

4

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

AMERICAN HOME ASSURANCE )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
TERRY L. NISSON, PhD, and )  
SUSAN BERGESON, )  
 )  
Defendants. )

**FILED**

JUN 26 1996

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

NO. 95-C-128-B ✓

ENTERED ON DOCKET

DATE JUN 28 1996

**REPORT AND RECOMMENDATION  
ON NISSON'S MOTION TO STRIKE BERGESON'S EXPERT WITNESS REPORTS**

The motion referred to the undersigned United State Magistrate Judge is NISSON'S OBJECTION AND MOTION TO STRIKE DEFENDANT SUSAN BERGESON'S COMPLIANCE WITH FEDERAL RULE 26(a)2(A)(B). [Dkt. 24]. Resolution of this motion may restrict the issues presented at trial. Therefore, the motion is being handled by way of report and recommendation.

American Home Assurance Company ("American Home") issued a psychologist professional liability insurance policy to Terry L. Nisson, PhD, a practicing psychologist. In an Oklahoma state court action pending in Tulsa County, CJ-92-4233, Dr. Nisson has been sued by his former patient, Susan A. Bergeson. She alleges Dr. Nisson was negligent with regard to the services rendered, thereby causing her harm. Ms. Bergeson also alleges that in the course of treatment, Dr. Nisson persuaded her to disrobe and engaged in sexual activities with her. [Dkt. 11, exhibit A, p.3].

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The instant suit is a declaratory judgment action wherein American Home seeks a determination of its obligations under a limitation provision of the psychologist professional liability insurance contract between American Home and Dr. Nisson. The insurance policy covers the insured to the extent of the policy limits of \$1,000,000 subject to limitations contained in the policy. The policy contains a provision which purports to limit coverage to a total of \$25,000 in any case where sexual misconduct is alleged. The contract language at issue is, as follows:

1. **Sexual Misconduct** -- The total limit of the Company's liability hereunder shall not exceed \$25,000 in the aggregate for all damages with respect to the total of all claims against any Insured(s) involving any actual or alleged erotic physical contact, or attempt thereat or proposal thereof:

(a) by any Insured or by any other person for whom any insured may be legally liable; and

(b) with or to any former or current patient or client of any Insured, or with or to any relative or member of the same household as any said patient or client, or with or to any person with whom said patient or client or relative has an affectionate personal relationship.

In the event any of the foregoing are alleged at any time, either in a complaint, during discovery, at trial or otherwise, any and all causes of action alleged and arising out of the same or related courses of professional treatment and/or relationships shall be subject to the aforesaid \$25,000 aggregate limit of liability and to all other provisions of this cause. The aforesaid \$25,000 aggregate limit of liability shall be part of, and not in addition to, the limits of liability otherwise afforded by this policy.

The Company shall not be obligated to undertake nor continue to defend any suit or proceeding subject to the

aforesaid \$25,000 aggregate limit of liability after said \$25,000 aggregate limit of liability has been exhausted by payments for damages.

[Dkt. 1, exhibit B, p.3].

According to American Home, because sexual misconduct has been alleged in the state court case, its obligation under the policy is limited to \$25,000 for all claims, including those claims of a nonsexual nature, Ms. Bergeson has asserted against Dr. Nisson. In addition to asserting his reasonable expectation that the policy would provide coverage up to the full \$1,000,000 limits for any and all claims of professional negligence, regardless of the type and nature of the alleged acts of negligence, Dr. Nisson claims that it is against the public policy of the State of Oklahoma for an insurer to provide lesser coverage for a psychologist's sexual misconduct than it provides for non-sexual misconduct. Consequently, he asserts that the special provision related to sexual misconduct is void as a matter of public policy. Dr. Nisson further asserts that the sexual misconduct provision is void as against public policy to the extent it attempts to limit coverage of claims of non-sexual misconduct whenever sexual misconduct is alleged. He also asserts the doctrines of estoppel, waiver, and unclean hands. [Dkt. 2, p.5-6]

Ms. Bergeson was joined as a party defendant to this action pursuant to Fed.R.Civ.P. 19(a) because her state court allegations against Dr. Nisson for sexual and other misconduct create an interest in the coverage and limitations of coverage contained in the policy issued by American Home to Dr. Nisson. *Maryland Casualty*

*Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941). She also asserts that the policy limitations are void as against public policy. [Dkt. 16].

In accordance with the Court's Scheduling Order [Dkt. 17], the parties filed witness lists and exchanged expert witness reports as required by Fed.R.Civ.P. 26(a)(2)(A)(B). Ms. Bergeson's expert witness reports disclosed that psychologist, Thomas J. Vaughn, would render opinions concerning the specifics of Dr. Nisson's deviation from the standard of care in treating Ms. Bergeson and his purported violations of the ethical principles and code of conduct of the American Psychological Association. [Dkt. 25, exhibit A]. Similar opinions were to be expressed by Dee Ann Bohl, licensed professional counselor and marital and family therapist [Dkt. 25, exhibit B] and by Morris Salge, licensed professional counselor. [Dkt. 25, exhibit C].

Dr. Nisson has objected to the proposed testimony of Ms. Bergeson's experts because they all deal with the factual issue of whether Dr. Nisson improperly treated Ms. Bergeson. According to Dr. Nisson, such testimony is relevant to the underlying state court action but not relevant to the issues in the declaratory judgment action which seeks only to interpret the sexual misconduct clause in the insurance policy and to determine whether the limitations contained therein are void as against the public policy of the State of Oklahoma. Dr. Nisson asks that Ms. Bergeson's experts not be allowed to testify in the instant declaratory judgment action.

Ms. Bergeson asserts that if this Court were to determine that the \$25,000 coverage limitation is enforceable, then the Court must next consider whether coverage for non-sexual acts of negligent psycho-therapy is also limited to \$25,000

under the sexual misconduct provision of the policy. The Court finds these questions to be framed by the pleadings. In addition, these questions are the same ones that have been addressed by other courts construing the same or similar sexual misconduct provisions. See, e.g. *American Home Assur. Co. v. Cohen*, 881 P.2d 1001 (Wash. 1994) (Washington Supreme Court answering public policy question on certification from the U.S. Court of Appeals for the Ninth Circuit); *RLI Ins. Co. v. Williams*, 1996 WL 189579 (N.D. Tex.). Ms. Bergeson argues that in order to satisfy the "actual controversy" jurisdictional requirement and to avoid the issuance of an advisory opinion concerning the applicability of the sexual misconduct policy sublimit to non-sexual negligence allegations, the Court must determine whether non-sexual negligent psycho-therapy has been *alleged* in the state court action. The Court agrees that such an inquiry is appropriate and finds that Ms. Bergeson's amended petition filed December 9, 1992 in the state court action contains allegations of non-sexual negligence occurring in Dr. Nisson's treatment of her. [Dkt. 11, exhibit A, p.3, ¶ IX.].

Ms. Bergeson also asserts that in order for the Court to assess whether its jurisdiction extends to the legal determination of the enforceability of sexual misconduct sublimit as applied to non-sexual psychotherapy negligence, "a factual determination of the existence of such negligence must be made" by this Court. [Dkt. 25, p. 3]. Further, if the Court were to find that the sexual misconduct sublimit did not apply to non-sexual claims, Bergeson argues that "a full blown factual determination must be made and judgment rendered as to the merits of Bergeson's

claim of [non-sexual] negligence.” *Id.* at p.4. Ms. Bergeson reasons: that such factual determinations are necessary to prevent American Home from characterizing all of the non-sexual negligence as stemming from the sexual misconduct in order to apply the \$25,000 sublimit to as many of the allegations as possible to limit its exposure; that such a determination will prevent American home from later claiming that it is not bound by the state court judgment in which it did not participate; and given the Oklahoma Constitutional provision, Article 7, Section 15, which requires that all jury verdicts be general verdicts, not special verdicts, there is no certainty that, in awarding damages, a state court judgment will differentiate between the damages stemming from sexual misconduct and non-sexual psychotherapy negligence. Bergeson asserts that the expert witness opinions demonstrate the existence of non-sexual psychotherapy negligence and provide proof of the merits of Bergeson’s allegations for the “full blown factual determination . . . as to the merits of Bergeson’s claim of [non-sexual psychotherapy] negligence” which she maintains must occur. She asks, therefore, that the expert witness reports not be stricken, and that the expert witnesses be allowed to testify.

The Court notes that Ms. Bergeson has cited no authority to support her proposition that in this declaratory judgment action the Court must make a “full blown factual determination . . . as to the merits” of her claim of non-sexual psychotherapy negligence. The Court has reviewed a number of declaratory judgment cases in which the federal declaratory judgment procedure was invoked to have rights and obligations under insurance policies determined during the pendency of a state court

tort action between the insured and an injured party. While the Court's search was not exhaustive, it found no case in which a federal court determined the merits of a pending state court tort action as Ms. Bergeson suggests this Court is required to do.

In fact, if a declaratory judgment action requires the federal court to decide the same fact-dependent issues that are pending in another proceeding, the federal court should not entertain a declaratory judgment action, even though it has jurisdiction. *St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1170 (10th Cir. 1995), quoting *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1276 (10th Cir. 1989). If this declaratory judgment action required a factual determination as to the merits of Bergeson's claim of non-sexual negligence, the Court would be constrained to refuse to exercise its declaratory judgment power because the precise issue is pending in the underlying tort action in state court. *Id.* at 1169.

However, the Court finds that a factual determination as to merits of any of Bergeson's claims against Dr. Nisson is wholly unnecessary to the resolution of this declaratory judgment action. The parties are in agreement that Bergeson has alleged negligence of both a sexual and non-sexual nature. [Dkt. 24 and Dkt. 25, p.1-2]. Furthermore, the policy sublimit is triggered by the *allegation* of sexual misconduct, not by the success or lack thereof on the claims. In addition, the possibility that further litigation may ensue to determine what portion of a state court damage award is attributable to non-sexual psychotherapy negligence is not an impediment to granting declaratory judgment in this case. The relief granted in a declaratory judgment action is not required to entirely dispose of a matter. Further necessary and

RECORDED ON DOCKET  
6-28-96

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

FILED

JUN 27 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT S. SQUIRES,

Plaintiff,

vs.

ACTION ROOFING INCORPORATED, an  
Oklahoma Corporation,

Defendant.

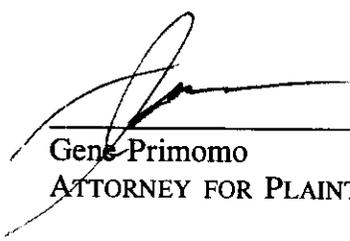
Case No. 95 C 260 H

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Robert S. Squires, and dismisses the above-entitled cause with prejudice against Defendant, Action Roofing Incorporated.



Robert Squires  
PLAINTIFF



Gene Primomo  
ATTORNEY FOR PLAINTIFF

6-28-96

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

**F I L E D**

JUN 27 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT S. SQUIRES,	
	Plaintiff,
vs.	
ACTION ROOFING INCORPORATION, an Oklahoma Corporation,	
	Defendant.

Case No. 95 C 260 H

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear his, its, or her own costs, expenses, and attorney fees without assessment against any other party.

Executed the respective dates shown adjacent to each signature.

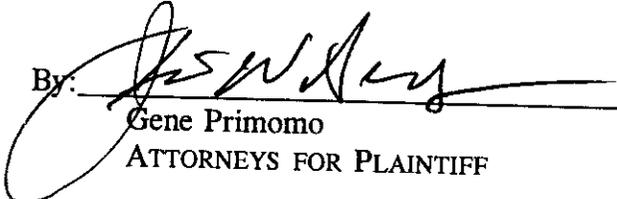
Dated this 17th day of June, 1996.

RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE  
Oneok Plaza  
100 West 5th Street, Suite 400  
Tulsa, Oklahoma 74103-4287  
(918) 582-1173

By: Andrew Pichauden (OBA# 16298) /pc:  
William D. Perrine  
ATTORNEYS FOR DEFENDANT

WILCOXEN, WILCOXEN & PRIMOMO  
P. O. Box 357  
Muskogee, OK 74402-0357  
(918) 683-6696

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

  
Gene Primomo  
ATTORNEYS FOR PLAINTIFF

g:\lit\cdp\119217\dwp.sti

DATE 6-28-96

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

**FILED**  
IN OPEN COURT

JUN 27 1996 *SL*

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

MEMBER SERVICES LIFE INSURANCE )  
COMPANY, doing business as MEMEER )  
SERVICE ADMINISTRATORS, as third )  
party administrator of the )  
LIBERTY GLASS COMPANY ERISA )  
QUALIFIED EMPLOYEE BENEFIT PLAN, )  
 )  
Plaintiff, )

vs. )

Case No. 95-C-27-H ✓

AMERICAN NATIONAL BANK & TRUST )  
COMPANY OF SAPULPA, as Guardian )  
of William Brooks Balthis, Debra )  
Leanne Balthis, and David D. )  
Balthis; E. TERRILL CORLEY; )  
THOMAS F. GANEM; STEPHEN R. CLARK; )  
BRADFORD J. WILLIAMS; and )  
WALTER M. JONES, )  
 )  
Defendants. )

SUPPLEMENTAL JUDGMENT

This matter came before the Court for hearing on May 28, 1996. Plaintiff appeared through its attorney of record, Phil R. Richards of Richards, Paul & Richards. Defendant American National Bank & Trust Company of Sapulpa appeared through Elmer Neel, Senior Vice President and Trust Officer, and through its attorneys, E. Terrill Corley and Thomas F. Ganem of Corley & Ganem, and Sam T. Allen, III and Sam T. Allen, IV of Loeffler, Allen & Ham. Defendants E. Terrill Corley, Thomas F. Ganem, Stephen R. Clark, and Bradford J. Williams appeared personally, and through their attorneys, E. Terrill Corley and Thomas F. Ganem of Corley & Ganem.

At the hearing, the Court heard arguments of counsel regarding the Request for Directions filed by Defendants, and the Motion for Order authorizing Defendant American National Bank to pay all or a portion of

the judgment entered in this cause to Plaintiff under protest and with a reservation of rights pending appeal. The Court finds that the judgment entered in this action on April 4, 1996, should be clarified as set forth hereinbelow. The Court further finds that the escrow fund currently held by Defendant American National Bank may be dissolved, with said funds being distributed at the discretion of the parties, since the judgment entered by this Court against Defendant American National Bank constitutes a general judgment against the funds and assets held by Defendant American National Bank as guardian of William Brooks Balthis, Debra Leanne Balthis, and David D. Balthis. The Court further accepts the agreement of the parties that either the judgment in favor of Plaintiff and against Defendant American National Bank, as guardian, or the judgment in favor of Defendants Corley, Ganem, Clark, and Williams and against Defendant American National Bank, as guardian, or both, may be paid in full by said Bank under protest, preserving all rights of Defendant American National Bank to appeal either or both such judgments.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff is hereby granted judgment against Defendant American National Bank & Trust Company of Sapulpa, as guardian of William Brooks Balthis, Debra Leanne Balthis, and David D. Balthis, in the principal sum of \$570,368.75, with pre-judgment interest thereon through and including the date of judgment, April 4, 1996, at the rate of eighteen percent (18%) as provided in the Plan in the amount of \$170,173.03, for a total judgment of \$740,541.78. Such judgment shall bear post-judgment interest in accordance with applicable law from and after the date of

judgment, April 4, 1996, which interest shall accrue upon said judgment until said judgment is paid in full. In addition, Plaintiff is hereby awarded judgment for attorneys' fees in the amount of \$14,563.50 and costs in the amount of \$1,005.65, which attorneys' fees and costs shall not bear post-judgment interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants Corley, Ganem, Clark, and Williams have, and are hereby granted, judgment against Defendant American National Bank & Trust Company of Sapulpa, as guardian of William Brooks Balthis, Debra Leanne Balthis, and David D. Balthis, in the principal sum of \$285,184.38 according to the terms of the contract entered into between Defendant American National Bank, as guardian, and Defendants Corley, Ganem, Clark, and Williams dated February 1, 1990. Such judgment shall bear post-judgment interest in accordance with applicable law from and after the date of judgment, April 4, 1996, which interest shall accrue upon said judgment until said judgment is paid in full.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the escrow account currently held by Defendant American National Bank may be dissolved, with the funds contained therein to be distributed at the discretion of the parties, and that the judgments entered hereinabove shall be judgments against the general funds and assets held by Defendant American National Bank, as guardian of William Brooks Balthis, Debra Leanne Balthis, and David D. Balthis.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, in accordance with the express agreement by each of the parties hereto, Defendant American National Bank, as guardian, may pay in full and under protest

either the judgment against said Bank and in favor of Plaintiff, or the judgment against said Bank and in favor of Defendants Corley, Ganem, Clark, and Williams, without waiver, but preserving all rights of Defendant American National Bank, as guardian, to appeal either or both such judgments.

 6/27/96  
\_\_\_\_\_  
Honorable Sven Erik Holmes  
United States District Judgment

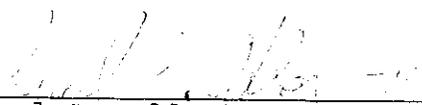
APPROVED AS TO FORM:

  
\_\_\_\_\_  
Phil R. Richards, Esq.

ATTORNEY FOR PLAINTIFF  
MEMBER SERVICES LIFE INSURANCE COMPANY,  
doing business as MEMBER SERVICE  
ADMINISTRATORS, as third party  
administrator of the LIBERTY GLASS  
COMPANY ERISA QUALIFIED EMPLOYEE  
BENEFIT PLAN

  
\_\_\_\_\_  
E. Terrill Corley, Esq.  
Thomas F. Ganem, Esq.

ATTORNEYS FOR DEFENDANTS  
AMERICAN NATIONAL BANK & TRUST  
COMPANY OF SAPULPA, E. TERRILL  
CORLEY, THOMAS F. GANEM, STEPHEN  
R. CLARK and BRADFORD J. WILLIAMS

  
\_\_\_\_\_  
Samuel T. Allen, III, Esq.  
Samuel T. Allen, IV, Esq.

ATTORNEYS FOR DEFENDANT  
AMERICAN NATIONAL BANK & TRUST  
COMPANY OF SAPULPA

PRR/MAC/4680/SUPPLEMT.JDG

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

LEE P. MOSIER, an individual,  
and GROUP MARKETING  
ASSOCIATES, INC., an Oklahoma  
Corporation,

Plaintiffs,

v.

MORRIS L. KUHN, an Individual,

Defendant.

and

LEE P. MOSIER, an individual,  
and GROUP MARKETING  
ASSOCIATES, INC., an Oklahoma  
Corporation,

Plaintiffs,

v.

M. L. KUHN ENTERPRISES, INC.,  
a Texas Corporation,

Defendant.

**FILED**

JUN 26 1996

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

Case No. 95-CV-361-BU ✓

**Consolidated**

ENTERED ON DOCKET

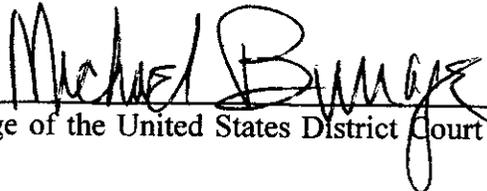
DATE JUN 27 1996

Case No. 95-CV-362-BU

**ORDER**

Pursuant to the Joint Stipulation of Dismissal With Prejudice of Plaintiffs and Defendants, it is therefore ordered that all of Plaintiffs claims and causes of action asserted against the Defendants in the above styled and numbered causes are hereby dismissed with prejudice. Each party shall bear its own attorney fees and costs.

ENTERED this 26 day of June, 1996.

  
\_\_\_\_\_  
Judge of the United States District Court

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

LEE F. MOSIER, an individual,  
and GROUP MARKETING  
ASSOCIATES, INC., an Oklahoma  
Corporation,

Plaintiffs,

v.

MORRIS L. KUHN, an Individual,  
Defendant.

and

LEE P. MOSIER, an individual,  
and GROUP MARKETING  
ASSOCIATES, INC., an Oklahoma  
Corporation,

Plaintiffs,

v.

M. L. KUHN ENTERPRISES, INC.,  
a Texas Corporation,  
Defendant.

**FILED**

JUN 26 1996

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

Case No. 95-CV-361-BU ✓

**Consolidated**

ENTERED ON DOCKET

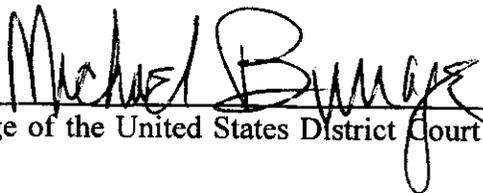
DATE JUN 27 1996

Case No. 95-CV-362-BU

**ORDER**

Pursuant to the Joint Stipulation of Dismissal With Prejudice of Plaintiffs and Defendants, it is therefore ordered that all of Plaintiffs claims and causes of action asserted against the Defendants in the above styled and numbered causes are hereby dismissed with prejudice. Each party shall bear its own attorney fees and costs.

ENTERED this 26 day of June, 199<sup>6</sup>.

  
\_\_\_\_\_  
Judge of the United States District Court

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

JUN 25 1996

SA

BRENT D. GREEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JIM EARP, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-CV-479-E ✓

ENTERED ON DOCKET

DATE 6/26/96

**ORDER**

Plaintiff, a former inmate of the Ottawa County Jail, has filed with the Court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983.

In his complaint, Plaintiff sues Jim Earp, Ottawa County Sheriff, under the Eighth and Fourteenth Amendments. He alleges that during his twenty-three-day detention the Ottawa County Jail was extremely overcrowded. Plaintiff was forced to lay his mat in the hallway to the shower room, although the floor was always wet. He states that men were walking over his mat and blankets all the time and that he and other inmates had to take turns sleeping because there were insufficient mats, blankets or room for everyone to lie down. Plaintiff further alleges he was denied medical attention for his allergies on three different occasions and as a result "became very ill with lung problems." Lastly, Plaintiff alleges (1) that the mats were not sanitized prior to being issued, (2) that there was a fungus growing on the walls and floors of the shower room, (3) that cleaning supplies consisted of bleach alone, (4) that there was insufficient hot water, and (5) that there were

only four working toilets and one working shower for thirty-four men. Plaintiff seeks \$250,000 in damages.

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

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's claims lack an arguable basis in law. Plaintiff does not allege he suffered any physical injury as a result of the overcrowding and lack of sanitation and hygiene. On April 26, 1996, President Clinton signed into law the Prison Litigation Reform Act which bars an action for mental or emotional injury suffered while in custody absent a prior showing of physical

injury.<sup>1</sup> Even if Plaintiff was forced to sleep on a mattress on the floor for four days, the Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D. Tex. 1988).

Moreover, Plaintiff alleges no facts to show that his medical conditions was serious and that Defendants acted with deliberate indifference. The Eighth Amendment prohibits prison officials from being deliberately indifferent to the serious medical needs of prisoners in their custody. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. See id. at 104-05; Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).<sup>2</sup>

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<sup>1</sup> The Prison Litigation Amendments impose the following limitation on recovery in prisoner civil actions:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Pub. L. No. 104-134, 110 Stat. 1321, section 803.

The Crime Control and Law Enforcement Act of 1994 also amended 18 U.S.C. § 3626 as follows:

(a) (1) HOLDING.--A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

<sup>2</sup> Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection

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

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

- (1) Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted**;
- (2) Plaintiff's civil rights complaint is **dismissed** without prejudice under 28 U.S.C. § 1915(d).

IT IS SO ORDERED this 25<sup>th</sup> day of June, 1996.

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

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regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990).

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

JUN 25 1996 *SAK*

KELTON J. GUDENOGE )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DAN GILBERT, et al., )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-466-E ✓

ENTERED ON DOCKET  
DATE 6/26/96

**ORDER**

On April 8, 1996, Plaintiff filed this civil rights action along with a motion for leave to proceed in forma pauperis. The Court now reviews Plaintiff's allegations and concludes that this action should be dismissed as frivolous.

In his pro se complaint, Plaintiff sues Police Officer Dan Gilbert, and District Attorney Winston Conner for false arrest and malicious prosecution. He contends Defendants arrested him on January 12, 1996, for selling drugs to Dan Gilbert on May 5 and August 11, 1995. Plaintiff alleges he could not have sold the drugs at issue because he was at Baptist Regional Health Center for knee surgery from May 1-11, 1995, and he participated in a camping trip at Grand Lake on August 11, 1995. Plaintiff seeks money damages and an order directing that all charges be dropped.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to

dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Winston Conner is entitled to absolute immunity for his actions taken in his role as prosecutor. Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976). In any event, Plaintiff cannot seek money damages for the alleged invalidity of the charges pending in Ottawa County prior to a determination that the charges are invalid. The Supreme Court recently held in Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such

determination, or called into question by a federal court's issuance of a writ of habeas corpus." Because the validity of Plaintiff's imprisonment has yet to be undermined, the Court must dismiss this action as premature.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is granted and this action is hereby dismissed without prejudice pursuant to 28 U.S.C. § 1915(d).

IT IS SO ORDERED this 25<sup>th</sup> day of June, 1996.

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





No. 12]. Magistrate Wolfe recommended that the Secretary's decision be reversed and remanded for further administrative review. *Id.* Defendant filed an objection to Magistrate Wolfe's Report and Recommendation. This objection was fully briefed and at issue on January 17, 1995. [Doc. Nos. 13 & 14]. Judge Sven Erick Holmes conducted a *de novo* review and on April 18, 1996, he ordered this matter recommitted to Magistrate Judge Sam A. Joyner<sup>3/</sup> for additional consideration.

The Court has reviewed the entire file, including the parties' briefs and Magistrate Wolfe's prior Report and Recommendation. Magistrate Wolfe reversed the Secretary's disability determination on a narrow issue -- that the ALJ failed to develop the record regarding the demands of Plaintiff's past relevant work. Magistrate Wolfe rejected all other grounds for reversal advanced by Plaintiff in his brief. With the exception of that portion which deals with the demands of Plaintiff's past relevant work, the Court adopts Magistrate Wolfe's Report and Recommendation and incorporates it by reference in this Order.

Pursuant to Judge Holmes' Order, the Court now gives additional consideration to the issue of whether the ALJ failed to adequately develop the record regarding the demands of Plaintiff's past relevant work. The Court finds that there was sufficient evidence in the record for the ALJ to determine the demands of Plaintiff's past relevant work. Therefore, the Court **AFFIRMS** the Secretary's disability determination.

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<sup>3/</sup> Magistrate Joyner replaced Magistrate Wolfe as of June 1, 1995.

## 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 Secretary has established a five-step sequential evaluation process.<sup>4/</sup> The Secretary terminated her review in this case at step four, finding that Plaintiff could return to his past relevant work.

The standard of review to be applied by this Court to the Secretary's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Secretary as to any fact, if supported by substantial evidence, shall be

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<sup>4/</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 Secretary has the burden of proof at step five to establish that the 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).

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 Secretary'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 Secretary. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Secretary'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 Secretary's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Secretary applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Secretary's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

### **III. THE RECORD CONTAINS SUFFICIENT EVIDENCE REGARDING THE DEMANDS OF PLAINTIFF'S PAST RELEVANT WORK.**

The Tenth Circuit has held that at step four of the sequential evaluation process, the ALJ's duty of inquiry "requires the ALJ to review the claimant's [RFC] 'and the physical and mental demands of the work [he has] done in the past.'" Henrie v. DHHS, 13 F.3d 359, 361 (10th Cir. 1993) (citing 20 C.F.R. § 404.1520(e)). Plaintiff argues that the ALJ failed in his duty to inquire about the physical demands of Plaintiff's past relevant work as required by Henrie. The Court does not agree.

In Henrie, the plaintiff's prior occupation was never mentioned in the record. The record was "devoid of evidence" regarding the demands of plaintiff's past job. Henrie, 13 F.3d at 361. Unlike in Henrie, the record in this case is not "devoid" of evidence regarding the demands of Plaintiff's work. Plaintiff's Disability Report contains a detailed description of the exertional demands of his past work. [R. at 122-23]. Plaintiff also provided some testimony regarding the nature of his previous work. See Smith v. Chater, 62 F.3d 1429, 1995 WL 465814, \*3 (10th Cir. Aug. 8, 1995) (recognizing that documentary and testimonial evidence regarding demands of past work can be sufficient).

The two RFC's in the file indicate that Plaintiff can perform at least light work. In particular, the RFC's indicate that Plaintiff could occasionally lift 20 pounds and frequently lift 10 pounds and that Plaintiff's ability to push and/or pull is unlimited. [R. at 133-140]. The ALJ found that with these abilities, Plaintiff could still perform his past relevant work. Plaintiff argues, however, that there is no evidence in the

record regarding the lifting demands of his past relevant work. So, Plaintiff argues that there is no way the ALJ could determine in accordance with Henrie whether Plaintiff could perform the lifting demands of his past relevant work. The Court does not agree.

The record establishes that Plaintiff was the Vice President of a floor covering business. This business sold floor coverings to contractors. Plaintiff indicates that he did not use machines, tools or equipment of any kind. Plaintiff supervised many individuals. He was responsible for teaching and training his staff. Plaintiff was also in charge of finding and keeping customers, making quotations, purchasing products, setting prices and negotiating sales prices. Plaintiff also measured jobs for the amount of floor covering needed and at times supervised the installation of the floor covering. Plaintiff was also responsible for filling out reports. Plaintiff also fielded customer complaints. Plaintiff indicates that he sat for about five hours a day, stood for about three hours a day and walked for about one hour a day. Plaintiff also indicates that he had to bend frequently and reach only occasionally. [R. at 85, 122-23]. There is nothing in the record which indicates that Plaintiff's past relevant work required him to lift or carry anything which was beyond his RFC. See Smith, 1995 WL. at \*3.

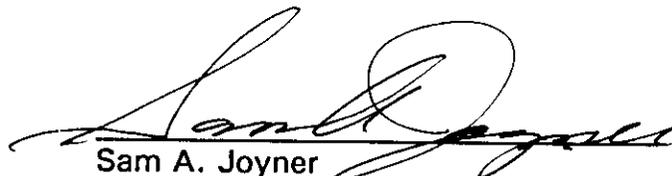
The Dictionary of Occupational Titles ("DOT") (4th ed. 1991) also provides additional information regarding the demands of Plaintiff's past relevant work. Section 270.357-026 defines the work demands for a floor coverings salesperson. This job is defined in the DOT as light work. Section 163.167-018 defines the work

demands for a sales manager. This job is defined in the DOT as sedentary work. As defined by the DOT, neither the floor coverings salesperson nor the sales manager position require lifting or carrying which would be inconsistent with Plaintiff's RFC. See Andrade v. Secretary of HHS, 985 F.2d 1045, 1051-52 (10th Cir. 1993) (recognizing that an ALJ may rely on the DOT's job description for claimant's job category); and 20 C.F.R. § 404.1566(d)(1) (authorizing administrative notice of information found in the DOT).

The Court finds, therefore, that there was sufficient record evidence for the ALJ to make a determination regarding the demands of Plaintiff's past relevant work. Consequently, the Secretary's decision is **AFFIRMED**.

IT IS SO ORDERED.

Dated this 25 day of JUNE 1996.

  
Sam A. Joyner  
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN 25 1996 *su*

**KELLY GOODWIN,** )  
 )  
 *Plaintiff,* )  
 )  
 v. )  
 )  
 **JAMES BENNETT, and PICCADILLY** )  
 **CAFETERIAS, INC., a corporation,** )  
 )  
 *Defendants.* )

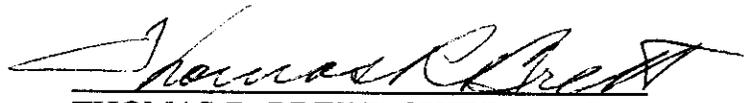
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 95-CV-928 B ✓

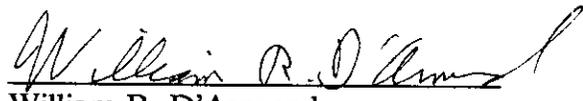
**ORDER OF DISMISSAL WITH PREJUDICE**

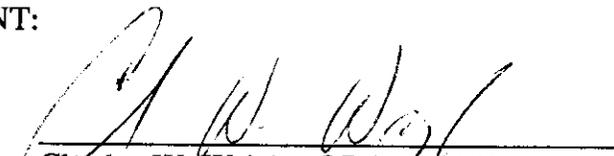
The Court, being fully advised, and based upon the agreement of the respective parties, hereby orders that all claims of Plaintiff Kelly Goodwin against Defendant Piccadilly Cafeterias, Inc., are hereby dismissed with prejudice.

Dated this 25 day of June, 1996.

  
THOMAS R. BRETT, CHIEF JUDGE

APPROVED AS TO FORM AND CONTENT:

  
William R. D'Armond  
Kean, Miller, Hawthorne, D'Armond  
McCowan & Jarman, L.L.P.  
One American Place, 22nd Floor  
Baton Rouge, LA 70825  
ATTORNEYS FOR DEFENDANT, Piccadilly Cafeterias

  
Charles W. Wright, OBA #11019  
401 West Main Street, Suite 260  
Norman, OK 73069  
ATTORNEY FOR PLAINTIFF

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

**FILED**

JUN 26 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TULSA RIG IRON, INC., an )  
Oklahoma corporation, )  
 )  
Plaintiff, )  
vs. )  
 )  
FLUID SYSTEMS, INC., a )  
Louisiana corporation, )  
 )  
Defendant. )

Case No. 95-C-1004-BU ✓

ENTERED ON DOCKET

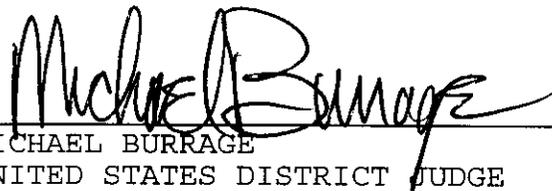
DATE JUN 26 1996

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 26<sup>th</sup> day of June, 1996.

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

ENTERED ON DOCKET

DATE 6/26/96

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

JUN 25 1996 *SK*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARION PARKER, )  
)  
Plaintiff, )  
)  
vs. )  
)  
BANCOKLAHOMA MORTG. CO.; HARRY )  
MORTG. CO.; BRUMBAUGH & FULTON; )  
COMMONWEALTH MORTG. CO.; FIRST )  
MORTG. CO.; NORWEST MORTG. CO.; )  
BOATMEN'S FIRST NATIONAL BANK OF )  
)  
Defendants. )

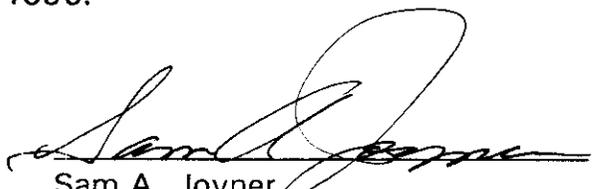
Case No. 92-C-664-J ✓

**JUDGMENT**<sup>1/</sup>

The Court hereby enters judgment in this action pursuant to the Court's Findings of Fact and Conclusions of Law. Judgment is entered for BancOklahoma Mortgage Co. ("BancOklahoma") and against Parker on Parker's claim for breach of the settlement agreement by BancOklahoma. Judgment is entered for Parker and against Boatmen's First National Bank of Oklahoma in the amount of \$200.

IT IS SO ORDERED.

Dated this 25 day of June 1996.

  
Sam A. Joyner  
United States Magistrate Judge

<sup>1/</sup> In accordance with 28 U.S.C. § 636(c), the parties consented to proceed before a United States Magistrate Judge. [Doc. No. 159-1].

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ENTERED ON DOCKET

DATE 6/26/96

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

JUN 25 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARION PARKER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BANCOKLAHOMA MORTG. CO.; HARRY )  
 MORTG. CO.; BRUMBAUGH & FULTON; )  
 COMMONWEALTH MORTG. CO.; FIRST )  
 MORTG. CO.; NORWEST MORTG. CO.; )  
 BOATMEN'S FIRST NATIONAL BANK )  
 )  
 Defendants. )

Case No. 92-C-664-JC ✓

**FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1/</sup>**

On January 18, 1995, the parties filed a stipulation of dismissal of the above action pursuant to a settlement agreement (hereafter "Settlement Agreement"). The stipulation of dismissal provided that the Court retained jurisdiction to supervise the Settlement Agreement. [Doc. No. 150-1].

On December 7, 1995, Plaintiff filed a "Motion to Reopen the Case" with respect to BancOklahoma Mortgage Corporation ("BOMC") and Boatmen's First National Bank of Oklahoma ("Boatmen's"). [Doc. No. 154-1]. Plaintiff's Motion was granted.

On June 4, 1996, Plaintiff's allegations of violations of the Settlement Agreement by BOMC and Boatmen's were heard by this Court. Plaintiff appeared by and through counsel Michael T. Braswell. Defendant BOMC appeared by and through

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<sup>1/</sup> In accordance with 28 U.S.C. § 636(c), the parties consented to proceed before a United States Magistrate Judge. [Doc. No. 159-1].

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counsel Marilyn M. Wagner and C.S. Lewis III, and Defendant Boatmen's appeared by and through counsel Larry D. Henry and Patrick W. Cipolla.

The Court has heard the evidence and reviewed the stipulations submitted by the parties, the pleadings and briefs in the case, the transcript of the April 17, 1996 proceeding, and the applicable case law. For the reasons discussed below, the Court hereby finds as follows:

**DEFENDANT BOMC**

**FINDINGS OF FACT**

1. Pursuant to a Settlement Agreement, BOMC and Parker agreed that BOMC would engage Parker to perform single-family residential loan appraisals for a period of twelve months, beginning January 1, 1995.

2. BOMC agreed to assign five appraisals per month to Parker, for a total of 60 appraisals during 1995.

3. BOMC's branches assigned a total of 66 appraisals to Parker in 1995, or six more than the 60 required by the Settlement Agreement. The number of appraisals assigned per month was generally equal to or greater than five. However, in some months, the number of appraisals assigned to Parker was less than five. The assignment of appraisals were as follows:

January	3	July	7
February	7	August	4
March	8	September	2
April	2	October	6
May	5	November	12
June	3	December	7

4. BOMC paid Parker \$275 for each appraisal that was assigned to Parker.

5. BOMC's performance substantially complied with the terms of the Settlement Agreement.

CONCLUSIONS OF LAW

1. In construing a contract, a court considers the language of the contract, the intent of the parties to the contract, and the interpretation of the contract by the parties to it. See, e.g., 15 O.S. 1991, § 154 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."); 15 O.S. 1991, § 155 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article."); 15 O.S. 1991, § 152 ("A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful."); 12 O.S. 1991, § 159 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."). In determining whether a parties' performance complies with the intent of the contract, a court observes the performance of the parties as compared to the intent of the parties. See, e.g., Collins v. Baldwin, 405 P.2d 74, 81 (Okla. 1965).

2. The Court finds that BOMC did not materially breach the Settlement Agreement, and judgment is entered for the Defendant, BancOklahoma Mortgage Co.

## DEFENDANT BOATMEN'S

### FINDINGS OF FACT

1. In November 1994, Boatmen's and Plaintiff entered into a Settlement Agreement to resolve a Title VII lawsuit filed by Parker against Boatmen's. The Settlement Agreement provided that Parker would be hired to perform at least one real estate appraisal per month from Boatmen's for a twelve-month period beginning January 1, 1995.

2. Boatmen's did not assign any appraisals to Parker prior to November 1995. In November, Boatmen's ordered five appraisals from Parker. Boatmen's requested one appraisal per month from Parker in December 1995, January, February, March, April, and May 1996.

3. The Settlement Agreement provided that Boatmen's would assign twelve appraisals to Parker in 1995 (one per month). Boatmen's requested a total of six appraisals from Parker during 1995.

4. As of May 29, 1996, Boatmen's had assigned eleven (of the twelve required by the Settlement Agreement) appraisals to Parker. Boatmen's intends to assign one appraisal to Parker in June 1996, which will bring the total number of appraisals assigned to Parker to twelve.

### CONCLUSIONS OF LAW

1. Boatmen's failure to assign any appraisals to Parker prior to November 1995 constituted a breach of the Settlement Agreement.

2. Under the Settlement Agreement, Boatmen's should have assigned Parker a total of twelve appraisals. Boatmen's had already, as of the date of the evidentiary hearing, assigned eleven appraisals to Parker. In addition, Boatmen's represented that it planned to assign one additional appraisal to Parker in June 1996. Parker is entitled to the opportunity to perform twelve appraisals. If Boatmen's has not yet assigned the final appraisal to Parker, Boatmen's must assign an appraisal within thirty days of the date of this order. If Boatmen's has assigned a total of twelve appraisals to Parker as of the date of this order, Boatmen's is not required, under the Settlement Agreement to assign any additional appraisals.

3. Although Boatmen's breached the Settlement Agreement, Parker's damages are limited. Parker is entitled only to such damages as he sustained by reason of Boatmen's delayed compliance with the Settlement Agreement. Oklahoma State Fair Exposition v. Leopard Bros., Inc., 243 F.2d 290, 292 (10th Cir. 1965); Marshall v. Nelson Elec., 765 F. Supp. 1018, 1033-34 (N.D. Okla. 1991); Collins v. Baldwin, 405 P.2d 74, 81-81 (Okla. 1965) ("In such [a] case the judgment should make such monetary award to the injured party as would place him in the position he would have been had the contract been performed, but it should not put him in a better position than he would have been had there been complete performance.").

4. The only damages which Parker has suffered are associated with Boatmen's failure to order the appraisals beginning in January 1995. Parker's damages are therefore limited to his "lost interest" on income which he should have earned, beginning in January 1995, but which, due to the delay in the ordering of the

appraisals he did not begin to earn until after November 1995. With the exception of his lost interest income, at the end of June 1996,<sup>2/</sup> Parker will be in the same position as he would have been if Boatmen's had complied with the Settlement Agreement.

5. Assuming a high cost of money (ten percent), Parker's "lost interest income" would amount to approximately \$200.<sup>3/</sup> Therefore, Boatmen's is ordered to pay \$200 to Parker for his damages.

#### ATTORNEY FEES

6. Although Parker is the "prevailing party" on his claim against Boatmen's, the Court concludes that attorney fees cannot properly be awarded to Plaintiff.

7. Under Title VII, attorney fees are allowed to the prevailing party pursuant to 42 U.S.C. § 2000e-5. Although the underlying action by Plaintiff was brought under Title VII, the current "action" before the Court is for the breach of a Settlement Agreement which settled the Title VII action. The Tenth Circuit found in Morris v. City of Hobart, 39 F.3d 1105, 1112 (10th Cir. 1994) that an action to enforce a settlement agreement is a contract action (brought under state law) and not a proceeding "under Title VII." Consequently, attorney fees cannot be awarded pursuant to that statute.

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<sup>2/</sup> This presupposes that Boatmen's does order a "twelfth" appraisal from Parker.

<sup>3/</sup> This damage estimate is advanced by Boatmen's. Plaintiff offers no estimate of his actual damages sustained.

8. The language of the settlement agreement itself affirms that Plaintiff's action is for breach of contract and not under Title VII. It provides, in paragraph 9, that the Court retains jurisdiction, "for the purpose of enforcing the terms of this Settlement Agreement and resolving any disputes between said parties arising under this Settlement Agreement. Parker's sole remedy, in the event of a dispute with BOMC, Boatmen's or MCC arising under this Settlement Agreement, shall be to ask the Court to reconvene the settlement conference originally conducted on November 28, 1994, as to said parties, for the purpose of resolving any such disputes." Since this restrictive language does not provide for attorney fees, they cannot be recovered unless Oklahoma statutory law specifically authorizes attorney fees.

9. Oklahoma statutory law provides that a prevailing party "in any civil action to recover . . . for labor or services . . ." shall be awarded a reasonable attorney fee. 12 O.S. 1991, § 936. In Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990), the Tenth Circuit, interpreted 12 O.S. § 936, and concluded that, under Oklahoma law:

The statute applies if "recovery is sought for labor and services as in the case of a failure to pay for them . . . . Its provisions are inapposite if the suit be one for damages arising from the breach of an agreement that relates to labor and services." Because Merrick sought damages for the alleged breach of a labor contract and not for the value of services rendered, we conclude that section 936 does not apply.

Id. at 434 (citations omitted). See also Holbert v. Echeverria, 744 P.2d 960 (Okla. 1987); Burrows Construction Co. v. Independent School District No. 2 of Stephens

County, 704 P.2d 1136 (Okla. 1985). Attorney fees are permitted under 12 O.S. § 936 only if the action is for recovery of labor and services which have been rendered but have not yet been paid. Fees are not permitted if the suit is for damages from the breach of an agreement which relates to labor and services. Consequently, Plaintiff is not entitled to attorney fees under this section.

Dated this 25 day of June 1996.

  
Sam A. Joyner  
United States Magistrate Judge

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

**FILED**

JUN 24 1996

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

PAULA COOK,

Plaintiff,

v.

BANK OF OKLAHOMA, sued as  
BANK OF OKLAHOMA, N.A.,  
a corporation,

Defendant.

Case No. 95-C-1010-H ✓

ENTERED ON DOCKET

DATE 6-25-96

ORDER OF DISMISSAL UPON SETTLEMENT

The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, if any party hereto certifies to this Court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

IT IS SO ORDERED.

This 24<sup>th</sup> day of June, 1996.



Sven Erik Holmes  
United States District Judge

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

**FILED**

JUN 24 1996

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

SHELLEY SEALS,

Plaintiff,

v.

OIL DATA, INC., a Texas corporation;  
JIM HEDINGER, an individual and in  
his capacity as office manager,

Defendants.

Case No. 95-CV-511-H

ENTERED ON DOCKET

DATE 6-25-96

JUDGMENT

This Court entered an order on May 22, 1996, granting summary judgment in favor of Defendants on Plaintiff's Title VII claim and dismissing the remaining pendent state law claims

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants and against Plaintiff

IT IS SO ORDERED.

This 24<sup>TH</sup> day of June, 1996.

  
Sven Erik Holmes  
United States District Judge

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ENTERED ON DOCKET  
DATE 6-25-96

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

IN RE: )  
)  
CATHERINE ELAINE TAYLOR, )  
d/b/a Cathy's Cottage, )  
)  
Debtor, )  
)  
MONSI L'GGRKE, )  
)  
Appellant/Movant, )  
)  
v. )  
)  
KAREN S. DUNN and RICHARD L. )  
DUNN, )  
)  
Appellees, )  
)  
and )  
)  
CAROL WILMA WOOD; THOMAS )  
ENGLISH; and PATRICK MALLOY III, )  
)  
Defendants. )

Bankruptcy Case No. 91-03468-W

Case No. 96-CV-54-H ✓

**FILED**

JUN 24 1996

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

ORDER

This matter comes before the Court on appeal from the United States Bankruptcy Court for the Northern District of Oklahoma.<sup>1</sup>

On September 30, 1992, the bankruptcy court, upon motion of the bankruptcy trustee, Patrick

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<sup>1</sup>Although the papers filed by Mr. L'Ggrke in this action list individuals as appellees and defendants herein, the relief requested by Mr. L'Ggrke and his oral representations to the Court in a scheduling conference held June 21, 1996, suggest that this is purely an appeal from the bankruptcy court. Thus, the Court will construe it as such.

//

Malloy, III, held a hearing on the sale of certain realty, which was property of the debtor's estate. Following the hearing, the court filed a written order approving the sale of the property to Karen S. Dunn and Richard L. Dunn. The case was subsequently closed. On September 21, 1994, Mr. L'Ggrke moved the bankruptcy court to reopen the proceedings for the purposes of vacating the order approving the sale of the property to Mr. and Ms. Dunn. On December 12, 1994, the bankruptcy court denied the motion to reopen on the grounds that Mr. L'Ggrke had received notice of the September 30, 1991 hearing and had failed to attend and avail himself of his opportunity to present evidence.

On December 27, 1994, Mr. L'Ggrke filed a second motion to reconsider in the bankruptcy court, followed shortly thereafter by an "amended" motion to reconsider on January 9, 1995. On January 11, 1996, the bankruptcy court again denied his motion to reconsider, finding, in part, that "L'Ggrke still presents no evidence which tends to indicate that he had no opportunity or no adequate opportunity to appear and present evidence at the hearing on September 30, 1992." Mr. L'Ggrke then brought the instant action in this Court on January 23, 1996.

Rule 8002(a) of the Bankruptcy Rules provides that a notice of appeal from the bankruptcy court "shall be filed within 10 days of the date of the entry of the judgment, order, or decree appealed from." The Court finds that Mr. L'Ggrke effectively filed a notice of appeal on January 23, 1996.<sup>2</sup> Thus, the Court must determine whether the notice of appeal was filed within ten days of the date of

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<sup>2</sup>Although Mr. L'Ggrke filed his *pro se* action directly in this Court rather than first filing a notice of appeal in the bankruptcy court, Rule 8002(a) also provides:

If a notice of appeal is mistakenly filed with the district court . . . , the clerk of the district court . . . shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

entry of the order or judgment appealed from.

Mr. L'Ggrke contends that he is appealing the order of the bankruptcy court entered on January 11, 1996, denying his motion to reconsider the court's order entered October 2, 1992. The United States Supreme Court has held:

[W]here out of time petitions for rehearing are filed and the . . . court merely considers whether the petition sets out, and the facts if any are offered support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 149 (1942). Applying this rationale to the facts of the instant case, it is clear that the January 11, 1996 order of the bankruptcy court did not reexamine the court's previous order. Rather, in the January 11 order, the bankruptcy court merely considered whether Mr. L'Ggrke had alleged facts sufficient to warrant reexamination of the original order and determined that he had not. The same is true of the bankruptcy court's order entered on December 12, 1994. Because the Court concludes that Mr. L'Ggrke is appealing the order of the bankruptcy court which became final on October 2, 1992, his appeal is out of time and must be dismissed. Accordingly, Mr. L'Ggrke's appeal from the Bankruptcy Court of the Northern District of Oklahoma is hereby dismissed.

IT IS SO ORDERED.

This 24<sup>TH</sup> day of June, 1996.

  
Sven Erik Holmes  
United States District Judge



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

GEORGE WIFORD, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 BOBBY BOONE, )  
 )  
 Respondent. )

No. 94-C-821-B ✓

**FILED**  
JUN 24 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JUN 25 1996

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Limestone County Detention Center, alleges denial of access to Oklahoma case law and statutes and ineffective assistance of counsel. As more fully set out below, the Court concludes that Petitioner's petition for a writ of habeas corpus should be DENIED.

I. BACKGROUND

In April 1990, Petitioner plead guilty to Murder in the First Degree in Ottawa County District Court, Case No. CRF-89-278, and received a sentence of life imprisonment without parole. Petitioner did not pursue a direct appeal of his conviction and in September 1993, filed his petition for post-conviction relief alleging ineffective assistance of counsel. In August 1994, the Oklahoma Court of Criminal Appeals affirmed the district court's denial of post-conviction relief on state procedural grounds-- i.e., that petitioner's claim could have been raised on direct appeal. Next, Petitioner filed the instant petition for a writ of habeas corpus in this Court. He alleges denial of access to

Oklahoma case law and statutes since his transfer to Limestone County Detention Center.<sup>1</sup> Petitioner also alleges ineffective assistance of counsel. He contends counsel failed to call certain witnesses at his preliminary hearing, failed to have Petitioner's competency evaluated, and failed to request a change of venue.

## II. DISCUSSION

### A. Denial of Access to Oklahoma Case Law and Statutes

In his first ground for relief, Petitioner argues that he has been denied access to Oklahoma case law and statutes since his transfer to Limestone County Detention Center, a Texas private prison. Respondent argues that habeas corpus is not the proper remedy for the relief which Petitioner seeks and that Petitioner's claim is cognizable in a civil rights action pursuant to 42 U.S.C. § 1983.

The claim raised by Petitioner challenges the condition of his confinement rather than the legality or duration of his confinement. Therefore, the Court concludes that Petitioner's proper remedy would be a civil rights action pursuant to 42 U.S.C. § 1983. In any event, Petitioner's claim that he is denied access to Oklahoma cases and statutes is now moot. Oklahoma Statutes Annotated are available on disc to Oklahoma inmates at the Limestone County Detention Center. Oklahoma Decisions are also to be made available, although their

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<sup>1</sup>Petitioner alleges denial of access to Oklahoma cases and statutes in his January 16, 1996 letter.

availability date has yet to be ascertained.

Petitioner argues that he does not know how to run a computer and is accustomed to using books. However, as per the contractual agreement between the State of Oklahoma and the Limestone County Detention Center, inmates are assigned to the library to assist other inmates in obtaining information from the computer. Therefore, the Court concludes that Petitioner's claim that he is denied access to Oklahoma case law and statutes is not cognizable in this habeas corpus proceeding. In the alternative, the Court concludes that it is now moot.

#### B. Ineffective Assistance of Counsel

In his second ground for relief, Petitioner claims that defense counsel's assistance was ineffective. Petitioner alleges that defense counsel failed to call certain witnesses, failed to have Petitioner's competency properly evaluated, and failed to request a change of venue. Respondent argues that defense counsel was competent and skillful, and did not fall below the level of effective assistance of counsel.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), held that "judicial scrutiny of counsel's performance must be highly deferential," and, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689. To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient

performance prejudiced his defense. Strickland, 466 U.S. at 687; Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. To establish the second prong, a petitioner who has pled guilty must show a reasonable probability that without counsel's errors, he would not have pled guilty and would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

First, Petitioner alleges that defense counsel should have called certain witnesses, Richard and Mike Teeters, at his pre-trial hearing. Petitioner contends that he told defense counsel where the Teeters lived and worked, but defense counsel told Petitioner he could not find them. Even if Petitioner can establish that defense counsel was deficient in his inability to locate these witnesses, he has failed to establish that but for defense counsel's errors, he would not have pled guilty and would have insisted on proceeding to trial. Therefore, the Court concludes that Petitioner's first claim of ineffective assistance of counsel is without merit.

Second, Petitioner alleges that defense counsel failed to have Petitioner's competency properly evaluated. Petitioner's only argument regarding his competency is that he told defense counsel his father was a patient in a mental hospital. However, Defense counsel's decision not to relate this information at the sentencing hearing does not make defense counsel's performance

defective because the mental state of Petitioner's father is not relevant to the competency of Petitioner.

Moreover, at the sentencing hearing, Petitioner, defense counsel and the State were questioned extensively regarding Petitioner's competency. The trial court also used its own observations of Petitioner to determine his competency. Petitioner was asked specifically if he had ever been treated for mental illness or if he had ever undergone any type of psychological counseling. Petitioner specifically stated that he had not. The trial court went to great lengths to ensure Petitioner understood the consequences of entering a guilty plea.

In light of the numerous questions Petitioner was asked regarding his competency and the sentencing court's own observations, Petitioner cannot meet the first prong of the Strickland test. Therefore, the Court concludes Petitioner's second claim that defense counsel's assistance was ineffective by defense counsel failing to have Petitioner's competency properly evaluated is without merit.

Lastly, Petitioner alleges that defense counsel should have requested a change of venue. Petitioner argues that because he knew a lot of people in Ottawa county and would have had to select a jury, defense counsel should have requested a change of venue. However, in light of Petitioner's guilty plea and the plea bargaining agreement, a change of venue would not have affected Petitioner's case.

Petitioner cannot meet the first prong of the Strickland

test because counsel's performance did not fall below the level of a reasonably competent attorney. Therefore, Petitioner's third claim that defense counsel should have requested a change of venue is also without merit.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner's claim that he is denied access to Oklahoma case law and statutes is moot and that Petitioner's claims of ineffective assistance of counsel are without merit. Accordingly, Petitioner's application for a writ of habeas corpus is hereby DENIED.

IT IS SO ORDERED this 24 day of June, 1996.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



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

JUN 24 1996

CARL DEAN HAMBRICK,  
Plaintiff,

vs.

GOVERNMENT EMPLOYEES INSURANCE  
COMPANY,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

95-C-721-K

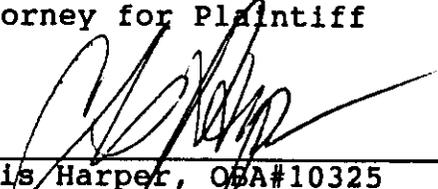
ENTERED ON DOCKET  
DATE JUN 25 1996

JOINT STIPULATION OF DISMISSAL

COME NOW the parties in the above styled matter, pursuant to Rule 41 of the Federal Rules of Civil Procedure, and stipulate to the dismissal of the above styled action in its entirety as the claims between the parties have been resolved by settlement, and this matter may be dismissed with prejudice.

Respectfully submitted,

  
\_\_\_\_\_  
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\_\_\_\_\_  
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Attorney for Defendant  
Government Employees Insurance  
Company

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MA L E D

JUN 21 1996

TERRANCE W. SARGENT, )  
 )  
 Plaintiff(s), )  
 )  
 vs. )  
 )  
 PAT BALLARD, individually and in his official )  
 capacity as Sheriff of Washington County, )  
 )  
 Defendant(s). )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-CV-331-K

ENTERED ON DOCKET

DATE JUN 24 1996

**ORDER**

Now before the Court is Defendant's Motion for Summary Judgment. [Doc. No. 6]. Plaintiff appears *pro se* and *in forma pauperis*.

**Background Information**

On December 28, 1994, Plaintiff was arrested in Bartlesville, Oklahoma on charges of possession of marijuana and drug paraphernalia. Plaintiff was booked into the Washington County Jail in Bartlesville, Oklahoma on December 29, 1994. On March 1, 1995, the Oklahoma authorities determined that Plaintiff had outstanding charges in Iowa relating to his alleged possession of a controlled substance. On March 22, 1995 an additional charge of possession of cocaine was filed against Plaintiff by the Oklahoma authorities. On March 31, 1995, Plaintiff appeared with counsel before the district court for Washington County and entered a *nolo contendere* plea to the Oklahoma charges. One week later, on April 7, 1995, Plaintiff was transferred to the Polk County Jail in De Moines, Iowa. Thus, Plaintiff was in the

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Washington County Jail as a pretrial detainee for approximately 13 weeks and as a prisoner for 1 week. (Martinez report, Exhibit "A" to Defendant's motion for summary judgment).

Plaintiff has filed this action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that while he was in the Washington County Jail, he was (1) denied access to the courts, (2) denied an adequate grievance system, (3) refused doctor-prescribed medication, and (4) denied a doctor-prescribed diet. Defendant has filed a motion for summary judgment arguing that on the basis of the court-ordered Martinez<sup>1/</sup> report, Plaintiff's complaints are not actionable under § 1983. For the reasons stated below, Defendant's motion is **GRANTED** with respect to those claims relating to items (1), (2) and (4). Defendant's motion is **DENIED** with respect to those claims relating to item (3).

#### **Summary Judgment Standards**

A court may grant summary judgment only when the materials of record "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." Fed. R. Civ. P. 56(c). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). While conducting this analysis, the court will resolve all doubt in favor of the Plaintiff, the non-moving party.

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<sup>1/</sup> A Martinez report is a court-authorized report based on an investigation by prison officials. It may be used to develop a record to ascertain whether there are any factual or legal bases for the prisoner's claims. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).

Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980). The court will also construe Plaintiff's *pro se* pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

Plaintiff's complaint may also be treated as an affidavit because it is sworn under penalty of perjury and it states facts based on personal knowledge. Although the Court may use a Martinez report to conduct a frivolity review under 28 U.S.C. § 1915, the Court will not use the Martinez report to resolve factual issues by accepting the report's factual findings as true when they are in conflict with Plaintiff's pleadings or affidavits. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991).

#### **Plaintiff's Complaint**

For purposes of this motion for summary judgment, the Court will liberally construe Plaintiff's Complaint as an attempt to state a claim against Defendant in both his individual and official capacities. An official capacity suit is simply another way of pleading an action against an entity of which the officer is an agent (i.e., the Washington County Jail). An official capacity suit is in all respects, other than name, to be treated as a suit against the entity. Kentucky v. Graham, 473 U.S. 159 (1985); Polk County v. Dodson, 454 U.S. 312 (1981). Because the real party in interest in an official capacity suit is the governmental entity, the entity's policy or custom must have played a part in the deprivation of the plaintiff's constitutional rights. In an individual capacity suit, to establish personal liability, plaintiff must establish that the

defendant himself, acting under color of state law, caused the deprivation of the plaintiff's constitutional right. Id. See also, Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978); and Polk County v. Dodson, 454 U.S. 132 (1981).

#### **I. COUNT I -- ACCESS TO COURTS**

Plaintiff's claim regarding access to the courts has nothing to do with the actual criminal charges pending against him. As the Martinez report indicates, Plaintiff was appointed counsel on January 5, 1995 to help him defend the drug charges filed against him. The record indicates that Plaintiff was visited by an attorney at the Washington County Jail on February 7, 1995. Plaintiff also appeared at his arraignment and plea hearing with his court-appointed counsel on March 31, 1995. Plaintiff's lawyer was present when Plaintiff entered his plea of *nolo contendere*. (Martinez report, Exhibit "A" to Defendant's motion for summary judgment, attachments 6 & 7). Plaintiff has offered nothing to controvert these facts. Rather, Plaintiff argues that he was entitled to access to a law library in connection with a civil forfeiture proceeding.

When Plaintiff was arrested, he was driving his father's Bronco. This Bronco was apparently seized by Oklahoma authorities because it was used in a drug-related crime. See, e.g., 63 O.S. §§ 2-503, 2-504, 2-506 and 2-508. Plaintiff argues that he was entitled to access to a law library so that he could prevent the impending forfeiture of his father's Bronco. Plaintiff states that because Defendant denied him

access to a law library, he had to borrow money to hire a lawyer and he had to wait for the lawyer to file the appropriate motions to retrieve his father's Bronco. Plaintiff argues that had he been granted access to a law library, he would have been able to prepare the motions himself, and he would have been able to obtain the Bronco earlier. (Plaintiff's response brief, pp. 9-10).

Plaintiff, as a pretrial detainee, has a constitutional right to "adequate, effective, and meaningful" access to the courts. Bounds v. Smith, 430 U.S. 817, 822 (1977); Matzker v. Herr, 748 F.2d 1142, 1151 (7th Cir. 1984) (applying right to pretrial detainees). As an initial matter, the Court questions whether this right is even implicated in this case. With respect to the civil forfeiture action, Plaintiff appeared to be trying to protect his father's legal rights as to the Bronco, not his own. It is not clear whether the lawyer handling the civil forfeiture action had as his client Plaintiff's father or Plaintiff. The Court will, nevertheless, assume that Plaintiff had some legal interest in the Bronco, which he was trying to protect. Even assuming that fact, Plaintiff's right of access to the courts was not violated under the facts of this case.

This case is indistinguishable from Love v. Summit County, 776 F.2d 908 (10th Cir. 1985), cert. denied 479 U.S. (1986). In Love, the plaintiff was a pre-trial detainee in a Utah county jail. The Utah courts appointed counsel for plaintiff on his criminal charges. At some point later, plaintiff obtained his own counsel on the criminal charges. While incarcerated, plaintiff made requests for access to a law library so that he could file a civil rights lawsuit challenging his conditions of

confinement. The defendant sheriff refused, citing a lack of manpower to transport plaintiff to a law library. The sheriff did, however, make a telephone and postage available to plaintiff so that he could contact his attorneys. Love, 776 F.2d at 909-10.

After being denied access to the law library, the plaintiff in Love retained his own attorney. This attorney was willing to file some, but not all, of the civil rights claims plaintiff wanted to file. With respect to the claims plaintiff's lawyer refused to file, plaintiff's lawyer gave plaintiff some standard forms and told plaintiff that another lawyer might be willing to litigate his additional claims on a contingency fee basis. Under these facts, the Tenth Circuit held that the plaintiff

did not show that he was denied access to adequate legal assistance to help him prepare and pursue his claims before the courts or that defendants in any significant way restricted that access.

Love, 776 F.2d at 914. Based on the above facts, the Court felt that there simply was no

evidence that the defendants in any way impeded plaintiff's contacts with the courts, his access to his criminal attorney or to his civil counsel, or that they would have impeded his access to any additional legal assistance his civil counsel might have obtained. Defendants did deny plaintiff access to the law library. However plaintiff actually had access to alternative sources of legal assistance. . . .

Id. at 915 (emphasis added).

The facts of this case are substantially similar to those in Love. Plaintiff obtained his own civil counsel. The Martinez report indicates that Plaintiff had

unlimited access to a phone to call his lawyer. When an inmate in the Washington County Jail wishes to talk to his attorney, he is removed from his cell and he may use a phone for free. Inmates also have phones in their cells which can be used for \$5/hour. (Exhibit "A", Defendant's motion for summary judgment). Nowhere does Plaintiff allege that Defendant hampered his ability to use the phone to talk to his lawyer. There are also no allegations that Plaintiff was prevented in any way from sending mail to either his lawyer or the court. Despite the fact that Defendant denied Plaintiff access to a law library, Defendant did not place any obstacles in Plaintiff's way with respect to his access to a lawyer. As in Love, Plaintiff had actual and effective access to a lawyer to handle his civil forfeiture cases. Thus, the Court finds that Plaintiff's right to access to the courts was not violated by Defendant.

Even if Defendant's conduct could be viewed in some way as a significant restriction of Plaintiff's access to the courts, Plaintiff cannot recover. To recover on a denial of access claim, Plaintiff must demonstrate "that any denial or delay of access to the court prejudiced him in pursuing litigation." Tref v. Galetka, 74 F.3d 191, 194 (10th Cir. 1996). There is no evidence that Plaintiff's presentation of his defense to the court, *via* his attorney, was in any way prejudiced by his denial of access to a law library. Plaintiff argues that, if he had been given access to a law library, he might have been able to obtain his father's vehicle sooner, and, therefore, save some storage expenses. Even if the Court were to accept Plaintiff's assertions as true, they do not establish prejudice with respect to the merits of Plaintiff's defense to the civil forfeiture claim.

## II. COUNT II -- GRIEVANCE SYSTEM

Plaintiff argues that the Washington County Jail has an inadequate grievance system. Plaintiff argues first that there are no grievance forms. According to the Martinez report, Plaintiff is correct. There are no grievance forms. Inmates are directed to fill out their grievances on plain notebook paper, which is provided by the jail. The record contains two such handwritten grievances from Plaintiff to Defendant. (Exhibit "A" to Defendant's motion for summary judgment, attachments 8 & 9). Plaintiff also argues that even when he makes a handwritten grievance, no one responds. This allegation is not addressed in the Martinez report.

Plaintiff also argues that there is no neutral arbiter to which a grievance is forwarded once the sheriff and an inmate reach an impasse. The Martinez report indicates that the following system is in place at the Washington County Jail. Initially, an inmate's grievance is sent to the jail administrator for resolution. If the inmate is not satisfied with the administrator's decision, the grievance is forwarded to Defendant. Defendant's resolution of the matter is apparently final. (Exhibit "A" to Defendant's motion for summary judgment).

To state a claim under 42 U.S.C. § 1983, Plaintiff must establish that Defendant's actions deprived Plaintiff of a constitutional right. In the context of a state prison system, an inmate grievance system is not constitutionally required. Flick v. Alba, 932 F.2d 728, 729 (8th Cir. 1991); Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994), cert. denied 115 S.Ct. 1371 (1995); Flowers v. Tate, Nos. 90-3742 & 90-3796, 1991 WL 22009, at \*1 (6th Cir. Feb. 22, 1991). See, e.g., Hall v. Haughain,

No. 94-1443, 1994 WL 702345 (10th Cir. Dec. 16, 1994). Plaintiff simply has no legitimate claim of entitlement to a grievance system. Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988), cert. denied 488 U.S. 898 (1988). Thus, Plaintiff's § 1983 claim with respect to the Washington County Jail grievance system must fail. See also, Reed v. Richards, No. S91-143(P), 1992 WL 396863 (N.D. Ind. 1992), aff'd 1994 WL 259442 (7th Cir. Jun. 13, 1994); Spencer v. Moore, 638 F.Supp. 315, 316 (E.D. Mo. 1986); Hoover v. Watson, 886 F.Supp. 410, 418 (D. De. 1995), aff'd 74 F.3d 1226 (3d Cir. 1995); Stamps v. McWherter, 888 F.Supp. 71, 74 (W.D. Tenn. 1995).

### III. COUNTS III AND IV -- DOCTOR-PRESCRIBED MEDICATION AND DIET

#### A. Medication

According to Plaintiff, he suffers from severe headaches, neck and shoulder pain and swelling of the face and lips. These symptoms are apparently related to a prior injury sustained by Plaintiff in a car accident. The medical records submitted with the Martinez report establish that Plaintiff was seen by a prison doctor on at least two occasions regarding the above-described symptoms. The doctor prescribed some form of Tylenol to control Plaintiff's symptoms. Midrin was also prescribed for Plaintiff's severe headaches. (Exhibit "A" to Defendant's motion for summary judgment, attachment 10, Prisoners Medication and/or Medical Request Forms dated 1/1/95 and 3/30/95).

Plaintiff alleges that Defendant only provided his prescribed medication for seven days and then refused to provide him any further medication. Plaintiff's allegation is supported by the record. The record reflects that for seven days -- from January 5, 1995 to January 11, 1995, Defendant provided Plaintiff with his medication. From that point forward, Defendant refused to provide Plaintiff with his prescribed medication. Plaintiff was without his prescribed medication from January 12, 1995 to February 22, 1995 (i.e., approximately six weeks). From February 23, 1995 until his transfer to an Iowa prison, six weeks later, Plaintiff did receive medication but only because his father drove from Minnesota to bring him his medication. (Exhibit "A" to Defendant's motion for summary judgment, attachment 11).

A State has an obligation to provide medical care for those whom it incarcerates. A failure to provide adequate medical care to a prisoner is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. To establish such a violation, the prisoner must demonstrate that the prison officials were deliberately indifferent to the prisoner's serious illness or injury. Estelle v. Gamble, 429 U.S. 97 (1976). Because Plaintiff was a pretrial detainee while at the Washington County Jail, the due process clause of the 14th Amendment and not the Eighth Amendment is the applicable constitutional provision. Nevertheless, the due process rights of a pretrial detainee are at least as great as the Eighth Amendment rights of convicted prisoners. Both the Tenth Circuit and the Supreme Court have confirmed that the test in Estelle is applicable to claims by pretrial detainees. Bell v.

Wolfish, 441 U.S. 520, 535-37 (1979); Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985).

As the statement of the rule suggests, Estelle requires a two pronged analysis. First, there is an objective component, which requires that the prisoner's illness or injury be serious. Second, there is a subjective component, which requires that the defendant act with a culpable state of mind. Mere inadvertence or negligence on the defendant's part is not sufficient. The prisoner must establish that the defendant acted with deliberate indifference. Deliberate indifference requires more than negligent conduct, but less than intentional conduct. Estelle, 429 U.S. at 103-105; Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321, 2323-24 (1991); Hardy v. Price, 996 F.2d 1064, 1066-67 (10th Cir. 1993).

A medical need is serious if it is one that has been diagnosed by a doctor as mandating treatment. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied 450 U.S. 1041 (1981). Plaintiff complained of severe headaches and swelling of the face. He was examined by a prison doctor and that doctor prescribed medication for Plaintiff. The Court will not second-guess a licensed doctor's determination that Plaintiff's condition was serious enough to warrant medication. Thus, the Court finds at a minimum that there is a material question of fact as to whether or not Plaintiff's headaches and facial swelling were "serious."

The Court in Estelle recognized that not only deprivations of medical care that produce physical torture or death are actionable. Less serious denials which cause or perpetuate pain are also actionable. "To assert otherwise would be inconsistent

with contemporary standards of human decency. It is clear from this principle that a constitutional claim is stated when prison officials intentionally deny access to medical care or interfere with prescribed treatment." Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977). Thus, the intentional failure to provide medication prescribed by a doctor is the type of deliberate indifference prohibited by the Constitution. Estelle, 429 U.S. at 104-105 (holding that intentional interference with prescribed treatment can constitute deliberate indifference); Ramos, 639 F.2d 559, 575 (10th Cir. 1980) (holding that deliberate indifference is shown when prison officials prevent an inmate from receiving recommended treatment); Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704 (11th Cir. 1985); Newman v. State of Alabama, 349 F.Supp. 278, 286 (M.D. Ala. 1972), aff'd 503 F.2d 1320 (11th 1974); Todaro v. Ward, 431 F.Supp. 1129, 1133 (S.D.N.Y. 1977), aff'd 565 F.2d 48 (2d Cir. 1977).

Shortly after being incarcerated at the Washington County Jail, Plaintiff was declared indigent. (Exhibit "A" to Defendant's motion for summary judgment, attachments 7 & 8). Plaintiff could not then pay for his own medication. Under such circumstances, the State has an obligation to provide Plaintiff with adequate medical care. Estelle, 429 U.S. 100-105. Defendant has offered no constitutionally sound reason for denying Plaintiff his prescribed medication. The only reason appears to be a concern over cost. Inadequate resources cannot, however, excuse the denial of a constitutional right. Constitutional rights would be meaningless if they could be circumvented through underfunding. Harris v. Champion, 15 F.3d 1538, 1562-63 (10th Cir. 1994) (citing several cases). See also City of Revere v. Massachusetts

Gen. Hospital, 463 U.S. 239 (1983); and Anacata, 769 F.2d at 704 (recognizing that a delay in medical treatment cannot be justified as a means of coercing payment).

For Defendant to be held liable in his official capacity, Plaintiff must demonstrate that a policy or custom of the Washington County Jail played a part in the violation of his constitutional rights. See Kentucky v. Graham, 473 U.S. 159 (1985) ; Polk County v. Dodson, 454 U.S. 132 (1981). Plaintiff alleges that he was told by his jailers that it was the Washington County Jail's policy that inmates be provided with medication only for seven days. After that, according to the alleged policy, the inmates's family has to provide any medication. Defendant has offered nothing to controvert Plaintiff's allegation. In fact, the Inmate Transaction Summary Report attached to the Martinez report as attachment 11 confirms that Plaintiff was only provided medication by Washington County Jail for seven days. After that, Plaintiff was apparently on his own. The Court finds that based on the record before it, there is a material question of fact as to whether or not there was a policy at the Washington County Jail that inmates not be provided medication after seven days.

Under Oklahoma law, a sheriff is responsible for the proper management of the jail in his county. He is also responsible for the conduct and training of his deputies. See 19 O.S. § 513 & 547(A). A sheriff will not, however, be held personally responsible under § 1983 unless the plaintiff can establish that an "affirmative link" exists between the alleged constitutional violation and either the sheriff's "personal participation, his exercise of control or direction, or his failure to supervise." Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). An affirmative link can be

demonstrated if the sheriff (1) participates in the deprivation of a constitutional right, (2) acquiesces in the deprivation of constitutional right, or (3) establishes or utilizes an unconstitutional policy or custom. Id. As the Court stated above, there is a material question of fact regarding the existence of a seven day medicine policy at the Washington County Jail. The Court also finds that there are material questions of fact as to whether that policy, if it existed, was established, utilized or acquiesced in by Defendant Ballard.

### 1. Defendant's Qualified Immunity

In his individual capacity, Defendant claims that he has qualified immunity from liability on Plaintiff's medical care claim. Under the doctrine of qualified immunity, Defendant cannot be held personally liable unless Plaintiff can establish that Defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir.1988). When the qualified immunity defense is raised in a motion for summary judgement, Plaintiff must show (1) that the defendant's conduct violates the law as it now exists, and (2) that the law was clearly established at the time of the alleged unlawful conduct. Curnmins v. Campbell, 44 F.3d 847, 850 (10th Cir.1994); Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir.1995). If Plaintiff fails to carry either part of this burden, Defendant is entitled to qualified immunity. Id. at 1535; Thompson v. City of Lawrence, 58 F.3d 1511, 1515 (10th Cir.1995).

"The key to the [qualified immunity] inquiry is the objective reasonableness of the official's conduct in light of the legal rules that were clearly established at the time the action was taken." Laidley v. McClain, 914 F.2d 1386, 1394 (10th Cir.1990). It is not sufficient that the right at issue be clearly established at a general level. The inquiry must be more particularized -- was the right clearly established under the particular factual situation presented by the case at hand? See Anderson v. Creighton, 483 U.S. 635 (1987). In order for the law to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992). As the authority quoted in section III(A) establishes, there was clearly established Supreme Court and Tenth Circuit precedent by 1995 (i.e., the date of Defendant's conduct) to the effect that the intentional deprivation of doctor-prescribed medication is a violation of a pretrial detainee's constitutional rights. Defendant is not, therefore, entitled to qualified immunity on Plaintiff's medical care claim.

#### **B. Diet**

Plaintiff has been diagnosed by prison doctors as having celiac disease and being lactose intolerant. Celiac disease is defined as "intestinal malabsorption syndrome characterized by diarrhea, malnutrition, bleeding tendency, and hypocalcemia." Tabor's Cyclopedic Medical Dictionary, 336 (17th ed. 1993). Celiac disease is to be treated with a gluten free diet, which was prescribed for Plaintiff by

the prison doctors. One who is on a gluten free diet must eliminate gluten by avoiding all products containing wheat, rye, oats or barley. Id. at 813. Plaintiff argues that his doctor-prescribed dietary needs were not being met at the Washington County Jail. (Exhibit "A", Defendant's motion for summary judgment, attachment 10, Prisoners Medication and/or Medical Request Forms dated 1/11/[95] and 3/30/95).

Estelle's "deliberate indifference" standard is also used to assess Plaintiff's claim regarding his diet. That is, Plaintiff must demonstrate that Defendant was deliberately indifferent to his serious illness or injury. Estelle v. Gamble, 429 U.S. 97 (1976). The diet was prescribed by prison doctors. This satisfies the objective/seriousness prong of the Estelle test. Ramos, 639 F.2d at 575. The Court will not second-guess the prison doctor. At a minimum there is a material question of fact as to whether or not Plaintiff's celiac disease and lactose intolerance were "serious." Plaintiff has, however, failed to create a genuine issue of fact regarding Defendant's culpable state of mind. Plaintiff cannot demonstrate deliberate indifference with respect to his dietary needs.

The record reflects that the Washington County Jail staff was attempting to satisfy Plaintiff's special dietary needs. Plaintiff admits that at least one member of the jail staff, Jan Willaford, made an effort to meet his dietary needs. The doctor's notes also indicate that Ms. Willaford was trying to work with a dietician to work out Plaintiff's dietary problems. (Exhibit "A", Defendant's motion for summary judgment, attachment 9 and attachment 10, Prisoners Medication and/or Medical Request forms dated 3/30/95).

On January 14, 1995, Plaintiff was served rice instead of pizza for breakfast. Plaintiff refused the rice because he thought it was half cooked. For lunch on the same day, Plaintiff was served two pieces of ham, two pear halves and some potato chips, which Plaintiff refused to eat. A similar situation occurred the following day. On January 31, 1995, Plaintiff was mistakenly served pizza. Once Plaintiff brought this to the jailer's attention, the pizza was replaced with beans, which Plaintiff refused to eat. Id. at attachments 12-16. Serving plain but nutritious food to inmates does not offend the Constitution. Smith v. Harvey County Jail, 889 F.Supp. 426 (D. Kan. 1995); Zingmond v. Harger, 602 F.Supp. 256, 262-63 (N.D. Ind. 1985).

At about the same time Plaintiff was diagnosed by the prison doctors as being lactose intolerant (March 29, 1995), the jail staff was contacting a nurse at the Washington County Health Department to obtain diets and/or menus for people who are "lactose intolerant, or could not eat any grains." (Exhibit "A", Defendant's motion for summary judgment, attachment 17). The prison cook was informed that Plaintiff was to receive only meat, vegetables and fruit. Plaintiff was not to receive pastas, oatmeal or milk products. Id. The Inmate Transaction Summary Report indicates that these instructions were apparently carried out. Id. at attachment 11.<sup>2/</sup> Plaintiff argues that these contacts with the health department were motivated by a fear of this lawsuit. This lawsuit was, however, not filed until two weeks after the staff's conversation with the health department and Defendant was not served with the

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<sup>2/</sup> See, e.g., entry on 3/31/95 (Inmate's menu golash [*sic*] no noodles, pine[apple]), entry on 4/1/95 (inmate's hamburger patty, potatoes, pi[neapple]), and entry on 4/3/95 (supper: fried bolonga [*sic*], baked beans, a[pple]).

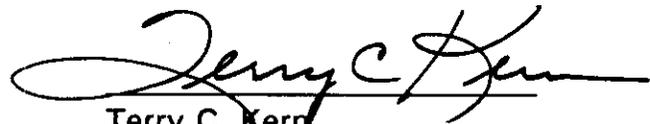
lawsuit for almost a month after the staff's conversation with the health department. All in all, the Court finds nothing in the record which establishes that Defendant was deliberately indifferent to Plaintiff's dietary needs. In fact, it appears the Washington County Jail staff was trying to develop a diet to meet Plaintiff's needs.

### **CONCLUSION**

Defendant's motion for summary judgment (doc. no. 6) is **GRANTED** as to all claims relating to Plaintiff's alleged (1) denial of access to the courts, (2) denial of an adequate grievance system, and (3) denial of a doctor-prescribed diet. Defendant's motion for summary judgment is denied as to all claims relating to Plaintiff's alleged denial of doctor-prescribed medication.

IT IS SO ORDERED.

Dated this 20 day of June, 1996.

  
Terry C. Kerr  
United States District Judge

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

MARKUS ALLEC RICE, a minor, )  
by and through his mother and )  
next friend, ANGELA DANITA )  
RICE, )

Plaintiff, )

vs. )

UNITED STATES OF AMERICA, )

Defendant. )

ENTERED ON DOCKET

DATE JUN 24 1996

No. 94-C-264-K

**FILED**  
~~IN OPEN COURT~~

JUN 21 1996

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

O R D E R

Now before this Court is Plaintiff's Objection to Judgment, Motion to Alter Judgment and Motion for New Trial. This Court has duly considered Plaintiff's motions and does not agree that the Memorandum of Decision entered in this case on June 3, 1996 was based on errors of law and fact. Plaintiff's motions and the relief requested therein are therefore DENIED.

IT IS SO ORDERED THIS 20 DAY OF JUNE, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**  
JUN 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHANNON K. HUNT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JULIE O'CONNOR, & STANLEY GLANZ, )  
 )  
 Defendants. )

No. 96-CV-508-B /

ENTERED ON DOCKET

DATE JUN 24 1996 ✓

**ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS**

Plaintiff, an inmate at the Tulsa County Jail, has filed with the court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983.

In his complaint, Plaintiff alleges interference with his personal mail. He contends that at his last meeting with Julie O'Connor, his public defender, he noticed that she had a letter addressed to Plaintiff from a Lynn Mullinax although Plaintiff had not authorized release of his personal mail to her or anyone else. Plaintiff further alleges that he has never received the letter from Lynn Mullinax and that Ms. O'Connor refused to give it to him. Plaintiff seeks damages and an order directing the delivery of all his personal mail to him.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to

3

dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes Plaintiff's claim for interference with his personal mail is cognizable under section 1983. The Supreme Court has recognized that inmates have a First Amendment right to send and receive mail. See Procunier v. Martinez, 416 U.S. 396 (1974); Turner v. Safley, 482 U.S. 78 (1987); Thornburgh v. Abbott, 482 U.S. 78 (1987).

The Court concludes, however, that Plaintiff's claims against Ms. O'Connor lack an arguable basis in law. When representing an indigent defendant a public defender, like Ms. O'Connor, does not act under color of state law. See Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)); Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994). Therefore, Ms. O'Connor must be dismissed without prejudice at this time.

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

- (1) Plaintiff's motion for leave to proceed in forma pauperis

is granted.

- (2) Julie O'Connor is **dismissed** without prejudice.
- (3) The Clerk shall cause **summons** to be issued and served without prepayment of fees and costs as to Stanley Glanz.
- (4) The Clerk shall **mail** a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 21<sup>st</sup> day of June, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



contends that the "smell of pork" spreads rapidly over pork-free eggs, thereby defiling them. Plaintiff seeks damages of \$47 million for violation of his First Amendment rights or release from custody.

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

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's factual contentions are clearly baseless. The smell from dishes containing pork does not contaminate pork-free food on the same food line. Moreover, the package of the Jell-O at issue in this action does not reveal it contains pork byproducts. Accordingly, Plaintiff's complaint must be dismissed as factually

frivolous under 28 U.S.C. § 1915(d).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is GRANTED, but this action is DISMISSED without prejudice as frivolous.

IT IS SO ORDERED this 21<sup>st</sup> day of June, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUN 21 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DYCO PETROLEUM CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MESA OPERATING COMPANY and )  
 HILLIN-SIMON OIL COMPANY, )  
 )  
 Defendants. )

Case No. 95-C-1204-H

ORDER

This matter comes before the Court on Defendant Mesa Operating Company's Motion to Dismiss or to Transfer Venue (Docket #7).

Defendant Mesa Operating Company ("Mesa") was formerly a working interest owner in the Jarvis No. 1-10 Well (the "Well") located in Beckham County, Oklahoma. Plaintiff Dyco Petroleum Corporation ("Dyco") is also a working interest owner and serves as operator of the Well pursuant to a Joint Operating Agreement ("JOA") between, *inter alia*, Mesa and Dyco dated November 9, 1981. Mesa assigned its interest in oil and gas leases covering the Well to Defendant Hillin-Simon Oil Company ("Hillin-Simon") on February 17, 1988. Dyco claims that at the time of this assignment, Mesa had produced more than its share of gas from the Well. Dyco subsequently brought this declaratory judgment action, seeking judicial determination of whether Mesa retained or Hillin-Simon assumed the obligation for overproduction from the Well. Dyco also asserts a claim against Hillin-Simon for its alleged failure to pay its share of the operating expenses of the Well. Mesa then filed this motion to dismiss or transfer venue.

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Diversity actions may be brought only in:

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a) (1996). The Court applies each of these in turn to the facts of the instant case.

## I.

Dyco claims that venue is proper under section 1391(a)(1), which provides that a diversity action may be brought in “a judicial district where any defendant resides, if all defendants reside in the same state.” In order for venue to be proper under section 1391(a)(1), Dyco must establish two independent elements. First, Dyco must show that at least one defendant resided in the Northern District of Oklahoma at the time the action was commenced. If both defendants resided in this District at that time, venue is proper under section 1391(a)(1). If Dyco establishes that one but only one defendant resided in the Northern District at that time, Dyco must then demonstrate that the requirements of the second clause are met. Thus, Dyco must show that both defendants reside in the same state. Although it asserts that Mesa resides in the Northern District for venue purposes, Dyco has made no claim that Hillin-Simon resides in Oklahoma, nor does the record reveal evidence that Hillin-Simon is an Oklahoma resident for purposes of section 1391(a)(1). Therefore, even if Mesa was a resident of the Northern District at the time the action commenced, venue would not be proper under section 1391(a)(1) because Hillin-Simon is not an Oklahoma resident and thus the second

prong of that provision has not been satisfied.<sup>1</sup>

Moreover, the Court finds that Dyco also has failed to satisfy the first requirement of section 1391(a)(1). As noted above, Dyco does not allege that Hillin-Simon resided in this District at the time the action was commenced. Further, for the reasons discussed below, the Court concludes that Mesa also did not reside in the Northern District on the date this action was filed, December 6, 1995.

A corporate defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. *Id.* § 1391(c). The assertion of personal jurisdiction over a nonresident corporate defendant is appropriate where the defendant has sufficient “minimum contacts” with the forum. See Helicopteros Nacionales De Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Such contacts must be “continuous and systematic,” Hall, 466 U.S. at 415-16, such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice,” International Shoe, 326 U.S. at 316. Jurisdiction over a nonresident corporation is available where that defendant “purposefully avails itself of the privilege of conducting activities [within the judicial district], thus invoking the benefits and protections of its laws.” Hanson v. Denckla, 357 U.S. 235, 253 (1958).

Upon review of the evidence presented by Dyco and Mesa, the Court concludes that Mesa was not subject to personal jurisdiction in the Northern District of Oklahoma on December 6, 1995. Mesa is a Delaware corporation with its principal place of business in Irving, Texas. Dyco contends

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<sup>1</sup>In support of its claim that venue is proper under section 1391(a)(1), Dyco relies upon the fact that Hillin-Simon waived objection to venue by filing a responsive pleading in this Court without raising such an objection. Dyco correctly asserts that Mesa has no standing to object to venue on behalf of Hillin-Simon. However, the requirement that all defendants reside in the same state is a necessary prerequisite to establishing venue pursuant to section 1391(a)(1). Both defendants are equally situated to object to venue when all of the requirements of the venue statutes have not been satisfied.

that Mesa "has had numerous contacts with the Northern District on a regular basis over the past years." Pl.'s Br. at 5-6. In support of this proposition, Dyco submitted the following evidence: (1) gas contracts which Mesa entered into with Northern District operators in 1980 and 1989, Pl.'s Ex. D; (2) correspondence between Mesa and Samson Resources Company dated May 8, 1995 and September 20, 1995, Pl.'s Ex. E; (3) a letter to Dyco from Mesa dated April 23, 1990, requesting copies of the operator's allocations for the Well, Pl.'s Ex. E; (4) the complaints filed in three actions in this Court to which Mesa was a party, Pl.'s Exs. F,G,H; and (5) copies of checks paid by Mesa to Tulsa companies, the most recent of which was dated May 24, 1993, Pl.'s Ex. I.<sup>2</sup>

Even if this evidence would have been sufficient to establish personal jurisdiction over Mesa at the time when each item occurred, the Court finds it is insufficient to subject Mesa to personal jurisdiction in this District at the time the instant action was commenced. Mesa had assigned all rights and liabilities in the gas contracts prior to December 6, 1996. Def.'s Ex. 1. Further, the last of the lawsuits referenced by Dyco was terminated in 1994. The remaining evidence does not suggest the probability of some going-forward relationship between Mesa and the Northern District. The Court finds that Dyco has failed to establish that Mesa was subject to personal jurisdiction in this district on December 6, 1995, and thus did not reside here for purposes of determining whether venue is proper under section 1391(a)(1).

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<sup>2</sup>Dyco also contends that Mesa is subject to specific jurisdiction because the instant action allegedly arose from Mesa's contacts in the Northern District. The Court concludes that this claim is properly addressed in its discussion of section 1391(a)(2), which specifically provides that venue is proper where "a substantial part of the events or omissions giving rise to the claim occurred."

## II.

Dyco also asserts that venue is proper pursuant to section 1391(a)(2), which provides that a diversity action may be brought where “a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated.”

Dyco contends that the action arose out of a dispute over the JOA, which was negotiated “at least in part, in Tulsa, Oklahoma, pl.’s ex. A at 2, and administered by Dyco in its Tulsa office. However, the Complaint merely seeks a judicial declaration of which defendant retained or assumed liability for Mesa’s alleged overproduction of the Well.<sup>3</sup> Therefore, the critical events giving rise to this claim occurred in connection with Mesa’s assignment of its interest in the Well to Hillin-Simon. The negotiations between Mesa and Dyco and subsequent correspondence relating to Dyco’s administration of the JOA cannot be construed as “a substantial part of the events or omissions giving rise to” the current claim against Mesa. Further, it is uncontested that the Well is located in the Western District of Oklahoma. Thus, venue in this District is not proper under section 1391(a)(2).

## III.

Subsection three of the venue statute is inapplicable because the Court finds that there is at least one judicial district where this action may be brought. That district is the Western District of Oklahoma.

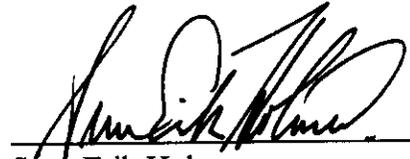
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<sup>3</sup>The Complaint also asserts a breach of contract claim against Hillin-Simon for Hillin-Simon’s alleged failure to pay Dyco its share of the operating expenses of the Well, in accordance with the provisions of the JOA. The Complaint does not include a claim against Mesa for breach of the JOA.

Because Dyco has commenced this action in an improper venue, the Court grants the Motion to Transfer the case to the Western District of Oklahoma (Docket #7) pursuant to 28 U.S.C. § 1406(a).

IT IS SO ORDERED.

This 21<sup>st</sup> day of June, 1996.



Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MARK W. VANN, et al. )  
 )  
 Defendants. )

JUN 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 1029H

**CLERK'S ENTRY OF DEFAULT**

It appearing from the files and records of this Court as of June 21, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, Mark W. Vann and Brenda A. Vann aka Brenda Ann Vann, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 21st day of June, 1996.

PHIL LOMBARDI, Clerk  
United States District Court for  
the Northern District of Oklahoma

By J. Adamski  
Deputy

ENTERED ON DOCK

DATE 6/24/96

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

**F I L E D**

JUN 20 1996 *SAR*

VELMA L. KIRK,

Plaintiff,

v.

UNITED STATES OF AMERICA,  
ex rel. INTERNAL REVENUE  
SERVICE,

Defendant,

v.

JIMMY M. SMITH,

Additional defendant on  
the counterclaim.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-635-W ✓

**JUDGMENT**

Defendant is granted judgment against plaintiff in the amount of \$102,104.82,  
plus statutory interest from the dates of assessments of the taxes plus costs,  
pursuant to 26 U.S.C. § 7401.

Dated this 19<sup>th</sup> day of June, 1996.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 6/24/96

**F I L E D**

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

JUN 20 1996 *SLC*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

VELMA L. KIRK, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED STATES OF AMERICA, )  
 ex rel. INTERNAL REVENUE )  
 SERVICE )  
 )  
 vs. )  
 )  
 JIMMY M. SMITH, )  
 )  
 Additional defendant )  
 on the counterclaim.)

No. 95-C-635-B *W* ✓

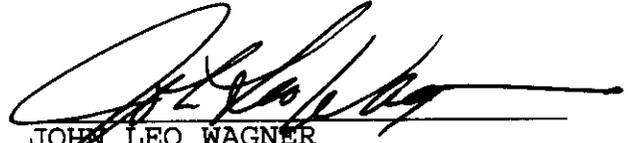
ORDER

Having considered the United States' Motion For Summary Judgment, it is hereby ORDERED that the United States' Motion shall be GRANTED. Accordingly, the Court finds that plaintiff was a person responsible for the collection and paying over of the withholding taxes of Crystal Bowl, Inc. for the third quarter of 1987 through the fourth quarter of 1990 and that plaintiff's failure to collect and pay over the taxes was willful. Therefore it is hereby ORDERED, ADJUDGED AND DECREED that:

- (1) Plaintiff's complaint shall be dismissed with prejudice;

(2) Judgment shall be entered in favor of the United States on its counterclaim in the amount of \$102,104.82, plus statutory interest from the dates of assessments, plus costs.

This the 18<sup>th</sup> day of June, 1996.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

PRODUCERS OIL COMPANY and  
CHARLES GOODALL REVOCABLE TRUST,

Plaintiffs,

vs.

MARION Z. THOMPSON,  
PAMELA DENISE THOMPSON,  
JACK JUNIOR THOMPSON,  
PAMELA SUE THOMPSON,  
EMRAL GUINN, GEORGE HUGHES,  
NANCY HUGHES, and SUN REFINING AND  
MARKETING COMPANY,

Defendants.

JUN 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 92-C-1178-E

ENTERED ON DOCKET

DATE JUN 21 1996

**ORDER GRANTING APPLICATION FOR DISMISSAL  
WITHOUT PREJUDICE AS TO DEFENDANTS  
MARION Z. THOMPSON AND PAMELA DENISE THOMPSON**

On this 19th day of June, 1996 the Application of the  
Plaintiffs, Producers Oil Company and Charles Goodall Revocable  
Trust for dismissal without prejudice as to Defendants,  
Marion Z. Thompson and Pamela Denise Thompson, comes on before the  
Court. The Court being fully advised in the premises Orders,  
Adjudges and Decrees that the above styled and numbered cause of  
action should be and hereby is dismissed without prejudice against  
Defendants Marion Z. Thompson and Pamela Denise Thompson only.

IT IS SO ORDERED.

S/ JAMES O. ELLISON  
UNITED STATES DISTRICT COURT JUDGE

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

PRODUCERS OIL COMPANY and  
CHARLES GOODALL REVOCABLE TRUST,

Plaintiffs,

vs.

MARION Z. THOMPSON,  
PAMELA DENISE THOMPSON,  
JACK JUNIOR THOMPSON,  
PAMELA SUE THOMPSON,  
EMRAL GUINN, GEORGE HUGHES,  
NANCY HUGHES, and SUN REFINING AND  
MARKETING COMPANY,

Defendants.

Case No. 92-C-1178-E

ENTERED ON DOCKET  
DATE JUN 21 1996

ORDER GRANTING APPLICATION TO DISMISS  
WITH PREJUDICE AS TO DEFENDANTS  
JACK JUNIOR THOMPSON, PAMELA SUE THOMPSON,  
EMRAL GUINN, GEORGE HUGHES,  
NANCY HUGHES AND SUN MARKETING COMPANY

On this 19th day of June, 1996 the Application of the  
Plaintiffs, Producers Oil Company and Charles Goodall Revocable  
Trust for dismissal with prejudice as to Defendants, Jack Junior  
Thompson, Pamela Sue Thompson, Emral Guinn, George Hughes, Nancy  
Hughes, and Sun Marketing Company comes on before the Court. The  
Court being fully advised in the premises Orders, Adjudges and  
Decrees that the above styled and numbered cause of action should  
be and hereby is dismissed with prejudice against Defendants Jack  
Junior Thompson, Pamela Sue Thompson, Emral Guinn, George Hughes,  
Nancy Hughes, and Sun Marketing Company only.

IT IS SO ORDERED.

S/ JAMES O. ELLISON  
UNITED STATES DISTRICT COURT JUDGE

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

**F I L E D**

JUN 20 1996 *lc*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CLAUDE "SONNY" MILES, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
RON CHAMPION, et al., )  
 )  
Respondent. )

No. 96-C-167-E ✓

ENTERED ON DOCKET

DATE JUN 21 1996

**ORDER**

This matter comes before the Court on Petitioner's Motion for a Continuance, filed on May 9, 1996, and Motion for an Extension of Time, filed on May 22, 1996 (docket #7 and #9). In his motion for a continuance, Petitioner alleges that "there has been a change in the law that leaves a critical proposition of error that is currently not exhausted in State Court." In his June 12, 1996, response, Petitioner contends the Court should hold this case in abeyance pending exhaustion of state remedies.

While holding this case in abeyance pending exhaustion of state remedies is certainly a viable option, the Court exercises its discretion to dismiss this action without prejudice to it being reasserted once Petitioner has exhausted all of his state remedies. ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motions for a continuance and for an extension (docket #7 and #9) are DENIED and this action is hereby DISMISSED WITHOUT PREJUDICE to permit Petitioner to return to state court and exhaust his state remedies.

SO ORDERED THIS 19<sup>th</sup> day of June, 1996.

*James O. Ellison*  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA JUN 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CLARENCE SMITH et al.,

Plaintiff,

vs.

ROGERS GALVANIZING COMPANY,

Defendant.

Case No.: 94-C-982-B ✓

Judge Thomas R. Brett

ENTERED ON DOCKET  
DATE JUN 21 1996

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
FOLLOWING HEARING ON PLAINTIFFS' MOTION  
FOR ATTORNEYS' FEES**

Plaintiffs' Motion for Attorneys' Fees having come on for hearing on the 24<sup>th</sup> day of May, 1996, and the Court having considered the issues, evidence presented, and arguments of counsel, the Court enters the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Plaintiffs, in their motion for attorneys' fees, requested an award of \$52,830.00 in attorneys' fees based upon 366.25 hours (184.1 hours for Clifford R. Magee and 182.15 hours for Gregory T. Colpitts) at an hourly rate of \$150.00 for Clifford R. Magee and an hourly rate of \$150.00 Gregory T. Colpitts.

2. Clifford R. Magee is an attorney licensed to practice law in the State of Oklahoma and the Northern District of Oklahoma with approximately eight (8) years of practice in litigation.

3. Gregory T. Colpitts is an attorney licensed to practice in the State of Oklahoma and the Northern District of

Oklahoma with a Master of Laws degree and approximately five years of practice.

4. Steven R. Hickman, Plaintiffs' expert on attorneys' fees as an attorney licensed to practice in the State of Oklahoma and the Northern District of Oklahoma, testified that 366.25 hours was a reasonable number of hours for Plaintiffs' legal counsel to expend on this litigation.

5. Thomas D. Robertsor., Defendant's expert on legal fees as an attorney licensed to practice in the State of Oklahoma and the Northern District of Oklahoma, testified that an hourly rate of \$125.00 to \$135.00 was a reasonable hourly rate for an attorney with approximately eight (8) years of practice and that an hourly rate of \$110.00 to \$120.00 was reasonable for an attorney with approximately five (5) years of practice.

#### **CONCLUSIONS OF LAW**

1. Pursuant to 29 U.S.C. Sec. 1132(g), the Plaintiff, as prevailing party, is entitled to recover a reasonable attorneys' fee.

2. Any Finding of Fact that might be characterized as a Conclusion of Law is incorporated herein.

3. Factors considered by the Court in exercising its discretion in awarding attorney's fees to Plaintiffs are as follows:

- a. the degree of Defendant's culpability or bad faith;
- b. the ability of the Defendant to satisfy an award of attorney's fees;
- c. whether an award of attorney's fees against the

Defendant's would deter others from acting under similar circumstances;

d. whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and

e. the relative merits of the parties' positions.

**VAN HOOVE v. MID-AMERICA BUILDING MAINTENANCE, INC.**, 841 F.Supp. 1523, 1532 (D.Kan. 1993) citing **GORDON v. U.S. STEEL CORP.**, 724 F.2d 106 (10<sup>th</sup> Cir. 1983, remanded on other grounds).

4. Additional factors considered by the Court in exercising its discretion in awarding attorney's fees to Plaintiffs are as follows:

- a. time and labor required;
- b. the novelty and difficulty of the issues;
- c. the skill required to perform the legal services properly;
- d. the customary fee;
- e. the amount involved and the results obtained
- f. the experience of the attorneys; and
- g. the risk of nonrecovery.

**BURK v. OKLAHOMA CITY**, 598 P.2d 659 (Okl. 1979).

5. The Court concludes as a matter of law that a reasonable attorney's fee is calculated by the number of hours expended multiplied by an hourly rate.

6. The Court concludes as a matter of law that a reasonable number of hours for Clifford R. Magee to expend on

this matter was 183.85 and that a reasonable number of hours for Gregory T. Colpitts to expend on this matter was 182.15.

7. The Court concludes as a matter of law that a reasonable hourly rate for Clifford R. Magee is \$135.00 per hour and a reasonable hourly rate for Gregory T. Colpitts is \$115.00.

8. The Court concludes as a matter of law that a reasonable attorney fee for Clifford R. Magee is \$23,762.25 and that a reasonable attorney fee for Gregory T. Colpitts is \$20,257.25, thus, Plaintiffs are awarded attorneys' fees for a sum of \$44,022.50.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

JUN 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CLARENCE SMITH, et al.,

Plaintiff,

vs.

ROGERS GALVANIZING COMPANY,

Defendant.

Case No. 94-C-982-B

Judge Thomas R. Brett

ENTERED ON DOCKET

DATE **JUN 21 1996**

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered herein by the Court on the 1st day of November, 1995, the Court finds that the Plaintiffs, Clarence Smith and Betty Smith, are entitled to continuation coverage insurance benefits from the Defendant, Rogers Galvanizing Company, in the amount of \$7,456.74 for insurance benefits due Clarence Smith and Betty Smith for the period February 1, 1993, to May 31, 1993; \$39,054.42 for insurance benefits due Clarence Smith and Betty Smith for the period June 1, 1993, to September 30, 1995; and \$6,552.12 for insurance benefits due Betty Smith for the period October 1, 1995, to February 29, 1996.

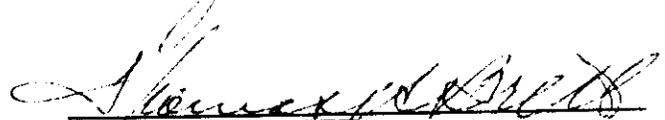
The Court further finds that the Defendant is entitled to a recoupment in the amount of \$11,594.57 in insurance premiums for the period February 1, 1993, to September 30, 1995, and \$1,463.55 in insurance premiums for the period October 1, 1995, to February 29, 1996.

The Court further finds that Plaintiffs should be awarded post-judgment interest at the rate of 5.62 percent per annum on the net judgment herein from this date.

The Court also finds that Plaintiff should be awarded a reasonable attorneys' fee in the amount of \$44,022.50.

IT IS SO ORDERED AND ADJUDGED that the Plaintiffs, Clarence Smith and Betty Smith, recover from the Defendant, Rogers Galvanizing Company, the sum of \$40,005.16 plus attorneys' fees in the amount of \$44,022.50, post-judgment interest at the rate of 5.62 percent per annum on the net judgment herein from this date, and reasonable costs, if timely applied for, pursuant to Northern District of Oklahoma Local Rule 54.1.

IT IS SO ORDERED this 20<sup>th</sup> day of June, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**JUN 20 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

NOVUS CREDIT SERVICES, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MITCHELL MOTOR COACH SALES, INC., )  
 )  
 Defendant. )

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Case No. 94-C-169-J

ENTERED ON DOCKET  
DATE 6-21-96

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

The plaintiff, NOVUS Credit Services, Inc., and defendant, Mitchell Motor Coach Sales, Inc., pursuant to FED. R. CIV. P. 41(a)(1), jointly stipulate that this matter should be dismissed with prejudice. Mitchell Motor Coach Sales, Inc. has fully performed its obligation under the Agreement of Settlement dated December 15, 1994 and the Order Approving Settlement and Administrative Closing Order dated January 4, 1995. Therefore, both parties in this matter hereby jointly stipulate that the above styled matter should be dismissed with prejudice, with each party to bear their own respective costs and fees.

Dated this 20<sup>th</sup> day of June, 1996.

By: Carol Wood  
 Carol Wood, OBA No. 10532  
 English & Wood, P.C.  
 15 West Sixth Street, Suite 1700  
 Tulsa, OK 74119-5466  
 (918) 582-1564  
 ATTORNEYS FOR PLAINTIFF

By: James W. Tilly  
 James W. Tilly, OBA No. 9019  
 Tilly & Ward  
 Two West Second Street, Suite 2220  
 P.O. Box 3645  
 Tulsa, OK 74101-3645  
 ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET  
DATE 6-21-96

THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN 20 1996 *SM*

JUDITH BRANSCUM, KATHRYN  
ALLISON and DEANNE LINN, )  
)  
)  
Plaintiffs, )  
)  
)  
-vs- )  
)  
)  
GRAND GATEWAY ECONOMIC )  
DEVELOPMENT ASSOCIATION, )  
)  
)  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 94-C-179H  
(Consolidated with 94-C-190-H) ✓

**STIPULATION OF DISMISSAL AND ORDER**

It is hereby stipulated by Judith Branscum, Kathryn Allison and Deanne Linn, plaintiffs, by and through Ralph E. Simon, their attorney, and Grand Gateway Economic Development Association, by and through its attorneys, Herrold, Herrold & Davis, Inc., by Jack N. Herrold, that the above-entitled action be dismissed with prejudice and that each of the parties hereto shall bear their own attorney's costs and fees incurred herein.

DATED June 19, 1996.

*Ralph E. Simon*  
\_\_\_\_\_  
RALPH E. SIMON, OBA #8254  
403 S. Cheyenne, Ste. 1200  
Tulsa, Oklahoma 74103  
(918) 583-8008

ATTORNEY FOR PLAINTIFFS

HERROLD, HERROLD & DAVIS, INC.

By   
JACK N. HERROLD, OBA #4141  
210 ParkCentre  
525 South Main  
Tulsa, Oklahoma 74103

ATTORNEYS FOR DEFENDANT

**ORDER**

~~On the above stipulation, IT IS SO ORDERED.~~

~~DATED June \_\_\_\_\_, 1996.~~

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET  
DATE 6-21-96

THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
JUN 20 1996 *sa*

JUDITH BRANSCUM, KATHRYN  
ALLISON and DEANNE LINN, )  
)  
)  
Plaintiffs, )  
)  
)  
-vs- )  
)  
)  
GRAND GATEWAY ECONOMIC )  
DEVELOPMENT ASSOCIATION, )  
)  
)  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 94-C-179H ✓  
(Consolidated with 94-C-190-H)

**STIPULATION OF DISMISSAL AND ORDER**

It is hereby stipulated by Judith Branscum, Kathryn Allison and Deanne Linn, plaintiffs, by and through Ralph E. Simon, their attorney, and Grand Gateway Economic Development Association, by and through its attorneys, Herrold, Herrold & Davis, Inc., by Jack N. Herrold, that the above-entitled action be dismissed with prejudice and that each of the parties hereto shall bear their own attorney's costs and fees incurred herein.

DATED June 19, 1996.

*Ralph E. Simon*

RALPH E. SIMON, OBA #8254  
403 S. Cheyenne, Ste. 1200  
Tulsa, Oklahoma 74103  
(918) 583-8008

ATTORNEY FOR PLAINTIFFS

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

ENTERED ON DOCKET  
DATE JUN 21 1996

KMART CORPORATION,

Plaintiff,

vs.

BUD & SON DISTRIBUTING, an  
Oklahoma partnership, whose partners  
are GEORGE C. BOYD, GAIL P. BOYD,  
EARL WIGGINS and SHELLY WIGGINS,

Defendants.

No. 96-C-82K ✓

**F I L E D**

JUN 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Now before this Court is the motion of Defendant Bud & Son Distributing ("Bud & Son") to dismiss for improper venue, pursuant to Fed.R.Civ.P. 12(b)(3). Plaintiff KMART Corporation ("KMART") and Bud & Son were parties to contracts for the disposal of waste tires. In an earlier case involving the same parties before the United States District Court for the Eastern District of Oklahoma, Bud & Son won a jury verdict in the amount of \$288,835.75. Boyd v. KMART, No. 95-C-249-P (E.D. Okla. filed May 25, 1995). Bud & Son alleges that the lawsuit in the Eastern District involved "a nearly identical dispute" to the one before this Court in which KMART seeks declaratory relief. (Def. Br. at 1.) Bud & Son argues, inter alia, that this Court should decline to exercise jurisdiction over KMART's action for declaratory relief because it simply constitutes an effort by KMART to forum shop after receiving an unfavorable verdict in what would be the most natural and convenient venue for the instant dispute, i.e., the Eastern District.

The Tenth Circuit has explained that a district court is not obliged to entertain every

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justiciable declaratory claim brought before it. “The Supreme Court has long made clear that the Declaratory Judgment Act ‘gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.’” State Farm Fire & Casualty Co. v. Mhoon, 31 F.3d 979, 982 (10th Cir. 1994) (quoting Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112 (1962)). Among the factors a district court may consider in deciding whether to hear a declaratory judgment action is “whether the declaratory remedy is being used merely for the purpose of ‘procedural fencing.’” State Farm Fire & Cas. Co., 31 F.3d at 983 (quoting Allstate Ins. Co. v. Green, 825 F.2d 1061, 1063 (6th Cir. 1987)). See also Hospah Coal Co. v. Chaco Energy Co., 673 F.2d 1161, 1164-65 (10th Cir.) (holding that declaratory judgment cannot “be used as yet another weapon in a game of procedural warfare”) (citing Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180 (1952)), cert. denied, 456 U.S. 1007 (1982).<sup>1</sup>

This Court believes that KMART's action for declaratory relief before this Court is being used merely for the purpose of procedural fencing. As KMART explains in its Amended Complaint, Bud & Son and its partners have threatened to file a lawsuit against KMART concerning the instant contractual dispute. (First Amend. Compl. ¶ 13.) KMART does not dispute Bud & Son's allegation that the instant contractual dispute is nearly identical to the one KMART lost in the Eastern District. Therefore, this Court is left with the unavoidable conclusion

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<sup>1</sup> Hospah Coal Co. does not stand for the proposition, as KMART suggests, that a court must honor the choice of forum of the first party to file a complaint. The Tenth Circuit explained, [W]e find that *Kerotest* stands for the proposition that simply because a court is the first to obtain jurisdiction does not necessarily mean that it should decide the *merits* of the case. However, in *Kerotest* the Court pays great deference to the district court's ability to decide if it should accept venue. We believe that *Kerotest* is in line with our view that the court which first obtained jurisdiction should be allowed to first decide issues of venue. Hospah Coal Co., 673 F.2d at 1164.

that KMART is using its action for declaratory judgment "as yet another weapon in a game of procedural warfare," a purpose that is highly disfavored in this circuit.<sup>2</sup> This Court therefore declines to hear KMART's action for declaratory judgment.

For the reasons cited herein, Bud & Son's motion to dismiss is GRANTED.

IT IS SO ORDERED THIS 18 DAY OF JUNE, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

---

<sup>2</sup> KMART laments that if this Court declines to hear its case, KMART could be forced to wait until "the next millennium" before a resolution of the instant dispute. (Def. Surreply Br. at 4.) This contention is disingenuous. KMART is free to seek declaratory relief in the Eastern District in this millennium.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL A. ONORATO aka DANIEL  
ANTHONY ONORATO aka D. A.  
ONORATO, JR.; VNB MORTGAGE  
CORP.; COUNTY TREASURER, Tulsa  
County, Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE JUN 21 1996

**F I L E D**

JUN 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 1030K

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 18 day of June,

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; and the Defendants, DANIEL A. ONORATO aka Daniel Anthony Onorato aka D.A. Onorato, Jr. and VNB Mortgage Corp., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DANIEL A. ONORATO aka Daniel Anthony Onorato aka D.A. Onorato, Jr., acknowledged receipt of Summons and Complaint on December 8, 1995, by Certified Mail.

**NOTE: THIS ORDER IS TO BE MAILED  
BY 1700 HRS TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.**

The Court further finds that the Defendant, VNB MORTGAGE CORP., 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 March 1, 1996, and continuing through April 5, 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, VNB MORTGAGE CORP., 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, VNB MORTGAGE CORP. 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 its 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 October 25, 1995; and that the Defendants, DANIEL A. ONORATO aka Daniel Anthony Onorato aka D.A. Onorato, Jr. and VNB MORTGAGE CORP., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DANIEL A. ONORATO, is one and the same person as Daniel Anthony Onorato and D.A. Onorato, Jr., and will hereinafter be referred to as "DANIEL A. ONORATO." DANIEL A. ONORATO, is a single unmarried person.

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 6, BLOCK 5, SUNWOOD HILLS SECOND AN  
ADDITION TO THE CITY OF TULSA, TULSA  
COUNTY, STATE OF OKLAHOMA ACCORDING TO  
THE RECORDED PLAT THEREOF.

The Court further finds that on April 29, 1986, Richard Greg Arend and Linda Ann Arend, executed and delivered to Phoenix Federal Savings and Loan Association, their mortgage note in the amount of \$67,521.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9½ %) per annum.

The Court further finds that as security for the payment of the above-described note, Richard Greg Arend and Linda Ann Arend, husband and wife, executed and delivered to Phoenix Federal Savings and Loan Association, a mortgage dated April 29, 1986, covering the

above-described property. Said mortgage was recorded on April 30, 1986, in Book 4939, Page 751, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1992, CIMARRON FEDERAL SAVINGS AND LOAN ASSOCIATION SUCCESSOR IN TITLE TO PHOENIX FEDERAL SAVINGS AND LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to BANCOKLAHOMA MORTGAGE CO. This Assignment of Mortgage was recorded on September 1, 1992, in Book 5433, Page 2527, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 6, 1994, BANCOKLAHOMA MORTGAGE CORP., assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, his successors and assigns. This Assignment of Mortgage was recorded on September 6, 1994, in Book 5656, Page 1153, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, DANIEL A. ONORATO and Diane C. Onorato, then husband and wife, became the current record owners of the property by virtue of a General Warranty Deed, dated August 14, 1986, recorded on August 15, 1986, in Book 4963, Page 819, in the records of Tulsa County, Oklahoma. The Defendant, DANIEL A. ONORATO and Diane C. Onorato, became the current assumptors of the subject indebtedness.

The Court further finds that on August 31, 1994, the Defendant, DANIEL A. ONORATO and Diane C. Onorato, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that on March 22, 1991, Daniel A. Onorato and Diane Lynn Onorato, filed their petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 91-B-925-W, which was Discharged on July 29, 1991, and subsequently closed on August 29, 1991. The subject property was scheduled in the real property of the bankruptcy.

The Court further finds that the Defendant, DANIEL A. ONORATO, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DANIEL A. ONORATO, is indebted to the Plaintiff in the principal sum of \$72,943.39, plus interest at the rate of 9½ percent per annum from September 18, 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 Defendants, DANIEL A. ONORATO and VNB MORTGAGE CORP., are in default, and have no right, title or interest in the subject real property.

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

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

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

Urban Development, have and recover judgment In Rem against the Defendant, DANIEL A. ONORATO, in the principal sum of \$72,943.39, plus interest at the rate of 9½ percent per annum from September 18, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, DANIEL A. ONORATO, VNB MORTGAGE CORP., COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, DANIEL A. ONORATO, 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;

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.

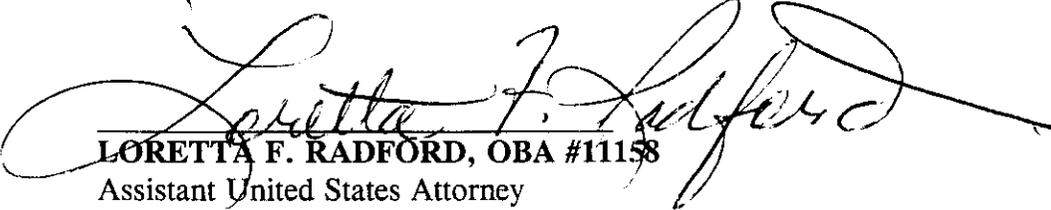
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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

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) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 1030K

LFR:flv