICAL CENTER, )  
INC., )  
)  
Defendant. )

No. 96-C-32-B

ENTERED ON DOCKET  
APR 26 1996

**JUDGMENT**

On April 22, 1996, the plaintiff in this action accepted an Offer of Judgment from the defendant, pursuant to Rule 68 of the Federal Rules of Civil Procedure. Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED that plaintiff have judgment against the defendant in the sum of Six Thousand Eight Hundred Dollars (\$6,800.00), consisting of Four Thousand Six Hundred Dollars (\$4,600.00) in wages (subject to applicable withholdings for taxes, social security, and medicare) and Two Thousand Two Hundred Dollars (\$2,200.00), representing a reasonable attorney's fee and the costs of this action.

DATED this 24 day of April, 1996, at Tulsa, Oklahoma.

~~PHIL LOMBARDI, Clerk of Court~~

S/ THOMAS R. BRETT

u.s. Dist. Judge

3

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

OPAL BOWLIN,  
Plaintiff,

vs.

BAKER HUGHES INCORPORATED,  
a Delaware Corporation,

Defendant.

ENTERED ON DOCKET

DATE APR 25 1996

No. 95-C-819-K

**FILED**

APR 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Now before this Court is Defendant's Motion for Summary Judgment and Plaintiff's Motion to Amend her Complaint. Defendant asserts that Plaintiff's complaint should be dismissed because her claims are based on statutes that establish an employer's liability to its employees, and Plaintiff was never an employee of the defendant named in the original complaint, Baker Hughes Incorporated. Plaintiff asserts that she inadvertently named the improper party in her original complaint. Her complaint named Baker Hughes Incorporated as the defendant; whereas, the proper party defendant is Baker Hughes Oilfield Operations, Inc., d/b/a Centrillift, a wholly owned subsidiary of Baker Hughes Incorporated. Plaintiff now seeks to amend her complaint pursuant to Fed.R.Civ.P. 15(c).

The Tenth Circuit has explained that three requirements must be met in order for an amendment adding a new party to relate back by virtue of Rule 15(c).

(1) The claim asserted in the amendment must arise out of the same conduct or circumstances asserted in the original pleading; (2) the party being added must have had such knowledge of the pendency of the action that it will not be prejudiced in its defense on the merits; and (3) the party added must have known or should have known that it would have been an original defendant but for a mistake on the part of plaintiff concerning the identity of the proper party to be sued.

Anderson v. Deere & Co., 852 F.2d 1244, 1247 (10th Cir. 1988).

It is the finding of this Court that Plaintiff has met all three requirements of Rule 15(c). The amended complaint asserts claims arising out of the same conduct and circumstances asserted in the original complaint. The proper defendant, Baker Hughes Oilfield Operations, Inc. d/b/a Centrilift did have notice of the instant action as well as the precedent administrative proceedings. The EEOC sent the Notice of Right to Sue to S.W. Brown, Manager of Human Resources for Centrilift, the proper defendant. Further, Richard Barnes, the attorney who filed an answer to the original complaint represents both Baker Hughes Incorporated, the improper defendant originally named, as well as Baker Hughes Oilfield Operations, the proper defendant. Therefore, not only will Baker Hughes Oilfield Operations not be prejudiced in its defense on the merits, but given the similarity in names and the fact that the proper party defendant was a

wholly owned subsidiary of the originally named defendant, Baker Hughes Oilfield Operations must have known or should have known that it would have been an original defendant but for a mistake on the part of plaintiff concerning the identity of the proper party to be sued.

For the reasons stated herein, defendant's motion for summary judgment is DENIED, and plaintiff's motion to amend her complaint is GRANTED.

IT IS SO ORDERED THIS 24 DAY OF APRIL, 1996.

  
TERRY C. KEEN  
UNITED STATES DISTRICT JUDGE

23  
UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ELMER THOMPSON aka ELMER W.  
THOMPSON; GEORGELLA  
THOMPSON aka GEORGE ELLA  
THOMPSON; STATE OF OKLAHOMA  
ex rel OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,  
Defendants.

**FILED**

APR 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 738K

ENTERED ON DOCKET

DATE APR 25 1996 ✓

**AMENDED ORDER**

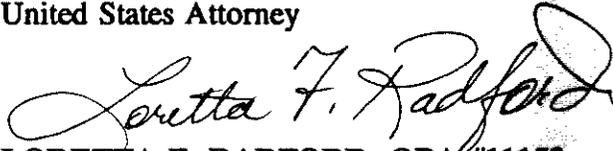
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Judgment of Foreclosure filed October 18, 1995 be vacated and that this action shall be dismissed without prejudice.

Dated this 24 day of April, 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:  
STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and title.

**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:esf

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CAROL GRAHAM, surviving  
spouse of LARRY R. GRAHAM,  
deceased

Plaintiff,

v.

SHIRLEY S. CHATER,  
COMMISSIONER,  
SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No. 92-C-702-E

ENTERED ON DOCKET  
DATE APR 25 1996

**STIPULATION FOR ATTORNEY FEES AND COSTS  
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

The parties to this action hereby stipulate and enter their attorney fees and costs under the Equal Access To Justice Act (the "EAJA"), 28 U.S.C. § 2412(d), said application having been filed with this Court by plaintiff on or round February 14, 1996.

Upon negotiation and settlement, the parties have agreed by telephone conference that plaintiff's counsel should be compensated a total of \$5,875.00 for attorney fees (\$5,500.00) and costs (\$375.00) under the EAJA. This amount represents compensation for legal services rendered on behalf of plaintiff by her attorneys in connection with this civil action, in accordance with 28 U.S.C. § 2412(d).

This stipulation constitutes a compromise settlement of plaintiff's request for EAJA attorney's fees, and does not constitute an admission of liability on the part of the defendant under the EAJA. Payment of the Five Thousand Eight Hundred and Seventy-Five Dollars (\$5,875.00) shall constitute a complete

release from and bar to any and all claims plaintiff may have relating to EAJA attorney's fees, costs, and expenses in connection with this action under the EAJA.

Plaintiff's counsel retains the right to file a petition for attorney's fees under 42 U.S.C. §406(b)(1), subject to the offset/refund provisions of the law. See Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

ATTORNEY FOR PLAINTIFF

SAVAGE, O'DONNELL, SCOTT,  
McNULTY, AFFELDT & GENTGES

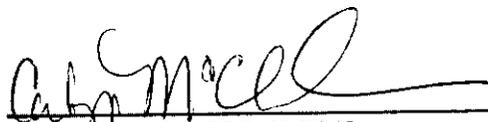
  
ALAN W. GENTGES  
1100 Petroleum Club Building  
601 South Boulder  
Tulsa, Oklahoma 74119-1333

4.9.96  
Dated

APPROVED AND SO ORDERED:

ATTORNEYS FOR DEFENDANT

STEPHEN C. LEWIS  
United States Attorney

  
CATHRYN McCLANAHAN  
Assistant U.S. Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

4-22-96  
Dated

S/ JAMES O. ELLISON

JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Stipulation For Attorney Fees and Costs Under The EAJA" has been mailed, postage prepaid, to Alan W. Gentges, Attorney for Plaintiff, 1100 Petroleum Club Building, 601 South Boulder, Tulsa, Oklahoma 74119-1333, by depositing same in the United States mail on this 22nd day of April, 1996.

  
\_\_\_\_\_  
CATHRYN McCLANAHAN  
Assistant U.S. Attorney



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 24 1996

CAROL GRAHAM, surviving  
spouse of LARRY R. GRAHAM,  
deceased

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Plaintiff,

Case No. 92-C-702-E

v.

SHIRLEY S. CHATER,  
COMMISSIONER,  
SOCIAL SECURITY ADMINISTRATION,

ENTERED ON DOCKET  
APR 25 1996  
DATE \_\_\_\_\_

Defendant.

**STIPULATION FOR ATTORNEY FEES AND COSTS  
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

The parties to this action hereby stipulate and enter their attorney fees and costs under the Equal Access To Justice Act (the "EAJA"), 28 U.S.C. § 2412(d), said application having been filed with this Court by plaintiff on or round February 14, 1996.

Upon negotiation and settlement, the parties have agreed by telephone conference that plaintiff's counsel should be compensated a total of \$5,875.00 for attorney fees (\$5,500.00) and costs (\$375.00) under the EAJA. This amount represents compensation for legal services rendered on behalf of plaintiff by her attorneys in connection with this civil action, in accordance with 28 U.S.C. § 2412(d).

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release from and bar to any and all claims plaintiff may have relating to EAJA attorney's fees, costs, and expenses in connection with this action under the EAJA.

Plaintiff's counsel retains the right to file a petition for attorney's fees under 42 U.S.C. §406(b)(1), subject to the offset/refund provisions of the law. See Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

ATTORNEY FOR PLAINTIFF

SAVAGE, O'DONNELL, SCOTT,  
McNULTY, AFFELDT & GENTGES



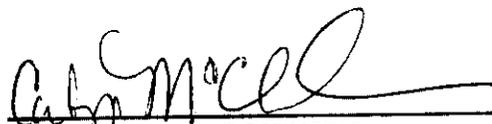
ALAN W. GENTGES  
1100 Petroleum Club Building  
601 South Boulder  
Tulsa, Oklahoma 74119-1333

4-9-96

Dated

ATTORNEYS FOR DEFENDANT

STEPHEN C. LEWIS  
United States Attorney



CATHRYN McCLANAHAN  
Assistant U.S. Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

4-22-96

Dated

S/ JAMES O. ELLISON

APPROVED AND SO ORDERED:

JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Stipulation For Attorney Fees and Costs Under The EAJA" has been mailed, postage prepaid, to Alan W. Gentges, Attorney for Plaintiff, 1100 Petroleum Club Building, 601 South Boulder, Tulsa, Oklahoma 74119-1333, by depositing same in the United States mail on this 22nd day of April, 1996.

  
\_\_\_\_\_  
CATHRYN McCLANAHAN  
Assistant U.S. Attorney

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

IN RE: )  
 )  
MORTEZA NIKOU, )  
 )  
 )  
Debtor. )  
 )  
MORTEZA NIKOU, )  
 )  
 )  
Appellant, )  
 )  
v. )  
 )  
HABIB AMIM, )  
 )  
 )  
Appellee. )

**F I L E D**

APR 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-879-E

ENTERED ON DOCKET

DATE APR 25 1996

**ORDER**

This order pertains to the Appeal of Morteza Nikou, (Docket #1), the Debtor, from the Order of the United States Bankruptcy Court for the Northern District of Oklahoma entered on August 24, 1995, which denied Debtor's Motion to Dismiss.

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

review is proper.

On June 20, 1990, while Habib Amim ("Amim") was in jail in Madison, Wisconsin, he entrusted to the Debtor for safe-keeping various articles of personal property, including jewelry, Persian carpets and paintings, copper, brass, china, and crystal, wood articles, electronic equipment, books, albums, and citizenship and stock certificates, and provided a \$13,500.00 check to pay for storage and transportation expenses. Debtor transported the property from Wisconsin to Tulsa, Oklahoma.

On October 14, 1994, Amim obtained a judgment for \$35,512.00 against the Debtor in Madison, Wisconsin, and the judgment was filed in Tulsa County District Court. The Debtor filed this bankruptcy case on February 27, 1995 and notice was sent to Amim that the deadline to file an adversary action was May 30, 1995.

On May 23, 1995, Amim filed a motion to extend the time to file an adversary action to August 30, 1995. On May 24, 1995, the Trustee also filed a motion to extend the time to July 30, 1995. On May 25, 1995, the court granted the Trustee's motion.

However, on May 30, 1995, the Debtor filed an objection to Amim's motion to extend time, and on May 31, 1995, the court granted Amim's motion to extend time to August 30, 1995. On that date, the court also sent out a notice of hearing on the motion.

On June 8, 1995, a hearing was held on Amim's motion to extend. Amim was represented by counsel. At the hearing, the court extended the deadline to file an adversary action to July 30, 1995, instead of August 30, 1995. On June 13, 1995,

an amended order memorializing the extension to only July 30, 1995 was entered.

Amim severed his relationship with his counsel, and on July 18, 1995, informed the court that he did not have an adequate amount of money in his prison account to attach with his complaint, so the fee would be sent from Madison, Wisconsin. He contends that he mailed his complaint on July 25, 1995, and in the cover letter dated July 25 he informed the court the fee would be sent separately from Wisconsin. On July 28, 1995, the court received the complaint, and the fee was received on August 1, 1995. On August 15, 1995, the Debtor filed a motion to dismiss the adversary complaint for failure to file within the time period allowed by the court.

A hearing on the motion to dismiss was held on August 21, 1995. At the hearing, Amim admitted he knew of the July 30, 1995 deadline by at least July 17, 1995. On August 24, 1995, the bankruptcy court entered a Scheduling Order which denied Debtor's motion to dismiss. On September 6, 1995, the Debtor filed this appeal.

Debtor argues that, because Amim was one day late filing his complaint due to his own neglect and had notice of the deadline, his complaint should have been dismissed under the Federal Rules of Bankruptcy Procedure 4004(a) and 4007(c), which set a strict 60-day time limit within which a creditor may dispute the discharge of the debtor and the dischargeability of debts.

Amim points out that the complaint was tendered for filing three days before the time limit expired and only the filing fee was one day late. The bankruptcy judge

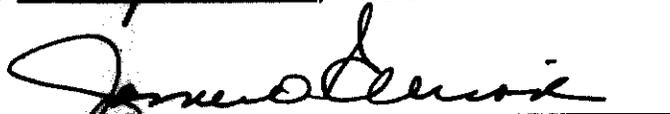
recognized that there was no proof that Amim received notice of the July 30 deadline earlier than July 17 and that he was in prison and deserved a "special exception... to get his day in court." (Transcription of Proceedings, August 21, 1995, pgs. 12-14).

There is no doubt that a pro se prisoner is disadvantaged in an unique way from making timely filings, as he must depend on prison authorities to do his mailing immediately, and in this case also had to depend on someone outside the prison to mail his filing fee. The Supreme Court in Houston v. Lack, 487 U.S. 266, 270 (1988), discussed this disadvantage and found that a pro se prisoner's notice of appeal in a habeas corpus case was filed when it was delivered to prison authorities for mailing.

Likewise, in this case, the bankruptcy court properly concluded that Amin deserved his day in court to prove his case and denied the motion to dismiss. There was sufficient justification for the decision, given that the court changed the deadline date several times, and the complaint was tendered two days early, the fee was only one day late, and Amin was a pro se prisoner.

The decision of the bankruptcy court is affirmed.

Dated this 24<sup>th</sup> day of April, 1996.



JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

s:nikou.ord

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

ANTHONY JEROME HARRIS, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
RITA ANDREWS, )  
 )  
Respondent. )

No. 95-C-908-E

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 25 1996

**F I L E D**

APR 24 1996

**ORDER**

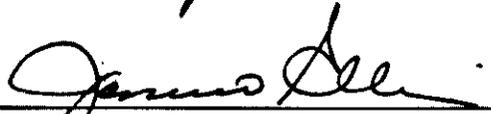
This matter comes before the Court on Respondent's motion to dismiss this habeas corpus action for failure to exhaust state remedies. Petitioner has objected.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has yet to exhaust his state remedies. Although he filed a state

petition for a writ of habeas corpus on April 6, 1995, the Muskogee County District Court has yet to rule on it and only recently set it for hearing. Accordingly, Respondent's motion to dismiss (docket #4) is **granted** and the petition for a writ of habeas corpus is hereby **dismissed without prejudice**. Petitioner's motion for partial summary judgment and notice of intent to file petition for writ of mandamus (docket #9) is **denied**.

IT IS SO ORDERED this 23<sup>rd</sup> day of April, 1996.



JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

**FILED**

**APR 24 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MELVIN WAYNE LUNSFORD, JR., )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON CHAMPION, )  
 )  
 Respondent. )

No. 95-C-923-E ✓

ENTERED ON DOCKET

DATE APR 25 1996

**ORDER**

At issue before the court in this habeas corpus action is Respondent's motion to dismiss for failure to exhaust state remedies. Petitioner has objected.

**I. BACKGROUND AND PROCEDURAL HISTORY**

On March 28, 1988, Petitioner pled guilty in Tulsa County Case No. CF-88-375 to two counts of Second Degree Burglary and one count of Unauthorized Use of a Motor Vehicle. On June 10, 1988, in accordance with the plea agreement, Petitioner received a suspended sentence of five years to be served concurrently. Thereafter the State filed an Application to Revoke Suspended Sentence. On October 26, 1992, Petitioner waived his right to a revocation hearing and confessed the allegations contained in the State's application.

The following year, in September 1993, Petitioner pled guilty in Osage County Case No. CRF-92-150 to Burglary, Unauthorized Use of a Motor Vehicle, and Feloniously Pointing a Weapon. The district court enhanced Petitioner's sentence on the basis of his 1988 Tulsa County conviction and sentenced him to twenty-five years

on each count to run consecutively. Petitioner did not file a certiorari appeal following his conviction in either CF-88-375 or CRF-92-150.

Thereafter, Petitioner filed an application for post-conviction relief in Osage County district court, challenging the constitutionality of the Tulsa County conviction.<sup>1</sup> The Osage County District Court denied relief and noted as follows: "Petitioner's remedy lies in the county(s) where the prior convictions he complains of originated. No other trial court has jurisdiction to take any action."

Petitioner did not appeal but filed an application in the Court of Criminal Appeals seeking to compel the District Court of Osage County to address his application for post-conviction relief. The Court of Criminal Appeals denied Petitioner's application, reiterating that "[t]he proper and most efficient method of attacking a former conviction is in the court imposing the judgment and sentence for that former conviction."

In late 1994 or early 1995, Petitioner filed a "Motion for Summary Judgment and Motion to Set Aside Judgment Void on its Face/Application for Post-conviction Relief" in Tulsa County District Court challenging his former conviction. On January 31, 1995, the district court denied relief, finding there is no

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<sup>1</sup> The file in this case does not contain a copy of Petitioner's application for post-conviction relief. However, the Order Denying Application for Extraordinary Relief by the Court of Criminal Appeals, filed on February 15, 1995, summarizes the substance of Petitioner's application for post-conviction relief in Osage County.

indication that Petitioner ever desired to discuss the possibility of appealing his case with his attorney, and Petitioner's plea was voluntarily and knowingly made. The Court of Criminal Appeals affirmed on April 28, 1995.

On September 14, 1995, Petitioner filed the instant habeas corpus action, challenging his Osage County conviction on its own merits and to the extent it was enhanced on the basis of an invalid prior conviction--i.e., the Tulsa County conviction, Case No. CF-88-375. He contends he was denied his right to counsel during the ten-day period to appeal his Osage County Conviction. As to the prior conviction from Tulsa County, Petitioner contends (1) it was invalid and should have never been relied on for enhancement purposes; (2) the state failed to vacate it as a matter of law; and (3) his due process and equal protection rights were violated when the court refused to grant him relief on the ground that he had not been informed of his right to appointed counsel on appeal.

Respondent has moved to dismiss on exhaustion grounds. Petitioner has objected.

## II. ANALYSIS

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the

state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

After carefully reviewing the record in this case, the court concludes that Petitioner has failed to exhaust his state remedies as to several of the grounds in his petition. In his first ground, Petitioner challenges his Osage County conviction on the ground he was denied counsel during the ten-day period to perfect his direct appeal. Petitioner did not present this claim to the Osage County District Court and then to the Court of Criminal Appeals. Therefore, this claim remains unexhausted.

Petitioner's claims in grounds III, IV, and V also remain unexhausted. While these claims are related to ground II of the petition--which challenges the prior conviction from Tulsa County to the extent it was used to enhance the Osage County conviction--Petitioner did not present these claims to the Tulsa County District Court and then to the Court of Criminal Appeals.<sup>2</sup>

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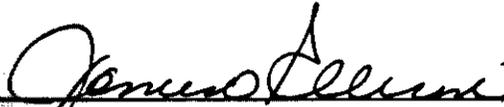
<sup>2</sup> To the extent grounds III, IV, and V challenge Petitioner's former conviction in Tulsa County District Court, they are nothing more than a restatement of ground II. In any event Petitioner would not be entitled to habeas relief on the basis of these claims.

To be entitled to federal habeas review, Petitioner must assert that he is held in custody in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. §2254; Engle, 456 U.S. 107, 119 (1982). Because Petitioner has merely challenged the state court's failure to follow its own procedural rules, his allegations are insufficient in and of themselves to justify habeas corpus review. See Bell v. Duckworth, 861 F.2d 169 (7th Cir. 1988), cert. denied, 489 U.S.

III. CONCLUSION

Accordingly, Respondent's motion to dismiss for failure to exhaust state remedies [docket #11] is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE as a mixed petition.

IT IS SO ORDERED this 13<sup>d</sup> day of April, 1996.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

---

1088 (1989) ("rule that procedural errors committed in state criminal [proceedings] are not ground for federal habeas corpus cannot be evaded by the facile equation of state procedural error to denial of due process"). Therefore, Petitioner would not be entitled to federal habeas relief without further support for his contention that the state court's failure to vacate his prior conviction violated his constitutional rights.

**F I L E D**

**APR 24 1996**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al., )  
 )  
 PLAINTIFFS, )  
 )  
 vs. )  
 )  
 SUN COMPANY, INC., (R&M), a Pennsyl- )  
 vania corporation; and SUN COMPANY, )  
 INC., a Pennsylvania corporation, )  
 )  
 DEFENDANTS. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

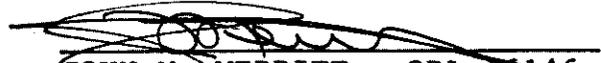
CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

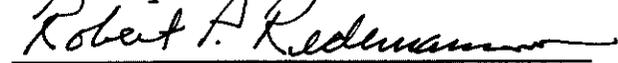
COME(S) NOW the Plaintiff, Josephine Woodrich, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146

Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs



ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET

DATE 4-25-96

**FILED**

**APR 24 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al., )  
 )  
 PLAINTIFFS, )  
 )  
 vs. )  
 )  
 SUN COMPANY, INC., (R&M), a Pennsyl- )  
 vania corporation; and SUN COMPANY, )  
 INC., a Pennsylvania corporation, )  
 )  
 DEFENDANTS. )

CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Rickey Hayhurst, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET  
DATE 4-25-96

**F I L E D**

**APR 24 1996**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al., )  
 )  
 PLAINTIFFS, )  
 )  
 vs. )  
 )  
 SUN COMPANY, INC., (R&M), a Pennsyl- )  
 vania corporation; and SUN COMPANY, )  
 INC., a Pennsylvania corporation, )  
 )  
 DEFENDANTS. )

CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Martin Ryan, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs  


ROBERT P. REDEMANN - OBA #7454  
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Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET  
DATE 4-25-96

**FILED**  
**APR 24 1996**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al., )  
 )  
 PLAINTIFFS, )  
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 vs. )  
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 SUN COMPANY, INC., (R&M), a Pennsyl- )  
 vania corporation; and SUN COMPANY, )  
 INC., a Pennsylvania corporation, )  
 )  
 DEFENDANTS. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

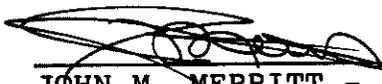
CASE NO. 94-C-1059-H

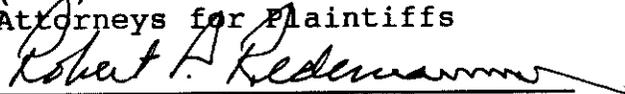
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Damon Phillips, Sheila Phillips and Mary Phillips, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
\_\_\_\_\_  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
\_\_\_\_\_  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET

DATE 4-25-96

**FILED**

**APR 24 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,  
PLAINTIFFS,  
vs.  
SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,  
DEFENDANTS.

CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Mary Gavillet, Chistopher Cale, Minor, Charles Cale, Minor, and Nicholas Moore, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.



JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs



ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

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

ENTERED ON DOCKET  
DATE APR 25 1996

FREEMAN R. ARKEKETA, JR., )

Plaintiff, )

vs. )

STANLEY GLANZ, )

Defendant. )

No. 95-C-337-K ✓

**FILED**

APR 24 1996 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On April 2, 1996 Magistrate Judge Joyner entered his Report and Recommendation regarding the motion of the defendant for summary judgment and/or motion to dismiss. The Magistrate Judge recommended the motion be granted in part and denied in part. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

It is the Order of the Court that the motion of the defendant to dismiss or for summary judgment (#17) is hereby GRANTED in part and DENIED in part. That portion of plaintiff's amended complaint which attempts to assert a claim based upon a constitutional right to underwear or socks is dismissed. As to the remainder of the

*28*

amended complaint (i.e., a claimed violation of equal protection)  
the pending motion is denied.

ORDERED this 24 day of April, 1996.

A handwritten signature in cursive script, appearing to read "Terry C. Kern", written over a horizontal line.

TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

**APR 23 1996**

DEBRA D. DAVIS,

Plaintiff,

v.

P-F BUSINESS SYSTEMS, INC.,

Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
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)

Case No. 95-C-594-BU

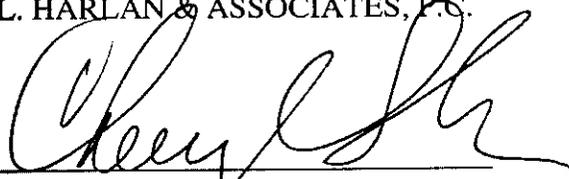
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
APR 24 1996

**JOINT DISMISSAL *WITH PREJUDICE* UNDER  
FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)(ii)**

All parties to this action irrevocably **dismiss** the action *with prejudice* to refileing in accordance with Federal Rule of Civil Procedure 41(a)(1)(ii), and further waive any claim to recover attorneys' fees, court costs and any other **expenses** of the litigation from the other party. Furthermore, counsel for Plaintiff hereby **releases** its attorney's lien filed in this action.

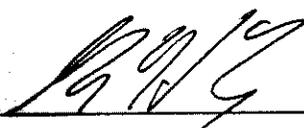
JOHN L. HARLAN & ASSOCIATES, P.C.

By:   
Cheryl S. Gan

404 East Dewey Street / Suite 106  
P.O. Box 1326  
Sapulpa, OK 74067  
(918) 227-2590  
(918) 227-1914 (fax)

**ATTORNEYS FOR PLAINTIFF  
DEBRA D. DAVIS**

GEORGE H. LOWREY, OBA #10,888

By:  \_\_\_\_\_

**LOWREY & LOWREY**  
406 South Boulder / Suite 820  
Tulsa, Oklahoma 74103-3825  
(918) 599-9788  
(918) 599-9707 (fax)

**ATTORNEYS FOR DEFENDANT**  
**P-F BUSINESS SYSTEMS, INC.**

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

STATE FARM FIRE AND CASUALTY  
COMPANY,

Plaintiff,

vs.

VALORIE BARRETT and ANTHONY  
BARRETT,

Defendants,

and

VALORIE BARRETT,

Third-Party Plaintiff,

vs.

BANCOKLAHOMA MORTGAGE  
CORPORATION, an Oklahoma  
corporation and PAUL DAVIS  
SYSTEMS OF TULSA, INC.,  
an Oklahoma corporation,

Third-Party Defendants.

Case No. 95-C-237-BU ✓

**FILED**

APR 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

EDD 4/24/96

**ORDER**

This matter comes before the Court upon Third Party Defendants, BancOklahoma Mortgage Corporation and Paul Davis Systems of Tulsa, Inc.'s Motion for Summary Judgment on the Third Party Complaint of Valorie Barrett and Third Party Plaintiff, Valorie Barrett's Motion for Partial Summary Judgment Against Third Party Defendants, BancOklahoma Mortgage Corporation and Paul Davis Systems of Tulsa, Inc. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. On May 25, 1990, John Gregorovic executed a mortgage ("the Mortgage") in favor of Commercial Bank & Trust Co. for the property located at 1811 North Ironwood, Broken Arrow, Oklahoma ("the

Ironwood Residence").

2. The Mortgage provided in pertinent part:

(4) . . . All or any part of the insurance proceeds may be applied by the Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in Paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged property.

\* \* \* \*

(5) . . . Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or abandoned Property.

\* \* \* \*

(6) . . . If Borrower fails to make these payments or the payments required under Paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument . . . then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2.

\* \* \* \*

(16) . . . Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach.

3. The Mortgage was insured by the Department of Housing and Urban Development ("HUD").

4. On June 13, 1990, Commercial Bank & Trust Co. of Tulsa

assigned the Mortgage to Third Party Defendant, BancOklahoma Mortgage Corporation ("BOMC").

5. In a decree of divorce dated June 27, 1994, Defendant, Valorie Barrett ("Barrett"), formerly Valorie Gregorovic, was awarded the Ironwood Residence subject to the mortgage indebtedness.

6. John Gregorovic signed and filed of record on August 7, 1994, a quit-claim deed, quit-claiming any interest in the Ironwood Residence to Barrett.

7. On August 9, 1994, the Ironwood Residence was substantially damaged by fire.

8. At the time of the fire, State Farm Fire and Casualty Company ("State Farm") had a contract of insurance covering Barrett's personal and real property.

9. Barrett made no payments on the Mortgage after Ironwood Residence was awarded to her. BOMC formally declared the Mortgage in default on September 27, 1994.

10. The Ironwood Residence has been vacant since August 9, 1994.

11. On September 7, 1994, Barrett engaged Sooner Public Adjusting, Inc. as her agent in the preparation, presentation and adjustment of loss caused by the fire on the Ironwood Residence.

12. Barrett knew at least as of September 14, 1994, that State Farm questioned the cause and origin of the fire.

13. Sooner Public Adjusting, Inc. retained James H. Pilkington as Barrett's cause and origin investigator in late

September, 1994. Mr. Pilkington made three site investigations on September 29, 1994, April 21, 1995 and May 18, 1995. Prior to April 5, 1995, Pilkington took numerous photographs of the fire scene and examined witness statements.

14. BOMC instituted foreclosure proceedings on November 30, 1994.

15. On December 6, 1994, Greg Meier, Barrett's counsel, wrote to BOMC's foreclosure counsel, enclosing copies of blank proof of loss forms for BOMC to submit to State Farm and informing counsel that Barrett would not be responsible for any legal costs or fees if BOMC did not submit a proof of loss.

16. BOMC's foreclosure counsel forwarded the letter to BOMC with a blank proof of loss. BOMC completed the proof of loss on December 28, 1994 and sent it to State Farm.

17. After the fire, the Ironwood Residence was the target of ongoing vandalism.

18. In the end of December, 1994, BOMC authorized Steve Cleveland of Field Service Express, Inc., to change the locks on the Ironwood Residence. The locks were changed pursuant to guidelines issued by HUD requiring the changing of one set of locks on vacant property.

19. BOMC also authorized Steve Cleveland to obtain bids to repair the fire damage to the Ironwood Residence.

20. In mid-January, 1995, BOMC received repair estimates from Third Party Defendant, Paul Davis Systems of Tulsa, Inc. ("PDS"), and Bright Construction Company.

21. Sooner Public Adjusting, Inc. knew BOMC had obtained repair estimates on the Ironwood Residence.

22. On or about March 22, 1995, BOMC received a letter from Tom Abbott of State Farm, enclosing other estimates for the repair work, including a revised bid from PDS. Two of the repair estimates were submitted to State Farm at the request of the Barretts.

23. The March 22, 1995 letter also enclosed \$28,073 in partial satisfaction of BOMC's proof of loss.

24. On March 27, 1995, BOMC wrote HUD, the mortgage insurer, requesting that HUD advise BOMC whether HUD desired the Ironwood Residence to be repaired prior to conveyance to HUD.

25. On March 31, 1995, HUD instructed BOMC to repair the Ironwood Residence.

26. On April 5, 1995, BOMC authorized PDS to repair the Ironwood Residence.

27. Immediately after April 5, 1995, PDS' agents entered the Ironwood Residence and removed cabinets, sheet rock, flooring, ceiling material and other related building materials.

28. On April 24, 1995, BOMC's foreclosure counsel received a letter from Greg Meier dated April 20, 1995. In the letter, Meier stated that Barrett had informed him that BOMC had authorized the "gutting of her home." Meier informed BOMC that it did not own the property and that he wanted to know why BOMC would deliberately destroy evidence needed to defend the instant action.

29. On that same date, BOMC, upon advice of counsel,

instructed PDS to cease all repair work.

30. Until receipt of the April 20, 1995 letter, BOMC had not been informed by Barrett, Greg Meier or Sooner Public Adjusting, Inc. that a controversy existed concerning insurance coverage of the Ironwood Residence. BOMC had never been instructed to not repair the property.

31. As of April, 1995, the Ironwood Residence was in danger of substantial physical deterioration.

32. Barrett's investigator, Mr. Pilkington is confident of his report and investigation of the fire. He had determined the origin of the fire during his September 29, 1994 site investigation. Mr. Pilkington does not contend that the repairs done in April, 1995 to the Ironwood Residence impaired or prejudiced his ability to conduct and complete an adequate investigation.

33. On June 7, 1995, Barrett filed a Third Party Complaint against BOMC and PDS alleging claims of trespass and conversion. Barrett seeks damages against BOMC and PDS for the property allegedly converted. In addition, as BOMC and PDS allegedly destroyed the fire scene, Barrett also seeks damages in an amount equal to her breach of contract counterclaim and indemnification for any sum Barrett is required to pay State Farm on its claim against her.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56, Fed.R.Civ.P. 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. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. at 323. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Id.

Where, as in the instant case, the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file. Id. at 324. The nonmoving party is then required to go beyond the pleadings and through affidavits, deposition testimony, answers to interrogatories, and admissions, designate specific facts showing there is a genuine issue for trial. Id.

In the instant motion, Third Party Defendants, BOMC and PDS, contend that they are entitled to summary judgment on Barrett's

claims of trespass and conversion. BOMC and PDS state that paragraphs 5, 6 and 16 of the Mortgage specifically granted BOMC the right to repair the Ironwood Residence in order to protect, preserve and prevent further waste to the property. Moreover, BOMC and PDS state that Barrett, through her counsel, Greg Meier, actually consented to the repair of Ironwood Residence when he directed BOMC, in the December 6, 1994 letter, to file a proof of loss. However, even if Barrett did not consent to the repairs, BOMC and PDS assert that Barrett is estopped to challenge their right to repair in light of Mr. Meier's letter and Sooner Public Adjusting, Inc.'s knowledge of BOMC's receipt of repair estimates. Furthermore, BOMC and PDS argue that summary judgment is required as the undisputed evidence indicates that Barrett sustained no actual damages resulting from the repair of the Ironwood Residence. BOMC and PDS assert that undisputed evidence reveals that Barrett's expert's analysis of the cause and origin of the fire was completed prior to the repair work. Hence, they argue that Barrett's ability to defend State Farm's complaint and prosecute her counterclaim has not been impaired or prejudiced, as alleged.

In response to BOMC and PDS' motion and in support of her partial summary judgment motion, Barrett argues that the terms of the Mortgage did not apply to her as she was not a signatory on the Mortgage. Moreover, Barrett contends that the paragraphs of the Mortgage, specifically relied upon by the BOMC and PDS to support their position, did not authorize BOMC and PDS to repair the property without her consent. If anything, Barrett asserts, the

terms of the Mortgage only granted BOMC the right to maintain and preserve the property in its existing state. Barrett additionally asserts that she never consented to the repair of the Ironwood Residence. She argues that the December 6, 1994 letter from Greg Meier was not and cannot be construed as a directive to BOMC to repair the Ironwood Residence. The letter, Barrett contends, was simply a notification to BOMC of the need to file their own proof of loss form. Barrett further contends that she is not estopped to assert the trespass and conversion claims. Barrett states that even if she were aware that BOMC had obtained repair estimates, she had no duty to inform BOMC and PDS not to repair the property since she was the owner of the property. Furthermore, Barrett argues that she has been damaged by BOMC and PDS' repairs on the Ironwood Residence. Barrett maintains that the repairs have seriously impaired her ability to defend State Farm's action and to prosecute her counterclaim against State Farm.

Upon review of the record, the Court finds that BOMC and PDS are entitled to summary judgment on Barrett's Third Party Complaint. Although she is not a signatory on the Mortgage, Barrett, by operation of law, is bound by the terms of the Mortgage. See, 59 C.J.S. Mortgages § 398 (1949); 55 Am. Jur. 2d, Mortgages §§ 1039, 1088 (1971); see also, Sooner Fed. Sav. & Loan Ass'n v. Oklahoma Central Credit Union, 790 P.2d 526, 529 (Okla. 1989). Paragraph 16 of the Mortgage specifically provided that BOMC could enter upon, take control of or maintain the Ironwood Residence at any time there was a breach. Approximately seven

months prior to the repair work, BOMC formally declared the Mortgage in default. Based upon paragraph 16 as well as paragraph 4, which authorized BOMC to apply insurance proceeds to restoration and repair of damaged property, the Court finds that BOMC was entitled to enter upon and repair the property using the insurance proceeds received from State Farm. The Court specifically rejects Barrett's suggestion that BOMC could only maintain the property in its existing state. The Court concludes that paragraph 16 of the Mortgage authorized the repair of the property. Furthermore, the Court finds that paragraph 5 of the Mortgage, which provided that BOMC could take reasonable action to protect and preserve the property if vacant or abandoned, entitled BOMC to effect the repairs. It is undisputed that the Ironwood Residence was vacant at the time the repairs were undertaken. It is also undisputed that the property as of April 1995 was subject to substantial physical deterioration. The Court concludes that under paragraph 5, BOMC was entitled to repair the property so as to prevent further deterioration.

In addition, the Court further finds that Barrett has failed to present sufficient competent evidence to raise a genuine issue of fact as to the issue of damages. Barrett has admitted that the only harm resulting from the alleged trespass and conversion is the impairment of her ability to defend State Farm's action against her and to prosecute her counterclaim against State Farm. However, the undisputed evidence establishes that Barrett's expert is confident of his conclusions as to the cause and origin of the fire. It also

shows that there is no contention on the part of Barrett's expert that the repairs have impaired or prejudiced his ability to conduct and complete an adequate investigation. Indeed, Barrett's expert determined the origin and cause of the fire during his initial visit to the property on September 29, 1994. Because Barrett has failed to come forth with sufficient admissible evidence to show that her ability to litigate has been impaired or prejudiced by the repairs, the Court concludes that summary judgment is appropriate.<sup>1</sup>

Based upon the foregoing, the Court **GRANTS** Third Party Defendants' Motion for Summary Judgment on the Third Party Complaint of Valorie Barrett (Docket Entry #60). The Court **DENIES** Motion for Summary Judgment of Valorie Barrett Against Third Party Defendants BancOklahoma Mortgage and Paul Davis Systems of Tulsa, Inc. (Docket Entry #58).

ENTERED this 23<sup>rd</sup> day of April, 1996.

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

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<sup>1</sup>As the Court finds that summary judgment is appropriate on the basis that the Mortgage authorized the repairs and Barrett has failed to show actual damages resulting from the repairs, the Court need not address BOMC and PDS' arguments relating to consent and estoppel. Similarly, the Court need not address BOMC and PDS' argument that they are entitled to summary judgment if State Farm should prevail on its summary judgment motion.

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

STATE FARM FIRE AND CASUALTY )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
VALORIE BARRETT and )  
ANTHONY BARRETT, )  
 )  
Defendants, )  
 )  
and )  
 )  
VALORIE BARRETT, )  
 )  
Third Party Plaintiff, )  
 )  
v. )  
 )  
BANCOKLAHOMA MORTGAGE CORP., )  
an Oklahoma corporation, and )  
PAUL DAVIS SYSTEMS OF TULSA, )  
INC., an Oklahoma corporation, )  
 )  
Third Party Defendants. )

Case No. 95-C-237-BU ✓

**FILED**  
APR 23 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

This matter comes before the Court upon the Motion for Summary Judgment or in the Alternative Motion for Summary Judgment as to Defendants' Counterclaim for Bad Faith and Punitive Damages filed by Plaintiff, State Farm Fire and Casualty Company ("State Farm"). Defendants, Valorie Barrett and Anthony Barrett ("the Barretts"), have responded to the motion and State Farm has replied thereto. Based upon the parties' submissions, the Court makes its determination.

State Farm commenced this action to obtain a declaratory judgment concerning its rights and responsibilities under a certain

homeowner's insurance policy issued to Defendant, Valorie Barrett. In its complaint, State Farm specifically seeks a declaration that coverage under the insurance policy does not exist for the Barretts' claimed property loss. According to State Farm, the property loss resulted from a fire which was caused or procured by the Barretts. State Farm claims that the insurance policy is void because the Barretts intentionally made material misrepresentations as to the cause of the fire on their proof of loss statement. State Farm also alleges that the Barretts intentionally made material misrepresentations concerning their financial condition at the time of fire and their claim for additional living expenses. In addition to seeking a declaration of no coverage under the insurance policy based upon the alleged material misrepresentations, State Farm seeks a judgment for the amount of money paid by State Farm to the Barretts under the insurance policy. The Barretts, in response, have denied the allegations of State Farm. Furthermore, they have asserted counterclaims against State Farm for breach of the insurance contract and for breach of the implied duty of good faith and fair dealing.

In the instant motion, State Farm argues that it is entitled to summary judgment as the undisputed facts establish that during the course of their examination under oath, the Barretts misrepresented facts or circumstances concerning their financial status. The misrepresentations as to financial status included Defendant, Anthony Barrett's ownership of the 1971 Corvette and intention to sell the 1971 Corvette to assist the Barretts'

financial woes; Defendant, Anthony Barrett's activities prior to the fire; the Barretts' reasons for leaving their employment and cable television being on the Ironwood Residence at the time of the fire. According to State Farm, these intentional misrepresentations which concerned the Barretts' financial status were calculated to discourage, mislead or deflect State Farm's investigation into the true facts surrounding the fire at Ironwood Residence. State Farm also contends that the undisputed evidence shows that the Barretts made misrepresentations as to their additional living expenses. State Farm contends that these intentional misrepresentations were made in order to obtain money for non-existent furniture and appliance rentals. State Farm argues that Defendants' intentional misrepresentations as to their financial status and the additional living expenses were material under applicable law and as such, void the insurance policy.

In the alternative, State Farm contends that if the Court finds genuine issues of fact as to the intentional misrepresentations, summary judgment is still appropriate as to the Barretts' counterclaim for bad faith and punitive damages. State Farm argues that reasonable minds cannot differ that a legitimate dispute concerning the origin of the fire existed between the parties at the time the Barretts' fire loss claim was denied.

The Barretts, in response, contend that summary judgment is not warranted as State Farm has not presented any evidence to show that the alleged inconsistent statements were material to State Farm's claim of arson against Defendants. Specifically, in regard

to Defendant, Anthony Barrett's statements about the 1971 Corvette, Defendants assert that the statements were not material as Defendant did not have any financial interest in the Ironwood Residence. At the time of the fire, the Ironwood Residence was owned by Defendant, Valorie Barrett. Moreover, the Barretts contend that Defendant, Anthony Barrett's statements were not intended to avoid State Farm from learning the truth about the 1971 Corvette but to keep Defendant, Valorie Barrett, from learning that the 1971 Corvette belonged to an ex-girlfriend. As to the alleged misrepresentations relating to their reasons for leaving their employment, the Barretts contend that questions of fact exist as to whether the alleged misrepresentations were in fact misrepresentations. The Barretts specifically dispute their former employers' statements as to why the Barretts left their employ. In regard to cable television, the Barretts contend that such fact was not material as cable television was not in any way connected to the fire. Furthermore, as to the additional living expenses, the Barretts assert that there was considerable conflict and confusion between State Farm and the Barretts regarding the additional living expenses. According to the Barretts, State Farm failed to give any guidance to them as to what would qualify as additional living expenses.

In addition to the alleged misrepresentations not being material, the Barretts contend that State Farm is not entitled to summary judgment as State Farm has not shown that it relied upon any of the alleged misrepresentations to its detriment.

Specifically, the Barretts argue that prior to the denial of the claim, State Farm prepared a Claim Committee Report relating to the Barretts' fire loss claim. In that report, the Barretts argue, State Farm made no references as to any misrepresentations made by the Barretts or that State Farm relied upon any such misrepresentations to its detriment. As a result, the Barretts contend that insurance policy is not void.

As to their counterclaim for bad faith and punitive damages, the Barretts contend that summary judgment is not appropriate. The Barretts argue that both before the claim was denied and throughout this litigation, the true object of State Farm's wrath has been at Druce Wood, the public adjuster who was employed by the Barretts to assist them in their claim. The Barretts argue that State Farm refused to provide Mr. Wood copies of their cause and origin reports soon after he was hired. They also refused to communicate with Mr. Wood throughout the lengthy investigation of the insureds from September, 1994 and through March, 1995. The Barretts state that State Farm never questioned the contents claimed by the Barretts as damaged or destroyed by the fire during the investigation process. After this lawsuit was commenced, State Farm subpoenaed the records of Mr. Wood's employer to obtain its computer hardware and software. The Barretts further argue that State Farm has presented no evidence that any of the alleged misrepresentations went into the denial of the Barretts' fire loss claim.

Under Oklahoma law and the language of the insurance policy

issued to Defendant, Valorie Barrett, an intentional material misrepresentation voids the insurance policy. Okla. Stat. tit. 36, § 4803, which sets forth the standard provisions of a fire insurance policy provides:

This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in the case of any fraud or false swearing by the insured relating thereto.

The insurance policy issued to Defendant, Valorie Barrett, specifically provides:

**Concealment or Fraud.** This policy is void as to you and any other insured, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.

Both the statutory standard fire policy found within § 4803 and the insurance policy at issue further provide, that in the event of a loss, the insured must submit to examination under oath. In summarizing the purpose of the examination under oath provision, the United States Supreme Court stated:

The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the Company to possess itself of all knowledge, in regard to the facts, material to its rights, to enable it to decide upon its obligations, and to protect it against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured.

Claflin v. Commonwealth Ins. Co., 110 U.S. 81, 94, 3 S.Ct. 507, 515, 28 L.Ed. 76, 82 (1884).

In Long v. Insurance Co. of North America, 670 F.2d 930 (10th

Cir. 1982), the Tenth Circuit set forth the test to determine whether a misrepresentation is material. The Tenth Circuit stated:

Regarding allegations of false swearing, a misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented.

670 F.2d at 934.

Viewing the evidence in a light most favorable to the Barretts, the Court finds that genuine issues of material fact exist as to whether the alleged misrepresentations made by the Barretts during the course of their examinations under oath were material. In the Court's view, reasonable minds could differ on the question of whether an insurance company investigating the claim at issue would attach importance to the alleged misrepresentations. In addition, the Court finds that genuine issues of material fact exist as to whether some of the alleged misrepresentations, such as those relating to the Barretts' employment, were actually misrepresentations. The Court further finds that genuine issues of fact exist as to whether some of the alleged misrepresentations, such as those relating to the 1971 Corvette, were made with an intent to deceive State Farm. Therefore, the Court finds that summary judgment in favor of State Farm is not appropriate.

In regard to the Barretts' bad faith counterclaim, the Court likewise finds that summary judgment is not appropriate. The Court notes that the Barretts' counterclaim is not limited to State Farm's refusal to pay. It also includes State Farm's investigation

and handling of the Barretts' claim. See, Timmons v. Royal Globe Ins., 653 P.2d 907, 917 (Okla. 1982) (Affirming a bad faith judgment based upon investigation of claim, Oklahoma Supreme Court stated "[t]he essence of the cause before the Court is failure to deal fairly and in good faith with an insured and as such, the jury may be shown the entire course of conduct between the parties to arrive at a determination of whether that standard had been breached or not"); see also, Buzzard v. Farmers Ins. Co., 824 P.2d 1105, 1109 (Okla. 1991) (recognizing that the manner in which an insurer investigates or handles a claim may be the basis for a bad faith judgment). Upon review of the record, the Court finds that genuine issues of material fact exist as to whether State Farm failed to deal fairly with the Barretts.

Based upon the foregoing, Plaintiff State Farm and Fire Casualty Company's Motion for Summary Judgment (Docket Entry #71) is **DENIED**. Plaintiff State Farm and Fire Casualty Company's Alternative Motion for Summary Judgment as to Defendants' Counterclaim for Bad Faith and Punitive Damages (Docket Entry #71) is also **DENIED**.

ENTERED this 23<sup>rd</sup> day of April, 1996.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DIANE L. JONES aka Diane Luzette )  
Jones; GENE JONES, JR. aka Gene Jones; )  
FIDELITY FINANCIAL SERVICES, )  
INC; STATE OF OKLAHOMA, ex rel. )  
DEPARTMENT OF HUMAN SERVICES; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
)  
Defendants. )

**FILED**

APR 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 24 1996

Civil Case No. 95 C 768BU

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 23<sup>rd</sup> day of April, 1996. 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, DIANE L. JONES aka Diane Luzette Jones, appears by her Attorney, Gary W. Wood; the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, appears by Sheila Condren, OBA #44; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, GENE JONES, JR., aka Gene Jones and FIDELITY FINANCIAL SERVICES, INC., appear not, but make default.

**NOTE: THIS ORDER IS TO BE MAILED  
BY THE CLERK TO THE PLAINTIFF AND  
PROSECUTOR AND TO THE DEFENDANT  
IF APPLICABLE.**

The Court being fully advised and having examined the court file finds that the Defendant, FIDELITY FINANCIAL SERVICES, INC, signed a Waiver of Summons on August 11, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, acknowledged receipt of Summons and Complaint on August 11, 1995, by Certified Mail.

The Court further finds that the Defendant, GENE JONES, JR., aka Gene Jones, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 24, 1996, and continuing through February 28, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, GENE JONES, JR., aka Gene Jones, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, GENE JONES, JR., aka Gene Jones. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully

exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 5, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, filed its Answer on October 10, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on October 23, 1995; that the Defendant, DIANE L. JONES aka Diane Luzette Jones, filed her Answer on September 25, 1995; and that the Defendants, GENE JONES, JR., aka Gene Jones and FIDELITY FINANCIAL SERVICES, INC, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DIANE L. JONES, is one and the same person as Diane Luzette Jones, and will hereinafter be referred to as "DIANE L. JONES." The Defendant, GENE JONES, JR., is one and the same person as Gene Jones, and will hereinafter be referred to as "GENE JONES, JR." The Defendants, DIANE L. JONES and GENE JONES, JR., were granted a Divorce on November 28, 1988, in Case No. FD-88-1406, in Tulsa County, Oklahoma. The Defendants, DIANE L. JONES and GENE JONES, JR., are both single unmarried persons.

The Court further finds that on November 9, 1988, Gene Jones, Jr., filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern

District of Oklahoma, Case No. 88-B-3458 C. On March 3, 1989, the Discharge of Debtor was filed and on April 24, 1989, the case was subsequently closed. On June 18, 1990, Diane Luzette Jones, filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-B-1661 C. On October 10, 1990 the Discharge of Debtor was filed and on December 10, 1990, the case was subsequently closed.

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-five (25), Block Forty-eight (48), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on November 29, 1979, the Defendants, GENE JONES, JR., and DIANE L. JONES, executed and delivered to MIDLAND MORTGAGE CO., their mortgage note in the amount of \$20,900.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-Half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, GENE JONES, JR., and DIANE L. JONES, husband and wife, executed and delivered to MIDLAND MORTGAGE CO., a mortgage dated November 29, 1979, covering the above-described property. Said mortgage was recorded on December 4, 1979, in Book 4444, Page 1664, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 28, 1988, MIDLAND MORTGAGE CO., assigned the above-described mortgage note and mortgage to MIDFIRST SAVINGS & LOAN

ASSOCIATION. This Assignment of Mortgage was recorded on May 3, 1988, in Book 5096, Page 2255, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 7, 1989, MIDFIRST SAVINGS AND LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 9, 1989, in Book 5170, Page 2277, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1989, the Defendant, DIANE L. JONES, 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 February 22, 1990, April 2, 1990 and April 17, 1991.

The Court further finds that the Defendants, GENE JONES, JR., and DIANE L. JONES, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, GENE JONES, JR., and DIANE L. JONES, are indebted to the Plaintiff in the principal sum of \$38,495.80, plus interest at the rate of 11.50 percent per annum from March 20, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$2.00 which became a lien on the property

as of July 2, 1990, a lien in the amount of \$1.00 which became a lien on the property as of June 20, 1991, a lien in the amount of \$18.00 which became a lien on the property as of June 26, 1992 and a lien in the amount of \$8.00 which became a lien on the property as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$643.00 which became a lien on the property as of May 14, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of \$143.87 which became a lien on the property as of October 29, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, GENE JONES, JR., and FIDELITY FINANCIAL SERVICES, INC., are in default, and have no right, title or interest in the subject real property.

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

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, GENE JONES, JR., and DIANE L. JONES, in the principal sum of \$38,495.80, plus interest at the rate of 11.50 percent per annum from March 20, 1995 until judgment, plus interest thereafter at the current legal rate of 5.46 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$29.00, plus costs and interest, for personal property taxes for the years 1989-1992, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of \$643.00 for its judgment, plus the costs and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$143.87, plus accrued and accruing interest, for state income taxes, plus the costs and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, GENE JONES, JR., FIDELITY FINANCIAL SERVICES, INC., and DIANE L.

JONES and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

**Third:**

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

**Fourth:**

In payment of Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, in the amount of \$643.00, for its judgment.

**Fifth:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$19.00, 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 \$143.87, plus accrued and accruing interest, for state income taxes which are currently due and owing.

**Seventh:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$8.00, 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

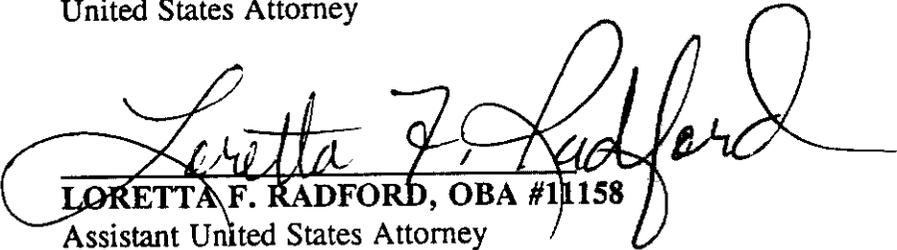
decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**s/ MICHAEL BURRAGE**

**UNITED STATES DISTRICT JUDGE**

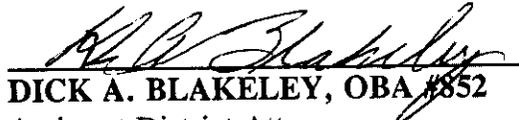
APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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

Assistant United States Attorney  
3460 U.S. Courthouse  
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Attorney for Defendants,  
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Tulsa County, Oklahoma

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Department of Human Services

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Attorney for Defendant,

Diane L. Jones

Judgment of Foreclosure

Civil Action No. 95 C 768BU

LFR:flv

4-23-96

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

**FILED**

LEO APPEGATE, JR., LORETTA )  
APPEGATE, LEO APPEGATE, III, and )  
PAUL APPEGATE, individuals, )

Plaintiffs, )

v. )

CITY OF TULSA, OKLAHOMA, )  
a municipal corporation, )

Defendant. )

APR 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-C-625H

JOURNAL ENTRY OF JUDGEMENT UPON AGREED SETTLEMENT

NOW ON this 22 day of April, 1996, this matter comes on for hearing before the undersigned judge. Plaintiffs appear by and through their attorneys of record, Clark Brewster and Greg Miller, and Defendant City appears by and through its attorney of record, Mark H. Newbold, Senior Assistant City Attorney.

The court, having reviewed the allegations set forth in plaintiffs' petition and, upon being advised that City's Mayor has authorized entry of a consent judgment in the sum of Thirty Five Thousand Dollars (\$35,000) and the Court being satisfied that plaintiffs fully understand the nature of this action with regard to its finality which precludes additional or further compensation for damages arising from the occurrence of the event identified in plaintiffs' petition and upon being further advised by plaintiff that it is their desire to settle the entirety of all claims and causes of action relating to the events identified in their petition upon payment of damages in the sum of Thirty Five Thousand Dollars (\$35,000) the court finds:

1. That the court has jurisdiction over the subject matter of this lawsuit and the parties hereto;

2. That plaintiffs are fully aware of their rights in this matter and it is plaintiffs' desire to compromise their right to trial by jury;

3. That plaintiffs desires to accept as full, final and complete settlement the sum of Thirty Five Thousand Dollars (\$35,000) for any and all damages, losses and expenses they sustained as a result of the events identified in plaintiffs' petition;

4. That by agreement of the parties, defendant City's payment to plaintiffs will stand as full compensation to plaintiffs and preclude any further or separate action by plaintiffs against City of Tulsa, a municipal corporation, or any of its employees, arising from or relating to the events described in plaintiffs' petition;

5. That City's Mayor has formally authorized settlement of plaintiffs' lawsuit in the sum of Thirty Five Thousand Dollars (\$35,000);

6. That all parties request this court to approve and finalize their mutual settlement;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that plaintiffs have and recover from the defendant City of Tulsa, Oklahoma, damages in the sum of Thirty Five Thousand Dollars (\$35,000) as full, final and complete compensation for any and all damages, losses and expenses incurred or sustained by plaintiffs incident to the events described in plaintiffs' petition.

IT IS FURTHER ORDERED BY THE COURT that payment to plaintiffs by defendant City will preclude any further or separate action by plaintiffs against any employee of defendant City of Tulsa arising from or pertaining to the events described in plaintiffs' petition.

IT IS THE FURTHER ORDER OF THE COURT that the defendant City of Tulsa shall be responsible for all court costs herein expended.

S/ SVEN ERIK HOLMES

---

Judge

APPROVED AS TO FORM AND CONTENT:

By: Gregory D. Miller  
Clark Brewster  
Gregory Miller  
Attorneys for Plaintiffs

By: Mark H. Newbold  
Mark H. Newbold  
Attorney for Defendant City

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

**FILED**

APR 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DONNA REESE COLLINS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PRINCIPAL MUTUAL LIFE )  
 INSURANCE COMPANY, )  
 a foreign corporation, )  
 )  
 Defendant. )

Case No. 95-CV-1109-BU

ENTERED ON DOCKET  
DATE APR 23 1996

**ORDER GRANTING JOINT STIPULATION AND APPLICATION FOR AN  
ORDER OF DISMISSAL WITH PREJUDICE**

For good cause having been shown, the parties, Plaintiff, Donna Reese Collins, and Defendant, Principal Mutual Life Insurance Company, by and through their attorneys of record, having stipulated to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiff's Petition filed October 16, 1995, in the District Court in and for Tulsa County, State of Oklahoma, hereby orders that the above-captioned action be dismissed with prejudice.

DATED this 22<sup>nd</sup> day of April, 1996.

s/ MICHAEL BURRAGE  
UNITED STATES DISTRICT COURT JUDGE

7

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

FILED

APR 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DAVID GOLZAR AND MARSHA GOLZAR )

Plaintiffs, )

V. )

ROLLINS, INC. d/b/a ROLLINS )  
PROTECTIVE SERVICES COMPANY )

Defendant. )

CASE NO. 95-C-792-B ✓

ENTERED ON BOOKS

APR 23 1996 ✓

ORDER

This matter comes on for consideration of Defendant Rollins, Inc. d/b/a Rollins Protective Services Company's (Rollins) Motion For Summary Judgment (docket # 10).

HISTORY OF CASE

This is an action removed from Tulsa County District Court wherein plaintiffs allege they contracted with Rollins to install a security system at their home in Tulsa, OK, and that the system was later replaced by Rollins in 1989. Plaintiffs allege their home was burglarized in December, 1993, the thieves gaining entry through a sliding glass door which, while wired into the old alarm system, had not been wired into the replacement system.

In their Complaint Plaintiffs allege the gross negligence of Rollins rendered unenforceable an exculpatory clause on liability contained in the contract between the parties (\$500 limit). Plaintiffs seek actual damages of \$133,725.25, plus attorneys fees and interest.

In its Motion For Summary Judgment Defendant argues that the contract limits any liability on the part of Defendant to the sum of \$500. Defendant alleges Plaintiff David Golzar is an experienced business man, signing many contracts and suing people, and that it is no defense that he did not read the contracts. Defendant avers that its agents did not prevent David Golzar from reading the contracts as alleged by Plaintiff in his Complaint. Although Defendant, in its Answer to Plaintiffs' Amended Complaint, alleged that Plaintiff Marsha Golzar is a stranger to the contracts since they were executed before David Golzar and Marsha Golzar were married, it failed to sufficiently set forth a statement of undisputed facts relating to Marsha Golzar to enable the Court to entertain summary judgment in regard to her claims.

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

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

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

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

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

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

In their Response to Defendant's motion Plaintiffs raise three issue as to which they allege a legitimate controversy of material facts exists: (1) Whether Defendant negligently designed the replacement system; (2) Whether Defendant's installation of the system was grossly negligent thereby nullifying any exculpatory or damage limiting clause in the contract; and (3) Whether Defendant denied to David Golzar a meaningful opportunity to read and understand the contract.

The Court has no problem with issue (3) above. Excerpts from David Golzar's deposition testimony clearly establish that he is an

experienced businessman, was handed the contract by Defendant's agent Boward, and never prevented from, if he so chose, reading the contract in its entirety, as follows:

"Q. Okay, Did Mr. Boward in any way attempt to prevent you from reading any of that contract or any of the documents that he presented to you?

A. Well, he didn't -- he never prevented me, but he never allowed me to read it, either.

Q. In what way? Explain that to me, that he did not allow you to read them.

A. Because he told me that, "I just need a few minutes of your time to sign some documents so we can get your alarm system changed.

Q. Yes, sir.

A. And he came by my office and he told me, "Sign this, sign this, sign this." And I signed and then he took it and left and arranged for the alarm system to be replaced.

Q. Of course, you knew you were signing a contract, though?

A. Yes, I did.

Q. In your own business, you have people sign contracts and you sign contracts, apparently, I would assume, in your business?

A. Right, yes, yes.

Q. You recognize, I assume as a businessman, that when you sign a contract, if you put your name to it, you're agreeing to those terms in that contract, aren't you?

A. Yes.

Q. In other words, had you told Mr. Boward, "Look, I'm not going to sign this until I have a chance to read all the way through it," you could have told him that and you could have done that, could you not?

A. Sure.

Q. And that's what I meant in the sense that he didn't physically in some way cover up part of the contract or say, "No, you can't read this," did he?

A. No. No, but he -- what he told me, which is probably correct, he told me, you know, "This is the contract to set up your alarm system and as we agreed on the amounts, so sign this." And he showed this, "Sign this," and I did, and he took it with him."

The Court concludes Defendant's motion on this issue should be granted.

The Court next considers Defendant's alleged gross negligence viz-a-viz the contract exculpatory or limiting provision (\$500

limit in any damages recoverable).

Limited liability provisions in alarm contracts are recognized under Oklahoma law. Fretwell v. Protection Alarm Company, 764 P.2d 149 (Okla.1988). However, the Oklahoma Supreme Court has stated that "[c]ourts have refused to uphold limitation of liability clauses where the defendant's conduct constituted gross negligence." Elsken v. Network Multi-Family Sec. Corp., 838 P.2d 1007 (Okla.1992).

Plaintiffs allege Defendant was grossly negligent by failing to include the sliding glass door leading from the patio into the master bedroom in the replacement security system.<sup>1</sup>

The Court concludes that whether Defendant's failure to include the sliding glass door into the replacement system was gross or plain negligence is a matter for the trier of fact, thereby precluding summary judgment on this issue. Defendant's motion on the issue should be denied.

Lastly, the Court addresses the issue of Defendant's alleged negligence in the design of a system which Plaintiffs allege is inadequate for the dimensions of the room at which the place of wrongful entry occurred. Again, the Court concludes that such matter is a material factual dispute which is a matter for the trier of fact. However, a contractual limitation of liability is valid and enforceable absence gross negligence. Elsken, supra. Fretwell, supra. The Court, having concluded that Plaintiff David

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<sup>1</sup> Plaintiffs allege Defendant failed to install glass sensors which sense the sound made by breaking glass. To gain access to the Golzar's residence, the burglars threw an outdoor gas grill through the glass door, creating a great deal of noise but failing to set off the alarms. Only when the thieves opened the china closet which was incorporated into the replacement system did the alarm sound.

Golzar's defense of having been substantially prevented from reading the contract with the limiting clause is without merit, is of the view that summary judgment should be granted in favor of Defendant on this issue beyond the sum of \$500, leaving for the trier of fact the issue of alleged simple negligence in the design of the system but limited to the sum of \$500.

#### Summary

In summary, the Court concludes Defendant's Motion For Summary Judgment should be and the same is hereby DENIED as to issue (1), Whether Defendant negligently designed the replacement system issue, up to the sum of \$500 but GRANTED as to any sums beyond \$500 on this issue; DENIED as to issue (2), Whether Defendant's installation of the system was grossly negligent thereby nullifying any exculpatory or damage limiting clause in the contract; and GRANTED as to issue (3), Whether Defendant denied to David Golzar a meaningful opportunity to read and understand the contract.

IT IS SO ORDERED this 22<sup>nd</sup> day of April, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

SHARON D. PHILLIPS; RICHARD H.  
VORIS; ANNA F. VORIS; MURRAY B.  
ATTERBERRY; LAVELLE  
ATTERBERRY; RICHARD M.  
ECKLUND; PEGGY J. ECKLUND;  
RICHARD A. SWARD; DOROTHY E.  
HILL; COUNTY TREASURER, Tulsa  
County, Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,  
Defendants.

**FILED**

APR 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 1078E

ENTERED ON DOCKET  
APR 23 1996  
DATE \_\_\_\_\_

**ORDER**

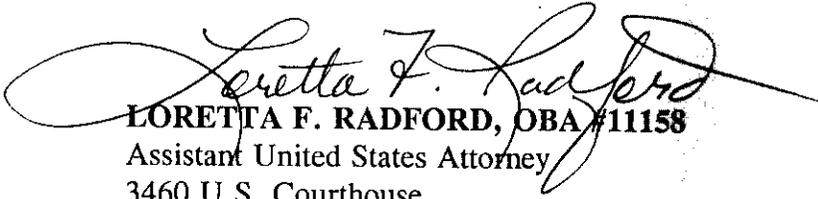
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 22 day of April, 1996.

S/ JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and title of the signatory.

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

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

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

In re: )  
 )  
Tulsa Energy, Inc. )  
 )  
Debtor, )  
 )  
Tulsa Energy, Inc. )  
 )  
Plaintiff(s), )  
 )  
vs. )  
 )  
KPL Production Company; Dalco Petroleum, )  
Inc. et al )  
 )  
Defendant(s). )  
 )

**FILED**  
APR 22 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-417-C

ENTERED ON DOCKET

DATE APR 23 1996

**ORDER**

Now before the Court is an appeal from the United States Bankruptcy Court for the Northern District of Oklahoma. The sole issue in this appeal is whether appellee Dalco Petroleum, Inc. ("Dalco") can legally waive Dalco's right to interest on suspended oil and gas proceeds under the Oklahoma Production Revenue Standards Act.<sup>1/</sup> United States Bankruptcy Judge Stephen J. Covey ruled that the division order which provides for suspension of proceeds without interest is in derogation of Oklahoma Statutes and public policy and is unenforceable. Appellant KPL Production Company (KPL) appeals that decision. For the reasons discussed below, the Bankruptcy Court's decision is **AFFIRMED**.

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<sup>1/</sup> 52 O.S. 1991, § 570.10, formerly 52 O.S.1991, § 540.

## **I. STATEMENT OF FACTS:**

Dalco has owned a working interest in certain oil and gas wells since May 1984. KPL became the operator of the wells in May 1984. In 1984, KPL presented to Dalco, and Dalco signed, a division order relating to the wells. The division order was drafted by KPL and among its numerous preprinted provisions was a statement that KPL could withhold proceeds of production without interest in the event of a title dispute.

In early 1984, Dalco and Dynex Energy became involved in such a title dispute and KPL began suspending revenues beginning with May 1984 production. Tulsa Energy filed its voluntary petition under Chapter 7 of the Bankruptcy Code on March 11, 1992. On June 19, 1992, Dalco assigned its interest in the wells to Debtor Tulsa Energy, Inc. On August 19, 1993, Tulsa Energy filed this adversary proceeding seeking turnover of suspended revenues from KPL. On August 10, 1994, KPL paid proceeds totaling \$80,354.70 into the registry of the Bankruptcy Court, which did not include any interest.

After that payment was made, both Tulsa Energy and Dalco objected to a proposed discharge order because it did not provide for the payment of interest. A stipulation of facts was filed and briefs on the question of interest recovery were filed by all interested parties. On March 24, 1995, Judge Covey issued his Memorandum Opinion in which he found that the waiver of interest provision upon which KPL relies is in derogation of Oklahoma law and would not be enforced by the court. That same day Judge Covey issued his Judgment Order in which he ordered KPL to pay interest

on the proceeds at the rate of six percent (6%) per annum.

KPL filed a Motion to Reconsider the Courts's ruling based on an unreported Oklahoma Court of Appeals case, Hughey v. Koch Industries, Inc.,<sup>2/</sup> which motion was denied by Judge Covey's ruling of May 1, 1995. KPL brings this appeal.

## II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). As this was a legal determination, the standard of review is *de novo*.

## III. LEGAL ANALYSIS

The issue before the court is whether KPL must pay interest on the suspended revenues, in spite of the waiver language contained in the division order. Oklahoma's Production Revenue Standards Act provides as follows:

[W]here proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, *that portion not timely paid shall earn interest at the rate of twelve percent ( 12%) per annum to be compounded annually*, calculated from the end of the month in which such production is sold until the day paid.

2. a. Where such proceeds are not paid because the title thereto is not marketable, *such proceeds shall earn interest*

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<sup>2/</sup> Case No. 84695, appearing in the March 11, 1995 issue of the Oklahoma Bar Journal.

*at the rate of six percent (6%) per annum to be compounded annually, calculated from the end of the month in which such production was sold until such time as the title to such interest becomes marketable.*

52 O.S.1991, § 570.10 (emphasis added).<sup>3/</sup> The court found and the parties do not dispute that the title to the oil and gas production was not marketable and the six percent (6%) interest provision is applicable.

KPL raises as a defense to its obligation to pay interest the language of the division order which provides that if a dispute arises concerning title, KPL may withhold the proceeds without interest. The subject division order states:

In the event any dispute or question arises concerning the title of Owner [Dalco/Tulsa Energy] to the property and/or the oil or gas produced therefrom or the proceeds thereof, you [KPL] will be furnished evidence of title satisfactory to you upon demand. Until such evidence of title has been furnished and/or such dispute is corrected or removed to your satisfaction, or until indemnity satisfactory to you has been furnished, you are authorized to withhold the proceeds of such oil or gas received and run, without interest. (Emphasis added).<sup>4/</sup>

There is no evidence that the waiver provision in the division order was discussed as a negotiable item by the parties. The language is in a preprinted form prepared by KPL. This court finds KPL cannot rely on this language to avoid paying interest on suspended proceeds.

The language of the Production Revenue Standards Act requiring the payment of interest on suspended revenues is mandatory. As the bankruptcy court properly

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<sup>3/</sup>In 1984, the statute was found at 52 O.S. 1981, § 540 with language substantially the same.

<sup>4/</sup> See Stipulated Fact No. 27; Record at Docket Entry No. 104.

found, contracts in derogation of statutes will be not be enforced by the courts.<sup>5/</sup> The division order which provides for suspension of proceeds without payment of interest is in derogation of the Production Revenue Standards Act and will not be enforced by the court.

Oklahoma has pronounced through Section 570.10 its strong public policy favoring prompt payment of proceeds of oil and gas production. The Oklahoma Supreme Court has given persuasive insight on that public policy in its interpretation of § 570.10.<sup>6/</sup> In the Hull case, the defendant had refused to pay proceeds to a royalty owner until the owner signed a division order. In finding such refusal violative of the public policy of the state, the court used language instructive for the case at bar.

The legislature's use of the term "shall" in § 540(A) in relation both to the time when payments must commence and to payments to interest owners with marketable title indicates a legislative mandate equivalent to the term "must," requiring interpretation as a command.<sup>7/</sup>

.....  
In enacting § 540, the legislature has expressed its intent that it shall be the public policy in Oklahoma for royalty owners to receive prompt payment from the sale of oil and gas products.<sup>8/</sup>

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<sup>5/</sup> 15 O.S.1991 § 211; Dycus v. Belco Industries, Inc., 569 P.2d 553, 556 (Okla. Ct. App. 1977); see An-Cor, Inc. v. Reherman, 835 P.2d 93, 95096 (Okla. 1992); Hamilton v. Cash, 91 P.2d 80, 81 (Okla. 1939).

<sup>6/</sup> Hull v. Sun Refining & Marketing Co., 789 P.2d 1272 (Okla. 1990).

<sup>7/</sup> *Id.* at 1277.

<sup>8/</sup> *Id.* at 1279.

.....

The custom and usage that Sun relies upon-- execution of a division order as a condition precedent to payment for royalty proceeds--did not survive the enactment of § 540. Although agents may contract and bind their principals to trade customs and usages, the power does not extend to customs and usages which are either illegal or contrary to public policy. The requirement that lessors execute division orders before receiving royalty payments conflicts with the spirit and letter of § 540 and is violative of public policy intended to be promoted through its enactment--prompt payment to royalty owners of proceeds from the sale of oil or gas.<sup>9/</sup>

This public policy interest in favor of prompt payment of proceeds cannot be waived by the parties in a division order. KPL attempts to distinguish Hull because it involved a royalty owner and not working interest proceeds. Section 570.10 is not limited to royalty owners. It applies to all proceeds from the sale of oil and gas production.

In the Bankruptcy Court and on appeal KPL relies heavily on the recent unpublished decision of the Oklahoma Court of Appeals, Hughey v. Koch Industries,<sup>10/</sup> Unpublished decisions of the Court of Appeals are "without value as precedent" and "shall not be considered as precedent by any court or in any brief or other material presented to any court."<sup>11/</sup> Thus the Hughey case has no precedential value before this court.

KPL admits that Hughey is not precedential, but asks the Court to give it "great

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<sup>9/</sup> *Id.* at 1280.

<sup>10/</sup> Case No. 84,695, appearing in the March 11, 1995 issue of the Oklahoma Bar Journal.

<sup>11/</sup> Rule 1.200(B)(E) of the Oklahoma Rules of Appellate Procedure in Civil Cases.

persuasive value". Again, by the implication, the Oklahoma Appellate rules are instructive. Rule 1.200(C)(B) states that Court of Appeals decisions "shall be considered to have persuasive effect" if they bear the notation "Released for publication by the Court of Appeals". The Hughey case did not receive this designation. Even if the case had been released for publication, this court finds the reasoning of the Hughey court unpersuasive. The court also finds KPL's reliance on Heiman, et al. v. Atlantic Refining Company<sup>12/</sup> misplaced. Neither the facts nor law of the Heiman case are sufficiently related to the case at bar to provide any precedential or persuasive value.

Therefore, the decision of the Bankruptcy Court is **AFFIRMED**.

Dated this 15<sup>th</sup> <sup>April</sup> day of ~~March~~ 1996.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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<sup>12/</sup> 891 P.2d 1252 (Okla. 1995).

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 18 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,  
Plaintiff,

v.

PROCEEDS OF BANK ACCOUNTS  
NO. 007890 AND 009958  
AT COMMUNITY BANK & TRUST,  
SENECA, MISSOURI,  
Defendants.

CIVIL ACTION NO. 95-C-942-C

CONSOLIDATED WITH

ENTERED ON DOCKET

APR 22 1996

DATE \_\_\_\_\_

UNITED STATES OF AMERICA,  
Plaintiff,

v.

TWENTY-FIVE (25) CALIFORNIA  
GOLD SLOT MACHINES, MORE OR  
LESS, WITH RELATED EQUIP-  
MENT, AND PROCEEDS,

CIVIL ACTION NO. 95-C-947-C

and

THIRTY (30) ELECTRONIC  
BINGO MACHINES, MORE OR  
LESS, WITH RELATED  
EQUIPMENT, AND PROCEEDS,  
Defendants.

APPLICATION FOR CLERK TO DISBURSE FUNDS  
DEPOSITED IN INTEREST-BEARING ACCOUNT

Comes now the plaintiff, United States of America, and requests that the Court forthwith order the Clerk of this Court to disburse the One Hundred Thousand Dollars (\$100,000.00) transferred to said Clerk in this case for deposit to an interest-bearing account, plus interest accrued and accruing thereon, less the appropriate registry fee, for the reason that the funds in said

account must be withdrawn on or before April 17, 1996, or the account renewed for a specified period of time by that date or within the grace period which follows. The plaintiff requests that the funds be disbursed as follows:

- 1) The sum of \$32,612.76 of the principal amount of \$100,000 to the Eastern Shawnee Tribe of Oklahoma, plus all interest accrued and accruing on the entire \$100,000, less the appropriate registry fee.
- 2) The sum of \$67,387.24 of the principal amount of \$100,000 to the United States Marshal for the Northern District of Oklahoma for forfeiture to the United States of America.

WHEREFORE, plaintiff prays that the Court forthwith enter an Order directing the Clerk of this Court to disburse the principal amount of \$100,000 which it was directed to deposit in an interest-bearing account, plus interest accrued and accruing thereon, less the appropriate registry fee as set forth above.

Respectfully submitted,

STEPHEN C. LEWIS  
United States Attorney

  
CATHERINE DEPEEW HART, OBA #3836  
Assistant United States Attorney  
3460 United States Courthouse  
333 West Fourth Street  
Tulsa, Oklahoma 74103  
(918) 581-7463

N:\UDD\CHOOK\FC\BORDER1\05331  
N:\UDD\CHOOK\FC\BORDER2\05331

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

**FILED**

APR 19 1996 *jo*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ERNIE MILLER PONTIAC-GMC TRUCK, )  
 INC. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ITT HARTFORD INSURANCE GROUP, )  
 HARTFORD ACCIDENT AND INDEMNITY )  
 COMPANY, TWIN CITY FIRE INSURANCE )  
 COMPANY, and HARTFORD INSURANCE )  
 COMPANY OF THE MIDWEST )  
 )  
 Defendants. )

Case No. 96-C-174 B ✓

**ORDER**

The Court has for consideration Ernie Miller Pontiac-GMC Truck's ("EMP") Notice of Objection to Removal and Motion for Remand (Docket # 2). After a review of the record and the applicable legal authorities, and being fully advised in the premise, this Court finds it does not have subject matter jurisdiction in the above styled case and hereby **GRANTS** EMP's Motion for Remand.

**Facts**

EMP alleges this Court does not have subject matter jurisdiction because the amount in controversy does not exceed \$50,000. The first cause of action detailed in EMP's state court Petition alleges ITT Hartford Insurance Group ("ITT") breached a contractual obligation to "defend any suit against the insured seeking damages on account thereof", thus resulting in damages to EMP in the amount of \$7,000, plus its costs and attorney's fees herein.

The second (and final) cause of action in EMP's Petition

alleges EMP suffered damages in the amount of \$8,000 as a result of ITT's failure to defend or reimburse EMP in a negligence action brought against EMP. EMP settled with the claimant in the negligence suit for \$8,000. EMP claims ITT Hartford had a contractual obligation to reimburse it the amount it paid in settlement of the claim. EMP also seeks costs and attorney's fees for this cause of action.

In its prayer, EMP prays judgment against the Defendants for "all other damages it may be entitled to, including punitive damages if Defendants' conduct is found to be in bad faith."<sup>1</sup>

The original file-stamped copy of EMP's Notice of Objection to Removal and Motion for Remand contains, inter alia, the following language:

"COMES NOW the Plaintiff, Ernie Miller Pontiac-GMC Truck, Inc. ... pursuant to 28 U.S.C. §1447(c), moves to remand this case to the State Court on the grounds and for the reasons that the amount in controversy does not exceed \$50,000.00."

(emphasis added).

Defendants take the position that based on Plaintiff's prayer for damages in excess of \$15,000, and punitive damages in an unlimited and unspecified amount, the amount in controversy must

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<sup>1</sup>Recent amendments to Oklahoma punitive damage law establish three (3) categories of possible recovery. 23 O.S. § 9.1. The applicable categories in this case, §§ 9.1(B), (C), permit recovery which could exceed \$50,000, assuming Plaintiff is able to prove Defendant acted with the requisite intent and/or malice. However, based on concessions made by Plaintiff in this instance, any punitive damage award would be limited to an amount which, when added with the actual award and attorney's fees, would not exceed \$50,000.

**FILED**

# United States District Court

APR 22 1996

Northern

DISTRICT OF

Oklahoma

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Herbert Roberts

v.

Shirley S Chater

## JUDGMENT IN A CIVIL CASE

ENTERED ON DOCKET

DATE APR 22 1996

CASE NUMBER:

93-cv-1136-M ✓

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

### IT IS ORDERED AND ADJUDGED

that Plaintiff's counsel shall receive \$7,000, or 25% of past-due benefits, whichever is less, as a reasonable fee for representation of Plaintiff at the judicial level. In accordance with this Court's order of February 7, 1996 [Dkt. 22], Plaintiff's counsel is to refund to Plaintiff the \$3,980 received under EAJA.

4-22-96

Date

Phil Lombardi

Clerk



(By) Deputy Clerk

228

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

HERBERT ROBERTS )  
SS# 444-38-0255, )  
Plaintiff, )  
v. )  
SHIRLEY S. CHATER, Commissioner, )  
Social Security Administration, )  
Defendant. )

NO. 93-C-1136-M

**F I L E D**

APR 18 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE APR 22 1996

**ORDER**

The motion of Plaintiff's attorney for an award of attorney fees allowable under 42 U.S.C. § 406(b) [Dkt. 23] is before the Court for decision.

According to 42 U.S.C § 406(b), when a court renders a judgment favorable to a claimant who was represented before the court by an attorney, it may "determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." The fee is paid out of, and not in addition to the amount of past due benefits.

The Social Security Administration has advised Plaintiff that it is withholding 25% of his past due benefits (\$8,476.00) to cover a court award of attorney fees. Plaintiff and his attorney entered into a 25% contingency fee contract. Plaintiff's attorney has requested payment of \$7,000.00 (20% of Plaintiff's past-due benefits) for his time spent in prosecution of Plaintiff's successful appeal in the district court. Plaintiff's attorney has secured an attorney fee award under the Equal Access To Justice Act (EAJA) of \$3,980.00 [Dkt. 22]. In accordance with *Weakley v. Bowen*,

*M*

803 F.2d 575, 580 (10th Cir. 1986) Plaintiff's attorney has been ordered to return the smaller of the two fee awards to Plaintiff. [Dkt. 22]. If awarded the \$7,000 he seeks under § 406, \$3,980 will be returned to Plaintiff, resulting in Plaintiff's net payment of a \$3020.00 attorney fee.

Defendant objects to a § 406(b) award of \$7,000 on the grounds of unreasonableness of the fee amount in comparison to the number of hours expended to litigate the case in the district court. Plaintiff's attorney submitted an itemization of services performed and hours expended which reflects he expended 33.7 hours. Defendant contends that 3.7 hours of the time was for services performed in connection with the administrative phase of the case. Since the Commissioner has the sole authority to award fees for services performed before the Social Security Administration, Defendant requests that counsel's time be reduced to 30 hours. See, *Harris v. Secretary of Health and Human Services*, 836 F.2d 496 (10th Cir. 1987). If the number of hours is set at 30 hours, an award of \$7,000.00 results in a per hour rate of \$233.33 which Defendant asserts cannot be considered reasonable. The Court disagrees with Defendant's assertion that 3.7 hours of counsel's hours were related to the administrative phase of the case. The 3.7 hours Defendant argues should be eliminated from consideration were spent conferring with the client's mother and the Appeals Counsel concerning an extension of time in which to appeal to the district court. A \$7,000 fee award for 33.7 hours equates to an hourly rate of \$207.72, presumably Defendant would object to this hourly rate as well.

Defendant asks the Court to award a "lodestar amount" as a reasonable attorney fee in this case, citing *Hubbard v. Shalala*, 12 F.3d 946 (10th Cir. 1993). A lodestar amount is the product of reasonable hours times a reasonable rate, which normally yields a reasonable attorney's fee. *Id.* at 948. In *Hubbard*, the plaintiff's attorney sought fees under § 406 on the basis of an hourly fee of \$150 per hour and also requested that the fee be enhanced at the rate of \$57.95 per hour. The Tenth Circuit rejected plaintiff's argument for the establishment of "a rebuttable presumption that an attorney in a Social Security Disability case would receive the full 25% contingency fee under contract unless (1) the attorney engaged in improper conduct or was ineffective, or (2) the attorney would enjoy an undeserved windfall due to the client's large back pay award or the attorney's relatively minimal effort." *Id.* Applying an abuse of discretion standard of review, the Tenth Circuit affirmed the district court denial of counsel's request for a fee enhancement and the judgment for fees based on a \$150.00 per hour lodestar calculation. Notably, in *Hubbard* the court did not hold that the lodestar calculation was the exclusive method for determining fee awards, nor did it say that a contingency fee award of 25% was unreasonable as a matter of law. Thus, *Hubbard* does not preclude the award sought in this case.

In the present case Plaintiff and his counsel entered into a contingency fee contract. Under such a contract counsel agrees to represent Plaintiff and receive a percentage of Plaintiff's recovery, if, and only if, Plaintiff obtains a recovery. Counsel receives no payment for his work if Plaintiff is unsuccessful. A contingency arrangement provides representation to those otherwise unable to pay for counsel.

Counsel accepts the risk of nonpayment, an often protracted wait for payment, and the possibility that the contingency fee will not fully compensate for the time expended, in exchange for the possibility of receiving more than what he would have received under a fixed per hour fee agreement. The occasional receipt of more than the prevailing per hour rate makes up for those occasions when the attorney has rendered services on a contingency contract and did not recover, thus allowing him to extend such service to more people.

In this case counsel has represented that he specializes in Social Security Disability representation and that 95% of his practice is in this area. He customarily renders such service on a contingent basis and took the instant case on a contingency agreement. The agreement between Plaintiff and his counsel provides for a fee of 25% of Plaintiff's past-due benefits, contingent on Plaintiff's recovery. Unlike *Hubbard*, Plaintiff's counsel has not asked for a fee enhancement. Rather, counsel seeks the benefit of his bargain with Plaintiff. Aside from Defendant's argument that the fee results in an hourly rate of over \$200 per hour, there is no basis for the Court to find that a fee award of \$7,000 is unreasonable. Moreover, since EAJA fees of \$3980 will be returned to Plaintiff, he will actually be paying only \$3,020 from his past-due benefits, making the per hour rate charged to Plaintiff for 33.7 hours \$89.61.

This case has been pending in the district court since December of 1993. Plaintiff's counsel was successful in obtaining a remand for the immediate award of benefits, and an award of fees under EAJA. In view of the contingency risk, the

result obtained, the delay in receiving a fee, and the effect of the EAJA award on Plaintiff's out of pocket expense, the Court finds that Plaintiff's net payment of \$89.61 per hour for attorney's fees is reasonable as is counsel's receipt of a total fee of \$7,000.

Pursuant to 42 U.S.C. § 406(b), the Court determines that a reasonable fee for representation of Plaintiff before the district court is \$7,000 or 25% of Plaintiff's past-due benefits, whichever is less, to be paid out of the past-due benefits. In accordance with *E.L. Harris v. Sec. of Health and Human Services*, 836 F.2d 496 (10th Cir. 1987) the award is only for services rendered at the judicial level.

The APPLICATION AND MOTION FOR AWARD OF ATTORNEY'S FEES AND FOR APPROVAL OF AWARD TO PLAINTIFF [Dkt. 23] is GRANTED. Plaintiff's counsel shall receive \$7,000, or 25% of past-due benefits, whichever is less, as a reasonable fee for representation of Plaintiff at the judicial level. In accordance with this Court's order of February 7, 1996 [Dkt. 22], Plaintiff's counsel is to refund to Plaintiff the \$3,980 received under EAJA. In accordance with Fed. R. Civ. P. Rule 58, THE COURT CLERK IS DIRECTED TO FORTHWITH PREPARE, SIGN AND ENTER JUDGMENT IN CONFORMITY WITH THIS ORDER.

SO ORDERED this 18<sup>th</sup> day of April, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE