

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

F I L E D

OCT 16 1996

CIVIL DIVISION

BERRI NORRIS,

Plaintiff,

vs.

Case No. 96-C-0045-H

EOD 10/18/96

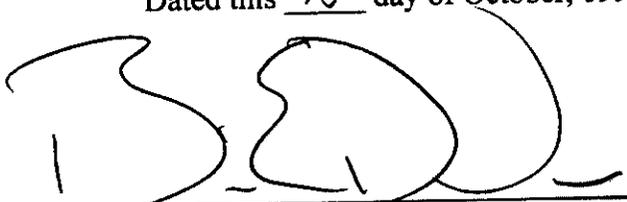
TULSA NURSING CENTER,
an Oklahoma Health Care Facility,

Defendant.

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

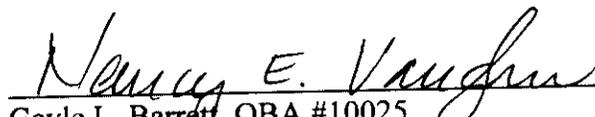
Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Berri Norris, and the Defendant, Tulsa Nursing Center, jointly stipulate and agree that this action should be and is hereby dismissed with prejudice. Each party has agreed to bear its own costs, attorneys fees, and expenses.

Dated this 15 day of October, 1996.



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ATTORNEYS FOR DEFENDANT

Plaintiff claims that he sought and received medical attention on the evening of July 26, 1995, but was denied medical treatment on July 27, 1995. Plaintiff additionally alleges that he was transferred to Lexington Correctional Center on July 27, 1995. Plaintiff states that on August 8, 1995, he was transferred to the Dick Connors Correctional Center.

Plaintiff asserts that on August 9, 1995 he submitted a phone list to the Dick Connors Correctional Center. Plaintiff contends that the purpose of the list was to permit names and telephone numbers to be added to the telephone computer system to enable him to make phone calls. After some complaints, Plaintiff alleges that he was told on September 15, 1995, that his list of names would be added to the computer. Plaintiff states that his concerns went unanswered, and that he filed a grievance on September 20, 1995.

Defendant filed a "Martinez" report and a Motion to Dismiss on January 31, 1996. Defendant contends that after being notified by Plaintiff that Plaintiff had been orally sodomized by another inmate, Plaintiff was taken for an immediate medical examination. According to Defendant, the result of the examination indicated Plaintiff had sustained no physical injuries.

Defendant acknowledges that Plaintiff was transferred, the day after the incident, to a different correctional center. Defendant notes that the transfer was administrative and had nothing to do with the incident.

Defendant additionally conducted an investigation of Plaintiff's complaint. According to the Unit Manager, an inmate stated that Plaintiff went to the cell where

Plaintiff claimed that he was assaulted wearing only boxer shorts and carrying three packages of cigarettes. According to Defendant, the name of the individual who Plaintiff claims assaulted him is inmate Willis. Inmate Lee is inmate Willis' cellmate. Defendant asserts that inmate Lee stated that he was present when Plaintiff entered the cell he shared with Willis, and that Plaintiff informed Lee and Willis that Plaintiff had watched a documentary on television about inmates who sue the state for large amounts of money claiming they are raped by other inmates. Inmate Lee stated he left the cell, leaving Plaintiff and inmate Willis in the cell alone.

Defendant asserts that in an interview with inmate Willis, the inmate who allegedly attacked Plaintiff, inmate Willis stated that Willis weighed 130 pounds and Plaintiff weighed closer to 200 pounds. Inmate Willis stated that due to their physical differences, he would be physically unable to assault Plaintiff. Inmate Willis stated that the current "price" for oral sodomy was three packages of cigarettes.

Defendant also notes that Defendant taped an interview with Plaintiff. According to Defendant, Plaintiff stated that he did not leave the cell during the alleged assault because he was waiting for inmate Willis' cellmate to return. According to Defendant, Plaintiff also stated that he did not feel he was going to be hurt and that he "was in total control" of the situation.

MOTION TO DISMISS

Standard: Motion to Dismiss

A motion to dismiss pursuant to 12(b)(6) should not be granted unless it is apparent that the plaintiff can prove no set of facts in support of his claim that would

entitle him to relief. See Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). "A court reviewing the sufficiency of a complaint presumes all of a plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." Hall, 935 F.2d at 1109. When a plaintiff is *pro se*, the court construes the pleadings liberally and holds the *pro se* plaintiff to a less stringent standard than an attorney. Id. at 1110. However, this "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. Not every fact must be described in specific detail, . . . and the plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint, Nevertheless, conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based" Id. at 1110 (citations omitted).

Failure to Protect: 8th Amendment

Plaintiff asserts that his rights were violated when he was attacked and orally sodomized by another inmate while in prison.

Within the context of state prisoner civil complaints, Federal courts can address only such complaints if the asserted conduct or incident constitutes a violation of the inmate's Federal Constitutional rights. In this case, the Eighth Amendment to the Constitution provides certain rights to an individual to be free from "cruel and unusual" punishment. The courts have concluded that inmates do have a right to be reasonably protected from threats of violence and attacks by other inmates. See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Deliberate

indifference on the part of corrections officials to inmate safety and the probability of violent attacks violates a convicted prisoner's Eighth Amendment rights. Berry v. City of Muskogee, 900 F.2d 1489, 1494-95 (10th Cir. 1990).

However, under the deliberate indifference standard, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that [an] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 114 S. Ct. 1970, 1984 (1994); see also MacKay v. Farnsworth, 48 F.3d 491, 493 (10th Cir. 1995) (the requisite mental state is that of deliberate indifference). The Court in Farmer additionally noted that an official's "failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be considered as the infliction of punishment." Farmer, 114 S. Ct. at 1979.

The Seventh Circuit Court of Appeals recently explained deliberate indifference to inmates' safety as follows:

If [prison employees] place a prisoner in a cell that has a cobra, but they do not know that there is a cobra there (or even that there is a high probability that there is a cobra there), they are not guilty of deliberate indifference even if they should have known about the risk, that is, even if they were negligent--even grossly negligent or even reckless in the tort sense--in failing to know. But if they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference.

Billman v. Indiana Dept. of Corrections, 56 F.3d 785, 788 (7th Cir. 1995).

In this case, Plaintiff has not **alleged** or established that Defendant knew that Plaintiff might be "attacked" by inmate Willis. Plaintiff alleges only that he went to the cell of inmates Lee and Willis, that inmate Lee left the cell, and that inmate Willis orally sodomized him.^{1/} Plaintiff has **alleged** no facts that establish that Defendant disregarded a serious risk of harm of which Defendant was aware, or that the risk was blatantly obvious. Farmer, 114 S. Ct. at 1984. Accordingly, Defendants' motion to dismiss must be granted as to Plaintiff's claim that Defendant violated his Eighth Amendment rights.

Telephone Access

Plaintiff additionally asserts that Plaintiff, after being transferred to the Dick Connors Correctional Facility, **submitted** a list of phone numbers to Defendant to permit Defendant to add the phone numbers to the computer calling system. Plaintiff states that he complained at various times to Defendant, and that Defendant never remedied the problems Plaintiff was **experiencing** with the telephone system. Plaintiff asserts that Defendant's failure to **correct** and provide for his telephone calls violated his rights.

A federal court is obligated to **dismiss** a prisoner complaint based on § 1983 if the prisoner cannot establish that the defendant, while acting under color of state law, deprived the prisoner of an existing **federal** constitutional right. See, e.g., Adickes v.

^{1/} In fact, Plaintiff's statements in his **brief** are contrary to a "deliberate indifference" standard. Plaintiff states that he "was forceful[ly] sexual[ly] **assaulted** 'oral[ly] sodomized' on his private part by another inmate in an unwanted sexual **crave** attack. . . ." The attack, as described by Plaintiff, appears to have been unanticipated. If the prison officials **could not** anticipate such an attack, their lack of "precautions" were not "deliberately indifferent."

S.H. Kress & Co., 398 U.S. 144, 150 (1970). A prisoner has no federal constitutional right to make personal telephone calls. See Martinez v. Mesa County Sheriff, 1995 WL 640302 (10th Cir. Nov. 1, 1995), *citing* Neitzke v. Williams, 490 U.S. 319, 327 (1989).^{2/} Plaintiff does not specify the constitutional right which he claims is violated. Based on the facts as presented by Plaintiff, the magistrate judge recommends that Plaintiff's claims be dismissed without prejudice.

Transfer to Different Prison

Plaintiff asserts that he was transferred to Lexington Correctional Center on July 27, 1995, and to the Dick Connors Correctional Center on August 8, 1995. Plaintiff does not specify what rights were violated by his transfers.

Plaintiff has no constitutional right to incarceration in a particular cell or facility. Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Plaintiff may have had in remaining in a particular facility is too insubstantial to rise to the level of due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), *cert. denied*, 461 U.S. 946 (1983); Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his

^{2/} Plaintiff does not allege that the "denial" of telephone access impeded his right to an attorney. In some circumstances, courts have recognized that restrictions on a pretrial detainee's telephone privileges which prevent the detainee from contacting his attorney may violate the Sixth Amendment. See Tucker v. Randall, 948 F.2d 388, 390-91 (7th Cir. 1991). However, Plaintiff asserts that the failure to properly input his telephone list into the computer interfered with his telephone calls to family members.

'right' in violation of due process").^{3/} To the extent that Plaintiff alleges that the prison officials improperly transferred him, he has not alleged a violation of the federal constitution, and the magistrate judge recommends that Plaintiff's complaints based on his transfer to a different facility be dismissed without prejudice.^{4/}

Denial of Medical Treatment

Plaintiff asserts that after he initially complained that he was raped he received medical attention from the registered nurse who was on duty. Plaintiff states that he has received no psychological therapy since the alleged rape.

Defendant notes that the registered nurse examined Plaintiff and found no physical injuries. Defendant asserts that Plaintiff, in an interview after the incident, claimed that he was "in control" of the situation at all times, but was hurt that inmate Willis did not respect him. Defendant, after concluding the investigation, recommended that no action be taken and concluded that none of the information gathered by the investigation supported Plaintiff's charge of rape.

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

^{3/} Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Macgip, 703 F.2d 909, 911 (5th Cir. 1983).

^{4/} Even if Plaintiff's complaint is liberally construed as alleging a retaliatory transfer, Plaintiff has still not asserted the violation of a federal constitutional right. A retaliatory transfer claim may be cognizable in a § 1983 action if the transfer is made in retaliation for the exercise of a federal constitutional right. See, e.g., Frazier v. L.F. Dubois, 922 F.2d 560 (10th Cir. 1990) ("Thus, we agree that '[w]hile a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution."). However, Plaintiff has not alleged that the transfer was in retaliation for his exercise of a federal constitutional right.

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).

Estelle requires a two pronged analysis. First, the objective component, requires that the prisoner's illness or injury be serious. Second, the subjective component, 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).

The constitutional duty to provide necessary medical care to inmates includes psychological or psychiatric care. Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980), cert. denied 450 U.S. 1041 (1981). A medical need is considered serious if it has been diagnosed by a doctor as mandating treatment, or if it is so obvious even a law person would recognize the need for a doctor's attention. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied 450 U.S. 1041 (1981).

The Fourth Circuit held, in Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) that a prisoner

is entitled to psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with

reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.

Id. at 47, cited with approval in Riddle v. Mondragon, 83 F.3d 1197 (10th Cir. 1996).

Applying the standards outlined by the Supreme Court in Estelle, and the Tenth Circuit in Ramos and Riddle, the magistrate judge concludes that the Plaintiff's allegations are insufficient to state a cause of action. Plaintiff's claims do not satisfy either prong of the test outlined by the Supreme Court in Estelle, and should be dismissed without prejudice.

COMPLIANCE WITH RULE 10(a)

Plaintiff's initial complaint was filed against "Ron Champion et al." Fed. R. Civ.

P. 10(a) provides:

Every pleading shall contain a caption setting forth the number of the court, the title of the action, the file number, and a designation as in Rule 7(A). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Fed. R. Civ. P. 10(a) (emphasis added).

In Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992), cert. denied 506 U.S. 915 (1992), the district court ordered a *pro se* plaintiff to file an amended complaint designating the names of the defendants and deleting "et al" from the caption. The *pro se* plaintiff was warned that if he did not file an amended petition his action would

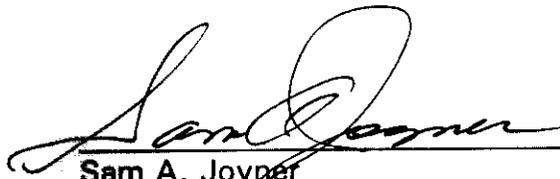
be dismissed. The plaintiff failed to comply with the court order, and the district court dismissed the complaint. On appeal, the Ninth Circuit affirmed the dismissal.

The magistrate judge is recommending dismissal of Plaintiff's complaint for failure to state a violation of a federal constitutional claim. However, assuming Plaintiff could adequately meet the requirements of a federal constitutional violation, the caption of Plaintiff's complaint does not comply with the Federal Rules of Civil Procedure because it does not specifically name each defendant. Absent dismissal of the complaint, Plaintiff should be required to comply with Fed. R. Civ. P. 10(a).

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** the Motion to Dismiss and **Dismiss** Plaintiff's action without prejudice. Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 17 day of October 1996.



Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

^{18th} day of October, 1996.
Frank M. Collins, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ZAKIYA S. AL-RIYAMY,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA STATE UNIVERSITY,)
 by and through,)
 THE BOARD OF REGENTS OF AND)
 FOR THE OKLAHOMA)
 AGRICULTURAL AND)
 MECHANICAL COLLEGES, ex rel.;)
 THOMAS C. COLLINS, WAYNE)
 POWELL, JOHN VEENSTRA, GREG)
 WILBER, MIKE AYERS,)
 WILLIAM CLARKSON, WILLIAM)
 McTERNAN, and ROBERT HUGHES,)
 as individuals;)
)
 Defendants.)

No. 96-C-0111 K ✓

FILED
OCT 16 1996 *Le*
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE OCT 18 1996

JOINT STIPULATION FOR ORDER OF DISMISSAL

COME NOW the plaintiff, ZAKIYA S. AL-RIYAMY, by and through her attorney of record, Kathy Evans Borchardt, and the defendants, by and through their attorney of record, David W. Lee, and as a result of of a Settlement Agreement and Full and Final Release of All Claims dated September 30, 1996, hereby stipulate that all issues pending between the parties to this proceeding have been resolved and submit that the Court should Order a Dismissal with Prejudice of this action.

WHEREFORE, premises considered, the parties pray that the Court enter an Order of Dismissal with Prejudice.

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Respectfully submitted,

Kathy Borchardt

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David W. Lee

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

OCT 17 1996

CHARLES E. CRABTREE,

Plaintiff,

vs.

TULSA COUNTY DISTRICT COURT,
and KEITH O. McARTOR,
Assistant District Attorney,

Defendants.

No. 96-CV-49-BU ✓

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

ENTERED ON DOCKET

DATE OCT 18 1996

ORDER

Plaintiff, a pretrial detainee at the Tulsa County Jail appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983 against Keith O. McArtor, Assistant District Attorney, Tulsa County, for malicious prosecution and defamation of character. The Defendant has moved to dismiss on the basis of absolute prosecutorial immunity. (Docket #4.) The Plaintiff has objected to Defendants' motion and has moved for summary judgment. (Docket #6.) For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be granted and Plaintiff's motion for summary judgment should be denied.

On October 3, 1995, the Tulsa County District Attorney's Office charged Plaintiff with Forcible Sodomy, Rape, Lewd Molestation, and Rape by Instrumentation, after former conviction of a felony, in Case No. CF-95-4724. At the preliminary hearing on December 4, 1995, some of Plaintiff's charges were dismissed whereas others were amended to sexual abuse of a minor child. Plaintiff is presently incarcerated awaiting jury trial.

In his complaint, Plaintiff alleges that on September 28 and October 3, 1995, Mr. McArtor made false statements in Case Nos. JVD-95-142 and CRF-95-4724 with intent to damage Plaintiff's character and subject him to harassment. Plaintiff alleges that Tulsa County Jail inmates attacked him after learning of these statements and, as a result, he is now forced to remain in segregation. Plaintiff further alleges that his family and friends have ostracized him since learning of these statements. Plaintiff seeks a jury trial, compensatory and punitive damages for the alleged damage to his reputation, and declaratory or injunctive relief.¹

A Court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1512 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S.

¹ On January 31, 1996, the Court sua sponte dismissed Plaintiff's claims against Sallie Howe Smith, Court Clerk of Tulsa County, and the Tulsa County District Court. The Court noted that neither Ms. Smith nor the district court were involved in the prosecutorial process which was at the issue in this action.

519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Defendant has moved to dismiss this action on the basis of absolute prosecutorial immunity. State prosecutors, such as the Defendant in this case, are entitled to absolute immunity from suits for civil damages when such suits are based on the prosecutor's performance of functions "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Gagan v. Norton, 35 F.3d 1473, 1475 (10th Cir. 1994) (quoted case omitted), cert. denied, 115 S.Ct. 1175 (1995). Of course, "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993) (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993)). Indeed, the Tenth Circuit has repeatedly found investigative and administrative actions taken by state prosecutors to be adequately protected by the doctrine of qualified, rather than absolute immunity. Gagan, 35 F.3d at 1475.

In making the often "difficult distinction" between prosecutorial and non-prosecutorial activities (i.e., absolute and qualified immunity), we have held "the determinative factor is "advocacy" because that is the prosecutor's main function." Pfeiffer, 929 F.2d at 1490 (quoting Rex, 753 F.2d at 843); Spielman v. Hildebrand, 873 F.2d 1377, 1382 (10th Cir. 1989). Finally, we have applied a continuum-based approach to these decisions, stating "the more distant a function is from the judicial process and the initiation and presentation of the State's case, the less likely it is that absolute immunity will attach." Pfeiffer, 929 F.2d at 1490 (citing Snell, 920 F.2d at 687).

Id. at 1476.

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

As to Plaintiff's malicious prosecution claim, the Court concludes that it also fails to state a claim upon which relief can be granted. Even assuming that Plaintiff could allege an adequate constitutional foundation for his malicious prosecution claim under section 1983, see Albright v. Oliver, 510 U.S. 266 (1994),

² Regardless the alleged damage to Plaintiff's reputation does not rise to a constitutional deprivation. See Paul v. Davis, 424 U.S. 693, 706-12 (1976); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1268 (10th Cir. 1989).

Plaintiff cannot prove any set of facts in support of at least one of the essential elements of malicious prosecution. See Anthony v. Baker, 808 F. Supp. 1523, 1526 (D.Colo. 1992) (in order to establish malicious prosecution a plaintiff must allege and prove all the elements of malicious prosecution under state law); see also Torres v. Superintendent of Police, 893 F.2d 404, 409 (1st Cir. 1990). Under Oklahoma law, a plaintiff bears the burden of affirmatively showing the following elements to establish a claim of malicious prosecution: 1) initiation of a civil or criminal action against the plaintiff, 2) want of probable cause in procuring the action, 3) the successful termination of the action in favor of the plaintiff, 4) malice on the part of the defendants, and 5) damages as a result of the action. Meyers v. Ideal Basic Industries, Inc., 940 F.2d 1379, 1383 (10th Cir. 1991), cert. denied, 112 S.Ct. 935 (1992); Linsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1124 (10th Cir. 1979), cert. denied, 444 U.S. 856 (1979); Page v. Rose, 546 P.2d 617, 620 (Okla. 1975).

Because Plaintiff is presently awaiting trial in Tulsa County District Court, as noted in the complaint and Defendant's motion, Plaintiff can prove no set of facts in support of his claim that the criminal proceedings were resolved in his favor. See also Heck v. Humphrey, 512 U.S. 477 (1994) (money damages premised on an unlawful conviction cannot be recovered under section 1983 unless the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by federal court's

issuance of a writ of habeas corpus); Parris v. United States, 45 F.3d 383, 384 (10th Cir. 1995) (same), cert. denied, 115 S.Ct. 1984 (1994). Accordingly, after liberally construing Plaintiff's pleadings in accord with his pro se status, see Haines v. Kerner, 404 U.S. 519, 520 (1972), and construing all the allegations in the light most favorable to the Plaintiff, the Court concludes that Defendant's motion to dismiss for failure to state a claim should be granted and that Plaintiff's civil rights action should be dismissed without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to dismiss for failure to state a claim (doc. #4) is granted and this action is hereby dismissed without prejudice. Plaintiff's motion for summary judgment (doc. #6) is denied as moot.

SO ORDERED THIS 17th day of October, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM D. CARDWELL; NOLA E.
CARDWELL; CITY OF BIXBY,
Oklahoma; COUNTY TREASURER,
Tulsa County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

EXHIBIT COVER SHEET ✓

DATE OCT 18 1996

Civil Case No. 95 C 1042H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16th day of **October**, 1996, there comes on for hearing before the Magistrate Judge the Motion of the **United States** of America to confirm the sale made by the United States Marshal for the Northern **District** of Oklahoma on August 5, 1996, pursuant to an Order of Sale dated May 2, 1996, of **the following** described property located in Tulsa County, Oklahoma:

**Lot Twenty-seven (27), Block Four (4),
SOUTHWOOD EAST, and addition to the town of
Bixby, Tulsa County, State of Oklahoma, according to
the recorded Plat thereof.**

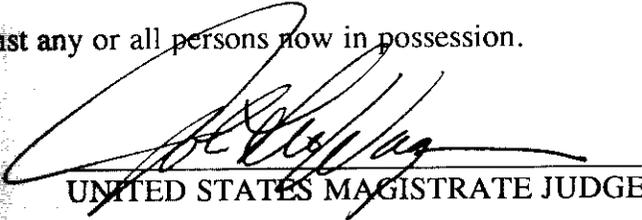
Appearing for the **United States** of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Tom D. Cardwell, Nola E. Cardwell, City of Bixby, Oklahoma, **County Treasurer**, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, **Oklahoma**, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes **the following** report and recommendation.

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The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Bixby Bulletin, a newspaper published and of general circulation in Bixby, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

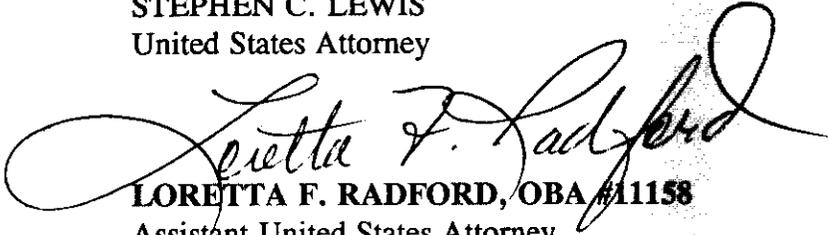
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95 C 1042H

CERTIFICATE OF SERVICE

The undersigned, Clerk of the Court, hereby certifies that a copy of the within report and recommendation of the United States Magistrate Judge in the above captioned case has been filed with the Clerk of the Court and that the parties to the case have been notified of the filing of the report and recommendation.

18th day of October 1995
C. C. [Signature], Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 SALLY FRAZIER fka Sally Haner;)
 UNKNOWN SPOUSE OF Sally Frazier)
 fka Sally Haner, if any; PAUL HANER;)
 UNKNOWN SPOUSE OF Paul Haner, if)
 any; STATE OF OKLAHOMA, *ex rel.*)
 DEPARTMENT OF HUMAN SERVICES;)
 COUNTY TREASURER, Rogers County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Rogers County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE OCT 18 1996

Civil Case No. 95-C 795H /

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16 day of October, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 2, 1996, pursuant to an Order of Sale dated March 26, 1996, of the following described property located in Rogers County, Oklahoma:

The West 845 feet of the North 458.5 feet of the NE¹/₄ of NE¹/₄ of Section 18, Township 23 North, Range 17 East of the I.B. & M., Rogers County, Oklahoma, according to the U.S. Government Survey thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Sally Frazier, Chris Crites the Unknown Spouse of Sally Frazier, State of Oklahoma, *ex rel.* Department of Human Services, County Treasurer, Rogers County, Oklahoma and Board of County Commissioners, Rogers

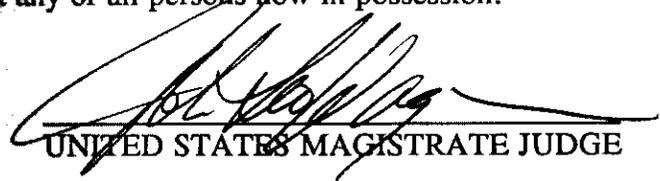
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County, Oklahoma, by mail and to the Defendants, Paul Haner and Unknown Spouse of Paul Haner, if any, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

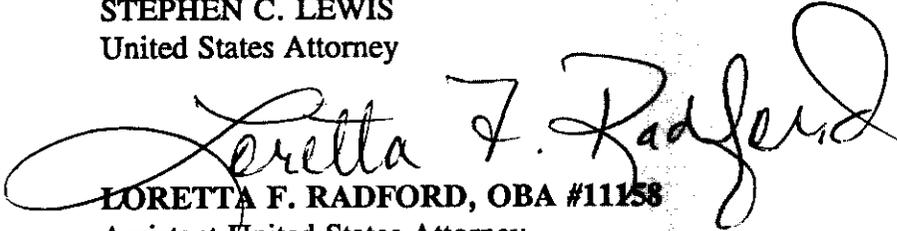
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 795H

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy
of the foregoing pleading was served on each
of the parties named by the summons to
them or to their attorneys of record on the

18th day of October, 1996.
C. Hentelley, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 17 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CLYDE PATRICK, JR.; VICKI S.)
PATRICK; CITY OF GLENPOOL,)
Oklahoma; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE OCT 18 1996

Civil Case No. 95-C 1043H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 16th day of OCT, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on August 5, 1996, pursuant to an Order of Sale dated May 3, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Fifteen (15), Block Nine (9), ROLLING MEADOWS II, an Addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Clyde Patrick, Jr., Vicki S. Patrick, City of Glenpool, Oklahoma, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Glenpool Post, a newspaper published and of general circulation in Glenpool, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

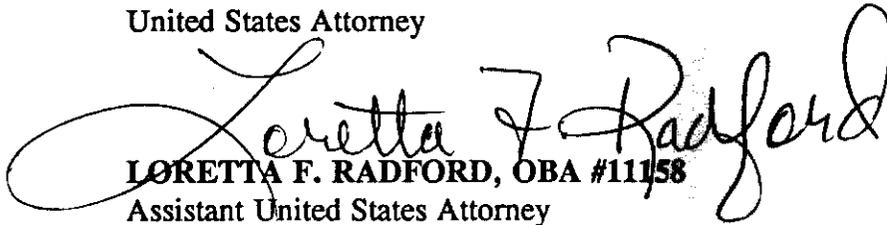
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 1043H

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Report and Recommendation of the Magistrate Judge in the above captioned case has been filed with the Clerk of the Court and that a copy of the Report and Recommendation of the Magistrate Judge has been served on the parties to the case by the undersigned on the 18th day of October, 1996.

C. Portillo, Deputy Clerk

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

DONALD MARK NEWMAN,
Plaintiff,
vs.
BILL BRIMMER, and TERESA
BRIMMER,
Defendants.

No. 95-C-527-H

FILED

OCT 15 1996

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

ENTERED ON DOCKET

DATE OCT 17 1996 ✓

ORDER

Before the Court for consideration is Defendants' motion for summary judgment. (Docket #32.) Also before the Court are Plaintiff's motions to compel discovery, to amend style of pleadings, to amend scheduling order, to bar testimony, and to withdraw motion to dismiss. (Docket #16, #24, #28, #33, and #39.) On October 4, 1996, the Court heard oral arguments on Defendants' motion for summary judgment. As more fully set out below, Defendants' motion for summary judgment and Plaintiff's motion to withdraw motion to dismiss are granted. Plaintiff's remaining motions are denied as moot.

In his amended complaint, Plaintiff Donald Mark Newman sues the Defendants for breach of contract and trespass, pursuant to 28 U.S.C. § 1332. Plaintiff seeks to recover \$35,000 in land payments, \$100,000 of capital improvements, and \$50,000 in punitive damages. Defendants contend that Plaintiff is not a party to the contract and, therefore, is not entitled to sue the Defendants for breach of contract.

Having reviewed the contract which is a part of the record in

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this case, the Court agrees that Late Kick Farms Limited, and not Plaintiff, was a party to the contract. (Ex A to Amended Complaint, Docket #14.) Plaintiff has neither alleged nor shown that he is authorized by Late Kick Farms Limited to sue in their name, nor does there appear in the record any assignment of the contract by Late Kick Farms Limited to the Plaintiff. Therefore, Plaintiff is not entitled to bring this action for breach of contract. See Okla. Stat. tit. 12, § 2017(A); Wittenberg v. Fidelity Bank, 844 P.2d 155, 158 (Okla. 1992) (every action must be prosecuted by the real party in interest).

Similarly, Plaintiff cannot bring an action in trespass as he is not the owner of the property in question. In fact, under the terms of the contract, it appears that Late Kick Farms Limited, and not Plaintiff, was the owner of the property.

Accordingly, Defendants' motion for summary judgment and Plaintiff's motion to withdraw motion to dismiss are hereby GRANTED. Plaintiff's motions to compel discovery, to amend style of pleadings, to amend scheduling order, and to bar testimony are DENIED AS MOOT.

IT IS SO ORDERED.

This 11TH day of OCTOBER, 1996.


Sven Erik Holmes
United States District Judge

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

EL PASO NATURAL GAS COMPANY,)

Plaintiff,)

v.)

Case No. 92-C-649 H ✓

WINDWARD ENERGY & MARKETING)
COMPANY and MARK A. PERRY,)

Defendants,)

FILED

OCT 15 1996

and)

WINDWARD ENERGY & MARKETING)
COMPANY and GOLDEN NATURAL)
GAS COMPANY,)

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

Counter-Plaintiffs,)

ENTERED ON DOCKET

v.)

DATE OCT 17 1996 ✓

BURLINGTON RESOURCES INC.,)
EL PASO NATURAL GAS COMPANY,)
MERIDIAN OIL HOLDING INC.,)
MERIDIAN OIL INC.,)
MERIDIAN OIL TRADING INC.,)
MERIDIAN OIL HYDROCARBONS INC.,)
MERIDIAN OIL MARKETING INC., and)
MERIDIAN OIL GATHERING INC.,)

Counter-Defendants.)

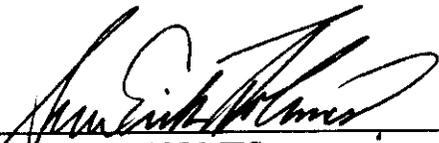
**ORDER OF DISMISSAL WITH PREJUDICE OF ALL
CLAIMS FOR RELIEF AND COUNTERCLAIMS**

There comes on for consideration the Joint Motion for Dismissal with Prejudice of the Parties, and the Court being fully advised **HEREBY FINDS AND ORDERS** that each and every

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complaint, claim for relief and counterclaim asserted herein is dismissed with prejudice to the bringing of a future action thereon.

DATED this 11TH day of October, 1996.


SVEN ERIK HOLMES
District Judge

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

FILED
OCT 15 1996

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

JACKIE HOWARD PARRET,)
)
Petitioner,)
)
v.)
)
BOBBY BOONE,)
)
Respondent.)

Case No. 94-C-221-H

ENTERED IN COURT

DATE OCT 17 1996

ORDER

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket #31), Petitioner's Objection to U.S. Magistrate's Report and Recommendation (Docket #32), an Order by Magistrate Judge McCarthy denying motion for order for copy of record at state's expense (Docket #33), and Petitioner's Objection to U.S. Magistrate's Order (Docket #34).

I.

When a party objects to a nondispositive order of a Magistrate Judge, Rule 72(a) of the Federal Rules of Civil Procedure provides in pertinent part that "[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Based on a review of the Order of the Magistrate Judge and the Objection thereto, the Court hereby denies Petitioner's Objection to U.S. Magistrate's Order (Docket #34).

II.

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

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Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge denying Petitioner's Petition for Writ of Habeas Corpus (Docket #1).

IT IS SO ORDERED.

This 11th day of October, 1996.



Sven Erik Holmes
United States District Judge

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

FILED
OCT 15 1996

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

MICHAEL COX,)
)
Plaintiff,)
)
v.)
)
GOODWILL INDUSTRIES OF)
TULSA, an Oklahoma Corporation,)
)
Defendant.)

Case No. 95-CV-565-H

ENTERED ON DOCKET
DATE OCT 17 1996

ORDER

This matter comes before the Court on the Report and Recommendation filed by Magistrate Judge Frank H. McCarthy (Docket #23).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), objections to a Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of the Report. Failure to file objections within the time allotted waives the right to appeal from a judgment of the District Court based upon the findings and recommendations of the United States Magistrate Judge. Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991).

In the instant case, Magistrate Judge McCarthy's Report and Recommendation was filed June 3, 1996. No objections to the report have been filed. Thus, the right to object to the findings and recommendations has been waived.

The Court hereby adopts Magistrate Judge McCarthy's Report and Recommendation (Docket #23) granting Defendant's Motion to Dismiss (Docket #17), dismissing the instant action without prejudice and requiring that Plaintiff seek leave of the Court to file any action based upon or including the same claim against Goodwill asserted in this action.

IT IS SO ORDERED.

This 11th day of October, 1996.


Sven Erik Holmes
United States District Judge

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10-9

F I L E D

OCT 16 1996

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)

Plaintiff,)

vs.)

CV 93-C-840-B ✓

**UNDETERMINED QUANTITIES OF DRUG,
GAS AND LIQUID OXYGEN FOR MEDICAL
USE IN HIGH PRESSURE CYLINDERS AND
CRYOGENIC HOME UNITS, et al.,**)

EOD 10/17/96

Defendants.)

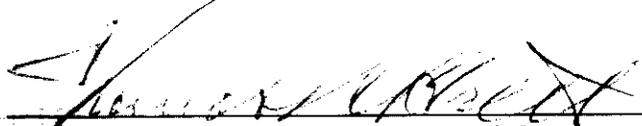
AGREED ORDER

Upon consideration of Defendant American Respiratory, Inc.'s Motion to Vacate, this Court, being fully advised, hereby finds and orders as follows:

1. Defendant American Respiratory, Inc. has been in continual compliance with the May 10, 1994, Consent Decree of Condemnation and Injunction since September 1, 1994.
2. The United States of America offers no opposition to the vacation of the Consent Decree with respect to America Respiratory, Inc.

Thus, IT IS HEREBY ORDERED that the Consent Decree be vacated with respect to Defendant American Respiratory, Inc.

Dated: 16 day of Oct, 1996.


UNITED STATES DISTRICT JUDGE

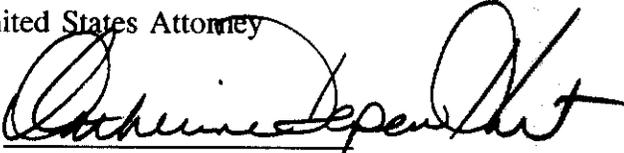
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We hereby consent to the foregoing Order.



Joseph R. Farris, OBA #
Feldman, Franden, Woodard,
Farris & Taylor
525 South Main, Suite 1400
Tulsa, OK 74103-4523
ATTORNEY FOR AMERICAN RESPIRATORY, INC.

STEPHEN C. LEWIS
United States Attorney

by: 

CATHERINE DEPEW HART
Assistant United States Attorney

MARGARET JANE PORTER
Chief Counsel

ARETA L. KUPCHYK
Assistant Chief Counsel for Enforcement,
Food and Drug Administration

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

RODNEY CHARLES MCCULLOUGH,)
)
 Petitioner,)
)
 v.)
)
 STEVE HARGETT,^{1/})
)
 Respondent.)

OCT 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-762-B

ENTERED ON DOCKET
DATE OCT 17 1996

REPORT AND RECOMMENDATION

Petitioner, Rodney Charles McCullough, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on August 9, 1995. Petitioner, is currently confined at the Mansfield Law Enforcement Center in Mansfield, Texas. Petitioner challenges his conviction for First Degree Murder in Tulsa County District Court, entered in Case No. CF-90-1475. By minute order dated July 23, 1996, the District Court referred the petition for a writ of habeas corpus for Report and Recommendation. For the reasons discussed below, the United States Magistrate Judge recommends that the petition for a writ of habeas corpus be DENIED.

I. **FACTUAL BACKGROUND**

Petitioner was living with a Ms. Paula Cosby. Ms. Cosby was married to but separated from the decedent Kevin Cosby. On March 23, 1990, Petitioner, who was celebrating his birthday, left work early. Petitioner met Mr. Cosby for the first time, later that day, when he arrived at the trailer home he shared with Ms. Cosby. Mr.

^{1/} Plaintiff notes that since the filing of this action he has been transferred to a different facility, and his current warden is H.N. "Sonny" Scott.

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Cosby, Ms. Cosby, and a friend of Ms. Cosby were at the trailer home. Petitioner left within the hour.

Mr. Wayne Gaskey testified that Petitioner telephoned him later that evening. Mr. Gaskey worked with Petitioner. Mr. Gaskey and Petitioner went to Taco Bueno to eat, and while at Taco Bueno Petitioner called the trailer home that he shared with Ms. Cosby. Mr. Gaskey testified that Petitioner appeared angry from the phone call, and requested that Mr. Gaskey take him to the trailer home.

At the trailer home, according to the testimony of Ms. Cosby, Petitioner wanted to know who had hung up the phone on him, and was informed that Mr. Cosby had unplugged the phone. Petitioner apparently took a swung at Mr. Cosby, and the two began wrestling. Mr. Cosby pinned Petitioner to the floor and eventually let him up. According to Ms. Cosby, Petitioner then headed to the bedroom stating that he was going to get his gun. Ms. Cosby informed Petitioner that he did not own a gun.

According to the testimony, Petitioner then went outside to the car and asked Mr. Gaskey to accompany him because Mr. Cosby was "big" and he needed help. Mr. Gaskey testified that Petitioner went back to the trailer house and knocked on the door. Mr. Cosby opened the door and hit Petitioner in the face with his fist. The two traded several punches on the porch. Mr. Gaskey testified that Mr. Cosby jumped off of the porch and the Petitioner followed him. Mr. Gaskey's line of vision was obscured for a short period of time. Mr. Gaskey testified that he saw Mr. Cosby and Petitioner rolling across the lawn, observed Ms. Cosby come out of the trailer house and yell to Mr. Cosby to "turn loose" of Petitioner because "you're going to hurt him," and saw

Mr. Cosby grab Petitioner and throw him against the trailer house and pin him. Mr. Gaskey testified that Mr. Cosby told Petitioner to drop the knife. According to Mr. Gaskey, Petitioner responded "if I do you'll kill me." Mr. Cosby backed away from Petitioner and walked into the trailer house.

According to Ms. Cosby, Mr. Cosby said that "he" stabbed me four times. Ms. Cosby made Mr. Cosby lie down; he told her he loved her, and he died.

Mr. Gaskey testified that when Petitioner was in the car Mr. Gaskey asked him if he had been cut or hurt. Petitioner responded "no, but he is. I stuck the mother - _____."

According to Mr. Gaskey, he and the Petitioner went back to Mr. Gaskey's residence where Petitioner cleaned up and changed shirts. (His shirt was covered with blood.) Petitioner and Mr. Gaskey then went to the Midnight Rodeo. According to Mr. Gaskey they were at the bar for approximately fifteen minutes when Petitioner said he was going to call the trailer house to find out if Ms. Cosby had taken Mr. Cosby to the doctor. After the phone call, Mr. Gaskey testified that Petitioner informed him that the sheriff or police had told him he should turn himself in, and Petitioner decided that he should. Mr. Gaskey drove Petitioner back to the trailer house.

At the trial, Ms. Cosby and Mr. Gaskey testified, relating, in part, the events of the night of March 23, 1990. In addition, a forensic pathologist, Ronald Distefano, the Chief Medical Examiner in Tulsa, testified.

Mr. Distefano testified that he performed the autopsy on Mr. Cosby, and that he died at approximately 9:40 p.m. on March 23, 1990. According to Mr. Distefano,

Mr. Cosby was 6'1", 160 pounds, and approximately 30 years old. Mr. Distefano testified that "stab wound number one" was located 19 inches from the top of the decedent's head, and the right edge of the wound was in the mid-line of the body. This stab wound perforated the sternum and the pericardium sac of the heart. Mr. Distefano testified that this would have required a great deal of force to perforate the sternum, and was, in his opinion, caused by a knife. Mr. Distefano testified that "stab wound number two" was located approximately 18 inches from the top of the head and to the left of the mid-line of the body. This stab wound perforated the rib cage, entered the left side of the lung, and perforated the pericardial sac and the wall of the left ventricle. Mr. Distefano testified that it caused massive bleeding and was the cause of death. "Stab wound number three" was 23 inches from the top of the head and to the left of the mid-line of the body. The stab wound angled up toward the heart, injuring the diaphragm. The medical examiner also testified about several other wounds to the decedent.

No further testimony was presented at trial. The record indicates that pictures depicting the various wounds to the decedent were introduced as evidence, but that the knife was not introduced. After a jury trial, Petitioner was convicted of First Degree Murder on June 19, 1990, and sentenced to a term of life imprisonment.

II. PROCEDURAL HISTORY

Petitioner appealed the decision of the trial court to the Oklahoma Court of Criminal Appeals. On direct appeal, Petitioner argued that: (1) the dismissal of minority venirepersons from the jury panel violated the equal protection clause; (2) the

state's photographic exhibits (depicting the decedent) prejudiced and inflamed the jury; (3) the trial court erred by refusing to give an instruction on self-defense; (4) the finding of guilt was based on insufficient evidence; and (5) prosecutorial misconduct undermined the fairness of the trial. See Response to Petition for Writ of Habeas Corpus, filed November 30, 1995, Exhibit "A." By Order dated July 15, 1994, the Oklahoma Court of Criminal Appeals remanded the case to the trial court for an evidentiary hearing with respect to Petitioner's assertion that the trial court improperly excluded two jurors based on race.

At an evidentiary hearing on August 9, 1994, Doug Horn, the prosecutor for the state during Petitioner's trial, testified. Doug Horn stated that his reason for excusing one of the potential jurors was because she was inattentive during the voir dire. Mr. Horn testified that he would have excluded any potential juror who appeared inattentive. According to Mr. Horn, the other juror was excluded because she had a relative who was in the penitentiary that had been either prosecuted by his office or by a district attorney's office. Mr. Horn testified that he excused five people based on this reason. Mr. Horn stated that he recalled the case because it was his first jury trial. In addition, Mr. Horn reviewed and submitted as an exhibit his notes on the jury from the trial. Mr. Horn's notes support his testimony. The trial court held, on August 29, 1994, that the jury was selected without any race prejudice or discrimination.

On March 27, 1995, the Oklahoma Court of Criminal Appeals, in a summary opinion, affirmed the decision of the trial court. See Response to Petition for Writ of Habeas Corpus, filed November 30, 1995, Exhibit "B."

In his application for post-conviction relief, Petitioner asserts the same five issues which he presented in his **direct appeal** to the Oklahoma Court of Criminal Appeals.

III. ANALYSIS

As a preliminary matter, a court **must** determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's **appellate** court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in **state court** at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), **cert. denied**, 475 U.S. 1020 (1986). As outlined above, each of the claims presented by **Petitioner** have been previously submitted to and decided by the Oklahoma Court of **Criminal Appeals**. The Court finds that the Petitioner meets the exhaustion requirements.

The granting of an evidentiary **hearing** is discretionary with the Court. Because the issues raised by Petitioner can **be resolved** on the basis of the record, the Court declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

BATSON CHALLENGE

Petitioner asserts that the state used peremptory challenges to improperly excuse two potential jurors based on their race.

In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that the exclusion of individuals from a jury, by the state, based solely on race violated a defendant's right to equal protection under the Constitution. In Powers v. Ohio, 499 U.S. 400 (1991), the Supreme Court explained that the holding in Batson applied even when the defendant and the excluded juror were not members of the same race.

In this case, Petitioner, who is white, objects that the state removed, by preemptory challenges, two potential black jurors. The trial court, during the trial, overruled Petitioner's objection, stating that Petitioner's objection to the exclusion of black jurors when the Petitioner is not black was "out in left field" and the trial court resented dealing with such a "frivolous objection."

Noting the Batson and Powers cases, the Oklahoma Court of Criminal Appeals remanded to the trial court for an evidentiary hearing to address the reason for the excusal of the two potential jurors. As noted above, the prosecuting attorney explained that Petitioner's trial was his first trial and he consequently recalled the trial. In addition, the prosecuting attorney had retained his jury notes which assisted his recollection. The prosecuting attorney testified that he excused the first juror for inattentiveness, and the second juror because she had a relative who was currently in prison.

Petitioner asserts only that the **state** has failed to articulate a race-neutral reason for the excusal of the two jurors. However, the courts have recognized "inattentiveness" as a race neutral reason. See United States v. Johnson, 4 F.3d 904, 913 (10th Cir. 1993) (recognizing the propriety of striking prospective jurors who are inattentive), cert. denied, 114 S. Ct. 1081 (1994). With regard to the second potential juror, the prosecuting attorney additionally explained that he excused a total of five potential jurors because of incarcerated relatives.^{2/}

The trial court found that the reasons articulated by the prosecuting attorney were sufficiently race neutral. In accordance with Batson,

once the opponent of a preemptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, __ U.S. __, 115 S. Ct. 1769, 131 L. Ed. 2d 834, 839 (1995). In this case, the trial court found that the **state** offered a sufficient race-neutral explanation of the preemptory strikes. In addition, **the** Petitioner has no other argument to suggest purposeful racial discrimination. **The** trial court's conclusion that the state's preemptory challenges to the two potential jurors was not motivated by race is supported by the evidence.

^{2/} The prosecuting attorney did state that he did not exercise a preemptory challenge with respect to one juror who had had a relative in prison, because the relative had been released and had served only ten years of a longer sentence.

Petitioner additionally argues that the trial court erred in not demanding a race-neutral reason at the time of trial, that the prosecutor could not recall his reasons for exclusion several years later at the evidentiary hearing, and consequently the only logical solution is to order a re-trial. Petitioner cites no authority to support his argument. In U.S. v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987), the Tenth Circuit, in addressing a Batson challenge, remanded the case to the trial court for an evidentiary hearing to determine the reasons for the state's exercise of its peremptory challenges. See also Harris v. Johnson, 81 F.3d 535, 538 (5th Cir. 1996); Turner v. Marshall, 63 F.3d 807; 814 (9th Cir. 1995), cert. denied, 116 S. Ct. 1863 (1996); Johnson v. Love, 40 F.3d 658, 661 (3rd Cir. 1994). The Court concludes that remanding the case to the trial court for the purpose of determining the prosecutor's basis for excusing the potential jurors was not error.

THE PHOTOGRAPHIC EXHIBITS

Petitioner argues that the trial court erred by admitting explicit photographic exhibits which were prejudicial to Petitioner. Petitioner cites Oklahoma case law and statutes to support his claim. In his reply brief, Petitioner asserts that his arguments are supported by the Fifth and Fourteenth Amendments to the United States Constitution.

Even if Petitioner is correct that the admission of the photographs violated Oklahoma law, habeas corpus relief is not available for alleged errors of state law. State court evidentiary rulings are reviewed on a petition for habeas corpus to determine only "whether the error, if any, was of such magnitude as to deny petitioner

his right to a fair trial.” Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) (citations omitted).

Erroneously admitted **evidence** deprives a defendant of fundamental fairness only if it was a “crucial, critical, highly significant factor in the defendant’s conviction.” The introduction of graphic **photographic** evidence rarely renders a proceeding **fundamentally unfair**.

Id. at 1296 (citations omitted). See also Gomez v. Ahitow, 29 F.3d 1128 (7th Cir. 1994) (“[W]e believe [that] the ‘only conceivable reason for placing them [the photographs] was to inflame the jury against [the defendant].’ Nonetheless, we cannot say that any resulting prejudice amounted to the likelihood that an innocent person was convicted, which as we **have stated** is what a petitioner alleging a violation of a general right to a fair trial must **demonstrate** to obtain habeas relief.”), cert. denied, 115 S. Ct. 1122 (1994).

After examining the **photographs** in question, the Court concludes that the admission of the photographs were **not inflammatory** or gruesome and that their introduction into evidence did not **deny** Petitioner a fundamentally fair trial.

JURY INSTRUCTION ON SELF DEFENSE

Petitioner asserts that the trial court **erred** by refusing to give an instruction on self-defense. Federal habeas relief is **not available** for alleged violations of state law. However, Petitioner contends that his **Fifth** and Fourteenth Amendment rights were violated by the trial court’s failure to **give** an instruction on self-defense.

At least one Circuit has held **that** the failure to give an instruction on self-defense is not a violation of the Due Process Clause. In Nickerson v. Lee, 971 F.2d

1125 (4th Cir. 1992), cert. denied, 507 U.S. 1125 (1993), the court initially noted that habeas relief was available based on a challenge to a jury instruction only when "the challenged instruction by itself so infected the entire trial that the resulting conviction violates due process, it is not enough that the instruction was undesirable, erroneous, or even 'universally condemned.'" Id. at 1137 (citations omitted). The court additionally concluded that

[e]ven assuming that there was sufficient evidence to warrant a self-defense instruction, and that there was therefore a violation of state law, the trial court's refusal to give the self-defense instruction did not violate Nickerson's due process rights. "Failure to give an appropriate theory-of-defense instruction, without more, is not a violation of the Due Process Clause. Some other circumstances, demonstrating a serious miscarriage of justice, must be present."

Id. at 1137 (footnotes and citations omitted).

Generally, a habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991)), cert. denied, 114 S. Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "[h]abeas proceedings may not be used to set aside a state

conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980)), cert. denied, 498 U.S. 961 (1990). The Supreme Court explained in Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.

Id. at 154. Furthermore, when an offered instruction is rejected by the trial court, the Petitioner's burden is even greater. "An omission, or an incomplete instruction is less likely to be prejudicial than a misstatement of the law." Id. at 155.

Under federal law, a jury instruction must be supported by competent evidence. Delo v. Lashley, 507 U.S. 272, 113 S. Ct. 1222 (1993) ("Nothing in the Constitution obligates state courts to give mitigating circumstances instructions when no evidence is offered to support them."). In United States v. Harr, 931 F.2d 1368 (10th Cir. 1991), the Tenth Circuit noted that "a trial judge is given substantial latitude and discretion in tailoring and formulating the instructions so long as they are correct statements of law and fairly and adequately cover the issues presented." Id. at 1371 (quotation omitted). The Court stated that "a defendant will not be entitled to an instruction which lacks 'reasonable legal and factual basis.'" Id. Oklahoma law parallels federal law. Coulter v. State, 721 P.2d 818 (Okla. Crim. App. 1986) (trial

court correctly refused to instruct on **self-defense** where sufficient evidence to support the instruction had not been presented); Nauni v. State, 670 P.2d 126 (Okla. Crim. App. 1983) ("If there is no evidence in the record to support an instruction it should not be given.").

Therefore, initially, the Court **reviews** the record of the trial court to determine whether the Petitioner presented **sufficient** evidence to warrant an instruction on self-defense.

Ms. Cosby testified that while **inside** the trailer Petitioner swung at Mr. Cosby, and the two began wrestling. According to Ms. Cosby, Mr. Cosby pinned Petitioner to the floor, asked Petitioner if he had "**settled** down," and let him up. Petitioner then proceeded to the bedroom of the trailer **stating** that he was looking for a gun, but was informed by Ms. Cosby that neither of **them** owned a gun.

According to Mr. Gaskey, **Petitioner** exited the trailer, approached the car in which Mr. Gaskey was sitting, and **asked** Mr. Gaskey to assist him because Mr. Cosby was "big" and the Petitioner needed **help**. Mr. Gaskey testified that Petitioner returned to the trailer house, knocked on the **door** a few times, and Mr. Cosby opened the door and hit Petitioner in the face with **his fist**. Mr. Gaskey stated that Mr. Cosby hit Petitioner once and then "**stop[ped] and kind of wait[ed]**." [Trial Transcript at 51-52]. Petitioner then approached Mr. Cosby, **and** the two traded punches on the porch. Mr. Gaskey testified that Mr. Cosby **jumped** off of the porch and appeared to be attempting to get away from the **Petitioner**, and the Petitioner followed him. Mr. Gaskey's vision was blocked for a **period** of time. Mr. Gaskey also saw Mr. Cosby

grab Petitioner and pin him against the trailer house and tell him to drop the knife. According to Mr. Gaskey, Petitioner responded "if I do you'll kill me." Mr. Cosby backed away from Petitioner and walked into the trailer house.

Mr. Gaskey additionally testified that after Petitioner returned to the car Mr. Gaskey asked him if had been cut or hurt. Petitioner responded "no, but he is. I stuck the mother - _____."

In addition, a forensic pathologist, Ronald Distefano, the Chief Medical Examiner in Tulsa, testified that several of the wounds on the decedent's body were "defensive" wounds. [Trial Transcript at 81].

Petitioner did not testify at trial. Petitioner's trial attorney asserted that Petitioner's theory was that when the decedent hit Petitioner (on the trailer porch), the decedent became the aggressor. Petitioner therefore argues that he had a "reasonable fear." [Trial Transcript at 87].

The record contains insufficient evidence to support Petitioner's "theory" of self-defense, and the Court cannot conclude that the trial court's failure to give such an instruction was error. Furthermore, Petitioner has not established that a failure to give such an instruction "by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

INSUFFICIENT EVIDENCE TO SUPPORT A GUILTY VERDICT

Petitioner argues that the evidence which was presented at trial was insufficient to support his conviction on the charge of first degree murder. Petitioner asserts that

the State did not prove the element of "malice aforethought" and therefore a conviction based on first degree murder violates the Constitution.

In Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979) the Supreme Court held that

in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254--if the settled procedural prerequisites for such a claim have otherwise been satisfied--the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Id. at 324, 2791-92. In Jackson, the Court was reviewing a Virginia state court non-jury conviction of first degree murder. The Court analyzed the requirement of premeditation and concluded that "[f]rom the circumstantial evidence in the record, it is clear that the trial judge could reasonably have found beyond a reasonable doubt that the petitioner did possess the necessary intent at or before the time of the killing." In analyzing a challenge based on the sufficiency of the evidence, the Court "review[s] the evidence in the light most favorable to the government to determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt." United States v. Horn, 946 F.2d 738 (10th Cir. 1991). See also Beachum v. Tansy, 903 F.2d 1321, 1331 (10th Cir. 1990) ("A conviction can constitutionally stand only if, after viewing all of the evidence presented at the trial in the light most favorable to the prosecution, any rational trier-of-fact could have found the essential elements of the crime charged beyond a reasonable doubt."), cert. denied, 498 U.S. 904 (1990); Cordoba v. Hanrahan, 910 F.2d 691 (10th Cir. 1990), cert. denied, 498 U.S. 1014

(1990); United States v. Shelton, 736 F.2d 1397,1401 (10th Cir. 1984), cert. denied 469 U.S. 857 (1984); Soap v. Carter, 632 F.2d 872, 876 (10th Cir. 1980), cert. denied, 451 U.S. 939 (1981).

Under Oklahoma law, proof of malice aforethought "requires nothing more than the deliberate intention to take the life of another without justification. This intent may be 'formed instantly before committing the act by which it is carried into execution.'" Huckaby v. State, 804 P.2d 447, 452 (Okla. Crim. App. 1990); Hiler v. State, 796 P.2d 346 (Okla. Ct. Crim. App. 1990).

A review of the record reveals that a rational fact finder, viewing the evidence "in the light most favorable to the prosecution" could have found Petitioner guilty beyond a reasonable doubt of first degree murder under Oklahoma law. The evidence at trial established that while Petitioner was in the trailer he walked toward the bedroom stating he was going to get a gun. Petitioner returned to Mr. Gaskey's car to request Mr. Gaskey's "assistance" because of the size of decedent. Petitioner again approached the trailer and knocked on the trailer door. The decedent hit Petitioner in the face and stepped back. Petitioner "recovered" from the blow, and began trading blows with the decedent. The decedent jumped off of the porch, and Mr. Gaskey testified that he appeared to be trying to get away from Petitioner. Petitioner followed the decedent off of the porch and the two again began struggling. The medical examiner testified that some of the knife wounds on the decedent's body were defensive, and that some of the stab wounds required a great deal of force (at least one penetrated the sternum and the pericardium sac of the heart). The evidence

presented at trial is sufficient to satisfy the standard articulated by the Supreme Court in Jackson.

PROSECUTORIAL MISCONDUCT

Petitioner's final argument is that improper comments by the prosecutor during closing statements deprived Petitioner of a fair trial.

In analyzing whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, a federal habeas corpus court must determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

In this case, Petitioner initially asserts that the prosecutor improperly vouched for the credibility of his own witnesses. Petitioner argues that jurors are the sole determiners of credibility and that the prosecutor's comments were an attempt to improperly influence the jury. Petitioner cites no federal cases. Petitioner complains of the following comments by the prosecutor.

Who were the State's witnesses? Paula, who Rodney was living with, and Wayne his friend, who he called out on his special day to go party with him. The people had no motive. They were Rodney's friends. Yet they came in here and told an absolutely honest account of what happened, of how Rodney killed Kevin, and no evidence was presented to dispute any of the State's facts.

[Trial Transcript at 97].

In United States v. Bowie, 892 F.2d 1494 (10th Cir. 1990), the Tenth Circuit addressed the standard for impermissible vouching.

It is error for the prosecution to personally vouch for the credibility of its witnesses. Argument or evidence is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony.

Id. at 1498 (citations omitted). In Bowie, the Tenth Circuit cited, with approval, United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986). The Dennis court noted that

Attempts to bolster a witness by vouching for his credibility are normally improper and error. The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility. This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity. Secondly [sic], a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony.

Id. at 1046 (citations omitted).

The comments by the prosecutor in this case do not meet the level of impermissible vouching prohibited by the Bowie and Dennis courts. Regardless, after a careful review of the record, the Court concludes that the comments were not "so prejudicial" that they rendered the trial "fundamentally unfair."

Petitioner additionally asserts that the prosecutor improperly injected his personal feelings into the proceedings. During closing argument the prosecutor stated:

As a result, you can make that determination as to what you want, whether you want this person Rodney McCullough, to be eligible for parole or not, but clearly he killed Kevin Cosby. His own words were, "I stuck the mother-_____." I feel he should go to prison for life [sic] for taking one. Thank you.

Finally, Petitioner asserts that the prosecutor improperly made a "smoke screen" comment which has been condemned by Oklahoma courts. Petitioner references no federal cases. The prosecutor stated

This case is what Paula and Wayne saw and what deductions the medical examiner could make from the dead body. That is the physical evidence. There's eyewitness testimony, but that is the State's case. The defense would like to throw up this wonderful smoke screen to say . . . why isn't the brother there or why isn't EMSA there or why isn't everybody at the scene there? As I said, I was going to bring you the essential witnesses.

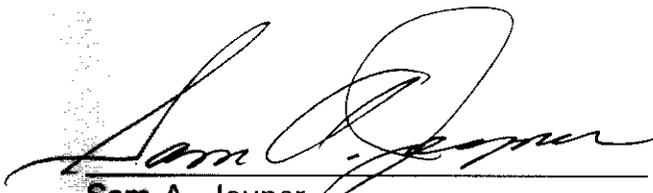
[Trial Transcript at 113].

The Court, having carefully reviewed the comments by the prosecutor and the transcript of the trial concludes that the prosecutor's comments did not "so infect the trial with unfairness as to make the resulting conviction a violation of due process."

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court DENY the petition for a writ of habeas corpus. Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

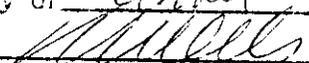
Dated this 16 day of October 1996.



Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

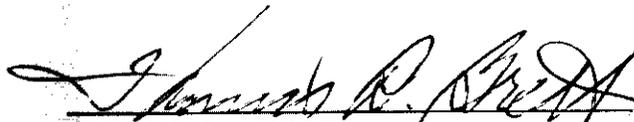
The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

17 day of October, 1996


afforded [Petitioner] all the relief the federal court could have given him." Hayes v. Evans, 70 F.3d 85, 86 (10th Cir. 1995).

Accordingly, the petition for a writ of habeas corpus is hereby DISMISSED AS MOOT.

SO ORDERED THIS 15th day of Oct., 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

JOE LEWIS SMITH, SR. aka JOE L.)
SMITH aka LEWIS J. SMITH aka J.L.)
SMITH; STATE OF OKLAHOMA *ex rel*)
OKLAHOMA TAX COMMISSION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)

Defendants.)

Civil Case No. 95-CV 886B

OCT 17 1996

ORDER

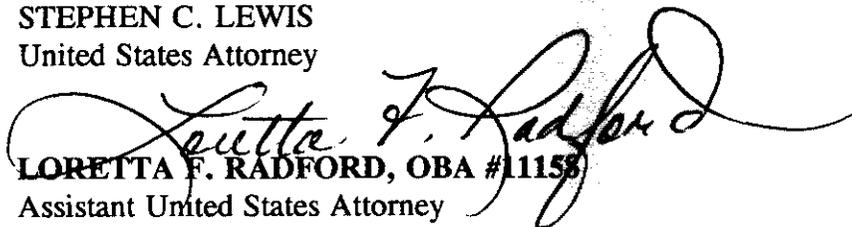
Upon the Motion of the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good case shown it is hereby **ORDERED** that the Order filed on the 30th day of September, 1996 which vacates the Judgement filed on the 5th day of January 1996; vacates the Marshal's Sale held on the 23rd day of April 1996; sets aside the Order of Disbursal filed on the 28th day of August 1996; and allows Plaintiff to file and Amended Complaint, is hereby vacated.

Dated this 16th day of Oct., 1996.


UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L".

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

WEBCO INDUSTRIES, INC. d/b/a)
SOUTHWEST TUBE & MANUFACTURING)
COMPANY, an Oklahoma corporation,)

OCT 15 1996

Plaintiff,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

v.)

No. 96-C-0037 K

THE HOME INDEMNITY COMPANY,)
a New Hampshire corporation,)

ENTERED ON DOCKET

Defendant.)

DATE OCT 17 1996

STIPULATION FOR DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, **Webco** Industries, Inc., d/b/a Southwest Tube & Manufacturing Company, by and through their attorneys of record, Michael D. Graves and Mark K. Blongewicz; and the **Defendant**, The Home Indemnity Company, by and through its attorney of record, Timothy L. Martin, and hereby stipulate and agree that the above-captioned cause may, upon **Order** of the Court, be dismissed with prejudice to further litigation pertaining to **all** matters involved herein, and state that a compromise settlement agreement **covering** all claims has been made between the parties, and the said parties **hereby request** the Court to dismiss said action with prejudice pursuant to this Stipulation.

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JTB*

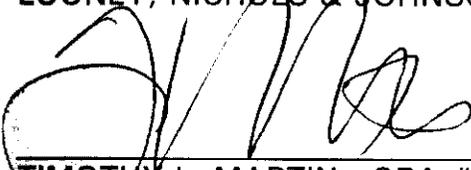
Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN, & NELSON, P.C.


MICHAEL D. GRAVES - OBA #3539
MARK K. BLONGEWICZ -- OBA #889
320 South Boston Ave., Suite 400
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ATTORNEYS FOR PLAINTIFF

and

LOONEY, NICHOLS & JOHNSON


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Oklahoma City, OK 73101
(405) 235-7641
(405) 239-2052 - FAX
ATTORNEYS FOR DEFENDANT

FILED

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

OCT 15 1996

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

KIMBERLY D. NICELY,)
)
 Plaintiff,)
)
 vs.)
)
 HEINZ BAKERY PRODUCTS, INC., a)
 division of PESTRITTO FOODS, INC.,)
 and PESTRITTO FOODS, INC.,)
)
 Defendants.)

Case No. 95-CV-920K

ENTERED ON 10/15/96
DATE OCT 17 1996

STIPULATED ORDER OF DISMISSAL WITH PREJUDICE

Plaintiff Kimberly D. Nicely and Defendant Heinz Bakery Products, Inc., by and through their respective counsel of record, hereby agree that this action be dismissed with prejudice in its entirety pursuant to Federal Rule of Civil Procedure 41,

IT IS NOW THEREFORE HEREBY ORDERED that this action is **DISMISSED** with prejudice and each party is to bear its own costs.

On this 11th day of October, 1996.

DOYLE & SALISBURY

**VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY**

By: Harold W. Salisbury
Harold W. Salisbury

By: Alan M. Koral
Alan M. Koral

100 W. 5th St., Ste. 550
Tulsa, OK 74103
(918) 583-7766

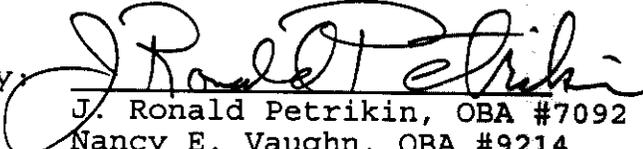
805 3rd Ave., Ste. 2200
New York, NY 10022
(212) 407-7700

Attorneys for Plaintiff
Kimberly D. Nicely

Attorneys for Defendant
Heinz Bakery Products, Inc.

CROWE & DUNLEVY

By:


J. Ronald Petrikin, OBA #7092
Nancy E. Vaughn, OBA #9214

500 Kennedy Building
321 South Boston
Tulsa, Oklahoma 73103
(918) 592-9800

Attorney for Defendant
Heinz Bakery Products, Inc.

SO ORDERED:

/s/ TERRY C. KERN

U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE SUM OF ONE THOUSAND)
TWENTY-TWO AND NO/100)
DOLLARS (\$1,022.00) IN)
UNITED STATES CURRENCY,)
)
Defendant.)

CIVIL ACTION NO. 96-CV-931-K

ENTERED ON DOCKET
DATE OCT 17 1996

STIPULATION FOR FORFEITURE

It is hereby stipulated by and between JOHN HUDSON WHITAKER, on the one hand, and the United States of America, on the other, as follows:

1. That John Hudson Whitaker, the owner of the defendant currency, hereby consents to the forfeiture of the following-described defendant currency to the United States of America, for disposition according to law:

THE SUM OF ONE THOUSAND
TWENTY-TWO AND NO/100
DOLLARS (\$1,022.00) IN
UNITED STATES CURRENCY.

2. That John Hudson Whitaker does not contest that the defendant currency is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
 vs.)
)
 PATRICIA R. STEDHAM; STATE OF)
 OKLAHOMA *ex rel* OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED
OCT 15 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
OCT 16 1996
DATE _____

Civil Case No. 95-C 1059E

ORDER OF DISBURSAL

NOW on the 15th day of Oct., 1996, there came on for

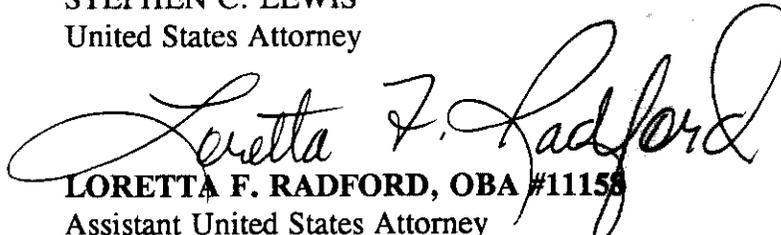
consideration the matter of disbursal of \$8,026.00 received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said \$8,026.00 should be disbursed as follows:

United States Marshal's Costs		\$396.87
Executing Order of Sale	3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
Appraisers' Fees	225.00	
Publisher's Fee	156.87	
County Treasurer, Tulsa County, Oklahoma		\$136.00
United States Department of Justice Credit for Judgment of \$63,381.27		\$7,493.13


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

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


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

LFR/flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRIS HUDDLESTON; UNKNOWN
SPOUSE OF Chris Huddleston, if any;
DEBORAH S. HUDDLESTON aka
Deborah Sue Huddleston; UNKNOWN
SPOUSE OF Deborah S. Huddleston aka
Deborah Sue Huddleston, if any;
DONNA J. LUTSKO; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

OCT 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 16 1996

Civil Case No. 95 C 850C ✓

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 27th day of March, 1996; the Judgment of Foreclosure entered herein on the 28th day of March, 1996; and the Order of Sale filed on the 23rd day of August, 1996, are vacated, and the action is dismissed without prejudice.

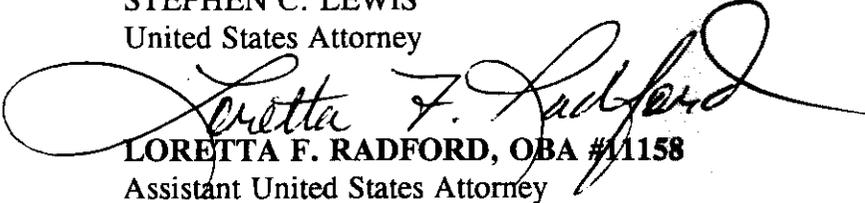
Dated this 15th day of oct., 1996.


UNITED STATES DISTRICT JUDGE

14

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L".

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, OK 74103

(918) 581-7463

LFR:flv

FILED

OCT 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

BILL J. LOGHRY,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES D. WOLFE and)
 PAMELA L. WOLFE,)
)
 Defendants and)
 Third-Party Plaintiffs,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Third-Party Defendant.)

No. 95-C-1214-E ✓

ENTERED ON DOCKET

DATE OCT 16 1996

ORDER

Before the Court is the Motion to Amend Complaint filed by Plaintiff Bill J. Loghry (Docket No. 39). Plaintiff fails to state any legitimate reason for amending the complaint at this late date. This case was removed from state court in December 1995. Since that time, discovery has been completed, and the Court has conducted two status conferences and granted extensions of time to both Plaintiff and Defendants regarding the filing of summary judgment motions on plaintiff's complaint. At this time, summary judgment motions by defendants Pamela L. Wolfe and James D. Wolfe (Docket No. 46), and third-party defendant, the United States (Docket No. 40), have been filed. Rather than move for summary judgment or respond to the pending motions, plaintiff has chosen to file multiple frivolous pleadings, e.g. Notice of Contract (Docket No. 29), Notice of Contract and Reaffirmation (Docket No. 30), and Notice of Refusal for Fraud (Docket No. 45).

(H)

The deadline for filing responses to the pending summary judgment motions is October 21, 1996, when the motions will be at issue. Should plaintiff wish to file a response in accordance with Fed.R.Civ.P. 56, he may do so by October 21, 1996. **However, no other pleadings will be accepted for filing without leave of Court.** Once the Court rules on the summary judgment motions and if issues remain to be tried, the Court will then set a schedule for trial.

Accordingly, Plaintiff's motion to amend complaint (Docket No. 39) is denied, and the Amended Complaint filed without leave in this case (Docket No. 31) is hereby stricken.

ORDERED this 15th day of October, 1996.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

DATE 10-15-96

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

ASBESTOS HANDLERS, INC.,)

Plaintiff,)

v.)

DOUGLAS EDWARD MOORE,)
VINCE STEVEN WAYHAN and)
ROBERT WAYNE EMERSON,)

Defendants.)

Case No. 96 CV 726K ✓

F I L E D

OCT 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ENTRY OF DEFAULT AGAINST DEFENDANTS DOUGLAS EDWARD MOORE,
VINCE STEVEN WAYHAN AND ROBERT WAYNE EMERSON**

Pursuant to the Request to Enter Default Against Defendants Douglas Edward Moore, Vince Steven Wayhan and Robert Wayne Emerson, and the Brief in Support of Plaintiff's Application for Default Judgment Against Defendants, filed by Plaintiff in the above-styled case, and upon examination of the pleadings on file in the office of the Clerk of the United States District Court for the Northern District of Oklahoma, the undersigned finds that the Complaint and Summons were served on Defendants Douglas Edward Moore, Vince Steven Wayhan and Robert Wayne Emerson by private process server, August 24, 1996, August 24, 1996 and August 17, 1996, respectively; that the time within which Defendants Douglas Edward Moore, Vince Steven Wayhan and Robert Wayne Emerson may answer or otherwise respond to Plaintiff's Complaint, has long since expired; that Defendants Douglas Edward Moore, Vince Steven Wayhan and Robert Wayne Emerson have not answered or otherwise responded to such claims for relief; and that the time for Defendants Douglas Edward Moore, Vince Steven Wayhan and Robert Wayne Emerson to answer or otherwise plead has not been extended.

Therefore, the Request for Entry of **Default** Against Defendants Douglas Edward Moore, Vince Steven Wayhan and Robert Wayne Emerson, should be and is hereby approved, and default is hereby entered against Defendants Douglas Edward Moore, Vince Steven Wayhan and Robert Wayne Emerson as provided by Rule 55(a) of the Federal Rules of Civil Procedure. A hearing on the amount of damages to which Plaintiff **Asbestos Handlers, Inc.** is entitled to recover will be set by the Court.

DATE THIS 1 day of October, 1996.

PHIL LOMBARDI, CLERK

By



Deputy

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

MARVIN LEE MOSLEY,)
)
 Plaintiff,)
)
 vs.)
)
 SHERIFF STANLEY GLANZ, et al.,)
)
 Defendants.)

ENTERED ON DOCKET

DATE OCT 15 1996

No. 96-CV-521-K ✓

FILED

OCT 10 1996

Phil Lombardi, Clerk
U.S. District Court

ORDER

Plaintiff, a pro se inmate at the Adult Detention Center, has filed his amended civil rights complaints [Doc. 6 and 7] against Sheriff Stanley Glanz and Tulsa County Commissioners Robert Dick, Lewis Harris, and John Selph. Plaintiff contends Defendants failed to protect him from an assault by fellow inmates and denied adequate medical care for his back following that assault. He further complains about the constant leaking of water in his cell from a broken air conditioner and the contraction of a rash from dirty clothing. Plaintiff seeks damages and declaratory and injunctive relief.¹

On July 15, 1996, the Court granted Plaintiff leave to proceed in forma pauperis. The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the

¹Although Plaintiff's amended Complaint is unsigned, the Court reviews it under 28 U.S.C. § 1915A.

complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id.

To prevail in a § 1983 case, a plaintiff must show that he has been denied a constitutional or federal statutory right and that the deprivation occurred under color of state law. 42 U.S.C. § 1983; see, e.g., West v. Atkins, 487 U.S. 42, 48 (1988). Plaintiff fails to allege which constitutional rights he believes have been violated. Even liberally construing the complaint to allege violations under the Eighth and Fourteenth Amendments, the Court concludes that Plaintiff's allegations fail to state a claim upon which relief may be granted. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991).

In the context of civil rights claims against government officials, it is well established principle that a defendant may not be held liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates. For instance, a supervisor may be found liable (1) if after learning of the constitutional deprivation through a report or appeal, the

supervisor failed to remedy the wrong; (2) if the supervisor created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; or (3) if the supervisor was grossly negligent in managing the subordinates who caused the unlawful condition or event. See Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986).

Plaintiff has failed to allege that either Sheriff Glanz or the Tulsa County Commissioners were personally involved in the alleged denial of medical care, alleged failure to protect from assault, and alleged failure to repair the air conditioner leak and provide clean clothing. Nor has Plaintiff alleged facts to support any of the three exceptions noted above.

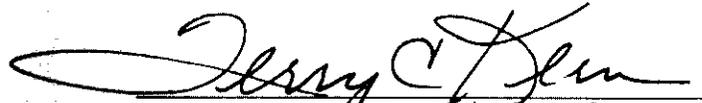
Moreover, the Tulsa County Commissioners cannot be held liable for the incidents alleged in the instant complaint. "Under Oklahoma law, the Board [of county Commissioners] has no statutory duty to hire train, supervise or discipline the county sheriffs or their deputies." Meade, 841 F.2d 1512, 1528. Therefore, "unless the Commissioners voluntarily undertook responsibility for hiring or supervising county law enforcement officers, which is not alleged, they were not 'affirmatively linked' with the alleged assault." Id.

Lastly, Plaintiff's allegations of denial of medical care fail to state a claim upon which relief can be granted. Plaintiff alleges no facts to show that his medical condition 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.² 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).

ACCORDINGLY, IT IS HEREBY ORDERED that this action is dismissed for failure to state a claim. The CLERK shall return to Plaintiff the original exhibits [Doc. 8] submitted by Plaintiff.

IT IS SO ORDERED this 10 day of October, 1996.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

² Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990).

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

DOROTHY P. and DAVID W.
BRITTON, husband and wife,
and as individuals

Plaintiffs,

v.

BERENDSEN FLUID POWER, INC.
an Oklahoma corporation; SOONER
HEALTH PLAN, an Oklahoma
corporation; PRINCIPAL MUTUAL
LIFE INSURANCE COMPANY, an
Iowa corporation, and John Palovich
as agent,

Defendants.

Case No. 96-C-364-E

ENTERED ON DOCKET
OCT 15 1996
DATE

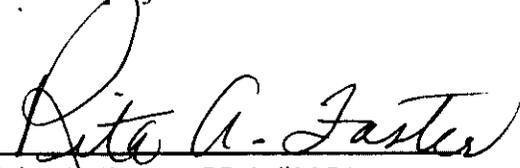
FILED

OCT 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, Dorothy P. and David W. Britton, and the Defendant, Oklahoma Health Alliance, L.L.C., successor to Sooner Health Plan, and stipulate that Plaintiff's claims against Sooner Health Plan and Oklahoma Health Alliance, L.L.C. should be and hereby are dismissed without prejudice.


Rita A. Foster, OBA #3054
2615 Woodward Boulevard
Tulsa OK 74114
(918) 742-8228

ATTORNEY FOR PLAINTIFFS
Dorothy P. and David W. Britton


Michael J. Gibbens, OBA #3339
CROWE & DUNLEVY
321 S. Boston Ave., Suite 500
Tulsa OK 74103
(918) 592-9800

ATTORNEYS FOR DEFENDANT
Oklahoma Health Alliance, L.L.C.,
Successor to Sooner Health Plan

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

MARILYN L. ARNALL,

Plaintiff

v.

LOCAL AMERICA, INC., an Oklahoma
corporation, d/b/a LOCAL AMERICA BANK,
FSB (Federal Savings Bank)

Defendant.

ENTERED ON DOCKET

DATE OCT 15 1996

96-C-309-E

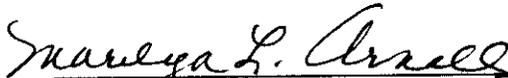
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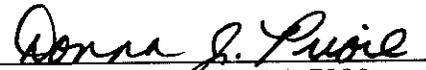
OCT 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

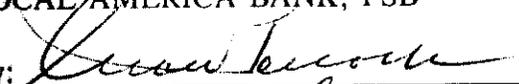
STIPULATION OF DISMISSAL WITH PREJUDICE

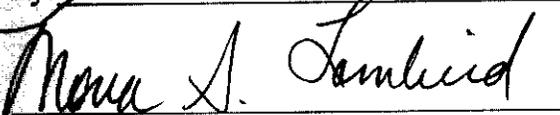
COMES NOW Marilyn L. Arnall and Local America, Inc., d/b/a Local America Bank, FSB, and their undersigned counsel of record, and hereby stipulate to a joint dismissal of the above-referenced action as between said parties *with prejudice* to refileing.


MARILYN L. ARNALL


Donna J. Priore, OBA# 7320
Randal D. Morley, OBA # 5414
BIRMINGHAM, MORLEY,
WEATHERFORD & PRIORE
1141 East 37th Street
Tulsa, OK 74105-3162
(918) 743-8355
ATTORNEYS FOR PLAINTIFF

LOCAL AMERICA, INC. d/b/a
LOCAL AMERICA BANK, FSB

By: 


Mona S. Lambird, OBA #5184

-of-

ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main
Oklahoma City, Oklahoma 73102
(405) 272-9241; (405) 235-8786 FAX
ATTORNEYS FOR DEFENDANT

Dated: October 11, 1996

53764

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

FILED

OCT 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TONY LAMAR VANN,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent.

No. ⁹⁵96-CV-518-C

ENTERED ON DOCKET
DATE OCT 15 1996

ORDER

This matter comes before the Court on Petitioner's notice to appeal and motion for leave to proceed in forma pauperis on appeal.

On July 5, 1996, the Tenth Circuit Court of Appeals affirmed the order dismissing this habeas corpus action for failure to exhaust state remedies. Thereafter, Petitioner filed a motion to be released on personal recognizance and a request for a writ of habeas corpus ad testificandum. On September 13, 1996, this Court denied Petitioner's motions without prejudice to them being reasserted when Case No. CIV-96-1277-M was transferred from the Western District of Oklahoma. Petitioner now seeks to appeal the above ruling.

At the outset the Court notes that Petitioner seeks to file a second appeal in this case although the Tenth Circuit Court of Appeals affirmed the dismissal of this action without prejudice. Therefore, the Court certifies that this appeal is not taken in good faith and that Petitioner should not be permitted to proceed in forma pauperis.

Next the Court addresses whether a certificate of probable cause should issue in this case. On October 1, 1996, the Tenth

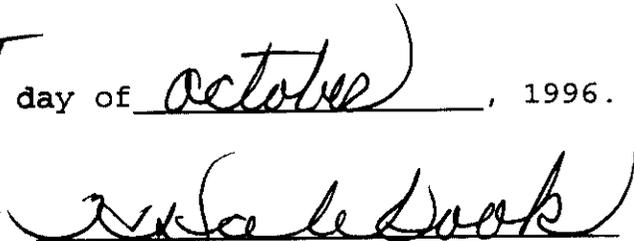
Circuit Court of Appeals issued the following Emergency General Order with regard to habeas actions:

Under the amendments contained in the Antiterrorist and Effective Death Penalty Act, no appeal may be taken in either state habeas cases or federal 28 U.S.C. § 2255 proceedings unless a certificate of appealability issues. 28 U.S.C. § 2253(b). Section 2253 provides that certificates to appeal should be issued, if at all, by a circuit justice or judge. Recognizing the conflict between this statute and the language of Federal Rule of Appellate Procedure 22(b), to achieve consistency within the circuit, this court directs the district courts to consider the propriety of issuing certificates of appealability in the first instance. Failure of the district court to issue a certificate of appealability within thirty days of filing the notice of appeal shall be deemed a denial.

This Court declines to follow the above Emergency General Order because the present statute specifically provides that only circuit judges may issue a certificate of appealability.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motion for leave to proceed in forma pauperis on appeal (Docket #32) is DENIED and that Petitioner's request for a certificate of Appealability is DENIED as this Court lacks the authority to rule on such a request. Further, the Court CERTIFIES that this appeal is not taken in good faith and that Petitioner should not be permitted to proceed in forma pauperis on appeal.

IT IS SO ORDERED this 10th day of October, 1996.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

OCT 11 1996



Phil Lombardi, Clerk
U.S. DISTRICT COURT

MAURICE SHERMAN BLISS, ET. AL.,

Plaintiffs,

vs.

CHARLES SCHUSTERMAN, ET. AL.,

Defendants and
Third Party Plaintiffs,

vs.

ROBERT L. FLOURNOY, GEORGE E.
CHANDLER and L. BRENT FARNEY,

Third Party Defendants.

Case No. 96-CV-557 - *c*

ENTERED ON DOCKET

DATE OCT 15 1996

ORDER

Before the Court are separate **motions** filed by the third party defendants and by the plaintiffs to dismiss the claim of **abuse** of process which has been raised by the defendants/third party plaintiffs in **their** counterclaim and third party complaint. The individual movants each assert the **same** grounds in support of dismissal. The Court will only address the assertions that the **defendants**/third party plaintiffs have failed to state a claim for abuse of process because **this** ground is dispositive of the matters raised in the pleadings.

In their counterclaim and third party complaint, the defendants/third party plaintiffs

alleged that the plaintiffs and third party defendants have committed an abuse of process by filing this action because the complaint was designed to seek damages from Samson Resources Company rather than the individual officials of Samson who are named in the complaint. They assert that all issues raised herein have previously been disposed of in the companion case of Mitchell Energy Company and Maurice Bliss et al v. Samson Resources, (Case No. 9:93CV83), *reversed and modified* in 80 F.3d 976 (5th Cir. 1996). They assert that the only purpose of this lawsuit is to try and recover monies from three officials of Samson otherwise uncollectable from Samson because of the Circuit Court's substantial modification and reduction of the damage award against Samson. Defendants/third party plaintiffs assert that the subject action is "patently frivolous;" and that it is designed to sully the reputations of the defendants/third party plaintiffs and to disrupt Samson's business activities. The defendants/third party plaintiffs assert that this action was filed as a personal vendetta and as a means to compel Samson or a related entity to pay substantial sums to settle the claim. They assert that the mere filing of this action is an improper use of process and subjects the plaintiffs and third party defendants to liability for abuse of process.

In analyzing the abuse of process claim, the Court applies Texas state law since this action was originally brought in Texas and the defendant/third party plaintiffs are residents of Texas. However, it is noteworthy that Texas and Oklahoma law on abuse of process are substantially the same, except that Oklahoma has an additional requirement of "willfulness." The defendant/third party plaintiffs' reliance on the laws of other states, although supportive of their positions, is misplaced and inapplicable.

The issue to be resolved is **whether** the factual allegations set forth in the counterclaim and third party complaint **will support** a claim of abuse of process. Under Texas law, the elements of a cause of action for abuse of process are: (1) an illegal, improper, perverted use of the process; (2) with an ulterior motive or purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulting from the irregularity.¹ See, Detenbeck v. Koester, 886 S.W.2d 477 (Tex.Civ.App.1994). Under both Texas and Oklahoma law, the "mere procurement or issuance of process with a malicious intent, or without probable cause, is not actionable; there must be an improper use of the process after its issuance." Id. at 481. There is no liability where the movant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. "Where the only process issued is a citation, and no allegations are made that there was any abuse in the execution or service of this process, no cause of action for abuse of process is stated." Id. citing Morris v. Blangger, 423 S.W.2d 133, 134 (Tex.Civ.App. 1968).² The focus of an abuse of process claim is not the

¹ Under Oklahoma law, an abuse of process claim requires a showing of three similar elements: (1) issuance of process; (2) an ulterior purpose; and (3) a willful action in the use of process not proper in the regular conduct of the proceeding. Myers v. Ideal Basic Industries, 940 F.2d 1379, 1382 (10th Cir.1991)

² In Myers, the Tenth Circuit stated that "an abuse of process occurs when legal process is used for an improper purpose, to accomplish an end not lawfully obtainable, or to compel someone to accomplish an end not lawfully obtainable, or to compel someone to do some collateral thing he could not legally be compelled to do. To establish the element of improper use of the process, it is clear that the plaintiffs must show some definite act or threat by the defendant not authorized by the process." 940 F.2d at 1382. "Merely showing that the defendant carried out the process to its authorized conclusion, even though with bad intentions, is insufficient to establish an abuse of process." Id. at 1382-83.

wrongfulness in the mere filing of the **complaint**, but rather some collateral act of using the complaint as a tool of extortion or to achieve some other illegal objective. In Blackstock v. Tatum, 396 S.W.2d 463, 468 (Tex.Civ.App.1965), the movants alleged that a frivolous suit was filed against them in an attempt to coerce them into dismissing an action that was already pending between the parties. In rejecting the abuse of process claim, the court stated:

As we understand it, abuse of process consists not in the filing and maintenance of a civil action, but rather in the pervasion of some process issued in the suit after its issuance. The process referred to in the cases is not in the filing and maintenance of a civil action, but in the wrongful use of a writ issued in the suit. The writ or process must be used in a manner or for a purpose for which it is not by law intended and the use must interfere with the person or property of another.

In Detenbeck, the court held that even assuming that the lawsuit was filed without "probable cause" and with the "malicious intent" of coercing a settlement of the case, such actions do not constitute an abuse of process. Detenbeck, 886 S.W. 2d at 481. In short, the defendants/third party plaintiffs are not compelled to settle, nor is settlement the only avenue available to terminate the case or recoup costs.

Accordingly, based upon the allegations raised in the counterclaim and third party complaint, the Court finds and concludes that the defendants/third party plaintiffs have failed to state a cause of action for abuse of process.

The Court will note that all the affirmative defenses raised in the defendants' answer remain viable. Some of these defenses are available to the defendants if they establish that the complaint is frivolous, or was filed in "bad faith."

Accordingly, it is the order of the Court that the motions to dismiss filed separately by the plaintiffs and the third party defendants are hereby granted. Entry of this order

renders moot all outstanding motions for issuance of protective orders.

IT IS SO ORDERED this 11 day of October, 1996.

A handwritten signature in cursive script, appearing to read "H. Dale Cook", written over a horizontal line.

H. DALE COOK
Senior United States District Judge

OK
12/3/96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
KENNETH E. ROBERTSON aka)
KENNETH ROBERTSON aka KEN)
ROBERTSON aka GENE ROBERTSON)
aka KENNETH EUGENE ROBERTSON;)
LENNIS G. ROBERTSON aka LENNIS)
GAIL ROBERTSON; STATE OF)
OKLAHOMA ex rel OKLAHOMA TAX)
COMMISSION; QR-92, LIMITED)
PARTNERSHIP; CITY OF BROKEN)
ARROW, Oklahoma; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

OCT 11 1996

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

UP

ENTERED ON DOCKET

DATE OCT 15 1996

Civil Case No. 96CV 152BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 11th day of October, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, City of Broken Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; the Defendants, Kenneth E. Robertson aka Kenneth Robertson aka Ken Robertson

7

1

aka Gene Robertson aka Kenneth Eugene Robertson, Lennis G. Robertson aka Lennis Gail Robertson, appear not; and the Defendant, QR-92, Limited Partnership, appears not, having previously filed a Disclaimer.

The Court being fully advised and having examined the court file finds that the Defendant, Kenneth E. Robertson aka Kenneth Robertson aka Ken Robertson aka Gene Robertson aka Kenneth Eugene Robertson, was served with process a copy of Summons and Complaint on June 5, 1996; that the Defendant, Lennis G. Robertson aka Lennis Gail Robertson, was served with process a copy of Summons and Complaint on June 5, 1996; that the Defendant, QR-92, Limited Partnership, acknowledged receipt of Summons and Complaint on February 29, 1996 by Certified mail; and that the Defendant, City of Broken Arrow, Oklahoma, acknowledged receipt of Summons and Complaint on February 29, 1996, by Certified Mail.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on March 18, 1996; that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, filed its Answer on March 20, 1996; that the Defendant, City of Broken Arrow, Oklahoma, filed its Answer on March 8, 1996; that the Defendants, Kenneth E. Robertson aka Kenneth Robertson aka Gene Robertson aka Kenneth Eugene Robertson and Lennis G. Robertson aka Lennis Gail Robertson, filed their Answer on July 5, 1996; and that the Defendant, QR-92, Limited Partnership, filed its Disclaimer on March 1, 1996.

The Court further finds that the Defendant, Kenneth E. Robertson aka Kenneth Robertson aka Den Robertson aka Gene Robertson aka Kenneth Eugene Robertson will hereinafter be referred to as ("Kenneth E. Robertson"); and Lennis G. Robertson aka Lennis

Gain Robertson will hereinafter be referred to as ("Lennis G. Robertson"). Kenneth E. Robertson and Lennis G. Robertson are husband and wife.

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

Lot Twenty-eight (28), Block Seven (7), SILVERTREE, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 29, 1986, Julia A. Deatherage, executed and delivered to Mercury Mortgage Co., Inc., her mortgage note in the amount of \$76,863.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Julia A. Deatherage, a single person, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated August 29, 1986, covering the above-described property. Said mortgage was recorded on September 10, 1986, in Book 4968, Page 2832, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 27, 1988, MERCURY MORTGAGE CO., INC., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 27, 1988, in Book 5136, Page 1606, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, Kenneth E. Robertson and Lennis G. Robertson, currently hold the title to the property by virtue of a General Warranty Deed, dated February 27, 1987, and recorded on May 5, 1987, in Book 5021, Page 548, in the records of Tulsa County, Oklahoma, and are the current assumptors of the subject indebtedness.

The Court further finds that on December 1, 1988, the Defendants, Kenneth E. Robertson and Lennis G. Robertson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Kenneth E. Robertson and Lennis G. Robertson, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Kenneth E. Robertson and Lennis G. Robertson, are indebted to the Plaintiff in the principal sum of \$132,851.99, plus interest at the rate of 9.5 percent per annum from August 22, 1996 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$56.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$55.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of \$57.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds **that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, has a lien on the property** which is the subject matter of this action by virtue of Business taxes in the **amount of \$653.27** which became a lien on the property as of October 15, 1992, a **lien in the amount of \$3,065.23** which became a lien on the property as of January 5, 1993, a **lien in the amount of \$119.19** which became a lien on the property as of May 12, 1993 and a **lien in the amount of \$929.19** which became a lien on the property as of June 17, 1993; also **by virtue of state income taxes in the amount of \$211.36** which became a lien on the property as of **April 26, 1993**. Said liens are inferior to the interest of the Plaintiff, United States of **America**.

The Court further finds **that the Defendant, QR-92, Limited Partnership, disclaim any right, title or interest in the subject property.**

The Court further finds **that the Defendants, Kenneth E. Robertson and Lennis G. Robertson, have shown no material facts to claim right, title or interest in the subject real property.**

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

The Court further finds **that the Defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.**

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, **acting** on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, Kenneth E. Robertson and Lennis G. Robertson, in the principal sum of \$132,851.99, plus interest at the rate of 9.5 percent per annum from August 22, 1996 until judgment, plus interest thereafter at the current legal rate of 5.90 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$168.00, plus costs and interest, for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, have and recover judgment In Rem in the amount of \$4,978.27, plus accrued and accruing interest, and the costs and interest of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Kenneth E. Robertson aka ~~Kenneth~~ Robertson aka Ken Robertson aka Gene Robertson aka Kenneth Eugene Robertson, Lennis G. Robertson aka Lennis Gail Robertson and QR-92, Limited Partnership, 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 the Defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the subject real

property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

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

First:

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

Second:

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

Third:

In payment of Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, in the amount of \$4,978.27, plus accrued and accruing interest, for state taxes due.

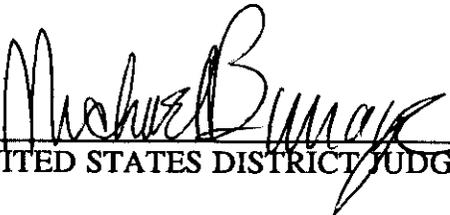
Fourth:

In payment of Defendant, County Treasurer, Tulsa
County, Oklahoma, in the amount of \$168.00, personal
property taxes which are currently due and owing.

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

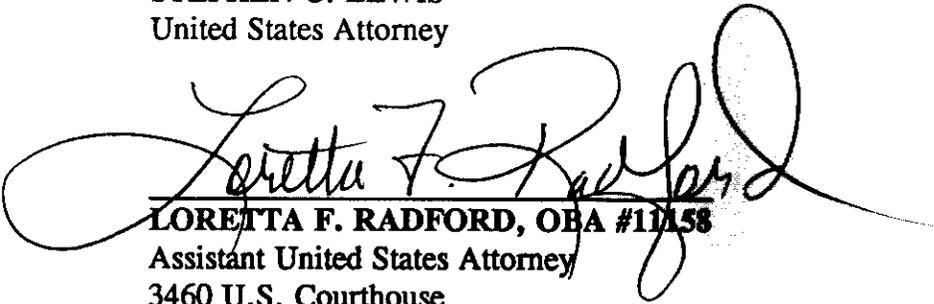
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right
to possession based upon any right of redemption) in the mortgagor or any other person
subsequent to the foreclosure sale.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

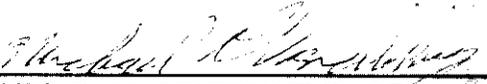

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State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 96CV 152BU

LFR:flv

elect continuation. 29 U.S.C. §1166. Failure to provide proper notice can render the plan administrator liable in the amount of up to \$100 per day. 29 U.S.C. §1132(c)(1).

The pending motion to dismiss is based upon statute of limitation grounds. Defendant notes the termination of plaintiff took place on July 22, 1992, while the present action was filed May 30, 1996, almost four years later. 29 U.S.C. §1132 is the civil enforcement provision for most ERISA and COBRA claims. There exists no federal statute of limitation regarding civil actions brought pursuant to the section. Therefore, the court must look to state law for the most analogous statute of limitation. Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1203 (10th Cir.1990).

Plaintiff correctly notes she actually raises two claims in her complaint: denial of plan benefits and failure to provide COBRA notice. Accordingly, the Court must determine the most analogous state statute for each claim. The Tenth Circuit has already concluded that a claim for plan benefits pursuant to §1132(a)(1)(B) is governed by Oklahoma's five-year statute of limitation on written contracts. Wright v. Southwestern Bell Telephone Co., 925 F.2d 1288, 1291 (10th Cir.1991). This claim was timely filed. Defendant argues plaintiff cannot possibly state a claim for recovery of benefits because it is clear plaintiff was no longer covered by the plan at the time of her medical expenses, and plaintiff has not exhausted her administrative remedies under the plan. Such a determination requires reference to matters outside

the record and is inappropriate regarding a motion to dismiss. Also, it seems somewhat anomalous that a defendant may fail to notify a plan participant of the option of continuing coverage, and thereby shorten what would have been a five-year statute of limitation to a three-year period. Defendant's argument is denied at this time.

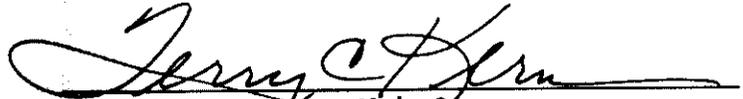
The Tenth Circuit has not spoken regarding the appropriate limitation for a claim under 29 U.S.C. §§1132(a)(1)(A) and 1132(c) alleging violation of the COBRA notice requirement. Plaintiff argues the same five-year limitation period described above should apply, in the interest of uniformity. However, the Tenth Circuit in Wright made clear each claim must be examined separately. Id. This Court is persuaded by the discussion in Middleton v. Russell Group, Ltd., 924 F.Supp. 48 (M.D.N.C.1996), in which the district court applied the North Carolina statute dealing with "liability created by statute." Such a statute of limitation also exists in Oklahoma. 12 O.S. §95(2) provides a three-year limitation on "an action upon a liability created by statute other than a forfeiture or penalty".¹ Having failed to timely bring this claim, plaintiff is time-barred as to any recovery under the COBRA notice provision.

It is the order of the Court that the motion of Defendant to dismiss (#2) is hereby DENIED as to plaintiff's claim for benefits

¹It is arguable that the COBRA liability of up to \$100 per day constitutes a penalty. If so, the one-year statute of limitation under 12 O.S. §95(4) applies and this claim is still barred.

and is hereby GRANTED as to plaintiff's claim regarding violation of the COBRA notice provision.

ORDERED this 10 day of October, 1996.


TERRY C. KEEN, Chief
UNITED STATES DISTRICT JUDGE

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

CLERK OF DISTRICT COURT
OCT 11 1996
DATE

MARINE MIDLAND BANK,)
)
Plaintiff,)

vs.)

TULSA LITHO COMPANY, Defendant;)
DWAYNE FLYNN, Defendant and)
Third-Party Plaintiff; and BANK OF)
OKLAHOMA, N.A., Defendant,)

v.)

SUPERB PRINTING COMPANY and)
CONSOLIDATED GRAPHICS, INC.,)
)
Third-Party Defendants.)

Case No. 96-C-401K ✓

F I L E D
OCT 10 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

On the 9th day of September, 1996, this Court granted the "Motion for Partial Summary Judgment" (the "Motion") filed by Defendant Bank of Oklahoma, N.A. ("BOK") against Co-Defendant Dwayne Flynn ("Flynn"). In accordance with this Court's ruling granting the Motion, this Journal Entry of Judgment is hereby entered as follows:

1. Effective December 31, 1995, for good and valuable consideration, Tulsa Litho Company ("Tulsa Litho") made, executed and delivered to BOK a certain Promissory Note (the "Note"), wherein Tulsa Litho promised to pay to BOK the principal amount of One Million One Hundred Eighty Six Thousand Dollars (\$1,186,000), with interest at the rate set forth in the Note, and payment of reasonable attorneys fees and all costs of collection in the event of default.

2. On March 15, 1993, Flynn made, executed and delivered a Guaranty Agreement, and on April 1, 1993, Flynn made, executed and delivered a second Guaranty Agreement

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(collectively the "Guaranty Agreements"), which guaranteed the prompt payment of all indebtedness owed to Brookside State Bank, a predecessor in interest to BOK. BOK is the holder of the Guaranty Agreements.

3. Flynn reaffirmed his obligations as guarantor of the indebtedness owed by Tulsa Litho by Letter Agreement dated effective December 31, 1995, and executed by Flynn on or about February 12, 1996.

4. Pursuant to the terms of the Guaranty Agreements, Flynn guaranteed the punctual payment and prompt performance of any and all indebtedness or obligation of any kind owed by Tulsa Litho to BOK. In addition, Flynn agreed to pay reasonable attorneys fees and other costs and expenses incurred by BOK in the enforcement of the Guaranty Agreements.

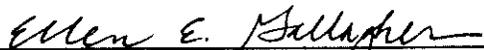
5. Tulsa Litho failed to make payments due to BOK, commenced a Chapter 11 bankruptcy case and is otherwise in default under the terms of the Note. BOK is entitled to judgment against Flynn in the principal amount of \$1,136,588.95, plus interest accruing thereon from May 15, 1996 at the per diem rate of \$528.83, plus costs of this action and reasonable attorneys fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that BOK have and recover judgment against Flynn in the amount of \$1,136,588.95, plus interest beginning May 15, 1996 at the per diem rate of \$528.83, less any subsequent payment(s) made on the Note by Tulsa Litho to BOK.

Dated this 8 day of October, 1996.

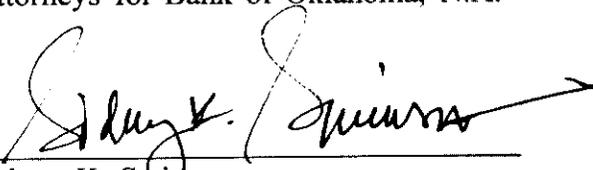

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



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Attorney for Dwayne Flynn

ENTERED ON DOCKET

DATE 10-11-96

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

ESTHER J. FULMER,

Plaintiff,

v.

WHITE CONSOLIDATED INDUSTRIES,
AMERICAN YARD PRODUCTS, INC.,
FOREIGN CORPORATIONS, TECUMSEH
ENGINES CO., and/or SUTHERLANDS
LUMBER STORES, JOHN DOE RETAIL
STORE(S),

Defendants.

Case No. 96-CV-896-H ✓

FILED

OCT 10 1996

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

ORDER

This matter comes before the Court on Defendant's notice of removal.¹

Plaintiff originally brought this action in the District Court of Tulsa County. Plaintiff's petition alleges one cause of action and claims damages "in excess of \$10,000.00" for this cause of action and "exemplary and/or punitive damages in excess of \$10,000."² Defendants filed a

¹ In pertinent part, the statute governing "procedure for removal" states that:

[t]he United States district court in which [the notice for removal] is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require.

See also 28 U.S.C. § 1447(c) (procedure after removal) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

² In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten

petition for removal stating that removal is **proper** on the basis of diversity jurisdiction. It appears that complete diversity of citizenship **exists between** the parties. Thus, the question before the Court is whether the jurisdictional amount **requirement** has been satisfied under 28 U.S.C. § 1332(a).

I.

Initially, the Court notes that **federal courts** are courts of limited jurisdiction. Further, [d]efendant's right to remove and **plaintiff's** right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed **narrowly**; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved **in favor** of remand.

Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have **diversity** jurisdiction, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). The **Tenth** Circuit has clarified the analysis which a district court should undertake in **determining whether** an amount in controversy is greater than \$50,000. The Tenth Circuit stated:

[t]he amount in controversy is **ordinarily determined** by the allegations of the complaint, or, where they are not dispositive, **by the allegations** in the notice of removal. The burden is on the party requesting removal to **set forth**, in the notice of removal itself, the "**underlying facts** supporting [the] **assertion** that the amount in controversy exceeds \$50,000." Moreover, there is a **presumption** against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.) (citations omitted), cert. denied, 116 S. Ct. 174 (1995); see Maxon v. Texaco Ref. & Mktg. Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (following Laughlin and remanding); see also Martin v. Missouri Pac. R.R. Co., 1996 WL 435614 (N.D. Okla. 1996) (same); Hughes v. E-Z Serve Petroleum Mktg. Co., 1996 WL 434528 (N.D. Okla. 1996) (same).

Thousand Dollars (\$10,000.00), **except** in actions sounding in contract.

Okla. Stat. Ann. tit. 12, § 2008(2) (West 1993).

In Laughlin, the plaintiff originally brought his action in state court. Defendant removed to federal court based on diversity jurisdiction. The court granted summary judgment to defendant, and plaintiff appealed. On appeal, the Tenth Circuit raised the issue of subject matter jurisdiction and remanded the case to state court. Neither the petition nor the notice of removal had established the requisite jurisdictional amount. The petition alleged that the amount in controversy was "in excess of \$10,000" for each of two claims. The notice of removal did not refer to an amount in controversy, but did contain a reference to the removal statute, 28 U.S.C. § 1441. In its brief on the issue of jurisdiction, Kmart set forth facts alleging that, at the time of removal, the amount in controversy was well above the jurisdictional minimum of \$50,000. However, Kmart failed to include those facts in its notice of removal.

The Tenth Circuit held that:

Kmart's economic analysis of Laughlin's claims for damages, prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.

Laughlin, 50 F.3d at 873.

In Laughlin, Kmart attempted to rely on Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993). The Shaw court held that "the plaintiff had conceded jurisdiction because he failed to contest removal when the motion was originally made, and because he stated in his opening appellate brief that the amount in controversy exceeded \$50,000." The Tenth Circuit distinguished Shaw, stating:

[w]e do not agree, however, that jurisdiction can be "conceded." Rather, we agree with the dissenting opinion that "subject matter jurisdiction is not a matter of equity or of conscience or of efficiency," but is a matter of the "lack of judicial power to decide a controversy."

Laughlin, 50 F.3d at 874 (citation omitted).

The Tenth Circuit's interpretation of 28 U.S.C. § 1441, the statute governing a party's removal of a lawsuit to federal court predicated on diversity jurisdiction, is in accord with the views of other federal courts. In a comprehensive, well-reasoned opinion, the Sixth Circuit held that, where the amount of damages in the lawsuit is not specified, the removing party bears the burden of proving by a preponderance of the evidence that the amount in controversy exceeds \$50,000. Gafford v. General Elec. Co., 997 F.2d 150, 157-60 (6th Cir. 1993); accord Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) (where the complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds \$50,000); Shaw, 994 F.2d at 366 (adopting preponderance of the evidence standard; removing defendant must produce proof to a reasonable probability that jurisdiction exists); McCorkindale v. American Home Assurance Co./A.I.C., 909 F. Supp. 646, 653 (N.D. Iowa 1995) (same); cf. Burns, 31 F.3d at 1097 (where plaintiff alleges a specific claim for damages in an amount less than the jurisdictional amount, to establish removal jurisdiction, defendant must prove to a legal certainty that, if plaintiff were to prevail, she would not recover less than \$50,000).

In Gafford, a witness on behalf of the removing defendant, the Senior Counsel for Labor and Employment at the GE facility where Plaintiff was employed, testified at the pretrial hearing on jurisdiction that, if the Plaintiff were to prevail on her claims, she would be entitled to damages in an amount greater than \$50,000. Plaintiff did not present any evidence contradicting that testimony. Id. at 160-61. On that basis, the Sixth Circuit upheld the district court's finding of removal jurisdiction. Id. at 161.

The Gafford court noted that its holding (that the appropriate burden of proof born by the removing party is the preponderance of the evidence) comports with the views expressed by the United States Supreme Court in McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). Quoting McNutt, the Gafford court stated:

[t]he authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in an appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence.

997 F.2d at 160.

To the extent that both Laughlin and Gafford represent the requirement that underlying facts be utilized by the removing party to satisfy its burden of proof, the Fifth Circuit is in accord. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 566 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994). In Anpac, a group of Colombian fishermen sued a chemical manufacturer and its Colombian subsidiary in Texas state court for personal injuries such as “skin rashes” allegedly arising out of a pesticide spill. The complaint did not specify an amount of damages. Defendant Dow filed a notice of removal which stated simply that “the matter in controversy exceeds \$50,000 exclusive of interest and costs.” Id. at 565. This conclusory statement did not establish that removal jurisdiction was proper. Id. The Fifth Circuit articulated its analysis in Allen, stating:

[f]irst, a court can determine that removal was proper if it is facially apparent that the claims are likely above \$50,000. If not, a removing attorney may support federal jurisdiction by setting forth the facts in controversy -- preferably in the removal petition, but sometimes by affidavit -- that support a finding of the requisite amount.

Removal, however, cannot be based simply upon conclusory allegations. Finally, under any manner of proof, the jurisdictional facts that support removal must be judged at the time of the removal, and any post-petition affidavits are allowable only if relevant to that period of time.

63 F.3d at 1335 (citations omitted); see also Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 273-74 (2d Cir. 1994) (“We hold that if the jurisdictional amount is not clearly alleged in the plaintiff’s complaint, and the defendant’s notice of removal fails to allege facts adequate to establish that the amount in controversy exceeds the jurisdictional amount, federal courts lack diversity jurisdiction

as a basis for removing the plaintiff's action from state court.") (emphasis added); Reid v. Delta Gas, Inc., 837 F. Supp. 751, 752 (M.D. La. 1993) (denying motion to remand where removing party introduced deposition testimony of plaintiff and letter from neurosurgeon to establish federal jurisdiction).

These views of other federal courts are consistent with the central holding of Laughlin, as expressed by the Tenth Circuit's statement that "[t]he burden is on the party requesting removal to set forth, in the notice of removal itself, the underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." 50 F.3d at 873.

III.

In the instant case, neither the allegations in the petition nor the allegations in the removal documents establish the requisite jurisdictional amount. The petition alleges one claim. Plaintiff seeks actual damages "in excess of \$10,000" and exemplary and/or punitive damages "in excess of \$10,000" for this claim. Thus, on its face, the petition does not establish that the amount in controversy is greater than \$50,000.00.

In its removal documents, Defendant has failed to satisfy the requirements set forth in Laughlin and the other authorities described above. The petition for removal does not allege any underlying facts whatsoever with respect to Plaintiff's claims for damages. Instead, Defendant offers only the conclusory statement that "[a]lthough plaintiff's Petition demands damages in excess of \$10,000, counsel for plaintiff has acknowledged that plaintiff seeks damages in excess of \$50,000.00 exclusive of interest and costs." Notice of Removal at ¶ 5. The Court concludes that this statement, standing alone, does not affirmatively establish that the amount in controversy exceeds \$50,000 for purposes of diversity jurisdiction.

IV.

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the

removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$50,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$50,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction. Laughlin, 50 F.3d at 873. And the Tenth Circuit has clearly stated what is required to satisfy that burden.

Here, as the sole underlying fact in support of its claim that the amount in controversy exceeds \$50,000.00, Defendant offers only a statement that Plaintiff's counsel has acknowledged that plaintiff seeks damages in excess of \$50,000. The Court believes that under Laughlin, this is not adequate. If the face of the petition does not affirmatively establish that the amount in controversy exceeds \$50,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts. Indeed, in many cases, the removing party may be able to satisfy its burden by simply parsing out the elements of damages claimed in the petition, assuming, of course, that the total of these elements exceeds \$50,000.00. E.g., Herber, 886 F. Supp. at 20 ("Practitioners in Wyoming should be made aware that, under Laughlin, the jurisdictional allegation is determined as of the time of filing the Notice of Removal. An affidavit setting forth underlying facts will properly support a Notice of Removal."). In other cases, the removing party may seek to establish the necessary facts underlying the damages claim through discovery requests which produce "underlying facts," rather than the mere report of Plaintiff's counsel's acknowledgement which was tendered to the Court here.

Based upon a review of the record, the Court concludes that Defendant has not met its burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the

District Court of Tulsa County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 9TH day of October, 1996.



Sven Erik Holmes
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

OCT 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON PITMAN, Wife of GAIL)
PITMAN, Deceased,)
)
Plaintiff,)
)
vs.)
)
BLUE CROSS AND BLUE SHIELD OF)
OKLAHOMA, individually and as)
Trade Name of GROUP HEALTH)
INSURANCE OF OKLAHOMA, INC.,)
)
Defendant.)

Case No. 92-C-451-E

ENTERED ON DOCKET
DATE OCT 11 1996

ORDER

This Court granted summary judgment in favor of Blue Cross on Pitman's claim for coverage, finding that the amendment was unambiguous. The appellate court remanded, concluding that "the court erred by not considering the insurer's apparent conflict of interest in determining whether deference should be given to the insurer's interpretation of coverage." Pitman v. Blue Cross and Blue Shield of Oklahoma, 24 F.3d 118, 119 (10th Cir. 1994). The Court, upon consideration of the evidence presented at trial, the briefs submitted, and arguments of counsel, enters the following findings of fact and conclusions of law:

Findings of Fact

1. Blue Cross is a health service insurance corporation writing insurance in the state of Oklahoma. Blue Cross is organized as a not-for-profit, non-stock corporation pursuant to Okla.Stat.tit. 36, §§2601-2623.
2. During the period in question, Blue Cross entered into a group insurance plan ("the

75

plan") agreement with the Metropolitan Tulsa Chamber of Commerce. The plan is defined as an Employee Welfare Benefit Plan governed by ERISA, therefore this court has jurisdiction, and venue is proper.

3. Gail Pitman, as husband of Chamber of Commerce employee Sharon Pitman, was insured under the plan, as of September 1, 1989.

4. In August 1990, Mr. Pitman was diagnosed with multiple myeloma, and received Chemotherapy treatment which was paid for under the plan. However, in August 1991, Mr. Pitman's treating physician prescribed high dose chemotherapy (HDC) and autologous bone marrow transplant (ABMT), for which Blue Cross denied preauthorization on January 28, 1992.

5. Preauthorization was denied by Barbara Johnson, telephone claims adjuster. Johnson made the determination of coverage without knowing whether the plan was self-funded or insured by Blue Cross. She also was without knowledge as to the purpose behind the exclusion she relied on in denying preauthorization.

6. The exclusion relied on by Johnson provided as follows:

5) Preauthorization will be denied, and Benefits will not be provided, for any other allogeneic or syngeneic bone marrow transplants (with or without high doses of chemotherapy or radiation), such as:

* * *

e) Multiple myeloma;

* * *

7) Preauthorization will be denied, and Benefits will not be provided, for autologous bone marrow transplants for any other cases, such as:

* * *

e) Multiple myeloma.

This exclusion was added to the plan by amendment effective May 1, 1991. Under the terms of the Amendment, bone marrow transplants would be covered for certain, but not all types of cancer. The Amendment also contained an "experimental/ investigative" exclusion, but this exclusion was not the basis of Johnson's denial of preauthorization.

7. In deciding to amend the plan, Blue Cross did no financial or actuarial studies, and made no attempt to determine which beneficiaries would be effected.

8. Blue Cross claims that the purpose behind the amendment to the plan, which specifically addresses bone marrow transplants in cases of multiple myeloma is because broad coverage for unproven procedures actually hinders and disrupts the established process by which innovative technologies are properly tested and then accepted or rejected by the scientific and medical communities. The Court does not find this convincing in light of the fact that the exclusion did not limit the instances in which a bone marrow transplant in multiple myeloma would be covered to approved clinical trials in research facilities, but rather excludes coverage for bone marrow transplants in multiple myeloma patients altogether.

9. Moreover, while Blue Cross is established as a non-profit organization, the court is not convinced that Blue Cross does not benefit from the denial of claims, or exclusion of coverage of certain procedures.

10. While both Dr. Coulter and Michael Rhoads testified as to "appropriate" purposes for the 1991 amendment, Blue Cross did not establish either that Dr. Coulter or Michael Rhoads were present in the meeting whereby the amendment was drafted or

that these purposes were considered by the board.

11. Any findings of fact that are actually conclusions of law should be considered as such.

Conclusions of Law

12. Mr. Pitman's action is for payment of benefits wrongfully denied by Blue Cross's alleged breach of fiduciary duty. In reviewing Blue Cross's action to deny Mr Pitman's claim, this court must determine the standard of review. "[A] denial of benefits challenged under §11342(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. . . . Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r]' in determining whether there is an abuse of discretion." Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948, 956-57 (1989).

13. In this case, the plan gave the fiduciary discretionary authority, and that discretionary authority was exercised in determining what benefits were available for Gail Pitman.

14. In determining a standard of review, this court must look at both the decision to amend the plan and the decision to deny benefits. ("The decision to amend the plan which underlies the denial of benefits must remain the focus of review, especially when a plan's administrator deemed the employee's fiduciary under ERISA is also the plan's insurer." Pitman, 24 F.3d at 122.)

15. A conflict arises when the insurer would receive a financial benefit from the denial of benefits. Hickey v. Digital Equipment Corporation, 43 F.3d 941 (4th Cir. 1995). A conflict may be found even when the company has a good history of paying benefits because "even the most careful and sensitive fiduciary . . . may unconsciously favor its profit interest over the interests of the plan, leaving beneficiaries less protected than when the trustee acts without self-interest and solely for the benefit of the plan." Id., at p. 946. The Court concludes that, despite Blue Cross's not-for-profit status, it receives a financial benefit from the denial of benefits.

16. A substantial conflict of interest alters the standard of review. When a fiduciary exercises discretion and one decision will further the financial interests of the fiduciary, the fiduciary is not entitled to as much deference as would otherwise be appropriate. Rather the merits of the decision will be reviewed to determine whether it is consistent with an exercise of discretion by a fiduciary acting free of the interests that conflict with those of the beneficiaries. "In short, the fiduciary decision will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict." Doe v. Group Hospitalization & Medical Services, 3 F.3d 80, 87 (4th Cir. 1993). In essence, the court is determining whether the administrator's decision was reasonable, and weighing the conflict of interest as a factor in analyzing the reasonableness of the decision. Bernstein v. Capitalcare, Inc., 70 F.3d 783, 788 (4th Cir. 1995).

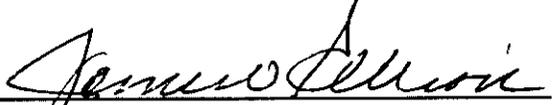
17. When a plan fiduciary demonstrates a substantial conflict of interest on the part

of the fiduciary, the burden shifts to the fiduciary to prove that the decision committed to its discretion was not tainted by self interest. Brown v. Blue Cross and Blue Shield of Alabama, Inc., 898 F.d. 1556, 1566-67 (11th Cir. 1990).

18. Here, Blue Cross has not carried its burdern of proving that the amendment of the plan, and the attendant denial of benefits to Pitman was not arbitrary and capricious in that it advanced its interest over that of Pitman. As noted in findings of fact number 8 and 10, the evidence put on by Blue Cross is not convincing as to the interest being protected by the amendment. The Court finds that the amendment of the plan and the denial of benefits was to protect Blue Cross's self-interest, and therefore the specific exclusion of a bone marrow transplant with multiple myeloma is void.

19. Any conclusions of law that are actually findings of fact should be considered as such.

IT IS SO ORDERED THIS 9th DAY OF OCTOBER, 1996.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

OCT - 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRY DEAN BATES,)
)
Plaintiff,)
)
vs.)
)
LARRY L. OLIVER, Attorney at Law, in his)
Official and Personal Capacity,)
)
Defendant.)

Case No. 94-C-858-E

ENTERED ON DOCKET
DATE OCT 11 1996

REPORT & RECOMMENDATION

Defendant, Larry L. Oliver filed a Motion to Dismiss and Motion for Default Judgment on the Pleadings and for Summary Judgment on November 22, 1995. [Doc. No. 34-1, 34-2, 34-3]. Plaintiff, Terry Dean Bates filed his response on December 12, 1995. [Doc. No. 37-1]. Plaintiff additionally filed several briefs on April 13, 1995 which addressed some of the issues raised by Defendant in his Motion to Dismiss. [Doc. No. 22]. By minute order dated July 23, 1996, the District Court referred this case to the Magistrate Judge for all further proceedings consistent with the Magistrate Judge's jurisdiction. For the reasons discussed below, the United States Magistrate Judge recommends that Defendant's Motions to Dismiss be **GRANTED**.

PROCEDURAL HISTORY

Plaintiff filed this action on September 8, 1994. [Doc. No. 1-1]. Plaintiff alleged that Defendant violated numerous rules of the Oklahoma Rules of Professional

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Conduct while serving as Plaintiff's criminal defense attorney. Plaintiff also asserted that Defendant conspired with the District Attorney of Pawnee County to obstruct justice and deny to Plaintiff his "equal protection of the law." Plaintiff alleged federal jurisdiction based on 28 U.S.C. § 1343(a), 42 U.S.C. § 1981, and 42 U.S.C. § 1985 (2)(3).

The District Court dismissed this action on September 22, 1994, without prejudice. [Doc. No. 4-1]. The basis of the dismissal was that Plaintiff's complaint did not pass the "frivolity" standard, and lacked an "arguable basis in either law or fact."

Plaintiff filed a Motion to Reconsider on October 6, 1994. [Doc. No. 5-1]. The District Court granted Plaintiff's Motion on December 28, 1994. [Doc. No. 10-1]. Plaintiff filed an Amended Complaint on January 23, 1995. [Doc. No. 13-1].

In his Amended Complaint, Plaintiff asserted that jurisdiction in this Court was proper under 28 U.S.C. § 1343(a), 42 U.S.C. § 1981, 42 U.S.C. § 1985(2)(3), and 28 U.S.C. § 1652. Plaintiff asserted that Defendant did not provide adequate legal counsel; that Defendant permitted an associate to represent Plaintiff against Plaintiff's permission; that Defendant failed to disclose information to Plaintiff; that Defendant failed to investigate potentially exculpatory witnesses; that Defendant breached his duty of confidentiality; that Defendant held an unauthorized meeting with Plaintiff's family to obtain assistance in persuading Plaintiff to plead guilty; that Defendant withheld information from Plaintiff concerning the possibility of appeal; and that Defendant conspired with the District Attorney of Pawnee County to obstruct justice.

Defendant filed a Motion to Dismiss on March 30, 1995. [Doc. No. 19-1]. Defendant argued that Plaintiff's original complaint had been dismissed by the Court to permit Plaintiff the opportunity to amend his complaint to comply with the federal habeas corpus statute. Defendant asserted that because Plaintiff's Amended Complaint did not significantly differ from the complaint which was dismissed by the Court, that the Court should again dismiss Plaintiff's complaint. Plaintiff filed numerous responsive briefs. [Doc. No. 22-1]. By Order dated October 25, 1995, the District Court denied Defendant's Motion to Dismiss noting that the Court had never granted Plaintiff leave to amend his complaint to seek habeas corpus relief under 28 U.S.C. § 2245. [Doc. No. 29-1]. Defendant was given twenty days to file an answer or a second motion to dismiss.

Defendant filed his second Motion to Dismiss on November 22, 1995. [Doc. No. 34-1]. Defendant asserted that Plaintiff had failed to properly invoke the jurisdiction of the federal courts, that Plaintiff's Complaint failed to state a claim upon which relief can be granted, and that Plaintiff's claim was barred by the statute of limitations.

MOTION TO DISMISS

Federal courts are courts of limited jurisdiction. Generally, jurisdiction in the federal courts is present because of the "diversity" of the parties, or because the case involves a "federal question."

Diversity is governed by 28 U.S.C. § 1332, and requires that the citizenship of all defendants and the citizenship of all plaintiffs be different. Plaintiff acknowledges

that he is a citizen and resident of **the state** of Oklahoma, and that Defendant is a citizen and resident of the state of **Oklahoma**. [Doc. No. 13-1]. Plaintiff therefore concedes that jurisdiction is not **founded on diversity**.

Federal courts also have jurisdiction over cases involving "federal questions."

The statute provides that "[t]he District courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Plaintiff asserts that jurisdiction in this Court is proper pursuant to several federal laws.

28 U.S.C. § 1343(a)

Plaintiff initially asserts that jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1343(a). The statute provides:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover **damages** for injury to his person or property, or because of **the deprivation** of any right or privilege of a citizen of **the United States**, by any act done in furtherance of any **conspiracy** mentioned in section 1985 of Title 42;

(2) To recover **damages** from any person who fails to prevent or to aid in **preventing** any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress **the deprivation**, under color of any law, statute, ordinance, **regulation**, custom or usage, of any right, privilege or immunity **secured** by the Constitution of the United States or by **any Act** of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the **United States**;

(4) To recover **damages** or to secure equitable or other relief under any **Act of Congress** providing for the protection of civil rights, **including** the right to vote.

28 U.S.C. § 1434(a).

This statute provides federal **jurisdiction** over certain claims properly brought under 42 U.S.C. § 1985, and claims **alleging** violations under color of state law of any right secured by the United States **Constitution** or federal law. See, e.g., *Nouse v. Nouse*, 450 F. Supp. 97 (D. Md. 1978) ("In order for jurisdiction to exist under section 1343, a complaint must at a minimum **seek** recovery under one of the substantive statutes to which section 1343 relates."). The statute, alone, absent a properly pled cause of action, does not provide this **Court** with jurisdiction over Plaintiff's complaint.

The only substantive statute **under** which Plaintiff asserts a claim, with respect to this statute, is 42 U.S.C. § 1985. **However**, as discussed below, Plaintiff has failed to allege a prima facie case under that **statute**. Consequently, 28 U.S.C. § 1343 does not assist the Plaintiff in his argument **that** jurisdiction is proper in this Court.

42 U.S.C. § 1981

Plaintiff additionally asserts that **jurisdiction** in this Court is proper pursuant to 42 U.S.C. § 1981. This statute provides that:

All persons within the **jurisdiction** of the United States shall have the same right in **every** State and Territory to make and enforce contracts, to **sue**, be parties, give evidence, and to the full and equal **benefit** of all laws and proceedings for the security of **persons** and property as is enjoyed by white citizens, and **shall be** subject to like punishment, pains, penalties, taxes, **licenses**, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). Plaintiff refers the Court to State of Louisiana ex rel. Purkey v. Cilino, 393 F. Supp. 102 (E.D. La. 1975). In that case the court noted

[t]he purpose of the section [1981] is to give all citizens equal benefit of all laws which provide for the security and property as enjoyed by white citizens. Section 1981 applies only to claims of racial discrimination. No allegations of racial discrimination is made in this case. . . . Since racial discrimination is not present, a 1981 claim for damages or injunctive or declaratory relief has no chance of success against the named defendants.

Id. at 106.

To establish a prima facie case under Section 1981, a plaintiff must allege facts to support: (1) an intent to discriminate on the basis of race by the defendant, and (2) the discrimination concerned one or more of the activities enumerated in the statute. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976); Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1532 (10th Cir. 1995); Fitzgerald v. Mountain States Tele. & Tele. Co., 68 F.3d 1257, 1262 (10th Cir. 1995) ("Title 42 U.S.C. § 1981 proscribes public or private racial discrimination in the formation and enforcement of contracts.").

As noted above, Plaintiff's complaint alleges that Defendant provided improper legal representation to Plaintiff, violated various ethical rules, withheld information from Plaintiff, and conspired with the District Attorney. Nothing in Plaintiff's complaint or briefs asserts a claim based on racial discrimination. Absent meeting the prima facie requirements for a claim under 42 U.S.C. § 1981, Plaintiff cannot claim, based on this statute, that jurisdiction in federal court is proper (pursuant to 28 U.S.C. § 1343). The Magistrate Judge recommends that Plaintiff's Complaint, to the extent

that it is based on 42 U.S.C. § 1981, **be dismissed** for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).¹

42 U.S.C. § 1985(2) & 1985(3)

Plaintiff asserts that jurisdiction is proper pursuant to 42 U.S.C. §§ 1985(2) &

(3). Section 1985(2) provides:

. . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

42 U.S.C. § 1985(2). Section 1985(3) provides:

If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

To properly allege a cause of action under the second-part of § 1985(2) or the first-part of § 1985(3),² a claimant must allege "some racial, or perhaps otherwise

^{1/} See also Tilton v. Richardson, 6 F.3d 693 (10th Cir. 1993) (when the question of whether a court has subject matter jurisdiction was intertwined with the merits of the case, the district court should rule on the merits rather than dismiss for lack of jurisdiction), cert denied, 510 U.S. 1093, 14 S. Ct. 925 (1994).

^{2/} The "second-part" of § 1985(2) and the first part of § 1985(3) are the sections quoted above. See Kush v. Rutledge, 460 U.S. 719, 725, 103 S. Ct. 1483, 1487 (1983) ("The second part of § 1985(2) applies to conspiracies to obstruct the cause of justice in state courts, and the first part of § 1983(3) provides a cause of action against two or more persons who 'conspire'. . .").

class-based, invidiously discriminatory animus." Griffin v. Breckenridge, 403 U.S. 88, 101-02, 91 S. Ct. 1790, 1798 (1971).

Each of these portions of the statute [cited above] contains language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws.

This limiting language was construed in Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 388 (1971), a case in which a unanimous Court held that § 1985(3) applies to purely private conspiracies. In explaining why that holding would not create an open-ended federal tort law applicable to "all tortious, conspiratorial interferences with the rights of others," *id.*, at 101, 91 S. Ct. at 1797, we expressly stated,

"The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.* at 102, 91 S. Ct. at 1798.

Kush v. Rutledge, 460 U.S. 719, 725-26, 103 S. Ct. 1483, 1487 (1983). See also Santistevan v. Loveridge, 732 F.2d 116 (10th Cir. 1984) ("Kush makes clear that the Griffin v. Breckenridge rule applies only to the last half of section 1985(2) and all of section 1985(3).") (Justice McKay, concurring).

In Tilton v. Richardson, the Tenth Circuit Court of Appeals further articulated the requirements of a § 1983(3) claim.

Firstly, a valid claim must, of course, involve a conspiracy. Secondly, however, § 1985(3) does not "apply to all tortious, conspiratorial interferences with the rights of others," but rather, only to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously

discriminatory animus." The other "class based animus" language of this requirement has been narrowly construed and does not, for example, reach conspiracies motivated by an economic or commercial bias. In fact, the Supreme Court has held that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause." Thirdly, and most importantly for this appeal, § 1985(3) covers only conspiracies "aimed at interfering with rights that are protected against private, as well as official, encroachment." This last requirement was affirmed in the Supreme Court's most recent § 1985(3) case, Bray v. Alexandria Women's Health Clinic. In that case, the Court made explicit that:

In Carpenters, we rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated § 1985(3). The statute does not apply, we said, to private conspiracies that are "aimed at a right only against state interference," but applies only to such conspiracies as are "aimed at interfering with rights protected against private, as well as official encroachment." There are few such rights (we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude, and, in the same Thirteenth Amendment contest, the right of interstate travel.)

It is thus plain that § 1985(3) applies to private conspiracies only in the event that the right aimed at by the conspiracy is one protected against both public and private interference. In short, to state a claim under 42 U.S.C. § 1985(3) for a non-racially motivated private conspiracy, if indeed such a claim can be stated, it is necessary to plead, inter alia: (1) that the conspiracy is motivated by a class-based invidiously discriminatory animus; and (2) that the conspiracy is aimed at interfering with rights that by definition are protected against private, as well as official, encroachment.

Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993), cert denied, 510 U.S. 1093, 14 S. Ct. 925 (1994).

Plaintiff's only allegations of conspiracy occur in ¶ 21 of his Second Amended Complaint. [Doc. No. 13-1]. Plaintiff asserts that Defendant knowingly conspired with the District Attorney of Pawnee County to hinder justice and deny Plaintiff equal protection of law. Plaintiff further asserts that the Pawnee District Attorney withheld key evidence and witnesses and that Defendant failed to investigate key witnesses and withheld evidence. Plaintiff does not allege the required racial or the limited class-based invidiously discriminatory animus that is required in a § 1985 action. Absent such an allegation in the pleadings, Plaintiff cannot establish a prima facie case under § 1985, and Plaintiff's cause of action should be dismissed for failure to state a claim upon which relief can be granted. See, e.g., Tilton 6 F.3d at 685.

28 U.S.C. § 1652

Plaintiff additionally asserts that jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1652. This section provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652. This statute provides that, under certain circumstances, in actions where state law applies, the federal courts will apply the appropriate state laws. Nothing in this statute confers jurisdiction over Plaintiff's claims. Plaintiff does not explain or elaborate upon how jurisdiction in this case is appropriate pursuant to this statute.

Plaintiff's Legal Malpractice Claims

Plaintiff's complaint generally alleges a claim of legal malpractice claim against his attorney. Such a claim is certainly appropriate and recognized in Oklahoma state court. See, e.g., Post Oak Oil Co. v. Stack & Barnes, P.C., 913 P.2d 1311 (Okla. 1996). The courts have consistently recognized that federal courts, absent unusual allegations or circumstances, are not the appropriate forum for legal malpractice suits. See, e.g., Bilal v. Kaplan, 904 F.2d 14 (8th Cir. 1990); Brown v. Schiff, 614 F.2d 237 (10th Cir. 1979) ("These cases question the jurisdiction of a district court to consider what in essence are legal malpractice suits brought under § 1983."), cert denied, 446 U.S. 941, 100 S. Ct. 2164 (1980).

STATUTE OF LIMITATIONS

Defendant asserts that Plaintiff initially filed his claim (on September 8, 1994) within the appropriate time period for the statute of limitations. The District Court dismissed Plaintiff's claim (September 22, 1994), and Plaintiff subsequently re-filed his claim (on January 23, 1995). Defendant contends that Plaintiff's Second Complaint is untimely.

Both parties agree that the applicable statute of limitations should be borrowed from Oklahoma, and would be two years. See, e.g., Maeve v. Grubbs, 841 F.2d 1512, 1524 (10th Cir. 1988); EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984). Assuming the parties are applying the appropriate statute of limitations, and that the Court would borrow the referenced Oklahoma statute, the Court would also borrow any applicable Oklahoma "saving" statutes. Pursuant to Oklahoma law, a Plaintiff is

given one year to commence a new action "after the reversal or failure [of the action] although the time limit for commencing the action shall have expired before the new action is filed." 12 O.S. 1991, § 100.

V. RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** Defendant's Motion to Dismiss [Doc. No. 35-1] without prejudice. Plaintiff has failed to establish that this Court has jurisdiction over Plaintiff's "legal malpractice" claims, and such claims should be dismissed due to the Court's lack of jurisdiction. With respect to Plaintiff's asserted "conspiracy" and "equal protection" claims under 42 U.S.C. §§ 1981 & 1985, Plaintiff has failed to state a claim upon which relief can be granted, and the Magistrate Judge recommends that such claims be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

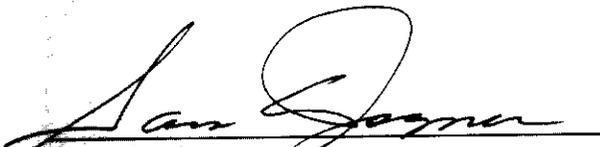
Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 9 day of October 1996.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to _____ or to their attorneys of record on the

11th day of October, 1996.
Kinda M. Collins


Sam A. Joyner
United States Magistrate Judge

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

FILED OCT 10 1996
10-11-96

UNITED WIRE LIMITED,)
)
 a corporation of Scotland,)
)
 Plaintiff,)
)
 v.)
)
 SOUTHWESTERN WIRE CLOTH OILFIELD)
 SCREENS, INC.,)
)
 an Oklahoma corporation, and)
)
 ROBERT E. NORMAN,)
)
 an Individual,)
)
 Defendants.)

Civil Action No. 95 C 832BH

FILED
OCT 10 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

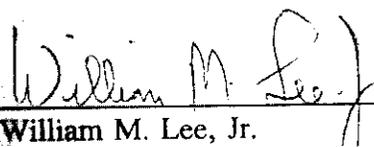
STIPULATION FOR
VOLUNTARY DISMISSAL

The parties to this action, having settled their disagreements, voluntarily dismiss this action pursuant to Rule 41(a)(1) of the Civil Rules of Civil Procedure with prejudice, with each party to bear its costs and attorneys' fees.

Dated: October 8, 1996

By:

UNITED WIRE LIMITED,



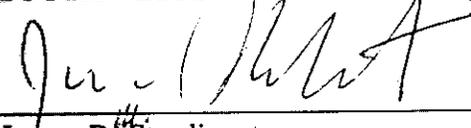
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Attorneys for Plaintiff

SOUTHWESTERN WIRE CLOTH, INC.,

Dated: October 9, 1996

By:



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**Attorneys for Defendant
Southwestern**

ROBERT E. NORMAN

Dated: October 9, 1996

By:



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**Attorneys for Defendant
Robert E. Norman**

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

F I L E D

OCT 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PROFESSIONAL AUTOMATION
SYSTEMS OF OKLAHOMA, INC.,
an Oklahoma corporation

Plaintiff,

vs.

PROFESSIONAL SYSTEMS PLUS,
INC., an Illinois corporation;
EAGLESOFT, INC., an Illinois
corporation; and SCOTT R.
KABBES, an individual,

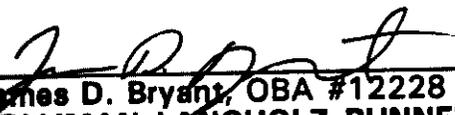
Defendants.

Case No. C 96-0034H

JOINT STIPULATION OF DISMISSAL

Plaintiff, Professional Automation Systems of Oklahoma, Inc., and defendants, Eaglesoft, Inc. (successor by merger of Professional Systems Plus, Inc.), and Scott R. Kabbes, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this proceeding with prejudice to the refiling of same.

Respectfully submitted,


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FORSMAN & SELLERS
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**ATTORNEYS FOR PLAINTIFF, PROFESSIONAL
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INC.**



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**ATTORNEYS FOR DEFENDANTS, EAGLESOFT,
INC., AND SCOTT R. KABBES**

eagle.dia/mdc

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CEI, INCORPORATED, an Oklahoma)
Corporation; and AETNA CASUALTY)
AND SURETY COMPANY, a)
Corporation,)
Plaintiffs,)

vs.)

Case No. 96-CV-488-H

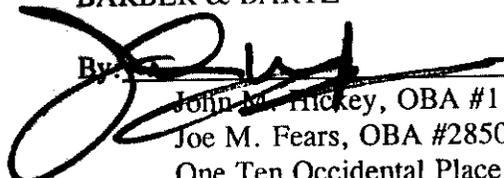
SHIRLEY KEITH, an Individual;)
MICHAEL JOHNSON, d/b/a Architec-)
ture Plus; and VAN BUREN PUBLIC)
HOUSING AUTHORITY,)
Defendants.)

FILED ON DECEMBER 11 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, CEI, Incorporated and Aetna Casualty & Surety Company, by and through their attorneys, Barber & Bartz, pursuant to Fed. R. Civ. P. 41, and hereby dismisses their claim against the Defendants, Shirley Keith and Van Buren Public Housing Authority, in the above captioned and numbered action with prejudice.

BARBER & BARTZ

By: 

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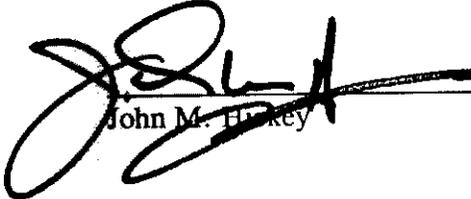
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Attorneys for Van Buren Public Housing
Authority and Shirley Keith

CERTIFICATE OF MAILING

I, John M. Hickey, hereby certify that on the 9th day of October, 1996, I caused a true and correct copy of the above and foregoing Stipulation of Dismissal With Prejudice to be mailed, postage prepaid, to:

Michael C. Redman
Doerner, Saunders, Daniel & Anderson
320 S. Boston, Suite 500
Tulsa, Oklahoma 74103


John M. Hickey