

**FILED**

OCT 30 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

RICHARD FRANKLIN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ALLSTATE INSURANCE COMPANY, )  
 )  
 Defendant. )

No. 96-CV-483C ✓

ENTERED ON DOCKET

DATE OCT 31 1996

**ORDER OF REMAND**

After a review of the record and the applicable legal authorities, and being fully advised in the premise, this Court finds it does not have subject matter jurisdiction in the above-styled case, and hereby remands same to state court.

**FACTS**

The Plaintiff brings this action against the Defendant, Allstate Insurance Company ("Allstate"), seeking to recover actual damages for alleged breach of an insurance contract, and punitive damages for alleged breach of the implied duty of good faith and fair dealing. In paragraph 13 of the Plaintiff's Petition, he seeks to recover "actual damages of \$1,000." In paragraph 14 of the Plaintiff's Petition, he seeks to recover "punitive damages of \$35,000.00." In the final paragraph of the Plaintiff's Petition, he states as follows:

WHEREFORE, Plaintiff, Richard Franklin, prays for actual damages against the Defendant, Allstate Insurance Company, in an amount of \$1,000.00, and punitive damages in excess of \$35,000.00 with interest thereon, together with cost of this action, his costs and attorneys fees and all other just and equitable relief to which Plaintiff may be entitled.

Based upon the Plaintiff's prayer for "punitive damages in excess of \$35,000.00", Allstate removed this action from state

court to federal court pursuant to 28 U.S.C. §1332.

On September 26th, 1996, a Case Management\Status Hearing was held in this action. During said hearing, the Plaintiff's attorney informed the Court that the Plaintiff seeks to recover a maximum of \$1,000 in actual damages, and a maximum of \$35,000 in punitive damages, in this action. The Plaintiff's attorney informed the Court that in no event does the Plaintiff seek to recover in excess of \$36,000, exclusive of interest and costs, from the defendant, Allstate, in this action.

#### LEGAL ANALYSIS

In order for a federal court to have diversity jurisdiction, the matter in controversy must exceed \$50,000, in addition to the requirement of diverse citizenship between the parties. 28 U.S.C. §1332. In Laughlin v. K-Mart Corp., 50 F.3d 871, 873 (10th Cir.) cert. denied --- U.S. --- 116 S.Ct. 174, 133 L.Ed.2d 114 (1995), the Tenth Circuit recently 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. (citation omitted). 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." (citation omitted). Moreover, there is a presumption against removal jurisdiction. (emphasis in original).

This District has recently rendered an opinion concerning removal based on facts similar to the instant case. In Maxon v. Texaco Refining, 905 F.Supp. 976 (N.D. Ok. 1995), the plaintiff objected to removal on the grounds the amount in controversy did not exceed \$50,000. Defendant, Texaco, argued the amount in controversy exceeded \$50,000 because plaintiff, Maxon, brought two

claims for actual damages "in excess of \$10,000", plus a prayer for punitive damages "in excess of \$10,000" for each claim. Plaintiff, Maxon, filed an Amended Notice of Removal wherein she rebutted defendant, Texaco's assertion the amount in controversy exceeded \$50,000 with the following language:

"Defendant asserts that the instant action belongs in Federal Court for yet another reason, that there is Diversity, and the amount in controversy [sic] in excess of \$50,000. There is not."

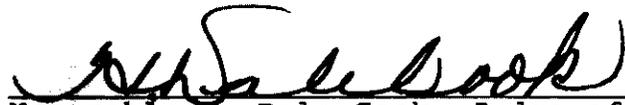
Maxon, 905 F.Supp. at 979.

The Court in Maxon held that plaintiff's amended notice of removal effectively denied the amount in controversy exceeded \$50,000, and that plaintiff's damages in state court should be so limited. Id.

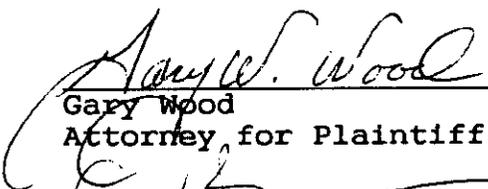
This court is firmly convinced that the representations of Plaintiff's counsel at the Case Management Conference that in no event does the Plaintiff seek to recover in excess of \$36,000, exclusive of interest and costs, from the Defendant, Allstate, in this action, concedes the amount in controversy does not exceed \$50,000. Thus, this court lacks subject matter jurisdiction, and this matter is hereby remanded to state court.

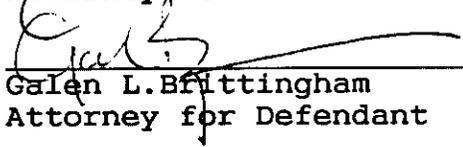
Furthermore, in accordance with the holding in Maxon, and in accordance with the representations made by Plaintiff's counsel at the Case Management Conference, in no event shall the Plaintiff seek damages in State Court in an amount in excess of \$36,000 exclusive of interest and costs from the Defendant, Allstate.

IT IS SO ORDERED this 29<sup>th</sup> day of October, 1996.

  
\_\_\_\_\_  
Honorable H. Dale Cook, Judge of the  
United States District Court for the  
Northern District of Oklahoma

Approved as to form and content

  
\_\_\_\_\_  
Gary Wood  
Attorney for Plaintiff

  
\_\_\_\_\_  
Galen L. Brittingham  
Attorney for Defendant

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

**FILED**

OCT 28 1996

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

SAMUEL J. WILDER,  
Pro se Plaintiff,

vs.

No. 96-C-276-E

OKLAHOMA DEPARTMENT OF  
HUMAN SERVICES,

Defendant.

FILED ON DOCKET

DATE OCT 31 1996

ORDER

Before the Court are Plaintiff's motion<sup>1</sup> for reconsideration of the Court's Order of September 16, 1996 (Docket No. 12) and motion for citation for indirect contempt (Docket No. 14). In its Order of September 16, 1996 (Docket No. 11), the Court dismissed this case and its consolidated case 96-C-277-B for lack of subject matter jurisdiction. In a footnote, the Court noted "that Plaintiff failed to appear at the Case Management Conference scheduled and held September 10, 1996, notwithstanding notice having been given to the Plaintiff by the District Court Clerk's office of the scheduled conference." Plaintiff urges the Court to reconsider its dismissal of the case, as he was unable to attend the September 10th case management conference due to his arrest for trespassing. Plaintiff also requests the Court to enter a contempt citation to defendant for failure to produce requested documents.

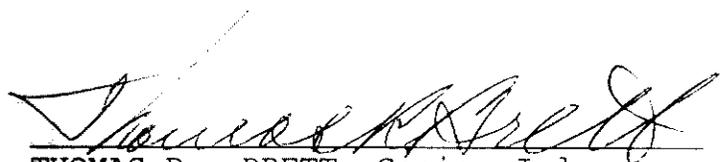
Plaintiff's presence or absence at the case management

---

<sup>1</sup> As plaintiff appears pro se, the Court construes the improperly designated Notice of Motion to Reconsider Ruling as a motion.

conference had no bearing on this Court's ruling in the September 16, 1996 Order. The Court dismissed the case based on the finding that, pursuant to 56 O.S. §168, plaintiff is required to bring his appeal of DHS' administrative hearing decision in Tulsa County District Court; and thus, this Court lacks subject matter jurisdiction. Accordingly, the Court denies plaintiff's motion to reconsider (Docket No. 12). Further, as the case is dismissed for lack of subject matter jurisdiction, plaintiff's motion for contempt is moot (Docket No. 14).

ORDERED this 28<sup>th</sup> day of October, 1996.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

10/25/96  
lc

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

**FILED**  
OCT 28 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WYANDOTTE TRIBE OF )  
OKLAHOMA, a corporation chartered )  
by the United States Government, )

Plaintiff, )

v. )

Case No. 95-C-779-B ✓

SAMUEL L. JACKSON, an individual, )  
and CLINTON E. HUTCHCRAFT, an )  
individual, )

Defendants. )

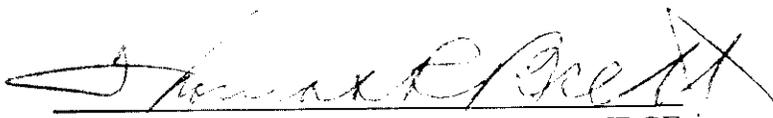
OCT 31 1996

JUDGMENT

Upon the Parties' Joint Motion for the Entry of a Preliminary Injunction; and the Parties' Agreement for the Entry of a Final Judgment, and being fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the Defendants Samuel L. Jackson and Clinton E. Hutchcraft, and each of them, are permanently enjoined from, and shall cease and refrain from, (i) holding themselves out on behalf of any entity named "Sovereign Nations Central Bank"; (ii) encouraging or importuning others to undertake or participate in any effort to promote the business of any entity so named; and (iii) representing or implying that any connection exists between any of Jackson's or Hutchcraft's activities and the Plaintiff.

DATED this 25<sup>th</sup> day of October, 1996.

  
CHIEF UNITED STATES DISTRICT JUDGE

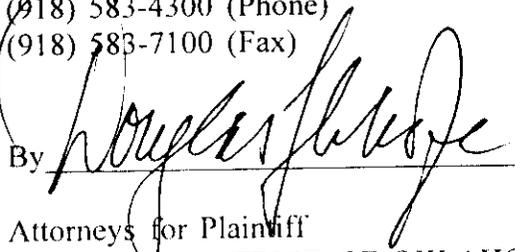
74

APPROVED AS TO FORM AND CONTENT:

DOUGLAS L. INHOFE, OBA No. 4550  
MARK A. WALLER, OBA No. 14831

INHOFE & WALLER, P. C.  
907 Philtower Building  
427 South Boston Avenue  
Tulsa, Oklahoma 74103-4114  
(918) 583-4300 (Phone)  
(918) 583-7100 (Fax)

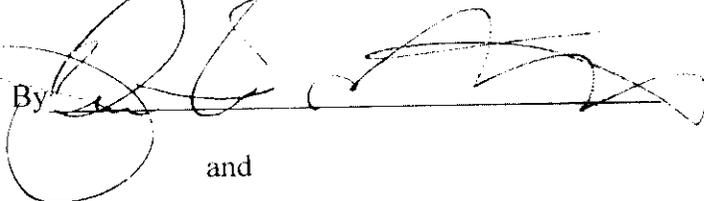
By



Attorneys for Plaintiff  
WYANDOTTE TRIBE OF OKLAHOMA

JOHN G. GHOSTBEAR, OBA No. #3335  
2738 East 51st Street  
Elmcrest Park, Suite 220  
Tulsa, OK 74105-6225

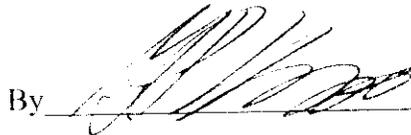
By



and

GEORGE P. VLASSIS  
VLASSIS & VLASSIS  
1545 W. Thomas Road  
Phoenix, Arizona 85015

By



Attorneys for Defendants  
SAMUEL L. JACKSON and  
CLINTON E. HUTCHCRAFT

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

CONNIE S. EDWARDS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SHIRLEY CHATER, )  
 Commissioner of the Social Security )  
 Administration, )  
 )  
 Defendant. )

OCT 31 1996

Case No. 95-C-951-K

**FILED**

OCT 30 1996

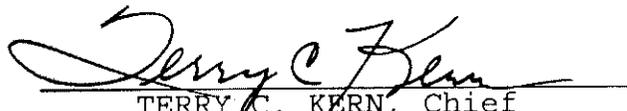
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

O R D E R

This Social Security action was referred to Magistrate Judge McCarthy. The defendant filed an unopposed motion to remand the case for further proceedings, which Magistrate Judge McCarthy granted by order entered February 22, 1996. No party objected to the order. However, since the action was before the Magistrate Judge on reference rather than by consent, this Court is required to enter the dispositive order.

It is the Order of the Court that the order of the Magistrate Judge entered February 22, 1996, is hereby adopted and approved as the Order of the Court. This action is remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. §405(g) and 1383(c)(3).

IT IS SO ORDERED THIS 30<sup>th</sup> DAY OF OCTOBER, 1996.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

W

512

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

FILED  
OCT 30 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WILLIAM JORDAN,  
Plaintiff,

vs.

LIFE INSURANCE COMPANY OF NORTH  
AMERICA,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

Case No. 96-C-0033K

OCT 3

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties to this action, having settled their disagreements, voluntarily dismiss this action, with prejudice, with each party to bear its own costs and attorney fees.

Respectfully submitted,

WILLIAM JORDAN

By Bryan L. Smith  
Bryan L. Smith, OBA #1521  
SMOLEN & SMITH  
201 West Fifth Street, Suite 530  
Tulsa, OK 74103-4245  
(918) 583-7800

ATTORNEYS FOR PLAINTIFF

LIFE INSURANCE COMPANY OF NORTH  
AMERICA

By Sheila M. Powers  
R. Casey Cooper, OBA #1897  
OF BOESCHE, McDERMOTT & ESKRIDGE  
100 West Fifth, Suite 800  
Tulsa, OK 74103-4216  
(918) 583-1777

ATTORNEYS FOR DEFENDANT

100



Therefore, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. This Court has jurisdiction over the parties and the subject matter in this action under 15 U.S.C. §§ 1051 et seq., 17 U.S.C. §§ 101 et seq. and 28 U.S.C. §§ 1331, 1332, 1338 and 1367.

2. Plaintiff Ragan is an individual with a residence in Tulsa, Oklahoma and is doing business at 11275 South 89th E Avenue, Bixby, Oklahoma, within this judicial district.

3. Defendants Bright Star and MSD are both Oklahoma corporations, each having a principal place of business at 13164 S. Memorial Drive, Bixby, Oklahoma, within this judicial district.

4. Bright Star designs, produces, markets and sells hand-crafted gift products, including framed sculptured artwork, which incorporate a unique and distinctive trade dress ("Trade Dress"). The Trade Dress is the overall look, image and appearance of Bright Star's framed sculptures, which have a distinctive, hand-crafted, hand-painted look, giving the products a warm, personalized appearance. Some of Bright Star's framed sculptures, exemplifying its Trade Dress, are shown in Exhibit A, which is a true and correct copy of pages from one of Bright Star's catalogs.

5. The elements of Bright Star's Trade Dress include one or more of the following:

- a. a simple unadorned frame (typically either black or gold);
- b. at least two mats (e.g., a front mat and a back mat) placed within the frame, with spacing between the mats, and an opening (typically square or rectangular) in the front mat;
- c. a three-dimensional sculpture attached to the back mat, where the sculpture is flat on the back side attached to the mat and sculptured on the front side;

- d. the sculpture is **hand-painted with multiple colors** (typically bright colors);
- e. the sculpture has a **hand-crafted look**, typically giving the appearance of ceramic that **has been fired and glazed**;
- f. **embellishments** (such as **bugle beads**, rhinestones, slick paint, torn paper, etc.) are typically **attached to the sculpture** or to one or both of the mats; and
- g. short expressive or **sentimental sayings** (called “sentiments”), either in rhyme or prose, are typically placed on at least one of the mats, usually the front mat, **wherein the sentiments have a hand-written look**.

6. Bright Star’s Trade Dress is **inherently distinctive and non-functional** and has acquired secondary meaning in the marketplace. Bright Star has expended substantial time and money promoting and advertising its Trade Dress in connection with its business and has developed substantial goodwill in its Trade Dress.

7. Defendants allege that **Ragan has marketed, sold and continues to market and sell framed products** which, among other things, **infringe the Trade Dress of Bright Star**. In particular, Ragan has marketed and sold **certain framed sculpture products** identified in her catalog as: FDA-TF (Treasure Friend), FDA-BF (Bunny Friend), FDA-GF (Gingerbread Friend), FDA-MS (Moon/Stars/Quilt), FDA-HS (Home Sweet Home) , FDA-TT (Table Top), FDA-SC (Sailor Child), FDA-MB (Moon/Baby), FDA-SB (Wishing Star Bouquet) , FDA-CT (Christmas Tree) and FDA-SH (Home With Snowman) (hereinafter, collectively, “Ragan Framed Sculptures”). A true and correct copy of a page from her catalog showing Ragan’s Framed Sculptures is attached as Exhibit B.

8. The marketing, sales and **distribution** of Ragan Framed Sculptures have created a

likelihood of confusion with Bright Star's Trade Dress as to source, sponsorship or affiliation, and infringe Bright Star's Trade Dress. The infringement has been innocent, unintentional and in good faith.

9. For purposes of settlement of this litigation, Ragan agrees to the entry of the following injunction:

IT IS THEREFORE ORDERED that Ragan and her respective officers, agents, servants, employees and attorneys, and those in active concert or participation with them, are hereby permanently enjoined and restrained from:

- (a) making any more Ragan Framed Sculptures;
- (b) marketing or selling existing Ragan Framed Sculptures, except to the extent authorized by Defendants;
- (c) designing, making, manufacturing, assembling, or otherwise producing, or selling, marketing, advertising, promoting, displaying, or in any way disseminating framed products that incorporate sculptures which are hand-painted or hand-crafted, or which are made from molds that are based on hand-crafted sculptures, except to the extent authorized by Defendants; or
- (d) any infringing use of Bright Star's Trade Dress.

FURTHER ORDERED, that this Court shall have continuing jurisdiction with regard to the terms of this Judgment.

FURTHER ORDERED, that Ragan shall have thirty (30) days from receipt of notice to cure any violation of this Judgment.

FURTHER ORDERED, that this Judgment is in full settlement of all claims and defenses

by and between the parties hereto and shall constitute a final adjudication with prejudice on the merits as to all claims and defenses which were raised, or which could have been raised by either of the parties hereto relating to the subject matter of the Plaintiff's Complaint, the Defendants' Answer and Counterclaims, and/or the Plaintiff's Reply.

FURTHER ORDERED, that any and all pending motions filed by either party are denied, as moot.

FURTHER ORDERED, that any relief not granted is DENIED.

FURTHER ORDERED, that each party will bear its own costs, including attorney's fees.

SIGNED on this 30 day of October, 1996.

United States District Judge  
Northern District of Oklahoma

CONSENTED AND  
AGREED TO:

ANGIE D. RAGAN  
(Appearing and Acting Pro Se)

By: Angie D. Ragan

Date: 10/25/96

BRIGHT STAR DESIGNS, INC.

By: Michelle Samara  
Michelle Samara

Title: President

Date: 10/24/96

MICHELLE SAMARA DESIGNS, INC.

By: Michelle Samara  
Michelle Samara

Title: President

Date: 10/24/96

Attorneys for Defendants

By: Douglas H. Elliott

Douglas H. Elliott

C. Dale Quisenberry

TOBOR & GOLDSTEIN, L.L.P.

1360 Post Oak Blvd., Suite 2300

Houston, TX 77056

Telephone: 713/877-1515

Facsimile: 713/877-1145

CERTIFICATE OF SERVICE

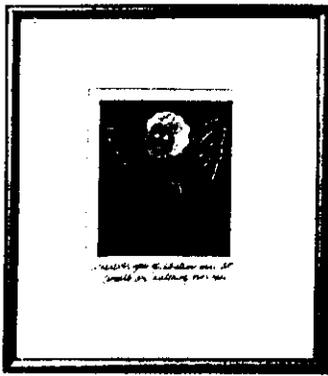
The undersigned hereby certifies that the above and foregoing document was mailed first class mail, postage prepaid to:

Angie D. Ragan  
11275 S. 89 E. Ave.  
Bixby, OK 74008

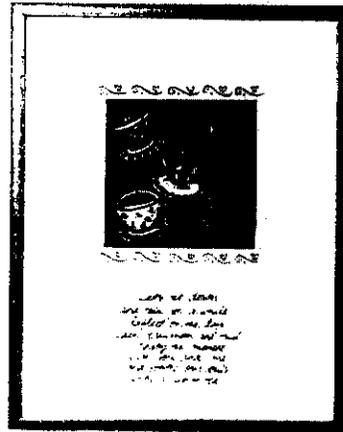
on this 25th day of October, 1996.

A handwritten signature in dark ink, appearing to read 'W. Rex McPhail', is written over a horizontal line.

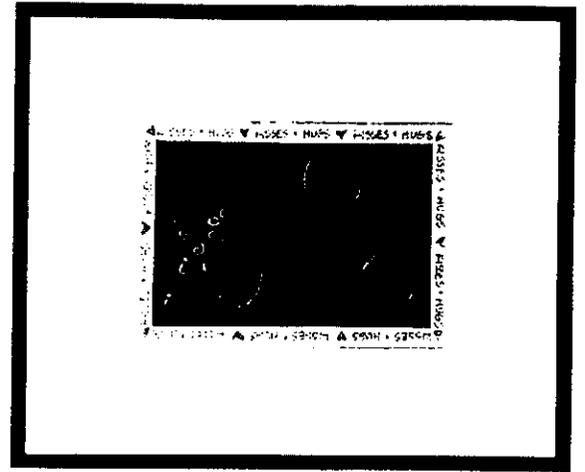
W. Rex McPhail



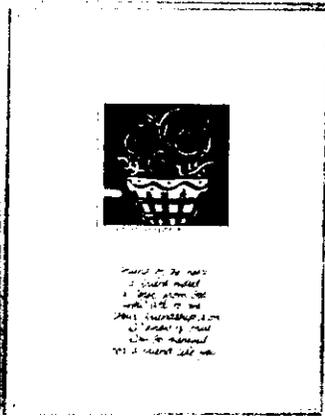
ANGELS WATCHING OVER YOU



TEA CUPS



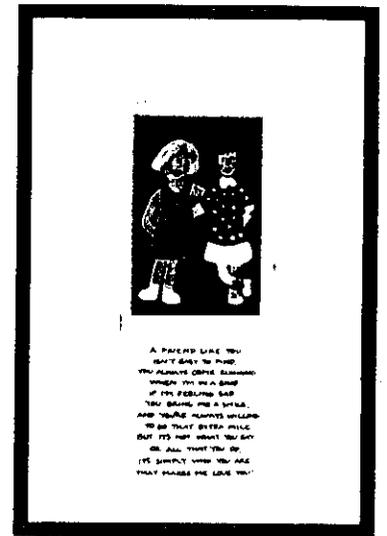
KISSES AND HUGS



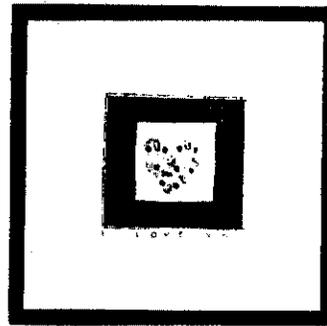
BEST FRIENDS



SOCKS



A FRIEND LIKE YOU



I LOVE YOU HEART

**ALL-OCCASION**

**Angels Watching Over You**

7 1/2" x 8" AC-AW01

Wherever you go, whatever you do, angels are watching over you!

**Tea Cups**

7" x 9" AC-TC01

Let's sit down and talk for a while, Reflect the day, each triumph and trial. Enjoy the moment, just you and me, and soothe our souls with a cup of tea.

**Kisses & Hugs**

12" x 10" AC-KH01

Kisses & Hugs (repeated all around the mat)

**Best Friends**

7" x 9" AC-BF01

Friend of the heart, A friend indeed, a gift from God you are to me. Your friendship is one I know is true, I'm so thankful for a friend like you!

**Socks**

8" x 8" AC-SK01

You knock my socks off!

**A Friend Like You**

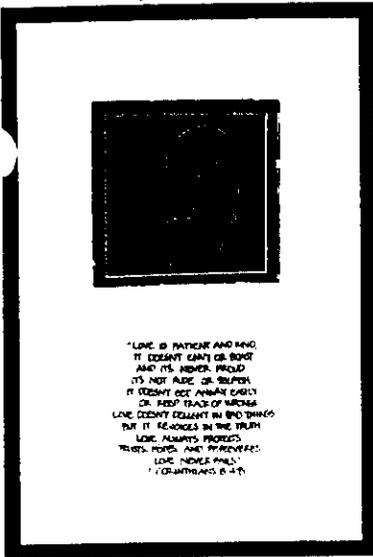
8 x 12" AC-FL01

A friend like you isn't easy to find, you always come running when I'm in a bind. If I'm feeling sad you bring me a smile and you're always willing to go that extra mile. But it's not what you say or all that you do, it's simply who you are that makes me love you!

**I Love You Heart**

7 1/2" x 7" AC-IL01

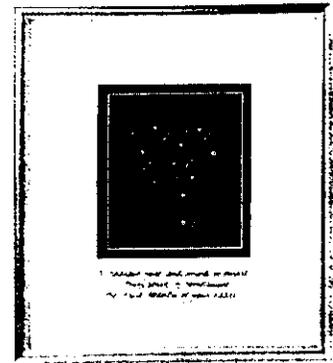
I Love You



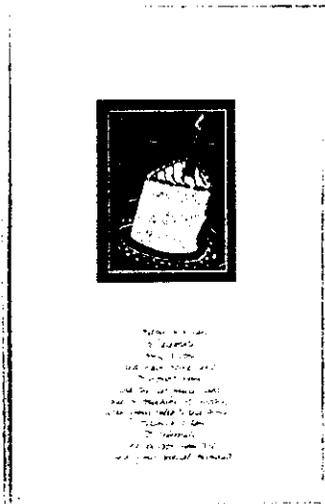
LOVE IS...



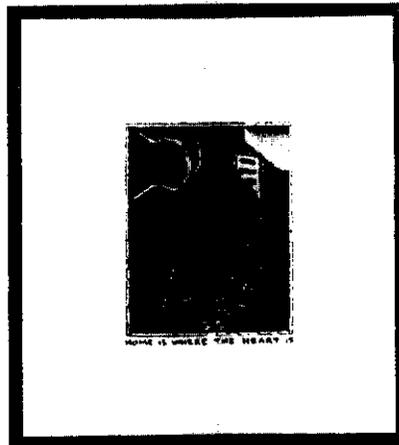
HATS OFF



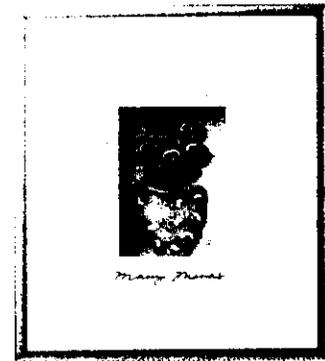
SPECIAL HEART



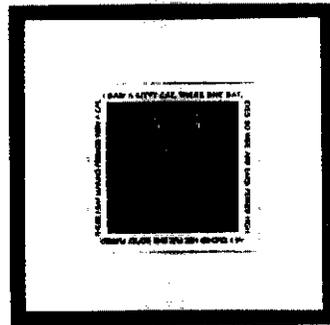
BIRTHDAY CELEBRATION



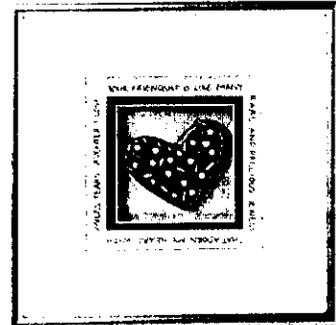
HOME IS WHERE THE HEART IS



THANK YOU BOUQUET



KITTY CAT



SMALL SQUARE JEWELLED HEART

**Love Is...**

8"x12" AC-1X01

"Love is patient and kind, it doesn't envy or boast and it's never proud. It's not rude or selfish, it doesn't get angry easily or keep track of wrongs. Love doesn't delight in bad things but it rejoices in the truth. Love always protects, trusts, hopes, and perseveres. Love never fails."

I Corinthians 13:4-8

**Hats Off**

9"x9" AC-H001

Hats off to you!

**Special Heart**

7"x8" AC-SH06

A radiant face and mind so smart only serve to compliment the true beauty of your heart!

**Birthday Celebration**

7"x11" AC-BC06

Today is a day to celebrate, sing a song and have some cake. To honor you and the life you're living that is touching so many with your talents and giving. Today is a day to celebrate the person you are and your special birthday!

**Home Is Where The Heart Is**

8"x9" AC-HH01

Home is where the heart is

**Thank You Bouquet**

7"x8" SP-TB01

Many Thanks!

**Kitty Cat**

7"x7" AC-KC01

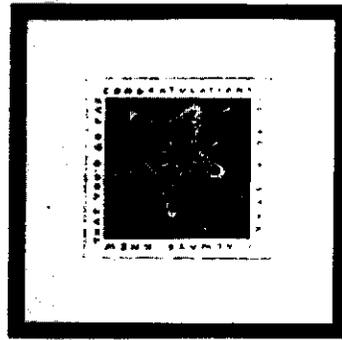
I saw a kitty cat, there she sat eyes so wide and ears perked high. As I touched her fur she softly purred, there I sat making friends with a cat.

**Small Square Jewelled Heart**

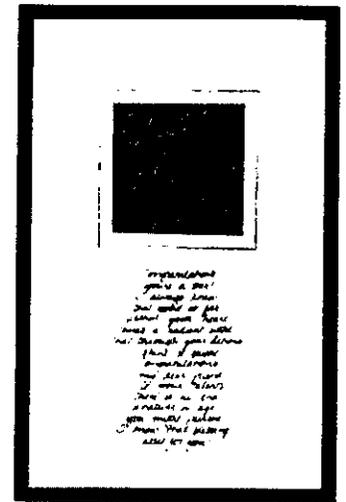
7"x7" AC-JH06



THANKS



SMALL CONGRATULATIONS STAR



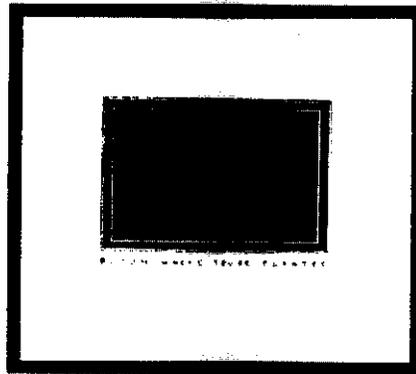
CONGRATULATIONS STAR



GOLDEN HEART



COFFEE TALK



BLOOM WHERE YOU'RE PLANTED



WEDDING CAKE

## ALL-OCCASION

### Thanks

12"x7" AC-TH06

For all that you do and the words you say to encourage my heart and brighten my day!

### Small Congratulations Star

7"x7" AC-CS02

Congratulations, you're a star! I always knew that you'd go far.

### Congratulations Star

7"x11" AC-CS01

Congratulations, you're a star! I always knew that you'd go far. Within your heart there's a radiant light that through your actions shines so bright.

Congratulations, my dear friend, to your talents there is no end. Whatever in life you might pursue, I know that blessings wait for you!

### Golden Heart

7"x8" AC-GH01

I Love You.

### Coffee Talk

8"x8" AC-CT01

Please tell me about your busy day, though our time is short we've much to say.

Forget the things to do and places to be, let's sit and chat over a cup of coffee!

### Wedding Cake

9"x11" EY-WC01

As your two hearts are now becoming one, so many new adventures are in each day to come. For the vows that you exchange are only the start of the love and life experiences waiting to fill your heart!

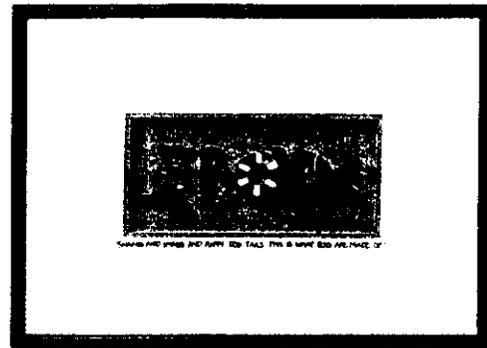
### Bloom Where You're Planted

10"x9" AC-BP01

Bloom where you're planted.



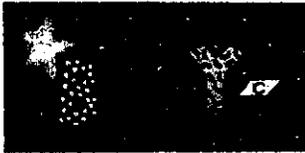
NOAH'S ARK



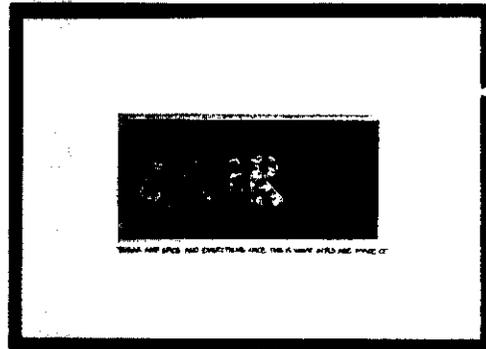
BOYS



AIRPLANE



BABY



GIRLS

# CHILDREN'S

**Noah's Ark**

12"x12" CH-NA01

Whenever there's a storm, sunshine is soon to follow!

**Boys**

11"x8" CH-BY01

"Snakes and snails and puppy dog tails, this is what boys are made of."

**Airplane**

7"x7" CH-AP01

Let your dreams soar so high they reach the clouds up in the sky!

**Baby**

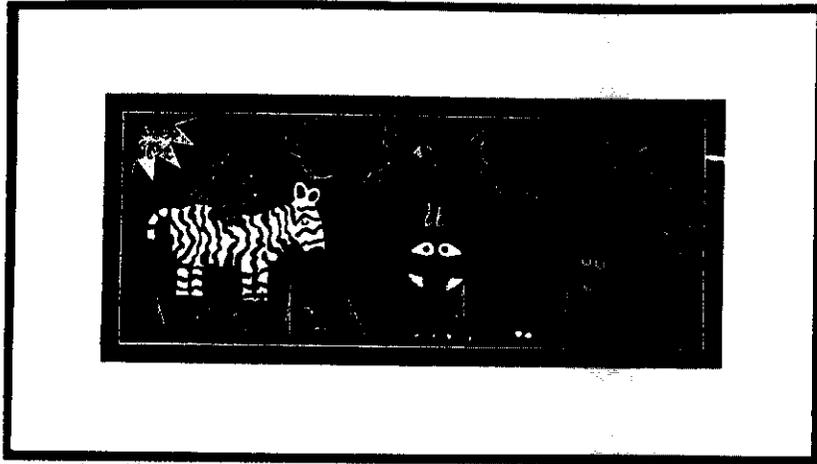
11"x8" CH-BR06

Precious baby, so small and sweet with tiny hands and soft little feet. Though this world seems strange and new, a wonderful life is awaiting you!

**Girls**

11"x8" CH-GI01

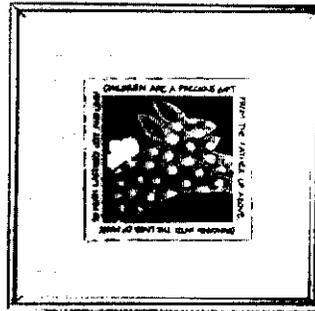
"Sugar and spice and everything nice, this is what girls are made of."



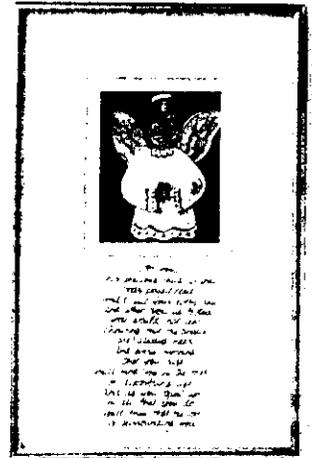
ANIMAL KINGDOM



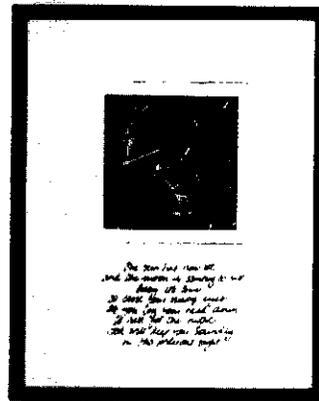
THE COW JUMPED OVER THE MOON



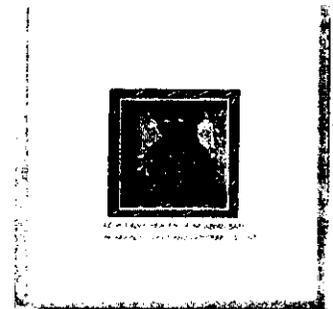
CHILDREN'S BUNNY



CHILDREN'S ANGEL



CHILDREN'S MOON



TEDDY BEAR

# CHILDREN'S

**Animal Kingdom**

21"x12" CH-AK01

**The Cow Jumped Over The Moon**

11"x9" CH-CJ01

The cow jumped over the moon

**Children's Bunny**

7"x7" CH-CR01

Children are a precious gift from the Father up above bringing into the lives of many so much lasting joy and love!

**Children's Angel**

7"x11" CH-CA06

For you, this precious child. I pray, God's perfect peace would fill your every day. And when you lie to sleep you would not fear knowing that His angels are always near. And every morning that you rise, you'll find joy in the task of discovering life. And as you grow up, in all that you do, you'll know that His love is surrounding you!

**Children's Moon**

7"x9" BLACK FRAME CH-MN01  
7"x9" SILVER FRAME CH-MN02

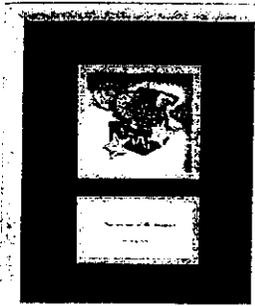
The sun has now set and the moon is starting to rise, Baby it's time to close your sleepy eyes as you lay your head down to rest for the night God will keep you soundly in His precious sight!

**Teddy Bear**

7"x7" CH-TB01

Fresh from heaven, a newborn babe, unbearably sweet and wonderfully made!

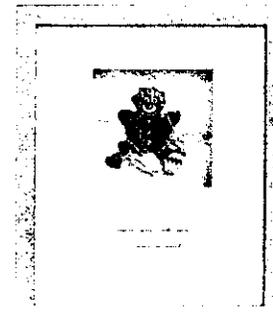
ALL FRAMED PIECES  
ARE APPROXIMATELY  
10" x 12"



**FDA-TF • Treasure Friend •** You are one of the treasures in my life.



**FDA-BF • Bunny Friend •** Once in a while there's a friendship that will last a lifetime through. I'm so thankful a friendship like that is the kind I am sharing with you.



**FDA-GF • Gingerbread Friend •** I couldn't have a better friend if I'd made one myself.



**FDA-MS • Moon/Stars/Quilt •** A child is a maker of memories... a child is love.

## The Newest Collection of Fanciful Designs

Known for her whimsical  
creations, Angie uses a "love of life"  
philosophy when designing.



**FDA-HS • Home Sweet Home •**  
Home Sweet Home



**FDA-TT • Table Top With Verse •** Home is where joy and memories live... full of the love only families can give.



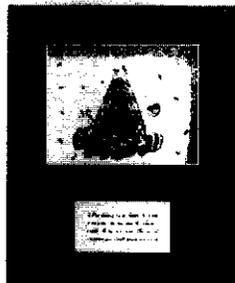
**FDA-SC • Sailor Child •** Children are makers of memories. They are a gift of God.



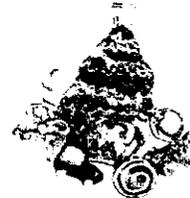
**FDA-MB • Moon/Baby •** Where did you come from baby dear? Out of the everywhere into the here!



**FDA-SB • Wishing Star Bouquet •**  
Here's a bouquet of wishing stars... Just for you!



**FDA-CT • Christmas Tree •** Christmas is a time to care, precious memories to share, with those we love the most, traditions that keep us close.



**FDA-SH • Home With Snowman •**  
There's no place like home for the holidays.



under both the Eighth and Fourteenth Amendments. He asserts that Defendants, under the guise of legitimate penal authority, applied pepper spray in such an excessive manner as to constitute "cruel and unusual" punishment. Plaintiff also contends his § 1983 rights were violated by lack of immediate and adequate medical attention, by denial of access to the law library, by being placed in segregation and his telephone usage restricted without prior notification or hearing, by unsanitary and overcrowded prison conditions, by inadequate ventilation and unsanitary food handling, by the unavailability of hygiene supplies except through Larry's Commissary at inflated prices, and by denial of outside-of-cell exercise time. Plaintiff seeks actual and punitive damages.

#### UNCONTROVERTED FACTS

1. Plaintiff was in custody in the Tulsa County Jail facility from June 1, 1995 until January 26, 1996. He was being held for the United States government pending testimony before a federal grand jury [Form-41 Hold].<sup>1</sup>
2. On or about September 12, 1995, Plaintiff was housed on the 8th Floor in the same cell with inmate Andre Green and inmate Ottie Webb, who were members of rival gangs.

---

<sup>1</sup> It is unclear from the record in this case whether Plaintiff was a pretrial detainee or a convicted felon. In any event, the Eighth Amendment applicable to convicted persons provides the benchmark in the case of a pretrial detainee who is protected under the Due Process Clause of the Fourteenth Amendment. McClendon v. City of Albuquerque, 79 F.3d 1014, 1022 (10th Cir. 1996) (citing Bell v. Wolfish, 441 U.S. 520, 525 n.16 (1979)).

3. Inmate Green began kicking on the door, trying to obtain the attention of the officers, demanding other "housing."
4. Officer Ralph Duncan ordered inmates Green, Webb and Carpenter to get on their beds, to stop the banging, and to quit asking for a change in placement.
5. Defendant Duncan released a burst of pepper spray in the face of both inmates, Webb and Carpenter.
6. Plaintiff was not treated by prison medical personnel after the pepper spray incident on September 12, 1995.
7. On or about April 11, 1996, Deputy Marshal Fagala contacted the Tulsa County Sheriff's Department regarding Plaintiff's placement within the confines of the county jail.
8. On or about April 11, 1996, Deputy Marshal Fagala advised Plaintiff was serving a sentence, would not be allowed outside exercise, and would not be allowed to mix with groups of inmates due to his status as a grand jury witness.
9. The Tulsa County Sheriff's Office contracts with Wexford Health Services to provide medical services to the inmates.
10. Plaintiff had access to and routinely used Prisoner Request and Grievance Forms.
11. The ventilation system was completely overhauled in 1994 following an electrical fire in the return air blower.
12. The commissary is exclusively controlled by Larry McCray and the sheriff's department has minimal involvement.
13. Effective December 1, 1995, an employee, adequately trained in the law according to the standards of the Department of

Justice, was hired to fill the law clerk position at the Tulsa City County Jail.

14. Stanley Glanz is the duly elected and acting Sheriff of Tulsa County and has held that position since January 1, 1989. Melvin T. Sandy (M.T. Sandy), Ralph Duncan III and Jack Putman are or were employees of the Tulsa County Sheriff's Department at the time of Plaintiff's incarceration.
15. Satayabama C. Johnson, M.D., is a licensed physician in the State of Oklahoma.

#### MOTION TO DISMISS

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, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Plaintiff alleges that following the pepper spray incident he

was not "checked by the nurse as stated in the TCSO policy and procedures," and that his requests for medical treatment were ignored.<sup>2</sup> Plaintiff also alleges that Dr. Johnson and her staff failed to administer antibiotic and change the bandage on eight sutures on the left side of his face as prescribed by Dr. Shehan at the Federal Transfer Center. Plaintiff alleges "Dr. Johnson [is] not qualified to modify or cancel this surgeon's orders." [Docket #1 at 12.]

Dr. Johnson has moved to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. She contends Plaintiff's allegations are conclusory and fail to support the elements for negligence under Oklahoma law. In his response, Plaintiff outlines how Dr. Johnson's conduct has met each of the elements of negligence and repeats "this deliberate neglect per se was the cause of plaintiff seeking administrative remedies...." [Docket #13 at 2.] Dr. Johnson, in reply to Plaintiff's response, states Plaintiff's allegations of medical negligence are not

---

<sup>2</sup> According to the Special Report, there is no notation which confirms or refutes the Plaintiff's claim that he was not seen by a nurse on September 12, 1995, following the pepper gas incident. Although attached to Plaintiff's Complaint are medical requests for treatment for the day of and a few days following the pepper gas incident, the affidavit of Ronald Isaacs, attached as Exhibit "D" to the Reply of Satayabama Johnson, M.D., attests that Mr. Carpenter's medical records file does not reflect any medical request forms until September 21, 1995. This request was for "cold pills" for which Sudafed 30 mg was prescribed on September 23, 1995. No request for treatment of his eyes was documented until December 12, 1995, approximately 3 months after the pepper gas incident, and even then, there is no mention that it relates to or arises from the pepper gas incident. [Doc. 19, Ex. "D".]

cognizable under 42 U.S.C. § 1983, and as such, Plaintiff has failed to state a claim upon which relief may be granted.

Under Estelle v. Gamble, 429 U.S. 97 (1976), the Court concludes that Plaintiff has failed to state a claim for deliberate indifference to his serious medical needs.<sup>3</sup> Liberally construing the allegations in the *Complaint* in the light most favorable to Plaintiff, the Court concludes that at the very most Dr. Johnson or her staff, including Daisy Mullins, may have been negligent. Such a claim, however, is insufficient to support a claim for deliberate indifference under the Eighth Amendment. See generally Reed v. Dunham, 893 F.2d 285, 286-87 (10th Cir. 1990); see also Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Therefore, the Court concludes Dr. Johnson and Nurse Mullins are entitled to dismissal of Plaintiff's denial of medical treatment claim for failure to state a claim.<sup>4</sup>

---

<sup>3</sup> Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection for medical care as that afforded convicted prisoners under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990).

<sup>4</sup> Even though Defendant Mullins has not filed a motion to dismiss for failure to state a claim, the Court concludes that Plaintiff's claims for negligent medical treatment against Nurse Mullins fail to state a claim upon which relief can be granted and should be dismissed at this time. See 28 U.S.C. § 1915(e)(2)(B), as amended by the Prisoner Litigation Reform Act of 1996 (granting the court the authority to dismiss a case "at any time if the court determines that the action . . . fails to state a claim on which relief may be granted").

### MOTION FOR SUMMARY JUDGMENT

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material fact ... and "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). However, the Court cannot resolve material factual disputes at summary judgment based on conflicting affidavits. Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991).

Where a *pro se* plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See id. at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's Complaint may also be treated as an affidavit if it is sworn under penalty of perjury and

states facts based on personal knowledge. Id. The court must also construe plaintiff's *pro se* pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

A. Pepper Spray Usage

In order for the use of pepper spray to rise to the level of an Eighth Amendment violation, Plaintiff must establish that Defendant "acted maliciously and sadistically for the very purpose of causing harm rather than in a good-faith effort to maintain or restore discipline." Mitchell v. Maynard, 80 F.3d 1433, 1440 (10th Cir. 1996) (citing Hudson v. McMillian, 503 U.S. 1, 6-7 (1992)). In making this determination, the Court must balance the need for force with the amount of force used. Hudson, 503 U.S. at 7. This standard "applies regardless of whether the corrections officers are quelling a prison disturbance or merely trying to maintain order." Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir. 1992). The absence of serious injury is a relevant, but not dispositive, factor to be considered in the subjective analysis. Hudson, 503 U.S. at 7.

Neither the Supreme Court nor a court of appeals has held, so far as this Court can determine, that it is "per se unconstitutional for guards to spray mace [or other chemical agents, such as pepper gas,] at prisoners confined in their cells." Williams v. Benjamin, 77 F.3d 756, 763 (4th Cir. 1996); see also Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984), cert. denied, 470 U.S. 1085 (1985); Bailey v. Turner, 736 F.2d 963 (4th Cir.

1984). However, "[i]t is generally recognized that 'it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain.'" Williams, 77 F.3d at 763 (4th Cir. 1996) (quoting Soto, 744 F.2d at 1270); see also Williams v. Landen, 920 F.2d 927 (4th Cir. 1990) (unpublished opinion) (reversing grant of qualified immunity to a guard who sprayed two cans of tear gas in prisoner's face for throwing water); Norris v. District of Columbia, 737 F.2d 1148 (D.C.Cir. 1984) (complaint alleged that correctional officers, without cause and for malicious purposes, maced, beat, and kicked inmate, causing substantial immediate pain as well as lingering ill effects; Battle v. Anderson, 376 F.Supp. 402 (E.D. Okla. 1974) ("the use of chemical agents such as mace or tear gas as a punitive measure rather than a control device results in the imposition of cruel and unusual punishment"), aff'd in part, rev'd in part, 993 F.2d 1551 (10th Cir. 1993).

The appropriateness of the use of chemical agents depends on "the 'totality of the circumstances, including the provocation, the amount of gas used, and the purposes for which the gas is used.'" Williams, 77 F.3d at 763 (quoting Bailey, 736 F.2d at 969). In some instances "[a] limited application of mace may be 'much more humane and effective than a flesh to flesh confrontation with an inmate.'" Williams, 77 F.3d at 763 (quoting Soto, 744 F.2d at 1262). "Moreover, prompt washing of the maced area of the body will usually provide immediate relief from pain." Williams, 77

F.3d at 763.

In the instant case there remain genuine issues of material fact as to whether Plaintiff disobeyed Corporal Duncan's order. Plaintiff alleges that Corporal Duncan ordered Webb, Green and himself to "get on our beds and to stop asking the officers to change our 'housing arrangement [sic].'" Plaintiff claims "we all got on our beds as ordered," but Corporal Duncan came into the cell and sprayed Plaintiff and Webb directly in the face "from no more than one foot away," in direct contravention of prison regulation which require a distance of three feet. Plaintiff further claims that the pepper spraying was "in no way necessary" as they had complied with the Corporal's order. [Complaint at "Page One."]<sup>5</sup>

Defendants, on the other hand, contend the pepper gas was used when Plaintiff refused to cease conduct that was disrupting state court proceedings being held immediately below the 8th floor where Plaintiff was housed. While Defendants claim the pepper gas was applied both according to policy and to package directions, the Special Report records that Corporal Duncan was advised only to tell the inmates to quit banging on the wall. Duncan attests the inmates were warned that if they continued, pepper gas would be used. When the banging continued, Corporal Duncan went to the 8th floor, gassed cell B-1-8, and continued walking down the cell row. The Corporal then turned around, walked down the cell row again,

---

<sup>5</sup> The Plaintiff's Complaint may be treated as an affidavit since it alleges facts based on the Plaintiff's personal knowledge and has been sworn under penalty of perjury. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991).

passing by B-2-8 where Plaintiff, Webb and Green were housed, and noticed the inmates had towels over their faces. According to Defendants, when the inmates were asked why they were banging on the walls, inmates Carpenter and Webb began cursing and complaining about the "too crowded" cell.<sup>6</sup> Duncan ordered all three inmates onto their bunks. According to the Report, Green complied and was not sprayed, but Carpenter and Webb refused to obey the order. Duncan opened the cell door and again ordered them to get on their bunks. After the fourth time, Corporal Duncan entered the cell and sprayed both Carpenter and Webb in the face. Defendants claim it was after the spraying incident before both inmates retreated to their bunks, and order was restored. [#15 at 3-4.]

Given the contradictions between the two versions of the facts asserted, the Court concludes that the excessive force claim cannot be resolved on the present motion for summary judgment. While the Martinez procedure (or Special Report) is a means of determining jurisdiction, sorting and clarifying issues, and otherwise elucidating the often obscure complaints filed by pro se plaintiffs, it should not be used to resolve a dispute. See El'Amin v. Pearce, 750 F.2d 829, 832 (10th Cir. 1984). In the present case, the use of pepper spray as a method of controlling Plaintiff's unruly behavior remains an issue of fact.<sup>7</sup> Therefore,

---

<sup>6</sup> According to Plaintiff, Green was a "RMG Blood" gang member and Webb was segregated for the racist, Nazi tattoos.

<sup>7</sup> Given the issues of fact remaining in this case, the Court must deny Defendant's request for qualified immunity at this stage of the proceeding.

the Court denies Defendants' motion for summary judgment as to this claim.

B. Denial of Access to the Law Library

Plaintiff claims that on numerous occasions he was denied access to the courts, legal reference materials, Department of Correction operations and policies, forms and instructions for filing an action under 42 U.S.C. § 1983, and white bond paper. Plaintiff alleges that Defendant Sandy deliberately avoided giving him access to the court. However, by his own admission, Plaintiff states that Mr. Sandy "has been removed from his duties as law library supervisor" and "replaced by Ms. Cyndi Johnston, a competent law clerk...". [#26 at 13.]

A pretrial detainee, just like a convicted inmate, has a constitutional right to adequate, effective, and meaningful access to the courts. In Lewis v. Casey, 116 S.Ct. 2174 (1996), the Supreme Court recently clarified a prisoner's right to access legal resources and the courts. The Court explained that under Bounds v. Smith, 430 U.S. 817 (1977), the Fourteenth Amendment only guarantees the right of access to the courts. Lewis, 116 S.Ct. at 2179-80. "Although providing access to a law library is an acceptable means of effectuating the right of access to the courts, Bounds did not create an independent right of access to a law library or legal assistance." Penrod v. Zavaras, 94 F.3d 1399, 1403 (10th Cir. 1996) (citing Lewis, 116 S.Ct. at 2179-80)). Therefore, an inmate alleging shortcomings in the library or legal

assistance program must establish that the alleged shortcomings "hindered his efforts to pursue a legal claim." Lewis, 116 S.Ct. at 2180; Penrod, 94 F.3d at 1403.

While Defendants admit the legal services may have been slow at times, there is no evidence that Defendants refused to comply with Plaintiff's legal requests. The administrative mail log indicates 26 mail entries on behalf of Plaintiff to various state and federal agencies for the relevant period.<sup>8</sup> Plaintiff also made over 80 requests for legal documents and services for the period of June 26, 1995 through January 25, 1996, with an average of two days before Plaintiff received each of the requested items. [#15 at 7-11.]

Furthermore, it is undisputed the Tulsa County Jail has now employed the services of an individual trained in the law, as required by the Department of Justice, to assist the inmates. Plaintiff admits that this employee provides competent assistance. Although Plaintiff was not physically allowed to browse the law library, he did have alternative legal representation and access to the courts through the assistance of an adequately trained law clerk/jailer. See Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991) (a prisoner's constitutional right of access to the courts is not conditioned on the showing of need, but on the absence of alternative legal resources). Even if the Defendants' conduct could be construed as significantly interfering with Plaintiff's

---

<sup>8</sup> Although the Special Report indicates that entries numbers 1 through 17 are for the period August 23, 1996 through January 23, 1996, The Court assumes these entries are for 1995.

access to the courts, which it is not, Plaintiff has not shown that he was prejudiced in pursuing this litigation. See Penrod, 94 F.3d at 1403; Treff v. Galetka, 74 F.3d 191, 194 (10th Cir. 1996).

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claim of denial of access to the courts and the law library.

C. Denial of Exercise Time

Plaintiff admits he was the victim of an attempted murder at the Reformatory just prior to coming to the Tulsa County Jail and that he had been indicted on numerous counts of income tax fraud. [#26 at 14.] It is undisputed that Defendants held Plaintiff for the United States government pending testimony before a federal grand jury, and that Plaintiff was classified as a federal prisoner on the basis of Form-41 Hold.<sup>9</sup> [#15 at 11-12.] Before an inmate held pursuant to Form-41 is permitted exercise outside of his cell, the U.S. Marshal's Service must grant permission. According to the Special Report, Robin Fagala of the United States Marshals Service was concerned for Plaintiff's safety and requested that Plaintiff be given additional security. [#15 at 16-17.] The sheriff's office complied with this request by placing Plaintiff in a secure cell area away from the general population. For these reasons, Plaintiff was not permitted to exercise outside of his cell and was precluded

---

<sup>9</sup> Although Plaintiff was not being charged with a federal violation, he was being held on a writ of habeas corpus from Oklahoma State Reformatory to give testimony before a federal grand jury.

from mixing with groups of inmates prior to his testifying before the grand jury.

The Court concludes that prisoners being held in segregated security on federal authority, such as Plaintiff, with restricted exercise time is reasonably related to a legitimate penological interest and does not violate Plaintiff's due process rights. Martin v. Tyson, 845 F.2d 1451, 1457 (7th Cir.) (per curiam), cert. denied, 488 U.S. 863 (1988). The Court finds there remains no genuine issue of material fact as to Plaintiff's claim for denial of out-of-cell exercise time. Additionally, Plaintiff has not established that Defendants intended harm.

D. Unsanitary and Inhumane Conditions of Confinement

Only where constitutional abuse is apparent should the Court interfere with the administrative functioning of the jail. Consequently, some level of discomfort is inherent in any incarceration, and as long as that discomfort does not amount to punishment it does not violate a detainee's constitutional rights. None of Plaintiff's complained of conditions, either alone or in totality, amount to punishment.

It is undisputed the Tulsa County Jail is currently under renovation, some 13 renovations or improvements have either been completed or are underway. [#15 at 13, Ex. I.] And while the conditions at the Tulsa County Jail are less than desirable, they do not amount to deprivation of "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347-49

(1981). Unless that level of deprivation is met, the jail conditions will not become the basis of a constitutional violation. In any event, Plaintiff has failed to show that Defendants intentionally deprived him of a constitutional right. See Daniels v. Williams, 474 U.S. 327 (1986). Therefore, the Court finds the Defendants are entitled to judgment as a matter of law on Plaintiff's general conditions of confinement claims.

#### CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant Johnson's motion to dismiss [#8] is GRANTED, and that Plaintiff's claims of negligent medical treatment are hereby DISMISSED for failure to state a claim upon which relief can be granted. Defendants Johnson and Mullins are hereby DISMISSED. The motion for summary judgment of Defendants Glanz and Duncan [#16] is DENIED as to Plaintiff's claim for the improper and excessive use of pepper gas spray. The motion for summary judgment of Defendants Glanz, Putman, Duncan, and Sandy is GRANTED on all remaining Eighth/Fourteenth Amendment claims. Specifically, Defendants Putman and Sandy are, thus, GRANTED judgment as a matter of law.

Defendants Glanz and Duncan shall RESPOND to Plaintiff's motion to invoke right to jury trial [#24] on or before fifteen (15) days from the date of filing of this Order.

Plaintiff's motion to consolidate [#46] this action with Case No. 95-cv-1011-C is DENIED. Although Case No. 95-C-1011-C, McKinley D. James v. Ralph Duncan, et al., involves similar

allegations of excessive force by use of pepper gas spray, the Court exercises its discretion to deny consolidation. Shump v. Balka, 574 F.2d 1341, 1344 (10th Cir. 1978). The circumstances surrounding the use of pepper gas are different and different defendants are named in the Complaint.

IT IS FURTHER ORDERED that Plaintiff's motions to strike Defendants' Motion to Dismiss [#11], to strike Defendants' affidavits [#20], to complete Defendants' Special Report [#25], to include pertinent information in Special Report [#36], to compel discovery [#44], to submit tangible information [#47], to obtain amended orders [#50], and to compel required initial disclosure [#52] are DENIED. Plaintiff's motion to proceed with discovery [#53] is GRANTED.

Furthermore, IT IS ORDERED that the following partial schedule will govern the course of this case and may be altered only by Court order, for good cause shown:

1. 12/31/96 Discovery cutoff (interrogatories and Rule 34 requests 30 days in advance)
2. 1/16/97 Dispositive motions cutoff (see Local Rule 56.1)
  - a. 1/12/97 Responses
  - b. 1/13/97 Replies

SO ORDERED this 28<sup>th</sup> day of October, 1996.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Housing )  
and Urban Development, )

Plaintiff, )

v. )

RODGER GILLELAND aka Rodger E. Gilleland )  
aka Roger E. Gilleland aka Rodger Edward Gilleland )  
aka Harvey Edward Gilleland; )

CAROL GILLELAND aka Carol A. Gilleland )  
aka Carol Ann Gilleland aka Carol Palmer Gilleland; )

JAMES I. WARREN; )

JANET L. WARREN; )

COMMERCIAL CREDIT PLAN )  
INCORPORATED; )

FIDELITY FINANCIAL SERVICES; )

CHILDREN'S MEDICAL CENTER; )

STATE OF OKLAHOMA *ex rel.* )

Oklahoma Tax Commission; )

CITY OF OWASSO, Oklahoma, )

COUNTY TREASURER, Tulsa County, )

Oklahoma; )

BOARD OF COUNTY COMMISSIONERS, )

Tulsa County, Oklahoma, )

Defendants. )

**FILED**  
OCT 29 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OCT 30

CIVIL ACTION NO. 95-C-388-K ✓

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 29 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, City of Owasso, Oklahoma, appears not,

18

having previously filed its Disclaimer of Interest; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, Children's Medical Center, appears not, having previously filed its Disclaimer; and the Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland, Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland, James I. Warren, Janet L. Warren, Commercial Credit Plan Incorporated, and Fidelity Financial Services, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland, was served on January 27, 1996 by certified mail, return receipt requested, delivery restricted to the addressee; that the Defendant, James I. Warren, executed a Waiver of Service of Summons on February 11, 1996; that the Defendant, Janet L. Warren, executed a Waiver of Service of Summons on February 11, 1996; that the Defendant, Commercial Credit Plan Incorporated, was served with Summons and Complaint on March 4, 1996 by a United States Deputy Marshal; that the Defendant, Fidelity Financial Services, executed a Waiver of Service of Summons on May 1, 1995; and that the Defendant, Children's Medical Center, executed a Waiver of Service of Summons on May 3, 1995; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Entry of Appearance on or about May 12, 1995.

The Court further finds that the Defendant, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland, was served by publishing notice of this action in the Tulsa Daily Commerce &

Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 3, 1996, and continuing through July 8, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland, and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on

May 11, 1995; that the Defendant, Children's Medical Center, filed its Disclaimer on or about May 5, 1995; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on or about May 12, 1995; that the Defendant, City of Owasso, Oklahoma, filed its Disclaimer of Interest on or about June 5, 1995; and that the Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland, Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland, James I. Warren, Janet L. Warren, Commercial Credit Plan Incorporated and Fidelity Financial Services, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 20, 1992, Rodger Edward Gilleland and Carol Ann Gilleland filed their voluntary petition in bankruptcy in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-4045-W. On March 19, 1993, a Discharge of Debtor was entered releasing the debtors from all dischargeable debts. Subsequently, Case No. 92-4045-W, United States Bankruptcy Court, Northern District of Oklahoma was closed on July 14, 1993.

The Court further finds that on December 22, 1994, Harvey Edward Gilleland aka Rodger Gilleland and Carol Ann Gilleland aka Carol Palmer Gilleland, filed their voluntary petition in bankruptcy in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 94-03818-W. On November 9, 1995, an Order was entered in this case amending Schedule A to include the following described property, modifying the automatic stay to permit foreclosure and sale of the following described real property and abandoning the following described real property.

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 EIGHT (8), BLOCK TWO (2), SMITHVIEW, AN ADDITION TO THE TOWN OF OWASSO, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on February 21, 1986, James I. Warren and Janet L. Warren executed and delivered to Charles F. Curry Company, their mortgage note in the amount of \$52,419.00, payable in monthly installments, with interest thereon at the rate of 10.50 percent per annum.

The Court further finds that as security for the payment of the above-described note, James I. Warren and Janet L. Warren executed and delivered to Charles F. Curry Company, a real estate mortgage dated February 21, 1986, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on February 27, 1986, in Book 4926, Page 2094, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 22, 1989, Charles F. Curry Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on June 29, 1989, in Book 5191, Page 1812, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland and Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland, currently hold the fee simple title to the property by General Warranty Deed,

dated August 17, 1988, and recorded on November 7, 1990, in Book 5287, Page 933 in the records of Tulsa County, Oklahoma.

The Court further finds that on June 18, 1989, Rodger E. Gilleland and Carol Gilleland entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on June 19, 1990 and June 7, 1991.

The Court further finds that the Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland and Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland and Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland, are indebted to the Plaintiff in the principal sum of \$51,653.46, plus administrative charges in the amount of \$1,492.94, plus penalty charges in the amount of \$24.00, plus accrued interest in the amount of \$33,233.10 as of January 1, 1995, plus interest accruing thereafter at the rate of 10.50 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$509.72 (\$399.72 publication fees, \$100.00 fee for evidentiary affidavit; \$10.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the total amount of \$85.00 (see table below), plus accruing costs and interest. Said liens are inferior to the interest of the Plaintiff, United States of America.

Personal Property Taxes	Tax Year	Amount	Date Docketed
93-02-3320010	1993	\$23.00	06/23/94
92-02-3315000	1992	\$24.00	
91-03-3301650	1991	\$38.00	06/26/92

The Court further finds that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, has liens on the property which is the subject matter of this action by virtue of the following tax warrants together with interest and penalty according to law. Said liens are inferior to the interest of the Plaintiff, United States of America.

Tax Warrant No.	Dated	Recorded	County	Amount	Book/Page
ITI9200315600	03/05/92	03/10/92	Tulsa	\$ 208.16	5387/582
ITI9200322700	03/12/92	03/19/92	Tulsa	\$ 707.49	5389/2094

The Court further finds that the Defendant, Children's Medical Center, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, City of Owasso, Oklahoma, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland, Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer

Gilleland, James I. Warren, Janet L. Warren, Commercial Credit Plan Incorporated and Fidelity Financial Services, are in default and therefore have no right, title or interest in the subject real property.

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

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment **in rem** against the Defendants, **Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland and Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland**, in the principal sum of \$51,653.46, plus administrative charges in the amount of \$1,492.94, plus penalty charges in the amount of \$24.00, plus accrued interest in the amount of \$33,233.10 as of January 1, 1995, plus interest accruing thereafter at the rate of 10.50 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.64 percent per annum until paid, plus the costs of this action in the amount of \$509.72 (\$399.72 publication fees, \$100.00 fee for evidentiary affidavit; \$10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the total amount of \$85.00, plus penalties and interest, for personal property taxes as shown in the table above, 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 in rem judgment in the total current amount of \$459.58 together with interest and penalty according to law, for tax warrants as shown in the table above.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland; Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland; James I. Warren; Janet L. Warren; Commercial Credit Plan Incorporated; Fidelity Financial Services; Children's Medical Center; City of Owasso, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, Rodger Gilleland aka Rodger E. Gilleland aka Roger E. Gilleland aka Rodger Edward Gilleland aka Harvey Edward Gilleland and Carol Gilleland aka Carol A. Gilleland aka Carol Ann Gilleland aka Carol Palmer Gilleland, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission;

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma.

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

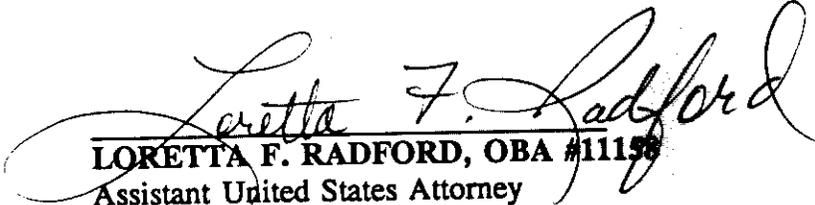
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**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

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

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

Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

Judgment of Foreclosure  
Case No. 95-C-388-K (Gilleland)

---

**DICK A. BLAKELEY, OBA #852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74013  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Case No. 95-C-388-K (Gilleland)



---

**KIM D. ASHLEY, OBA #14175**

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma ex rel. **Oklahoma Tax Commission**

Judgment of Foreclosure

Case No. 95-C-388-K (Gilleland)

LFR:cas

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

**FILED**

OCT 29 1996

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

ROSE ANNE YOAKUM, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ST. JOHN MEDICAL CENTER, INC., )  
 a non-profit corporation )  
 incorporated in the State )  
 of Oklahoma, )  
 )  
 Defendant. )

Case No. 95-C-963-BU /

ENTERED ON DOCKET  
DATE OCT 30 1996

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 29 day of October, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

69

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

**F I L E D**

OCT 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN RE: )  
)  
ASBESTOS PERSONAL INJURY )  
LITIGATION, )

M-1417

KIM SHUMATE, Individually and as )  
Personal Representative of the Heirs and )  
Estate of HERBERT EUGENE FLICKINGER, )  
Deceased, )

ENTERED ON DOCKET

DATE OCT 29 1996

Plaintiff, )

No. 90-C-260-C

vs. )

FIBREBOARD CORPORATION, et al, )

Defendants. )

**ORDER OF DISMISSAL WITH PREJUDICE AS TO  
DEFENDANTS ARMSTRONG WORLD INDUSTRIES, INC. (f/k/a  
ARMSTRONG CORK COMPANY) AND OWENS-CORNING  
FIBERGLAS CORPORATION**

NOW ON THIS 28<sup>th</sup> day of oct, 1996, the above-styled

and numbered cause comes before the undersigned Judge of the United States District Court for the Northern District of Oklahoma for the Dismissal With Prejudice as to the Defendants,

**Armstrong World Industries, Inc. (f/k/a Armstrong Cork Company) and Owens-Corning**

**Fiberglas Corporation, with each party to pay their own costs and attorney fees.**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-styled and numbered cause be and the same is hereby dismissed, with prejudice, as to the

89

Defendants, Armstrong World Industries, Inc. (f/k/a Armstrong Cork Company) and Owens-Corning Fiberglas Corporation, with each party to pay their own costs and attorney fees.

A handwritten signature in black ink, appearing to read "W. S. ...", written over a horizontal line.

Judge of the District Court  
Northern District of Oklahoma

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

**GARLAND LANE,**  
**Plaintiff,**

v.

**ELEMENTARY SCHOOL DISTRICT  
NO. 30 OF DELAWARE COUNTY,  
OKLAHOMA a/k/a KENWOOD PUBLIC  
SCHOOLS; JOHNNIE BACKWATER,  
and JERRY WHITEDAY, individually;  
JOHNNIE BACKWATER, JOSEPH  
PIGEON, and PHILLIP O'FIELD, as  
members of the Board of Education of  
Elementary School District No. 30 of  
Delaware County, Oklahoma;**

**Defendants.**

ENTERED IN COURT  
DATE OCT 29 1996

Case No. 96-CV-541-K ✓

**FILED**

OCT 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER DISMISSING DEFENDANTS  
JOSEPH PIGEON AND PHILLIP O'FIELD**

At the status conference for this case on September 13, 1996, the Court heard arguments on the defendants' pending motion to dismiss. The plaintiff, Garland Lane (Lane), was represented by Lana Tyree. The defendants, Elementary School District No. 30 of Delaware County, Oklahoma a/k/a Kenwood Public Schools (the School District), Johnnie Backwater (Backwater), Jerry Whiteday (Whiteday), Joseph Pigeon (Pigeon), and Phillip O'Field (O'Field), were represented by Mark Rains.

After reviewing the briefs of the parties and after hearing arguments of counsel, the Court finds that the motion to dismiss should be granted in part and denied in part.

The Court finds that Defendants Pigeon and O'Field have been sued in their official capacities as the current members of the Board of Education of Kenwood Public Schools.

Based on the allegations of the **Complaint**, Defendants Pigeon and O'Field were not members of the Board of Education **when** the School District non-renewed the employment of Superintendent Lane in 1994. **Thus**, the Complaint fails to state a cause of action upon which relief can be granted under 42 U.S.C. § 1983 against Defendants Pigeon and O'Field in their official capacities as **members** of the current Board of Education of the School District. Pursuant to Federal Rule 12(b)(6), the claims asserted against Pigeon and O'Field should be dismissed.

Defendant Backwater has been **sued** individually and in his official capacity since he was on the Board of Education in 1994. Based on a review of the Complaint, the Court finds that Lane has alleged **sufficient** facts to assert a claim for relief against Backwater individually and in his **official** capacity. Thus, the motion to dismiss filed by Defendant Backwater should be denied.

**IT IS THEREFORE ORDERED** that the Rule 12(b)(6) motion to dismiss of Defendants Joseph Pigeon and Phillip O'Field is granted and they are both dismissed from the case. The motion to dismiss of **Johnnie** Backwater is overruled.

  
Terry C. Kern  
United States District Judge

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

**FILED**  
OCT 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TUAN ANH NGUYEN, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 DAN REYNOLDS, et al., )  
 )  
 Respondents. )

No. 94-C-688-K

ENTERED ON DOCKET

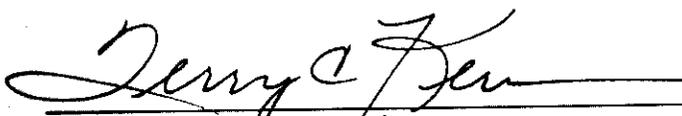
DATE OCT 29 1996

**JUDGMENT**

This matter came before the Court for consideration of the Petitioner's motion for writ of habeas corpus. The issues having been duly considered and a decision having been rendered in accordance with the Order previously filed,

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

ORDERED THIS DAY OF 25 OCTOBER, 1996

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

1042

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

**FILED**  
OCT 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TUAN ANH NGUYEN, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 DAN REYNOLDS, et al., )  
 )  
 Respondents. )

No. 94-C-688-K

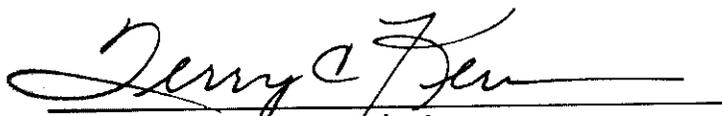
ENTERED ON DOCKET  
DATE OCT 29 1996

**JUDGMENT**

This matter came before the Court for consideration of the Petitioner's motion for writ of habeas corpus. The issues having been duly considered and a decision having been rendered in accordance with the Order previously filed,

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

ORDERED THIS DAY OF 25 OCTOBER, 1996

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

RICHARD L. WHEATLEY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 INTERNAL REVENUE SERVICE, )  
 UNITED STATES DEPARTMENT OF )  
 THE TREASURY, )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE OCT 29 1996

Civil Action No. 95-C-564B

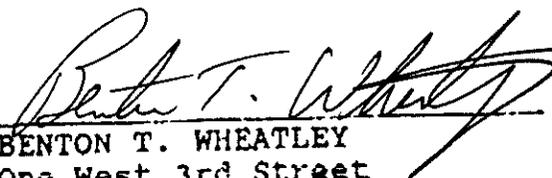
**F I L E D**

OCT 28 1996

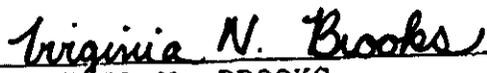
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

The plaintiff and the defendant hereby stipulate that the plaintiff's complaint shall be dismissed with prejudice. Each party shall bear its own costs, including attorney's fees or any other expenses of this litigation.

  
BENTON T. WHEATLEY  
One West 3rd Street  
Suite 100  
Tulsa, Oklahoma 74103-3501  
Telephone: (918) 582-8771

ATTORNEY FOR THE PLAINTIFF

  
VIRGINIA N. BROOKS  
Trial Attorney, Tax Division  
U.S. Department of Justice  
Post Office Box 7238  
Ben Franklin Station  
Washington, D.C. 20044  
Telephone: (202) 514-6499

ATTORNEY FOR THE DEFENDANT

**COPY**

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

ENTERED ON DOCKET

RONALD LEE,

Plaintiff,

vs.

GOLF WORLD, an Oklahoma Ltd.  
partnership; GOLF WORLD II, an  
Oklahoma ltd. partnership, METRO  
ENTERTAINMENT SYSTEMS, INC., an  
Oklahoma Corporation d/b/a GOLF  
WORLD AND MORE; GREAT  
ADVENTURES, L.L.C., an Oklahoma  
limited liability company; GOLF WORLD  
ENTERPRISES, INC., an Oklahoma  
Corporation,

Defendants.

Case No. 96 CV-675K

DATE OCT 28 1996

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

**DISMISSAL WITHOUT PREJUDICE**

COMES NOW the Plaintiff, and pursuant to F.R.C.P. Rule 41(a)(1), hereby dismisses  
without prejudice this action against all Defendants.

Respectfully submitted this 24 day of October, 1996.

DAVID GARRETT LAW OFFICE, P.C.



David M. Garrett, OBA# 3255  
Tami D. Mickelson, OBA# 13400  
Douglass R. Elliott OBA# 15152  
Steven M. Hightower, OBA# 16437  
215 State Street/10th Floor  
P. O. Box 2969  
Muskogee, Oklahoma 74401  
(918) 683-3288

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

**F I L E D**  
IN OPEN COURT

OCT 25 1996

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

FIRST MARINE INSURANCE )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CHARLOTTE ANN GIBBS, )  
 )  
Defendant. )

Case No.: 96-CV-562-H

ENTERED ON DOCKET

DATE OCT 28 1996

**ORDER**

On this day defendant's Motion to Dismiss and Brief and Support thereof, came on for hearing before this Court. The Court, having considered the arguments of the defendant and having reviewed the plaintiff's Complaint, and further being advised that plaintiff's counsel is without objection to an Order of Transference, finds that this case should be transferred to the Western District of Oklahoma.

**FACTS**

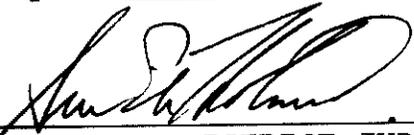
This is a declaratory action filed pursuant to 28 U.S.C. Section 2201. Jurisdiction is based upon diversity of citizenship, as plaintiff is a Missouri corporation and defendant is an individual and resident citizen of the State of Oklahoma and more specifically, within the Western District of Oklahoma. Contrary to the provisions of 28 U.S.C. Section 1391, defendant does not reside within this judicial district and the underlying facts giving rise to this cause of action did not occur within the Northern District of Oklahoma.

**CONCLUSION**

The Court believes that pursuant to 28 U.S.C. Section 1404, this action should be transferred to the Western District of Oklahoma as opposed to dismissing the lawsuit. Pursuant to the provisions of 28 U.S.C. Section 1406(a), this Court hereby transfers this cause of action to the United States District Court for the Western District of Oklahoma. The Clerk of this Court is directed to transfer the entire record of this case to the Clerk of the Court for the Western District of Oklahoma.

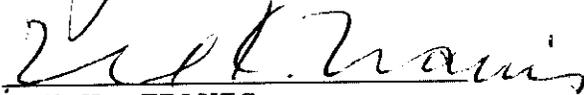
IT IS SO ORDERED.

Signed this 25<sup>TH</sup> day of OCTOBER, 1996.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
JAMES C. DANIEL  
Attorney for Plaintiff

  
REX K. TRAVIS  
Attorney for Defendant

**FILED**

OCT 25 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

VICKIE WROTEN, )  
)  
Plaintiff, )  
)  
vs. )  
)  
FIRST DATA RESOURCES, INC., )  
a Delaware Corporation, )  
)  
Defendant. )

No. 96-C-938-C

ENTERED ON DOCKET  
DATE OCT 28 1996

**ORDER**

Currently pending before the Court is the Motion to Reconsider filed by defendant, First Data Resources, Inc. ("First Data"), on October 24, 1996. On September 24, 1996, plaintiff, Vickie Wroten, filed her Petition against First Data in the District Court of Tulsa County, alleging negligence and intentional tortious conduct. On October 11, First Data filed Notice of Removal based upon diversity of citizenship. On October 22, the Court remanded the present case to state court on the grounds that neither plaintiff's Petition nor defendant's Notice of Removal stated with any degree of certainty the amount in controversy required in order to invoke diversity jurisdiction. Since neither the allegations in the Petition nor in the Notice of Removal established the requisite jurisdictional amount, the Court determined that this matter must be remanded to state court.

In First Data's present Motion to Reconsider, First Data represents that the amount in controversy does, in fact, exceed \$50,000. Further, First Data now provides the Court with a stipulation that plaintiff is claiming damages in excess of \$50,000. First Data additionally represents that counsel for plaintiff has been contacted and has no objection to First Data's motion.

Accordingly, based upon said stipulation, the Court hereby **GRANTS** First Data's Motion

to Reconsider, and the Court hereby **VACATES** its October 22 Order remanding this case to state court.

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

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

H. Dale Cook  
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

OCT 25 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiff,

v.

HOMER I. STILL;  
SHEILA R. STILL;  
COUNTY TREASURER, Rogers County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Rogers County, Oklahoma,

Defendants.

ENTERED ON DOCKET  
OCT 28 1996  
DATE \_\_\_\_\_

CIVIL ACTION NO. 96-CV-548-C ✓

**ORDER FOR PARTIAL SUMMARY JUDGMENT**

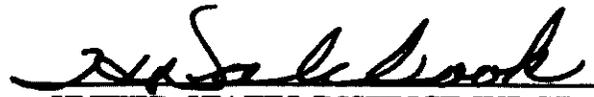
Before the Court is the Plaintiff's Motion For Partial Summary Judgment against the Defendants, **Homer I. Still and Sheila R. Still**, for the amount set forth in the Complaint and for foreclosure because no **genuine issue** exists as to any material fact and the United States is entitled to a judgment as a matter of law.

As there exists no **genuine issue** of material fact, the Court grants the Plaintiff's Motion For Partial Summary Judgment, entitling the Plaintiff to judgment in the amount of \$124,831.00, plus administrative charges in the amount of \$424.00, plus penalty charges in the amount of \$352.00, plus accrued interest in the amount of \$7,960.59 as of October 17, 1995, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during the foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums

5

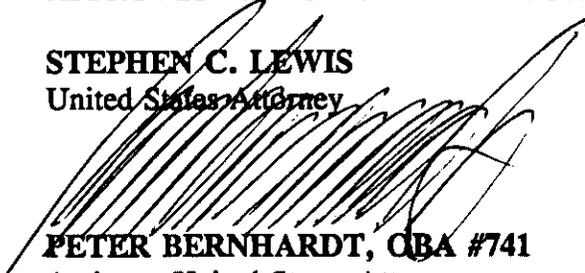
for the preservation of the subject property. The Court directs the Plaintiff to submit to the Court a Judgment of Foreclosure in accordance with this Order.

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

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney

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

Order For Partial Summary Judgment  
Civil Action No. 96-CV-548-C (Still)

PB:ces

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DARRELL D. LAWRENCE; ELAINE J. )  
 LAWRENCE; HOUSEHOLD FINANCE )  
 CORPORATION; HOUSEHOLD )  
 FINANCE CORPORATION III; BROKEN )  
 ARROW MEDICAL CENTER, INC.; )  
 CITY OF BROKEN ARROW, Oklahoma; )  
 COUNTY TREASURER, Tulsa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 Defendants. )

**F I L E D**

OCT 25 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 96-C 0193C

ENTERED ON DOCKET

DATE OCT 28 1996

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 25<sup>th</sup> 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; and the Defendants, Darrell D. Lawrence, Elaine J. Lawrence, Household Finance Corporation, Household Finance Corporation III, Broken Arrow Medica Center, Inc. and City of Broken Arrow, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Household Finance Corporation, acknowledged receipt of Summons and Complaint

(11)

on March 13, 1996; that the Defendant, **Household Finance Corporation III**, acknowledged receipt of Summons and Complaint on **March 13, 1996**; that the Defendant, **Broken Arrow Medical Center, Inc.**, acknowledged receipt of Summons and Complaint on **March 13, 1996**; that Defendant, **City of Broken Arrow, Oklahoma**, acknowledged receipt of Summons and Complaint on **March 14, 1996**.

The Court further finds that the Defendants, **Darrell D. Lawrence and Elaine J. Lawrence**, were served by publishing notice of this action in the **Tulsa**, a newspaper of general circulation in **Tulsa County, Oklahoma**, once a week for six (6) consecutive weeks beginning **May 17, 1996**, and continuing through **June 21, 1996**, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by **12 O.S. Section 2004(c)(3)(c)**. Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Darrell D. Lawrence and Elaine J. Lawrence**, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendants, **Darrell D. Lawrence and Elaine J. Lawrence**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, **United States of America**, acting through the **Secretary of Housing and Urban Development**, and its attorneys, **Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma**, through **Loretta F. Radford, Assistant United States Attorney**, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly

approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on March 28, 1996; and that the Defendants, Darrell D. Lawrence, Elaine J. Lawrence, Household Finance Corporation, Household Finance Corporation III, Broken Arrow Medica Center, Inc. and City of Broken Arrow, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, Darrell D. Lawrence and Elaine J. Lawrence, 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 Five (5), Block Two (2), CENTRAL PARK  
ESTATES THIRD, an Addition in Tulsa County, State  
of Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 10, 1979, the Defendants, DARRELL D. LAWRENCE and ELAINE J. LAWRENCE, executed and delivered to LIBERTY MORTGAGE COMPANY, their mortgage note in the amount of \$43,250.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that on March 31, 1986, Liberty Mortgage Company assigned the above-described mortgage note and mortgage to GMAC MORTGAGE

CORPORATION OF IOWA. This Assignment of Mortgage was recorded on April 4, 1986, in Book 4933, Page 3174, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 5, 1988, GMAC MORTGAGE CORPORATION OF IOWA, f/k/a NORWEST MORTGAGE 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 August 15, 1988, in Book 5121, Page 1111, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, the Defendants, DARRELL D. LAWRENCE and ELAINE J. LAWRENCE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on February 1, 1989, April 1, 1990, January 1, 1991, and July 1, 1991.

The Court further finds that on August 15, 1983, the Defendant, DARRELL D. LAWRENCE, filed his voluntary Chapter 7 petition in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 83-B-1155, which was discharged on February 7, 1984, and closed on by a final decree on March 30, 1984.

The Court further finds that the Defendants, Darrell D. Lawrence and Elaine J. Lawrence, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Darrell D. Lawrence and Elaine J. Lawrence, are indebted to the Plaintiff in the principal sum of \$80,267.65, plus interest at the rate of 10 percent per annum from April 1,

1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$48.00 which became a lien on the property as of June 23, 1994, a lien in the amount of \$44.00 which became a lien on the property as of June 25, 1993 and a line in the amount of 54.00 which became a line on the property as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, Darrell D. Lawrence, Elaine J. Lawrence, Household Finance Corporation, Household Finance Corporation III, Broken Arrow Medical Center, Inc. and City of Broken Arrow, Oklahoma, are in default, and have no right, title or interest in the subject real property.

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

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In rem against the Defendants, Darrell D. Lawrence and Elaine J. Lawrence, in the principal sum of \$80,267.65, plus interest at the rate of 10 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.64 percent per annum until paid, plus the costs of this action in the

amount, 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 \$146.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Darrell D. Lawrence, Elaine J. Lawrence, Household Finance Corporation, Household Finance Corporation III, Broken Arrow Medical Center, Inc., City of Broken Arrow, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, Darrell D. Lawrence and Elaine J. Lawrence, 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;

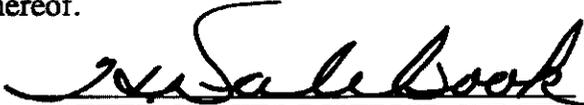
**Third:**

In payment of Defendant, COUNTY TREASURER,  
Tulsa County, Oklahoma, in the amount of \$146.00,  
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.

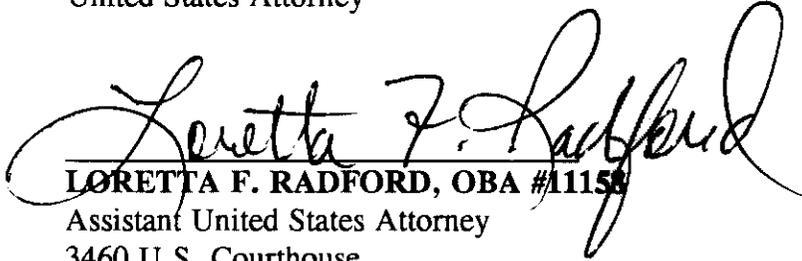
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant  
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right  
to possession based upon any right of redemption) in the mortgagor or any other person  
subsequent to the foreclosure sale.

**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

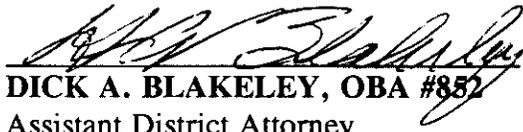
APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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

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



**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 96-C 0193C

**FILED**

OCT 25 1996

*RL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

RMP SERVICE GROUP, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BS&B SAFETY SYSTEMS, INC., )  
 )  
 Defendant/Third Party Plaintiff, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA *ex rel.* )  
 INTERNAL REVENUE SERVICE, )  
 )  
 Third Party Defendant, )  
 )  
 and )  
 )  
 JAMES L. MENZER, P.C. and JIM D. )  
 LOFTIS, P.C., )  
 )  
 Intervenors. )

Case No. 96-CV-450 E ✓

ENTERED ON DOCKET  
DATE OCT 28 1996

ORDER EXONERATING SUPERSEDEAS BOND

This matter comes before the Court this 24<sup>th</sup> day of October, 1996, upon the Joint Motion of BS&B and RMP for an Order exonerating BS&B's supersedeas bond posted in this case. The Court, for good cause shown, grants the Motion.

IT IS THEREFORE ORDERED that BS&B's supersedeas bond is exonerated and BS&B is relieved from any further bonding requirement on RMP's remaining judgment.

  
 HONORABLE JAMES O. ELLISON  
 JUDGE OF THE DISTRICT COURT

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

STATE FARM FIRE AND CASUALTY )  
COMPANY, )

Plaintiff, )

vs. )

VALORIE BARRETT and ANTHONY BARRETT, )

Defendants, )

and )

VALORIE BARRETT, )

Third Party Plaintiff, )

v. )

BANCOKLAHOMA MORTGAGE CORP., an )  
Oklahoma corporation and PAUL DAVIS )  
SYSTEMS, Inc., and Oklahoma corporation, )

Third Party Defendants.

Case No. 95-C-237-BU ✓

**F I L E D**

OCT 25 1996 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 28 1996

**REPORT & RECOMMENDATION**

On September 4, 1996 and October 9, 1996, the court entered "orders" with respect to Third Party Defendant's Motions for Attorneys Fees and Sanctions. The court hereby finds that it was without authority to enter its findings and conclusions as "orders" and therefore enters the following Report and Recommendation.<sup>1/</sup>

---

<sup>1/</sup> See, e.g., 28 U.S.C. § 636; Fed. R. Civ. P. 54(d)(2)(D).

188

By minute order dated June 5, 1996, the District Court referred the Motion for Attorneys Fees [Doc. No. 122-1] to the undersigned magistrate judge. By minute order dated June 13, 1996, the District Court referred the Motion for Sanctions [Doc. No. 158-1] to the undersigned magistrate judge.

On August 29, 1996, this court heard argument by the parties with respect to Third Party Defendants' Motion for Attorneys Fees Against Barretts [Doc. No. 122-1], and with respect to Third Party Defendant Bancoklahoma Mortgage Corporation's ("BOMC") and Paul Davis System Inc.'s ("PDS") Motion for Sanctions Against Barretts' attorney [Doc. No. 158-1]. At the August 29, 1996 hearing, Defendants Valerie and Anthony Barrett appeared by and through attorney Gregory G. Meier. Movant and Third Party Defendant BOMC and PDS appeared by and through attorneys J. Michael Medina and Richard J. Cipolla, Jr.

At the August 29, 1996 hearing the court directed the parties to indicate whether or not an additional hearing for the purpose of determining a reasonable amount of attorneys fees was necessary in their supplemental briefs. Defendants did not indicate that such a hearing was necessary. Third Party Defendants indicated that an additional hearing was not necessary. Consequently, the court concludes that the parties have submitted all of the information which the parties deem necessary for the court to reach a conclusion with respect to an award of a reasonable attorneys fee.

The court has heard the arguments of counsel, reviewed the case file and the briefs filed by the parties, and considered the briefs, supplemental briefs, and exhibits filed by the parties. The court finds that the Barretts' claim falls within the type of

property damage claim that was contemplated by 12 O.S. 1991, § 940 and that an award of attorneys fees in this case is therefore proper. The court recommends that considering the facts and issues in this case, the work performed by the attorneys, and the applicable case law and statute, that the Third Party Defendants be awarded a reasonable attorneys fee of \$41,127.10.<sup>2/</sup> With respect to BOMC's and PDS's Motion for Sanctions, the court recommends that it be denied.

**MOTION BY BOMC AND PDS FOR ATTORNEYS FEES**  
[Doc. No. 122-1]

**Applicability of § 940**

BOMC and PDS request an award of a reasonable attorneys fee as the prevailing party in this action. BOMC and PDS assert that attorneys fees are permissible under 12 O.S. 1991, § 940(a) which provides that:

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

BOMC and PDS argue that Barretts' claim is essentially one for the destruction of property, and that because BOMC and PDS prevailed on their Motion for Summary Judgment, the court should award a reasonable attorneys fee.

In Woods Petroleum Corp. v. Delhi Gas Pipeline Corp., 700 P.2d 1011 (Okla. 1984), the seller of gas sued the purchaser for damages for mismeasurement of the

---

<sup>2/</sup> This amount includes computerized legal research costs of \$633.35, which were requested by BOMC and PDS and not objected to by Barretts.

gas purchased by the defendant. The Oklahoma Supreme Court granted certiorari to consider the issue of "whether an award of attorney fees to the prevailing party under 12 O.S. § 940 is limited to actions for the physical negligent or willful injury to property." The court determined that a broad definition of the word "property" would render numerous other attorney fee statutes meaningless, and concluded that the legislature must have intended a "restricted" interpretation of the word "property." The court concluded, "[w]e therefore hold that attorney fees recoverable under the provisions of 12 O.S. Supp. § 940(A) by the prevailing party contemplate only those actions for damages for the negligent or willful physical injury to property."

Subsequent Oklahoma court decisions have noted that an action for trespass involves actual physical or negligent injury to property. In Schaeffer v. Shaeffer, 743 P.2d 1038 (Okla. 1987), landowners sued an adjacent landowner for damages for maintaining a nuisance (an open sewage lagoon). The plaintiffs prevailed and moved for attorney fees under § 940. The court determined that "[h]ere there is a substantial claim of damage to the property itself, and not to the more tenuous rights in property found not to be within the ambit of 12 O.S. 1981 § 940 in Woods Petroleum Corp., supra. Here the resultant damage is the result of the trespass of unpalatable organic vapors onto plaintiffs' land, and the trespass of unsanitary fluids into the plaintiffs' land in the vicinity of the plaintiffs' water well. Here the Court is presented with actual injury to the real property itself, and not the broader field of rights in property found to be outside the ambit of § 940 in Woods Petroleum Corp., supra." See also Parks v. American Warrior, Inc., 44 F.3d 889 (10th Cir. 1995) ("We looked to the

pleadings to find that Marino specifically claimed compensation for damage to the geological formations from which he could have produced oil and gas had the defendant not destroyed the well.”); Marino v. Otis Engineering Corp., 839 F.2d 1404 (10th Cir. 1988).

In this action, the Barretts assert that BOMC and PDS trespassed upon and converted their property and “destroyed the fire scene.” In the pretrial order, the Barretts assert that BOMC’s and PDS’s “willful, wanton, and malicious destruction of the ‘fire scene’ seriously impaired [Valerie Barrett’s] ability to both defend herself as well as to prosecute [her] counterclaim.” Barretts also note, in the pretrial order, that BOMC and PDS “trespass[ed] and wrongfully convert[ed] Third-Party Plaintiff’s property which constitutes a willful, wanton and malicious injury to Third-Party Plaintiff’s property . . . .” In an answer to Interrogatories posed by BOMC and PDS, the Barretts noted that “BOMC knew it did not have title to my property and knew who the title owner was; BOMC knew it had no contract between Valerie Barrett and BOMC; BOMC knew it didn’t have permission of Valerie Barrett to enter upon her property and remove items; BOMC knew what it instructed Paul Davis Systems to do insofar as gutting the interior of Defendant’s home; BOMC went far beyond any reasonable action to secure the premises and amounted to a complete remodeling project in Defendant’s home.” Furthermore, at oral argument, attorneys for BOMC and PDS noted that Valerie Barrett, in her counterclaim against BOMC and PDS sought reimbursement and indemnification for all amounts claimed by the Barretts in their counterclaim against State Farm. The Barretts’ counterclaims against State Farm

included claims for over \$37,844.38 for structural damage to the Barretts' home, and \$45,751.72 for damage to the contents of the home.

Oklahoma case law does limit attorneys fees under § 940 to actual physical damage to property. However, in this case the Barretts sued BOMC and PDS for trespass and "destruction" of the fire scene. In addition, Valerie Barrett requested judgment against BOMC for her property damage claims against State Farm. The court finds that the Barretts' claim falls within the type of property damage contemplated by § 940 and that attorneys fees should be awarded to the prevailing party. In addition, because BOMC's and PDS's Motion for Summary Judgment against the Barretts was granted, the court finds that BOMC and PDS are prevailing parties.

#### **Award of Attorneys Fees**

BOMC and PDS submitted copies of the hours of attorney time expended, a brief explanation of the work performed, and the billing rates for the attorneys who performed the work. The majority of the work performed by the attorneys for BOMC and PDS was billed at the rates of \$200.00 per hour and \$150.00 per hour. BOMC and PDS request a total fee award of \$51,199<sup>3/</sup>, and an additional \$633.35 in costs.

BOMC and PDS included, in their submissions to the court, affidavits attesting to the qualifications of Frederic Dorwart and Michael Medina, the principal attorneys representing BOMC and PDS. BOMC and PDS have additionally included an affidavit

---

<sup>3/</sup> The fee request by BOMC and PDS does not include approximately \$18,000 in attorneys fees which were not charged to BOMC or PDS; the amount does not include attorneys fees incurred by PDS prior to the joint representation of PDS by BOMC's attorneys; and the amount does not include fees for preparing the Motion for Attorneys Fees.

from R. Thomas Seymour stating that he has practiced law in Tulsa for over twenty years and that in his opinion the hourly rates charged by Mr. Dorwart and Mr. Medina are "well within the range of reasonable rates charged by attorneys having comparable experience. . . ." Supplemental Brief of Third Party Defendants, Exhibit "E." BOMC and PDS further submit that the Court may, by judicial notice and its own experience, determine a reasonable attorneys rate.

#### Barrett's Arguments

Defendants acknowledge that Mr. Dorwart and Mr. Medina may, on occasion, be "worth" \$200.00 and \$150.00 per hour, but contend that the majority of the work required on this case did not require a specific skill level, and the rates charged are excessive. Defendants note that the majority of the work performed by Mr. Cipolla could have been performed by a paralegal, and that a rate of \$110.00 per hour was therefore excessive. In addition, Defendants contend that time entries related to the foreclosure proceeding, or other matters which are not specifically covered by 12 O.S. 1991, § 940 should be disallowed.

#### Amount of Award

The court finds that a reasonable attorney rate based on the type of work performed, the nature of the service provided, and the prevailing rate in the community is \$125.00 per hour. Certainly BOMC and PDS have the right to hire and pay higher attorney rates which may reflect a higher quality of service. The court in no way intends the finding of a "reasonable rate" (which is a lower rate than the actual rate billed in this case) to in any way serve as a comment on the services actually

performed by Mr. Dorwart or Mr. Medina. Based on the factors outlined above, the Court concludes that, under the circumstances involved in this case, a reasonable attorney rate is \$125.00 per hour.

The court has thoroughly reviewed the attorneys fees invoices submitted by BOMC and PDS. Numerous entries indicated "no charge," and no amounts were billed to BOMC and PDS. All entries which reflected "no charge" were excluded by the court for the purpose of determining the number of attorney hours worked.<sup>4/</sup> The court additionally excluded all time entries which referenced work on the "foreclosure action." Defendants assert this time is not related to the proceeding for which the court has determined § 940 applies, and the court agrees.<sup>5/</sup> The court additionally excluded .25 hours related to a slander action.

Several time entries reflect conversations between PDS and BOMC with respect to the indemnification by BOMC of PDS. Although the Barretts' claim with respect to PDS may properly be within § 940, the nature of the indemnification action, from the limited time entries, appears to be contractual in nature and involves PDS and BOMC. The Court therefore excludes the time entries by BOMC and PDS as not directly related to the property action with the Barretts.<sup>6/</sup>

---

<sup>4/</sup> BOMC and PDS note that they are not intending to collect for these amounts in their request for attorneys fees.

<sup>5/</sup> The Court excluded 4.95 hours which were related to the foreclosure proceedings.

<sup>6/</sup> The Court excluded 5.95 hours related to the indemnification discussion.

A few time entries are "blacked out" with the notation "wrong project" in the margin next to the time entry. The court excluded all time entries with such notations.<sup>7/</sup> Some of the time entries for Mr. Cipolla described work that is traditionally performed by legal assistants. The court did not exclude these time entries,<sup>8/</sup> but reduced the reasonable rate for the work performed to \$60.00.<sup>9/</sup> The court additionally reduced the total number of hours by ten hours for entries which indicate an excessive amount of time for the amount of work performed.<sup>10/</sup>

Taking the above reductions into account, the court finds that a reasonable number of attorney hours expended is 322.75 hours.<sup>11/</sup> The reasonable number of hours (322.75) multiplied by the reasonable attorney rate (\$125.00) equals \$40,343.75. The court adds to this amount \$150.00 (the amount for 2.5 hours at the legal assistant rate of \$60.00 per hour, for the work performed by one of BOMC's attorneys which was "clerical" in nature). The court additionally adds the amount of

---

<sup>7/</sup> The Court excluded .9 hours based on the entry "wrong project."

<sup>8/</sup> Defendants request that this time be excluded. Oklahoma courts have concluded that legal assistant time is compensable in an attorney fee award pursuant to Oklahoma statute. See Taylor v. Chubb Group of Insurance Companies, 874 P.2d 806 (Okla. 1994). Furthermore, work performed by legal assistants can take the place of work performed by attorneys who would bill at a higher rate. The Court therefore concludes that some of the work performed by Mr. Cipolla, although not in the nature of work usually performed by an attorney, was necessary and BOMC and PDS should be compensated for it.

<sup>9/</sup> The Court reduced 2.5 hours of Mr. Cipolla to a rate of \$60.00 per hour. The remaining time billed by Mr. Cipolla the Court determined based on the rate of \$125.00 per hour.

<sup>10/</sup> The Court makes the following reductions: JMM's 7/26/95 entry (reduced by one hour); JMM's 9/22/95 entry (reduced by one hour); JMM's 10/25/95 entry (reduced by three hours); JMM's 1/18/96 entry (reduced by two hours); and JMM's 2/2/96 entry (reduced by three hours).

<sup>11/</sup> This number reflects the following number of attorney billable hours on a monthly basis: 6/95 - 11.25 hours; 7/95 - 8.25 hours; 8/95 - 1.1 hours; 9/95 - 14.65 hours; 10/95 - 20.15 hours; 11/95 - 17.75 hours; 12/95 9.0 hours; 1/96 - 95.65 hours; 2/96 - 75.35 hours; 3/96 - 31.65 hours; 4/96 - 37.95 hours.

computerized legal research costs requested by BOMC and PDS of \$633.35, which amount was not objected to by Defendants. The court therefore concludes that a reasonable attorneys fee in this case is \$41,127.10.

**MOTION BY BOMC AND PDS FOR  
SANCTIONS AGAINST BARRETTS' ATTORNEY  
[Doc. No. 158-1]**

BOMC and PDS request sanctions against Barretts' attorney, pursuant to 28 U.S.C. § 1927. Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case, unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct." BOMC and PDS argue that a reasonable inquiry by Barretts' attorney would have revealed that the Barretts' claims against BOMC and PDS had no merit and should not have been filed. In the alternative, BOMC and PDS assert that after the deposition of Pilkington, Barretts' expert, Barretts' attorney should have dismissed the claim, or, at the very least, after the filing of the summary judgment briefs on BOMC's and PDS's motion for summary judgment, Barretts' attorney should have dismissed the claim.

Barretts' attorney, Meiers, noted that BOMC and PDS never filed a motion to dismiss based on any insufficiency in the pleadings. In addition, Meiers urges the court not to interpret his actions throughout the litigation based on the final outcome of BOMC's and PDS's motion for summary judgment (which was granted).

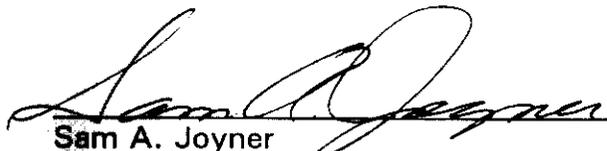
The court finds that BOMC and PDS have not met their burden of establishing that Barretts' attorney unreasonably or vexatiously multiplied the pleadings in this case. The conduct of Barretts' attorney did not reach the level of conduct required for an award of sanctions under 28 U.S.C. § 1927. The court recommends that BOMC's and PDS's Motion for Sanctions [Doc. No. 158-1] be denied.

## RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** Third Party Defendants' Motion for **Attorneys Fees** and award attorneys fees in the amount of \$41,127.10 [Doc. No. 122-1]. The United States Magistrate Judge additionally recommends that the District Court **DENY** Third Party Defendants' Motion for Sanctions [Doc. No. 158-1].

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, e.g., Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 25 day of October 1996.

  
Sam A. Joyner  
United States Magistrate Judge

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

FILED

KENNETH EDWARD DOTY, JR.,

Plaintiff,

vs.

LEROY YOUNG, E. MILLIGAN, AND  
KURT DYER,

Defendants.

OCT 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. <sup>95</sup>96-C-944-E

ENTERED ON DOCKET

DATE OCT 28 1996

REPORT AND RECOMMENDATION

Defendants' MOTION TO DISMISS [Dkt. 6] is before the undersigned United States Magistrate Judge for report and recommendation. Plaintiff filed his complaint pursuant to 42 U.S.C. § 1983, alleging civil rights violations by Defendants, Leroy Young, Warden of John Lilley Correctional Center (JLCC), Kurt Dyer, Head Food Supervisor at JLCC, and E. Milligan, R.N., Clinic Administrator at JLCC.

In Count I Plaintiff alleges he has been subjected to cruel and unusual punishment in that the Defendants have not properly attended to his special dietary requirements as a result of having undergone a complete gastrectomy (stomach removal).

In Count II Plaintiff alleges defamation of character as a result of Defendant Young's response to a "Request To Staff" wherein Young stated "You are wrong."

Count III concerning the Defendants' alleged failure to follow prison regulations regarding modification of a medical diet was dismissed by the district court as frivolous. [Dkt. 4].

Defendants invoke qualified immunity and seek dismissal for Plaintiff's failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff has filed a brief opposing Defendants' motion.

### STANDARD FOR MOTION TO DISMISS

A district court should not dismiss a complaint pursuant to Rule 12(b)(6) unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir.1991) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). "A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 F.2d at 1109. If the plaintiff proceeds pro se, the court should construe his pleadings liberally and hold the pleadings to a less stringent standard than formal pleadings drafted by lawyers. *Id.* at 1110. However, "[t]he broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Id.*

While a court may not consider materials outside of the pleadings for purposes of a Rule 12(b)(6) motion to dismiss without following summary judgment procedures and providing notice and opportunity to respond with affidavits or similar evidence to oppose the motion, written documents attached to a complaint as exhibits are considered part of the complaint and may be considered in a Rule 12(b)(6) motion to dismiss. Fed.R.Civ.P. 10(c) (A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.); *Hall*, 935 F.2d at 1112. Plaintiff has

attached several documents to his **complaint**. In conformity with Fed.R.Civ.P. 10(c) those documents are considered as **part of Plaintiff's complaint**.

### **COUNT I--CRUEL AND UNUSUAL PUNISHMENT**

Plaintiff alleges that upon his **transfer** to JLCC on January 18, 1995, or soon thereafter, he was examined by a Department of Corrections' physician who prescribed a diet of six small meals per day. A "**special diet request**" form signed by an R.N is attached to Plaintiff's complaint. This "**special diet request**" describes Plaintiff's required diet as "**6 Small Feedings (Meals) each day.**" According to Plaintiff, he is, in fact, receiving three meals each day and, in addition, he receives what he terms as three "**snacks**" each day. Plaintiff **alleges** that the three additional "**snacks**" do not comply with the dietary request and the failure to comply with the prescribed diet "**may very well have long term and distressing consequences upon health and/or life of the plaintiff.**" [Dkt. 7, p.1]. Plaintiff **concludes** therefore that the defendants have violated his constitutional right under **the Eighth Amendment** to be free from cruel and unusual punishment.

Addressing a state's obligations **under** the Eighth and Fourteenth Amendments to provide for the medical needs of **prisoners**, the Supreme Court has stated:

In order to state a **cognizable claim**, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is **only such** indifference that can offend "**evolving standards of decency**" in violation of the Eighth Amendment.

*Estelle v. Gamble*, 429 U.S. 97, 106, **97 S.Ct.** 285, 292, 50 L.Ed.2d 251 (1976).

The essence of Count I of Plaintiff's complaint is that he does not consider the three additional "feedings", which he acknowledges are being provided by the defendants, as being in compliance with the medical requirement that he receive six small feedings (meals) each day. In other words, Plaintiff seeks to make a constitutional issue out of the content of the food provided to him in the three additional feedings he receives each day.

The attachments to Plaintiff's complaint, accepted as true, make it clear that Plaintiff's doctor did not prescribe any specific foods which must be provided; nor did the doctor prescribe a particular nutritional content for the six small feedings. Instead, the responsibility of complying with the directive that Plaintiff be provided with six small feedings (meals) each day is left to the staff of the institution. Thus, the gravamen of Plaintiff's complaint is a disagreement with the judgment of the prison officials regarding the mode of compliance with the doctor's orders.

It is well established that a difference of opinion between a prison's medical staff and an inmate concerning the inmate's medical care, does not constitute the "deliberate indifference" necessary to support a claim of cruel and unusual punishment. *Ramos v. Lamb*, 639 F.2d 559, 575 (10th Cir. 1980). The same can be said for this Plaintiff's difference of opinion with the staff of the institution who are charged with providing the six small feedings (meals) each day. Deliberate indifference requires a higher degree of fault than negligence, or even gross negligence. *Berry v. City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990). Even if the staff of the institution were negligent or grossly negligent in exercising the discretion ascribed to

them by the doctor's order in determining the content of the six small feedings (meals) each day, neither such 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 Estelle v. Gamble*, 4429 U.S. at 104-105, *Ramos*, 629 F.2d at 575.

Plaintiff's allegations, even if true, fail to state a violation of his Eighth and Fourteen Amendments rights to be free from cruel and unusual punishment and should, therefore, be dismissed, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

#### COUNT II--DEFAMATION

Plaintiff alleges: "They have called me a liar, by telling me that I am wrong, in their own documentation, which is defamation of character." [Complaint, p.2, §B(1)].

The complaint contains the following as facts to support his allegations:

In Warden Leroy Youngs [sic] answer to my request to staff to him dated August 11, 1995 (photocopy included), I stated the facts and Warden Young told me "you are wrong" . . . that my diet requires only a snack and not a meal. In effect this is nothing more, or less, than calling me a bald-faced liar, when I have the knowledge, and documentation from them (photocopy included) in a request to staff to the medical dept. of 5-9-1995 to back what I say.

[Complaint, p.3, §C(1)(B)(2)].

Assuming for the sake of argument, that informing Plaintiff "you are wrong" is equivalent to calling him a "bald-faced liar," and therefore somehow caused damage to his reputation, this allegation fails to state a claim under 42 U.S.C. § 1983. In

order to state a cause of action under 42 U.S.C. § 1983, something more than simple defamation must be alleged. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Plaintiff must allege some conduct which has deprived him of a right, privilege or immunity secured by the Constitution and laws of the United States. In *Davis*, the police included the plaintiff's name and photograph in a flyer of active shoplifters distributed to merchants. The plaintiff in that case alleged that the flyer was defamatory and deprived him of his rights in violation of Section 1983 because it damaged his reputation and "would seriously impair his future employment opportunities." *Id.* at 697, 96 S.Ct. at 1159. The Supreme Court upheld dismissal of his complaint, holding that "reputation alone, apart from some more tangible interests such as employment" is not a sufficient interest to establish a claim of denial of due process. *Id.* at 701, 96 S.Ct. at 1161.

In this case Plaintiff has not alleged that the "defamation" resulted in any harm to a tangible interest. Although Plaintiff's interest in his reputation may be one of a number of interests the State may protect against injury by virtue of its tort law, the Supreme Court has stressed that Section 1983 was not meant to federalize state tort law. See e.g. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 1007, 103 L.Ed.2d 249 (1989); *Davis*, 424 U.S. at 701, 96 S.Ct. at 1160.

Plaintiff's allegations of defamation do not state a claim for deprivation of a constitutionally protected interest under § 1983.

## CONCLUSION

It is the recommendation of the undersigned United States Magistrate Judge that Defendants' MOTION TO DISMISS [Dkt. 6] be GRANTED.

In accordance with 28 U.S.C. §636(b), Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 25<sup>th</sup> day of October, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

OCT 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Housing )  
and Urban Development, )

Plaintiff, )

vs. )

Case No. 95-C-433-B ✓

HARRON JAMES EDWARDS; )  
MINUETTA MAXINE EDWARDS )  
aka Minnette M. Edwards; )

STATE OF OKLAHOMA, ex rel. )  
Department of Human Services; )

COUNTY TREASURER, Tulsa County, )  
Oklahoma; )

BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma; )

LEWIS EDWARDS, Tenant, )  
SPOUSE OF LEWIS EDWARDS, Tenant, )  
aka Sandra Mayfield, )

Defendants. )

U.S. DISTRICT COURT  
OCT 28 1996

**ORDER**

Before the Court for consideration is Plaintiff United States of America's ("USA") Motion for Partial Summary Judgment seeking judgment against Defendant Harron James Edwards, pursuant to Fed.R.Civ.P. 56. (Docket #21). Following a thorough review of the record and the applicable legal authority, the Court hereby GRANTS USA's Motion for Partial Summary Judgment.

24

### **I. Undisputed Facts**

1. 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 Thirteen (13), Block Fifteen (15), NORTHRIDGE, an Addition to Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

2. On July 18, 1990, Lawrence H. Stidham and Donice Stidham executed and delivered to Worthen First Mortgage Company their mortgage note in the amount of \$22,800.00 payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum. (USA's Brief, Exhibit "A")

3. As security for the payment of the above-described note, Lawrence H. Stidham and Donice Stidham executed and delivered to Worthen First Mortgage Company, a real estate mortgage dated July 18, 1980, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 4, 1980, in Book 4495, Page 93, in the records of Tulsa County, Oklahoma. (USA's Brief, Exhibit "B")

4. On October 22, 1980, Worthen First Mortgage Company assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on December 29, 1980, in Book 4518, Page 999, in the records of Tulsa County, Oklahoma. (USA Brief, Exhibit "C")

5. On April 17, 1991, Federal National Mortgage Association assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development. This

Assignment was recorded on April 25, 1991, in Book 5317, Page 1039, in the records of Tulsa County, Oklahoma. (USA's Brief, Exhibit "D")

6. Defendants **Harron James Edwards and Minuetta Maxine Edwards** currently hold fee simple title to the property by virtue of a **General Warranty Deed**, dated July 17, 1987, and recorded on July 17, 1987, in Book 5039, Page 2310 in the records of Tulsa County, Oklahoma, and are the current assumptors of the subject indebtedness. (USA's Brief, Exhibit "E")

7. On August 11, 1993, Defendant **Harron James Edward** entered into an agreement with the USA lowering the amount of the monthly **installments** due under the note in exchange for USA's forbearance of its right to foreclose. (USA's Brief, Exhibit "F")

8. Defendants **Harron James Edwards and Minuetta Maxine Edwards aka Minnette M. Edwards** defaulted under the terms of the **aforsaid** note and mortgage, as well as the terms and conditions of the forbearance agreement, by **reason** of their failure to make monthly installments due thereon, which default has continued, and **that by reason** thereof Defendants **Harron James Edwards and Minuetta Maxine Edwards aka Minnette M. Edwards** are indebted to USA in the principal sum of \$21,112.21, plus administrative charges in the amount of \$41.50, plus penalty charges in the amount of \$30.75, plus accrued interest in the amount of \$7,864.24 as of January 1, 1995, plus interest accruing thereafter at the rate of **11.5 percent** per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing. (USA's Brief, Exhibit "G")

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

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

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

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

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

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

A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521.

### **III. Legal Analysis**

At the center of this dispute is a United States Department of Housing and Urban Development ("HUD") Payment Plan, dated August 5, 1993. The Payment Plan appears to be a HUD preprinted form and shows the Mortgagor to be Harron Edwards, address 1389 East 48th Street North, Tulsa, Oklahoma. The terms of the Payment Plan provide for HUD to forbear foreclosing on its mortgage which is still in default under the original note until July 31, 1994 in exchange for certain promises from Harron Edwards to make twelve (12) monthly payments of \$257.00, keep hazard insurance on the subject property, and other typical real estate transaction provisions.

Defendant Harron James Edwards admits he and Minuetta Maxine Edwards currently hold fee simple title to the subject property and that they are the current assumptors of the subject indebtedness. However, Defendant Harron James Edwards claims the signature on the HUD Payment Plan of August 5, 1993 is a "total forgery, and was not signed or verified by this defendant." Defendant Harron James Edwards goes on to state he did not give permission for his signature to be used to obtain said Payment Plan from HUD.

As stated, in order for a nonmoving party to survive a properly supported motion for summary judgment, he must present affirmative evidence. In the instant case, Defendant Harron James Edwards has provided no pleadings, depositions, answers to interrogatories, admissions on file or affidavits in support of his contention the signature, dated August 11, 1993, on the August 5, 1993

HUD Payment Plan is a forgery and/or not his. Bald assertions not supported by affirmative admissible evidence do not operate to defeat a properly supported motion for summary judgment. Fed.R.Civ.P. 56(c); *See also Committee for the First Amendment v. Campbell, supra.*

Accordingly, USA's Motion for Partial Summary Judgment against Defendant Harron James Edwards is hereby GRANTED. USA is GRANTED judgment against Defendant Harron James Edwards in the amount of \$21,112.21, plus administrative charges in the amount of \$41.50, plus penalty charges in the amount of \$30.75, plus accrued interest in the amount \$7,864.24 as of January 1, 1995, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during the foreclosure action by USA for taxes, insurance, abstracting, or sums for the preservation of the subject property. The Court directs USA to submit to the Court a Judgment of Foreclosure in accordance with this Order on or before November 10, 1996.<sup>1</sup>

IT IS SO ORDERED THIS 24<sup>th</sup> DAY OF OCTOBER, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

<sup>1</sup>Although USA titles this motion as one for partial summary judgment, it is a full and final judgment as to Defendant Herron James Edwards.

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

**FILED**

MARKIE K. GARNER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MAYES COUNTY JAIL, et al., )  
 )  
 Defendants. )

No. 96-CV-91-K  
(Base file)

OCT 24 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

RECORDED ON 10/28/96  
DATE OCT 28 1996

**ORDER**

Before the Court for consideration is Plaintiff Markie Garner's Emergency Request for an Injunction Against the Oklahoma Department of Corrections, filed September 26, 1996. [Docket #48.] Plaintiff requests an order directing Dick Conner Correction Center to immediately transfer Plaintiff back to Joseph Harp Correction Center (JHCC) and to direct Sandra Dorris, mail room and trust fund officer at JHCC, to permit Plaintiff to photo copy and mail documents to opposing counsel in this case. Also before the Court is Plaintiff's letter, received on October 15, 1996, requesting a ruling on his pending motion for appointment of counsel. [Docket #47.] The Court has construed Plaintiff's letter as a motion for ruling.

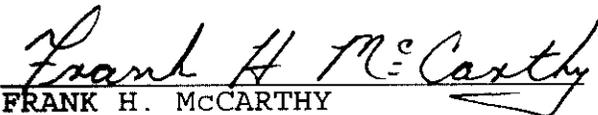
The above letter/motion indicates that Plaintiff is now back at JHCC. ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff shall INFORM the Court, on or before fifteen (15) days from the date of filing of this order, whether his emergency request for an injunction [Docket #48] is moot due to his return to JHCC and whether he still has problems mailing pleadings and documents to

5

opposing counsel. It is further ORDERED that Plaintiff's request for ruling [Docket #47] on his pending motion for appointment of counsel is DENIED. The fact that Plaintiff does not currently have an attorney is an insufficient reason to delay discovery in this case.

The Clerk shall MAIL a copy of Plaintiff's emergency motion and letter to opposing counsel in this case [Docket #47 and #48].

IT IS SO ORDERED this 24<sup>th</sup> day of OCT, 1996.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE





UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE OCT 28 1996

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ONE PARCEL OF REAL PROPERTY )  
KNOWN AS ROUTE 1, BOX 109, )  
DRUMRIGHT, CREEK COUNTY, )  
OKLAHOMA, )  
 )  
Defendant. )

CIVIL ACTION NO. 93-C-655-B

**F I L E D**

OCT 25 1996

STIPULATION OF DISMISSAL

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Comes now the plaintiff, the United States of America,  
and Janetta June Fisher, now Janetta June Porter, the Claimant in  
the above-captioned civil action, and stipulates that this cause of  
action be dismissed, without prejudice and without any costs, and  
the defendant property, to-wit:

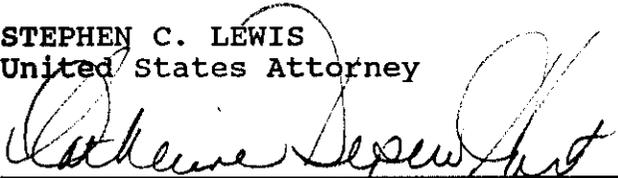
One Parcel of Real  
Property Known As: Route  
1, Box 109, (a/k/a as  
Route 1, Box 198)  
Drumright, Creek County,  
Oklahoma, more  
particularly described as  
follows:

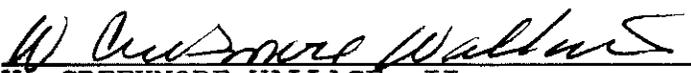
Beginning at the Southwest Corner (SW/C) of the Northwest Quarter of the Southwest Quarter (NW/4 SW/4) of Section 34, Township 18 North, Range 7 East of the Indian Base and Meridian, Creek County, Oklahoma; thence North 436 feet, thence East 700 feet, thence South 436 feet, thence West 700 feet to the Point of Beginning.

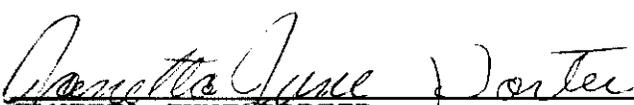
which was seized and arrested by the United States Marshals service in this action, be, and and it is, likewise, dismissed from the above-captioned civil action.

Respectfully submitted,

STEPHEN C. LEWIS  
United States Attorney

  
CATHERINE DEPEW HART, OBA #3836  
Assistant United States Attorney  
3460 United States Courthouse  
333 West Fourth Street  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
W. CREEKMORE WALLACE, II  
Attorney at Law  
P. O. Box 90  
Sapulpa, Oklahoma 74067  
Attorney for Claimant Janetta June Fisher,  
now Janetta June Porter

  
JANETTA JUNE PORTER,  
formerly JANETTA JUNE FISHER

N:\UDD\CHOOK\FC\FISHER2\05690

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

HAWKINS-SMITH, an Idaho General  
Partnership,

Plaintiff,

v.

SSI, INC., UNITED STATES FIDELITY  
& GUARANTY COMPANY, and  
INTERNATIONAL ROOFING, INC.,

Defendants,

SSI, INC.,

Third-Party Plaintiff,

v.

MULE-HIDE PRODUCTS CO., INC., and  
LARRY KESTER d/b/a ARCHITECTS  
COLLECTIVE,

Third-Party Defendants.

Case No. 95-CV-0006-H ✓

**FILED**

OCT 25 1996

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

ENTERED ON DOCKET

DATE OCT 28 1996

**ORDER**

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment on Counter-Claim of SSI Incorporated and Brief (Docket #70).

Plaintiff Hawkins-Smith asks the Court to grant partial summary judgment in its favor and against Defendant SSI, Inc., as to the counterclaim filed by SSI against Hawkins-Smith (Docket #19). Defendant's counterclaim alleges that Hawkins-Smith "failed to pay all amounts due and owing" under four construction contracts in 1993: (1) a June 30, 1993 contract to construct a commercial building known as Sports Town, (2) a July 27, 1993 contract to construct a commercial building known as Leaps and Bounds, and (3) two March 13, 1993 contracts to construct two commercial buildings known as Walgreens. Defendant claims Plaintiff owes \$118,230 on these contracts.

40

Hawkins-Smith responds in its motion for partial summary judgment that the two contracts on March 13 for the construction of two Walgreens were entered into by G & G Hawkins and SSI, that SSI has been paid all that is due and owing under those contracts, and that G & G Hawkins has received full lien releases and waivers of claims from SSI on those two projects. Moreover, Hawkins-Smith presents affidavits indicating that it was not a party to the contracts with SSI for the Walgreens construction projects.

I.

Summary judgment is appropriate where “there is no genuine issue as to any material fact,” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and “the moving party is entitled to judgment as a matter of law,” Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court held:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a “genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (“[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.”). “Factual disputes that are irrelevant or unnecessary will not be counted.” Id. at 248.

Summary judgment is only appropriate if “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. The Supreme Court stated: “[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 (“[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” (Citations omitted)).

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

## II.

In the instant case, Plaintiff filed its motion for partial summary judgment on August 8, 1996. On October 17, 1996, Defendant filed an unopposed application to file out of time an objection to Plaintiff’s motion for partial summary judgment (Docket #86). This application was granted by minute order on October 21, 1996.

Defendant’s objection to Plaintiff’s motion for partial summary judgment (Docket #87) states that “SSI’s counterclaim is not properly asserted against Hawkins-Smith for the amounts owed on the Walgreens’ Contracts. G & G Hawkins is the responsible party.” Def. Obj. at 1. Defendant now requests that the Court dismiss the counterclaim without prejudice as to the claims arising from the Walgreens’ contracts. In the alternative, Defendant argues that Hawkins-Smith’s motion for partial summary judgment should be denied. Defendant argues this despite the admission in Defendant’s papers that the counterclaim against Hawkins-Smith regarding the Walgreens’ contracts is “not properly asserted.”

Having reviewed in detail the briefs of both parties, the Court finds that Plaintiff is not a party to the Walgreens' contracts, and therefore Defendant's counterclaim based upon those contracts is ill-founded.

The Court hereby grants Plaintiff's Motion for Partial Summary Judgment on Counter-Claim of SSI Incorporated (Docket #70).

IT IS SO ORDERED.

This 23<sup>RD</sup> day of October, 1996.



Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
OCT 25 1996

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

GLORIA BOMAR, an individual, )  
and )  
ROCHELLE WARD, an individual, )  
Plaintiffs, )  
vs. )  
ASBURY UNITED METHODIST CHURCH, )  
an Oklahoma Church, )  
and )  
WILLIAM CLAXTON, an individual, )  
Defendants. )

Case No. 96-CV-701-H /

ENTERED ON FILE  
DATE OCT 28 1996

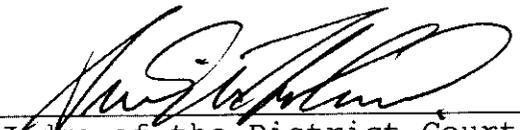
**ORDER**

This action came on for hearing before the Court, on Plaintiff's Motion To Dismiss for lack of subject matter jurisdiction over defendant, William Claxton, and the issues having been heard, judgment is rendered in the above-styled and numbered cause as follows:

The Court finds that defendant Claxton cannot be sued on the claim asserted herein.

IT IS THEREFORE ORDERED that William Claxton be dismissed without prejudice.

DATED this 25<sup>TH</sup> day of OCTOBER, 1996.

  
\_\_\_\_\_  
Judge of the District Court

APPROVED:

---

Attorney for Plaintiffs

---

Attorney for Defendant Claxton

---

Attorney for Defendant Asbury

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

FARMERS NEW WORLD LIFE )  
INSURANCE COMPANY, )  
a Washington corporation, )  
FARMERS INSURANCE COMPANY, INC., )  
a Kansas corporation, and )  
MID-CENTURY INSURANCE COMPANY, )  
a California corporation, )

Plaintiffs, )

v. )

MICHAEL W. LIPPITT, )

Defendant. )

**F I L E D**

**OCT 24 1996**

Paul Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-385-K

ENTERED ON DOCKET

DATE **OCT 28 1996**

**JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE**

All parties hereto, by and through **their respective** counsel, pursuant to the provisions of Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, **jointly** stipulate to the dismissal of plaintiffs' claims and defendant's counterclaims, without **prejudice** to the parties' right to re-file the same at a later date.

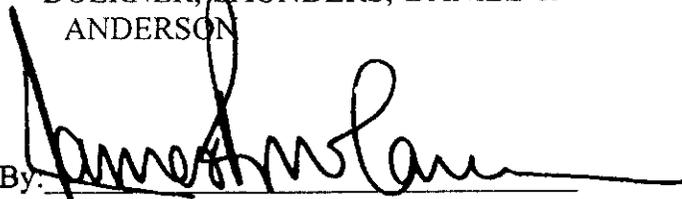
MORLAN & ASSOCIATES, P.C.

DOERNER, SAUNDERS, DANIEL &  
ANDERSON

By: 

Alfred K. Morlan, OBA #6412  
406 S. Boulder, Suite 402  
Tulsa, OK 74152-2940  
(918) 582-5544 - voice

Attorneys for Plaintiffs

By: 

James P. McCann, OBA #5865  
320 S. Boston, Suite 500  
Tulsa, OK 74103  
(918) 582-1211

Attorneys for Defendant

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

**F I L E D**

OCT 28 1996

Phil Leppardi, Clerk  
U.S. DISTRICT COURT

ROYCE GENE DAVIDSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TULCO OILS, INC.; TULCO OILS, )  
 INC. PENSION TRUST; and AETNA )  
 LIFE INSURANCE & ANNUITY )  
 COMPANY, )  
 )  
 Defendant. )

Case No. 96-C-359-B

FILED ON DOCKET  
OCT 28 1996  
DATE

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

The Plaintiff, Royce Gene Davidson ("Davidson"), and Defendants Tulco Oils, Inc. and Tulco Oils, Inc. Pension Trust (collectively hereinafter "Tulco"), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate to the dismissal, with prejudice, of this action and of all claims and counterclaims asserted in this action, and which could have been asserted in this action, by Davidson against Tulco, or by Tulco against Davidson, with Davidson and Tulco to each bear their own costs.

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

Respectfully submitted,



---

W. Kirk Turner, OBA # 13791  
NEWTON, O'CONNOR, TURNER & AUER  
15 West 6th Street  
2700 Bank-4 Center  
Tulsa, Oklahoma 74119-5423  
(918) 587-0101

&

Robert M. Honea, ABA # 83089  
J. Gregory Magness, OBA #14773  
HARDIN, DAWSON & TERRY  
P.O. Box 10127  
Fort Smith, Arkansas 72917-0127  
(501) 452-2200

Co-Counsel for Plaintiff,  
Royce Gene Davidson



---

FREDERIC DORWART, OBA # 2436  
J. MICHAEL MEDINA, OBA # 6118  
RICHARD J. CIPOLLA, JR., OBA # 13674  
Frederic Dorwart, Lawyers  
Old City Hall  
124 East Fourth Street  
Tulsa, Oklahoma 74103-5010  
(918) 583-9922

Counsel for Defendants,  
Tulco Oils, Inc., and  
Tulco Oils, Inc. Pension Trust

ENTERED ON DOCKET

DATE 10/28/96

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

ROBERT H. BARRON,  
(SSN: 570-82-3175)

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,

Defendant.

OCT 24 1996 SAR

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 95-C-1052-J ✓

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

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying him Disability Insurance Benefits. The Administrative Law Judge ("ALJ"), R.J. Payne, found that Plaintiff was not disabled because (1) Plaintiff retained the Residual Functional Capacity ("RFC") to perform a limited range of sedentary work, and (2) the Vocational Expert ("VE") identified significant jobs in the national economy which Plaintiff could perform despite his limitations.

Plaintiff argues that (1) the ALJ erred by finding that Plaintiff's impairments did not meet or equal Listing 1.03, and (2) the VE's testimony does not support the ALJ's conclusion that significant jobs are available in the national economy which Plaintiff can perform despite his limitations. The Court has reviewed the record and finds that all of the errors alleged by Plaintiff are without merit, except for one. The Court finds that in light of the Tenth Circuit's recent opinion in Clifton v. Chater, 79 F.3d 1007

---

<sup>1/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed October 31, 1995.

(10th Cir. 1996), the Commissioner's determination must be **REVERSED** based on the ALJ's failure to properly discuss his findings at step three of the sequential evaluation process.

## **I. STANDARD OF REVIEW**

A disability under the Social Security Act is defined as the

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

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

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

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

---

<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987); and *Williams v. Bowen*, 844 F.2d 748, 750-53 (10th Cir. 1988).

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

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

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when

she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## **II. MEDICAL/VOCATIONAL EVIDENCE**

At the time of the hearing below, Plaintiff was a 44 year old male with a 12th grade education. Plaintiff has some college credit with some vocational training as a CPA. Plaintiff's past relevant work was that of a construction worker from 1975 to 1988 and as a manager of a convenience store from 1988 to November 15, 1990. Plaintiff's past construction work was in the medium to heavy exertional range and his convenience store work was in the light to medium exertional range. *R. at 170, 173, & 202-203*. See 20 C.F.R. § 404.1567. Plaintiff quit working on November 15, 1990 due to arthritis, pain and weakness in both knees. *R. at 84-99*.

### **A. Relevant Period October 7, 1992 to December 31, 1994**

Plaintiff has filed a previous application for disability insurance benefits. This prior application was denied October 6, 1992, and Plaintiff did not appeal the denial. The October 6, 1992 decision is, therefore, a final determination that as of October 6, 1992 Plaintiff was not disabled. See 20 C.F.R. §§ 404.987 and 404.988.<sup>3/</sup> Under Title II of the Social Security Act, Plaintiff's date of last insurance was December 31, 1994. In order to receive disability insurance benefits, Plaintiff must establish that he

---

<sup>3/</sup> Section 404.987(a) states that a decision which is not appealed is a final decision. Section 404.988(b) defines the circumstances under which a final decision may be reopened within four years. Plaintiff's current application was filed March 18, 1994 (i.e., almost 17 months after his first application was denied). *R. at 51-54*. Thus, Plaintiff can meet § 404.988(b)'s time limitation for reopening the Commissioner's prior determination. Plaintiff has not, however, alleged that any of the circumstances described in § 404.988(b) are present in this case. Thus, the Court will not disturb the ALJ's decision not to reopen the prior determination. *R. at 11, ¶ 2*.

was actually disabled prior to the expiration of his insured status. Potter v. HHS, 905 F.2d 1346, 1348-49 (10th Cir. 1990). Thus, the relevant period for disability determination purposes in this case is October 7, 1992 to December 31, 1994. Plaintiff's counsel agreed with this in the pleadings filed with this Court. [Doc. No. 7, pp. 1-2].

**B. Evidence Prior to the Relevant Period**

The record reflects that Plaintiff injured his knees several times in sports-related accidents. Plaintiff has told doctors that (1) in 1966 he injured his right knee in a motorcycle accident, (2) in 1969 he injured his right knee while playing basketball, and (3) in 1986 he injured his left knee while playing softball. Plaintiff has reported to doctors that the 1969 injury resulted in open surgery to repair the cartilage in his right knee and that the 1986 injury resulted in arthroscopic surgery to repair the cartilage in his left knee. The ligaments in Plaintiff's knees were apparently not damaged by these injuries. *R. at 118-119, 147-48, 150, & 157-58*. There are no records in the file regarding these prior surgeries.

With regard to Plaintiff's knee problems, the medical records in the file begin in November 1990 with records from Kimbro Medical Center in Cleburne, Texas ("Kimbrow"). Plaintiff saw two or three doctors at Kimbro, but he primarily saw Randal L. Troop, M.D. Plaintiff presented to Kimbro on November 12, 1990 complaining of chronic pain in his knees. Plaintiff stated that his right knee was locking up several times a day and his left knee was weak and unstable several times a month. *R. at*

148, 151. At the time, Plaintiff was on no medication and in no acute distress. *R. at 118-19.*

X-rays were taken, which showed degenerative changes in the right, but not in the left, knee. For the right knee, the x-rays showed the following: (1) spurs, (2) adequate joint space, and (3) intact knee bones. For the left knee, the x-rays showed the following: (1) sclerosis with some lucencies, and (2) intact knee bones. Upon examination, the doctor found the following with regard to Plaintiff's right knee: (1) tenderness and pain along the joint line, (2) mild crackling sounds with movement, (3) minimal fluid in the knee joint, (4) range of motion from 0-120 degrees, (5) good knee cap tracking, and (6) intact ligaments. With respect to the left knee, the doctor found (1) tightness, some pain and muscle spasm; (2) range of motion from 0-125 degrees; (3) no crackling sounds; and (4) intact ligaments. The doctor's impression was that Plaintiff had a possible meniscus<sup>4/</sup> tear in his right knee and a possible ligament injury in his left knee. The doctor ordered arthroscopic surgery on Plaintiff's right knee and an MRI for Plaintiff's left knee. *R. at 118-19, 147-48 & 151.*

Plaintiff was admitted to Walls Regional Hospital in Cleburne, Texas on November 15, 1990 at 7:20 a.m. for arthroscopic surgery to his right knee. Plaintiff was discharged on the same day at 6:00 p.m. *R. at 116.* The arthroscopic surgery revealed that Plaintiff's anterior cruciate ligament was completely ruptured. It was

---

<sup>4/</sup> The meniscus is an "[i]nterarticular fibrocartilage of crescent shape, found in certain joints, esp. the lateral and medial menisci . . . of the knee joint." Taber's Cyclopedic Medical Dictionary, p. 1194 (17th ed. 1993).

debrided to prevent any impingement. The lateral meniscus in Plaintiff's right knee had a complex, degenerative tear. It was also debrided. The cartilage in a 2.5-3 cm area of Plaintiff's lateral, femoral condyle had deteriorated down to the bone. The same thing occurred in the cartilage on Plaintiff's tibia, but it was not as severe. This cartilage was removed and rebuilt with plastic. Plaintiff's knee cap was fine. *R. at 120-21.*

Four days after the surgery on Plaintiff's right knee, an MRI was performed on his left knee. This MRI showed that Plaintiff had degenerative spurs in his left knee and a possible tear of the meniscus in the left knee. The ligaments appeared, however, to be intact. After reviewing the MRI, Plaintiff's doctor recommended that the same type of surgery performed on Plaintiff's right knee be performed on Plaintiff's left knee. *R. at 125 & 146.*

Plaintiff was admitted to Walls Regional Hospital in Cleburne, Texas on December 6, 1990 at 6:10 a.m. for arthroscopic surgery to his left knee. Plaintiff was discharged on the same day at 1:15 p.m. *R. at 136.* The arthroscopic surgery revealed a medial meniscus tear with indication of chronic trauma. As with the right knee, the cartilage in a 2.5-3 cm area of Plaintiff's lateral, femoral condyle had deteriorated down to the bone. This was repaired. *R. at 130-31.*

Plaintiff was seen ten days later in his doctor's office. At that time, Plaintiff had a range of motion in his knees from 5-115 degrees, some swelling and fluid in the knees. There was, however, no sensory changes, and no popping in the knees as before the surgery. Plaintiff was taken off crutches and was referred to physical

therapy. *R. at 45.* There is no evidence in the record indicating where Plaintiff actually attended physical therapy. Plaintiff was seen two months later. At that time, Plaintiff was complaining of pain, intermittent weakness and popping in his knees. He was taking aspirin at the time to control pain. Plaintiff told the doctor that he wanted to be released to perform light duty work. *R. at 143-44.*

Upon examination of the right knee, the doctor found (1) anterior, lateral and rotary instability; (2) crackling noises; and (3) good knee cap tracking. Upon examination of the left knee, the doctor found (1) crackling and grinding sounds, and (2) good tracking of the knee cap. Plaintiff was released to light duty work with no lifting greater than 20 pounds, no kneeling and no squatting. *R. at 143-44.* Despite being released to return to light duty work, Plaintiff did not return to work and in fact did not work again after the first surgery to his right knee in November 1990.

Plaintiff was not seen by a doctor again for a year and a half. On August 31, 1992, Plaintiff saw W.J. Carter, M.D. Plaintiff complained of intermittent pain and swelling in his knees. Plaintiff reported that he took aspirin to control the pain and swelling. Upon examination, Dr. Carter found that the left knee had a small amount of fluid, but the meniscus and ligaments were intact. Dr. Carter found that the right knee had no fluid, but it did have some "ligamentous laxity." *R. at 155.* Dr. Carter's assessment was bilateral, degenerative arthritis. Plaintiff was told to continue the aspirin for pain. Id.

Dr. Thurma Fiegel performed a physical residual functional capacity assessment of Plaintiff on October 1, 1992. Dr. Fiegel found the following: (1) plaintiff can

occasionally lift 20 pounds; (2) Plaintiff can frequently lift 10 pounds; (3) Plaintiff can stand, walk and sit for six hours in an eight hour day with normal breaks; and (4) Plaintiff has an unlimited ability to push and pull. Dr. Fiegel found no other limitations. *R. at 38-45.*

Plaintiff completed a Disability Report during the relevant period on August 31, 1992. At that time, Plaintiff stated that he had not had any treatment since his last surgery in December 1991. Plaintiff stated that at the time, he helped do household chores, picked up the children, helped do grocery shopping, "tinkered" with minor car repairs, was able to drive and fully able to engage in social activities. The social security interviewer who completed the form with Plaintiff noted that Plaintiff had no problem sitting through the hour and a half interview. *R. at 84-91.* During the relevant period, Plaintiff also reported that he had been prescribed braces for his knees years earlier and these braces did help control his unsteadiness. However, Plaintiff does not wear these braces because they chaff him and they limit his movement. *R. at 118-19.*

### **C. Evidence After the Relevant Period**

Plaintiff completed a Disability Report on March 15, 1994. Plaintiff stated that he could work for two to four hours before his knees would start hurting and swelling. Plaintiff reported that he could not sit for an hour because his knees would fall asleep and he would have a hard time standing up. Plaintiff stated that he was "Mr. Mom" at home even though it might take him longer than others to get things done due to

his knees. Plaintiff also reported that he played drums at church twice a week for an hour. *R. at 92-99.*

At the request of the Social Security Administration, Plaintiff saw James Stauffer, D.O. on June 14, 1994. Plaintiff told Dr. Stauffer that (1) he could not stand for long due to pain, numbness and tingling in his legs; (2) his knees gave out; and (3) he had leg pain when walking. Plaintiff told Dr. Stauffer that his knees were the only joints that hurt him. Plaintiff also reported that at the time he was taking 10-15 aspirin a day to control pain. Upon examination, Dr. Stauffer found the following: (1) Plaintiff appeared to be in good health; (2) Plaintiff had normal range of motion in all joints in his extremities; (3) Plaintiff had good color and pulse in his extremities; (4) some grinding in the knee joints; (5) no knee joint pain; (6) no redness or inflammation, but some swelling in the knees; (7) no muscle atrophy; and (8) slow but stable gait. Dr. Stauffer's impression was degenerative joint disorder. *R. at 157-58.*

Plaintiff completed a reconsideration disability report on July 18, 1994, a Pain Questionnaire on August 10, 1994 and the Social Security Administration completed an Interview Outline on August 12, 1994. Following are the symptoms Plaintiff alleged in these reports: (1) constant pain in buttocks down to ankles which ranges from a dull ache to a sharp, cutting pain; and (2) pain in his shoulder. Plaintiff states that to relieve this pain he takes aspirin and Alleve. Following are the limitations Plaintiff alleged due to his symptoms: (1) impaired concentration due to pain; (2) angers easily and is depressed due to physical condition and pain; (3) can only sit for less than an hour without extreme pain in both legs; (4) has to elevate his feet for two

hours and use ice packs to relieve pain and swelling when it gets bad; (5) cannot bend, stoop, squat or kneel; (6) needs help bathing, dressing and putting on socks and shoes; (7) can only sleep for five to six hours at a time. Despite his impairments, Plaintiff indicated that he tries to be "Mr. Mom" as much as possible by (1) helping care for four children ages 12, 11, 9 and 2; (2) doing all house chores, including yard work, with the help of the children; (3) preparing supper with the children's help; (4) supervising the doing of the laundry by the children; (5) doing the shopping once a month by using a wheel chair at the store. Plaintiff also teaches adult bible classes and continues to play drums at his church three times a week. *R. at 100-113, 193-94.*

Because Plaintiff alleged depression, a psychiatric review of Plaintiff was ordered by the Social Security Administration. It is important to note that there is no mention of depression in the record any place other than on one form completed by Plaintiff when he applied for benefits in this case. A report was completed by a doctor, whose signature cannot be read. This doctor concluded that Plaintiff had an affective disorder which (1) produced slight restrictions of activities of daily living, (2) produced slight difficulties in maintaining social functioning, and (3) seldom produced deficiencies in concentration, persistence and pace. *R. at 63-71.*

In his testimony before the ALJ, Plaintiff indicated that he did not think he could perform a normal office job because he could not move around freely to alleviate his symptoms. Plaintiff testified that if he could move around freely, he felt that he could do office work. *R. at 184-85.* Plaintiff also testified that the first joint on the second

finger of his right had been amputated. Plaintiff alleges that because of this amputation, his right hand goes numb and is completely useless in cold weather. Plaintiff also testified that he has problems picking up small objects with his right hand, but he has learned how to compensate with his left hand. *R. at 190-91*. There are no medical records relating to Plaintiff's hand injury. Plaintiff also testified that he uses a broomstick as a cane to support his weight on occasion. *R. at 193*.

### **III. DISCUSSION**

#### **A. Listing 1.03**

At the conclusion of the hearing, Plaintiff's attorney made a closing argument to the ALJ. In particular, Plaintiff's attorney argued that Plaintiff met or equaled the requirements of Listing 1.03, which provides as follows:

*1.03 Arthritis of a major weight-bearing joint (due to any cause):* With history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination. With:

A. Gross anatomical deformity of hip or knee (e.g, subluxation, contracture, bony or fibrous ankylosis, instability) supported by X-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand; or

B. Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

20 C.F.R. Pt. 404, Subppt. P, App 1.

Given the above described medical record, Listing 1.03 is clearly applicable to this case. Dr. Carter specifically diagnosed Plaintiff with arthritis. There is evidence of persistent joint pain and stiffness. There is also evidence of reconstructive surgery of a major weight-bearing joint (i.e., both of Plaintiff's knees). Plaintiff also alleges that his knees did not return to full weight-bearing status within 12 months of his last operation. The ALJ was, therefore, required to consider the applicability of Listing 1.03.

The following paragraphs are the only mention of the listings in the ALJ's opinion:

At step 3, the Administrative Law Judge must determine if the claimant's severe impairment meets or equals the severity of any impairment listed in Appendix 1 to Subpart P, Regulation No. 4. Although the claimant's impairment is 'severe' by Social Security definition, it does not meet or equal the severity of any impairment listed in Appendix 1 to Subpart P, Regulations No. 4. Disability, therefore, cannot be established under 20 CFR 404.1520(d).

*R. at 14, ¶ 1.*

The medical evidence establishes that the claimant has severe degenerative joint disease in both knees, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

*R. at 19, Finding 3.* This analysis of the applicability of Listing 1.03 is not consistent with the requirements of the Tenth Circuit in Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).<sup>5/</sup>

In Clifton the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at step three, or even identify the relevant listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. The ALJ in this case did not discuss the medical evidence in connection with his step three conclusion. The ALJ in this case also did not even identify the applicable listing or discuss why the elements of that listing were not met in this case. In short, the ALJ in this case made the same type of summary conclusion as the ALJ in Clifton. In Clifton, the Tenth Circuit held that such a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

In particular, the Tenth Circuit held as follows:

Under the Social Security Act,

[t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the

---

<sup>5/</sup> The Court notes that the ALJ's decision was rendered on June 15, 1995. The Clifton opinion was not handed down until March 26, 1996. Thus, neither the Commissioner nor the ALJ had the benefit of the Tenth Circuit's analysis in Clifton at the time the underlying decision was rendered.

evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.

42 U.S.C. 405(b)(1). . . .

This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .

In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed Impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

The Court wishes to make it clear, however, that it is in no way expressing an opinion as to whether Plaintiff actually meets or equals Listing 1.03. Rather, the Court is simply remanding this case so that the ALJ can adequately discuss his conclusions

in connection with Listing 1.03. Only then can this Court review the ALJ's decision in connection with Listing 1.03.

**B. Vocational Expert**

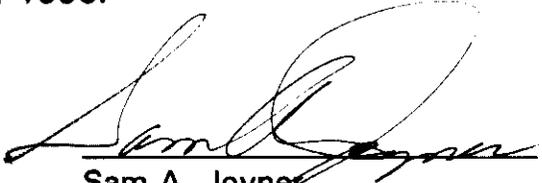
Plaintiff also alleges certain errors in connection with the ALJ's reliance on the Vocational Expert's testimony. The Court has thoroughly reviewed the record and the VE's testimony. *R. at 202-208*. The Court finds no errors committed by the ALJ at steps four or five of the sequential evaluation process.

**CONCLUSION**

The Court finds that the ALJ failed to adequately discuss his conclusions at step three of the sequential evaluation process. Consequently, the Commissioner's denial of benefits is **REVERSED** and this case is **REMANDED** to the Commissioner for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this 24 day of October 1996.

  
Sam A. Joyner  
United States Magistrate Judge



10/17/96  
le

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

CHAD JASON BOMAR, a minor, born )  
August 5, 1982, by and through )  
JOHN OLEN BOMAR, JR., and )  
GLORIA IRENE BOMAR, his father )  
and mother as natural guardians )  
and next friends, and in their )  
individual capacities, )

Plaintiffs, )

vs. )

OSTEOPATHIC HOSPITAL FOUNDERS )  
ASSOCIATION, an Oklahoma )  
corporation, d/b/a OKLAHOMA )  
OSTEOPATHIC HOSPITAL, BENIEN )  
CLINIC, INC., an Oklahoma )  
corporation, JOSEPH KEUCHEL, D.O., )  
W. RICHARD LOERKE, D.O., and )  
ROBERT S. LAWSON, D.O., )

Defendants. )

FILED

OCT 24 1996

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

No. 87-C-409-E ✓

ENTERED ON DOCKET  
DATE OCT 25 1996.

ORDER TO SELL ANNUITY SETTLEMENT

NOW, on this 3rd day of October, 1996, this matter comes on before me, the undersigned Judge of the United States District Court, pursuant to the Motion to Sell Annuity Settlement, Plaintiff, Gloria Bomar, natural guardian and next friend of Plaintiff, Chad Jason Bomar, appears in person represented by her attorney, Allen J. Autrey; F. Will DeMier of the firm Barkley and Rodolf appears in person on behalf of Defendant Oklahoma Osteopathic Hospital; and Plaintiff John Bomar appearing not, having been given notice of said hearing and responding by letter to the Court which was read into the record; and after being fully advised in the premises, the Court finds that for good cause said Motion should be granted.

IT IS THEREFORE ORDERED that Physicians Casualty sale the annuity entitled Presidential Life Insurance Policy #528190 purchased pursuant to a settlement agreement filed herein on May 31, 1988, on behalf of Plaintiffs to pay CHAD JASON BOMAR shall be

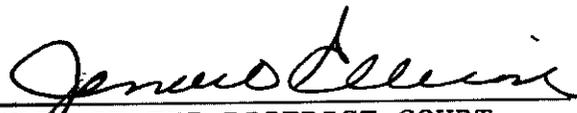
24

sold as soon as possible for its fair market present value and the proceeds paid over to Plaintiff GLORIA BOMAR as natural guardian and next friend of CHAD JASON BOMAR, for the purchase of a van with a wheelchair lift.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs file a return of sale within twenty days after sale of said annuity reflecting the amount of sale and the terms of purchase of a van with a wheelchair lift.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any remaining funds be placed in a trust account for the future benefit of CHAD JASON BOMAR subject to dispositon solely by Court Order upon application.

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

  
JUDGE OF THE DISTRICT COURT

ALLEN J. AUTREY, OBA #14980  
15 West Sixth St., Suite 1608  
Tulsa, Oklahoma, 74119  
(918) 582-0101  
Attorney for Plaintiff

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_\_ day of October, 1996, a true and correct copy of the above and foregoing instrument was deposited in the U.S. Mails with proper postage thereon fully prepaid to the following:

F. Will DeMier  
Barkley and Rodolf  
401 S. Boston  
Tulsa, OK 74103  
Attorneys for Defendant  
Oklahoma Osteopathic Hospital

Melvin C. Weiman  
Secrest, Hill & Folluo  
7134 S. Yale  
Tulsa, OK 74136  
Attorneys for Defendants  
Joseph Keuchel, D.O., W. Richard  
Loerke, D.O., Robert S. Lawson,  
D.O., and Benien Clinic, Inc.

Physicians Casualty  
P.O. Box 26296  
Oklahoma City, OK 73192  
Owner of Presidential Life  
Insurance Policy #528190

John Bomar  
1707 S. Indianapolis Ave.  
Tulsa, OK 74112

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

**F I L E D**

OCT 24 1996

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

**HOMEWARD BOUND, INC.,** )  
**et. al.,** )

**Plaintiffs,** )

**vs.** )

**THE HISSOM MEMORIAL CENTER,** )  
**et. al.,** )

**Defendants.** )

Case No: 85-C-437-E

ENTERED ON DOCKET

DATE OCT 25 1996

**ORDER & JUDGMENT**

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on October 9, 1996 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees in the amount of \$40,596.25 and out of pocket expenses in the amount of \$4,487.88.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to Plaintiffs' counsel, Bullock & Bullock, for attorney fees in the amount of \$40,596.25 plus expenses in the amount of \$4,487.88 and a

652

judgment in the amount of \$45,084.13 is hereby entered on this day. The contested time on the SURS audit issue will be resubmitted pending this Court's ruling on the fee issue.

ORDERED this 24<sup>th</sup> day of October, 1996.

  
HONORABLE JAMES O. ELLISON  
United States District Court

  
Louis W. Bullock  
Patricia W. Bullock  
**BULLOCK & BULLOCK**  
320 South Boston, Suite 718  
Tulsa, Oklahoma 74103-3783  
(918) 584-2001

Frank Laski  
Judith Gran  
**PUBLIC INTEREST LAW CENTER  
OF PHILADELPHIA**  
125 South Ninth Street, Suite 700  
Philadelphia, Pennsylvania 19107  
(215) 627-7100

**ATTORNEYS FOR PLAINTIFFS**



Mark Jones

Assistant Attorney General

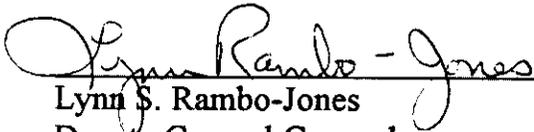
**OFFICE OF THE ATTORNEY**

**GENERAL**

4545 North Lincoln, Suite 260

Oklahoma City, OK 73105-3498

(405) 521-4274



Lynn S. Rambo-Jones

Deputy General Counsel

**OKLAHOMA HEALTH CARE**

**AUTHORITY**

4545 N. Lincoln Blvd., Suite 124

Oklahoma City, Oklahoma 73105

(405) 530-3439

**ATTORNEYS FOR DEFENDANTS**

(ORDER32.FEE)

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

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

HAWKINS-SMITH, an Idaho General  
Partnership,

Plaintiff,

v.

SSI, INC., UNITED STATES FIDELITY  
& GUARANTY COMPANY, and  
INTERNATIONAL ROOFING, INC.,

Defendants,

SSI, INC.,

Third-Party Plaintiff,

v.

MULE-HIDE PRODUCTS CO., INC., and  
LARRY KESTER d/b/a ARCHITECTS  
COLLECTIVE,

Third-Party Defendants.

Case No. 95-CV-0006-H

**FILED**  
OCT 26 1996  
Phil Lombard, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court on a Motion for Summary Judgment (Docket #63) by Third-Party Defendant Mule-Hide Products Co., Inc., ("Mule-Hide"). The Court heard oral argument from Mule-Hide and Plaintiff SSI, Inc. at the pretrial hearing on October 18, 1996.

This lawsuit stems from complaints of defective construction of two buildings known as "Sports Town" and "Leaps and Bounds" by the owner Hawkins-Smith. Hawkins-Smith entered into contracts with SSI, Inc., for the construction of these two commercial buildings. SSI subcontracted the roofing of the two buildings to International Roofing, Inc. ("IR"). Following institution of Hawkins-Smith's suit against SSI for breach of contract, SSI filed a third-party complaint (Docket #22) against Mule-Hide for negligence alleging that: "IR was trained and 'certified' by Mule-Hide," the roofing system installed on the buildings was manufactured by

59

Mule-Hide, and “[a]ny improper installation by IR is the direct result of the wrongful, negligent and inadequate training provided by Mule-Hide.”

Mule-Hide’s motion for summary judgment contends that it is entitled to judgment as a matter of law because Mule-Hide did not owe a legal duty of care to SSI.

I.

Summary judgment is appropriate where “there is no genuine issue as to any material fact,” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and “the moving party is entitled to judgment as a matter of law,” Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the **existence** of an element essential to that party's case, and on which that party will **bear the burden** of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a “genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (“the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment”). “Factual disputes that are irrelevant or unnecessary will not be counted.” Id. at 248.

Summary judgment is only appropriate if “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. The Supreme Court stated: “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co.

v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 (“there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” (citations omitted)).

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

## II.

It is settled law in Oklahoma that: “Actionable negligence consists of three elements: (1) the existence of a duty on the part of the defendant to protect plaintiff from injury; (2) a violation of that duty; and (3) injury proximately resulting therefrom.” Sloan v. Owen, 579 P.2d 812, 814 (Okl. 1977). In the instant case, the first question for the Court is whether Defendant Mule-Hide has a legal duty to protect Third-Party Plaintiff from injury. This is a question of law for the Court to determine. See Wofford v. Eastern State Hospital, 795 P.2d 516, 519 (Okl. 1990) (“The determination of Appellant’s duty toward Appellees was therefore a question of law for the trial court.”).<sup>1</sup> In making this determination, “the most important consideration [for the Court] is foreseeability.” Id.

Based on a review of the facts in this case, the Court concludes that Mule-Hide’s “certification” of IR to sell and install Mule-Hide roofing materials does not create a legal duty to protect a general contractor from the alleged negligence of IR. It is not reasonably foreseeable that, merely by authorizing IR to sell Mule-Hide products, Mule-Hide assumes a legal duty to

---

<sup>1</sup>At the pretrial hearing, Plaintiff agreed that the existence of a legal duty is a question of law for the Court to decide.

protect any third party from the negligent acts of IR in connection with the installation of a Mule-Hide roof. Thus, the Court holds that no legal duty exists on the part of Mule-Hide to protect SSI from the injury alleged in this case.

Holding that no legal duty exists in this case, the Court need not reach the remaining elements required for a claim of negligence under Oklahoma law.

The Court hereby grants Third-Party Defendant's Motion for Summary Judgment (Docket #63).

IT IS SO ORDERED.

This 23<sup>rd</sup> day of October, 1996.

  
Sven Erik Holmes  
United States District Judge

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

JOSEPH ANGELO DiCESARE,

Plaintiff,

vs.

J. D. BALDRIDGE, et. al.,

Defendants.

Case No. 93-C-507-H

FILED

OCT 26 1996

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

ENTERED ON DOCKET  
DATE OCT 25 1996

MAGISTRATE'S REPORT AND RECOMMENDATION

The captioned case has been referred to the undersigned United States Magistrate Judge for report and recommendation.

**I. BACKGROUND**

Plaintiff Joseph Angelo DiCesare, an Oklahoma state inmate, initiated this action by filing a pro se civil rights complaint pursuant to 42 U.S.C. § 1983 alleging malicious prosecution stemming from Plaintiff's arrest and prosecution on charges of cultivation of marijuana, Oklahoma Case No. CFR 88-131. The Court has previously entered orders denying Defendants' motions for summary judgment, without prejudice. [Dkt. 36, 45]. The first order [Dkt. 36] required the parties to submit additional briefing on the effect of *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) on Plaintiff's claim for malicious prosecution. The second order [Dkt. 45] found that the Plaintiff's Fourth Amendment claims asserted in his amended complaint had not been addressed. Those issues have now been fully addressed and Defendants' summary judgment motions [Dkt. 51, 53] are ripe for determination.

The following facts are undisputed. Plaintiff was arrested and charged in state court with the crime of cultivation of marijuana in Delaware County, State of Oklahoma Case No. CRF-88-131. Defendant Baldrige, a Craig County Oklahoma undersheriff at the time, received information concerning cultivation of marijuana in Delaware County by Joseph Angelo DiCesare.<sup>1</sup> He forwarded the information to Delaware County authorities. Defendant Sloan, an investigator for the Delaware County District Attorney's office observed marijuana plants growing on a Delaware County farm belonging to the DiCesare family during an aerial observation of the farm. [Dkt. 40, Ex. D]. On August 3, 1988, the farm was searched by Delaware County Sheriff's Deputies pursuant to a warrant and 235 marijuana plants were located and pulled up. [Dkt. 40, Ex. E]. Thereafter, Plaintiff was arrested and charged with the crime of cultivation of marijuana. [Dkt. 17, Ex. A].

On November 17, 1988, a preliminary hearing was held before the Honorable Martha Sue Thompson, Delaware County Special Judge. The Court found that "the crime of unlawful cultivation of marijuana has been committed and that there is probable cause to believe Defendant, Joseph Angelo DiCesare guilty thereof." [Dkt. 40, Ex. H]. Plaintiff was never tried on the charge; it was dismissed in June, 1991. [Dkt. 7, Ex. C].

---

<sup>1</sup>A former employee of Plaintiff, Joe Hudelson, testified at the preliminary hearing on the state criminal charge that when he was working for Plaintiff at the Delaware County farm loading cattle panels Plaintiff told him to be careful not to damage the marijuana plants. Hudelson relayed that information to Craig County Undersheriff Baldrige. [Dkt. 7, Ex. B, pp 8-18].

## II. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue of material fact" and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986). Conclusory allegations are insufficient to establish a genuine issue of fact. *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988).

## III. MALICIOUS PROSECUTION

It is well recognized that §1983 is not a source of substantive rights but provides a method for vindicating federal rights conferred elsewhere. *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979). In *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), a plurality of the Supreme Court held that the Fourth Amendment governed "pretrial deprivations of liberty." *Id.* at \_\_\_, 114 S.Ct. at 813. Fourteenth Amendment

substantive due process standards have no applicability. Therefore, Plaintiff's claim will be addressed in a Fourth Amendment context.

Plaintiff alleges malicious prosecution as the basis for his § 1983 claim.<sup>2</sup> The Tenth Circuit has ruled that malicious prosecution is cognizable under § 1983. *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996), *cert. denied*, 1996 WL 455752. The common law elements of malicious prosecution are the "starting point" for the analysis of a § 1983 malicious prosecution claim. *Id.* Under Oklahoma law, a plaintiff bears the burden of affirmatively proving each of the following elements to establish a claim of malicious prosecution: (1) initiation of a civil or criminal action against the plaintiff by the defendant; (2) its successful termination in favor of the plaintiff; (3) want of probable cause to bring the action; (4) malice on the part of the defendant; and (5) damages as a result of the action. *Parker v. City of Midwest City*, 850 P.2d 1065, 1067 (Okla. 1993).

In their briefs the parties argue about the existence of probable cause to charge Plaintiff with the crime of unlawful cultivation of marijuana and, in its order of September 23, 1994, the Court found that, based on the state of the record at that time there was a genuine issue of material fact about the existence of probable cause to prosecute Plaintiff for that crime. However, regardless of whether a genuine issue

---

<sup>2</sup>Even construing his complaint liberally, Plaintiff does not allege that his arrest, per se, was unlawful. This is, perhaps, a recognition that the statute of limitations has expired on such a claim. In § 1983 actions federal courts apply the state statute of limitations applicable to personal injuries. *See Albright v. Oliver*, 114 S.Ct. at 816 n. 6. Oklahoma provides a 2 year statute of limitations. 12 Okla. Stat. § 95(3).

of material fact exists as to probable cause, the underlying action was not terminated in Plaintiff's favor. Case No. CFR-88-131 was dismissed *without prejudice* on the motion of the district attorney. [Dkt. 7, Ex. C]. In *Greenberg v. Wolfberg*, 890 P.2d 895, 904 (Okla. 1994) the Oklahoma Supreme Court stated: "Dismissal without prejudice is not a termination favorable to the malicious-prosecution plaintiff." Defendants are therefore entitled to judgment in their favor.

#### IV. AMENDED COMPLAINT

Plaintiff's amended complaint raises additional claims, separate and apart from his malicious prosecution claim. He alleges that the defendants obtained warrants for which there was no probable cause and searched his farm after he was already in custody without a warrant; that the marijuana charge was used as a stepping stone to revoke his probation; that he was charged "astronomic" [sic] bonds (totaling nearly \$40,000) to secure his attendance in court; and that defamation of his character occurred as a result of the publication of his arrest in the newspaper.

Except for the claims concerning a warrantless search and warrants obtained without probable cause, the claims contained in Plaintiff's amended complaint actually relate to damages allegedly flowing from the malicious prosecution. Since Defendants have been granted summary judgment on the malicious prosecution claim, it follows that Plaintiff cannot recover for the damages he alleges resulted from that prosecution. Accordingly, summary judgment should be granted for Defendants on these claims.

Plaintiff does not specify which warrant he alleges was obtained without probable cause: the warrant for his arrest, for the search of the Delaware County

farm, or both. Regardless, the warrants were issued in August and September of 1988, the search and the arrest occurred then also. [Dkt. 23, Ex. C, p. 26; Dkt. 40, Ex. G]. A § 1983 claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991). Claims arising out of police action toward a criminal suspect, such as arrest, are presumed to have accrued when the actions actually occurred, absent any showing that plaintiff was unaware of his injuries at the time of the police actions which allegedly caused them. *Id.* The instant suit was commenced June 2, 1993. There is no showing that Plaintiff was unaware of his alleged injuries. Applying the Oklahoma two-year statute of limitations, 12 Okla. Stat. § 95(3), the Court finds that these claims are time-barred and Defendants' motion for summary judgment should therefore be granted. *See Meade v. Grubbs*, 841 F.2d 1512, 1523-24 (10th Cir. 1988).

Since the search of the Delaware County farm was performed pursuant to a warrant, the court presumes that what Plaintiff is referring to by his allegation of a warrantless search is a September 14, 1988 warrantless search of his Craig County farm. Plaintiff has previously prosecuted a § 1983 action in this Court based upon that search. Case No. 91-C-274-E. That case was dismissed upon recommendation of the magistrate judge because the search occurred more than two years prior to the filing of the action. [Dkt. 5]. The Tenth Circuit affirmed the dismissal in an unpublished decision. *DiCesare v. Poplin*, 986 F.2d 1427 (Table), 1993 WL 26631

(10th Cir. (Okla.)). That claim is therefore barred by reason of its previous adjudication. Defendants are entitled to summary judgment on this claim.

To the extent Plaintiff contends that the aerial surveillance of the Delaware County farm constitutes a warrantless search, summary judgment should be granted on that claim. The aerial observation of the Delaware County farm occurred on August 40, 1988. [Dkt. 23, Ex. D]. Plaintiff's claims flowing from that observation are barred by the two year statute of limitations, as previously discussed. Furthermore, the United States Supreme Court has ruled that aerial interdictive flights do not violate the protections afforded by the Fourth Amendment. *Florida v. Riley*, 488 U.S. 445, 451, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989).

#### **CONCLUSION**

For the reasons specified above, the undersigned United States Magistrate Judge RECOMMENDS that summary judgment be GRANTED in favor of Defendants and against Plaintiff. [Dkt. 51, 53].

In accordance with 28 U.S.C. §636(b), Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of service of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 23<sup>rd</sup> day of October, 1996.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within-entitled case has been filed with the Clerk of the United States District Court for the District of Columbia on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

UNITED STATES OF AMERICA, )

OCTOCT 25 1995

Plaintiff, )

v. )

CASE NO. 95-C-443-K

FOX RUN APARTMENTS, LORRAINE )

FILED

DRAKE, CHRISTINA BROWN, )

OCT 25 1995

SPRADLIN & ASSOCIATES, INC., )

FBI  
U.S. DISTRICT COURT

NORTHCORP REALTY ADVISORS, )

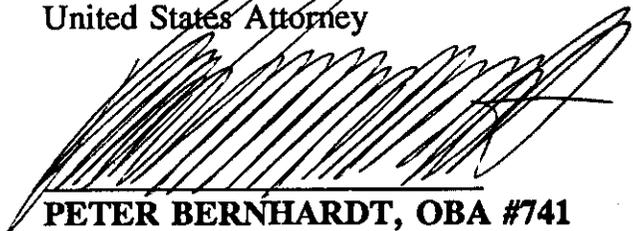
INC., )

Defendants. )

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff, **United States of America**, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, **Spradlin & Assoc, Inc.**, represented by legal counsel Richard A. Paschal, pursuant to Fed. R. Civ. P. 41(a)(1) hereby stipulate to the dismissal of this civil action with prejudice.

STEPHEN C. LEWIS  
United States Attorney



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



**RICHARD A. PASCHAL**  
15 East 5th St. Suite 3700  
Tulsa, OK 74103-4344  
(918) 599-9400  
Attorney for Spradlin & Assoc.



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

OCT 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

URALL O. EDWARDS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Shirley Chater, Commissioner of the )  
Social Security Administration, )  
 )  
Defendant. )

Case No. 93-C-313-E

ENTERED ON DOCKET

OCT 25 1996  
DATE \_\_\_\_\_

O R D E R

Pursuant to the Order of the Court of Appeals, Plaintiff, Urall O. Edwards is awarded benefits as prayed for in his Complaint.

IT IS SO ORDERED THIS 24<sup>th</sup> DAY OF OCTOBER, 1996.

  
\_\_\_\_\_  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**FILED**

OCT 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ANTHONY J. HARRIS,  
Petitioner,

vs.

RON CHAMPION,  
Respondent.

No. 90-C-448-E  
Consolidated with  
No. 95-CV-37-E

ENTERED ON DOCKET

DATE OCT 25 1996

**JUDGMENT**

In accord with the Order denying Petitioner's application for a writ of habeas corpus, the Court hereby enters judgment in favor of Respondent and against the Petitioner Anthony J. Harris.

SO ORDERED THIS 24<sup>th</sup> day of October, 1996.

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

OCT 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ANTHONY J. HARRIS,  
Petitioner,  
vs.  
RON CHAMPION,  
Respondent.

No. 90-C-448-E  
Consolidated with  
No. 95-CV-37-E

ENTERED ON DOCKET  
DATE OCT 25 1996

**ORDER**

Before the Court for consideration is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed in Case No. 95-CV-37-E on January 11, 1995, and consolidated with this action on May 15, 1995. Also before the Court are Respondent's response to the petition for a writ of habeas corpus and Petitioner's reply. (Docket #372 and #374.) The Court previously denied Petitioner's appellate delay claims in Case No. 90-CV-448-E. As more fully set out below, the Court finds that Petitioner is not entitled to habeas relief.

In the instant action Petitioner challenges his conviction for Forcible Sodomy and Assault and Battery with a Dangerous Weapon in the District Court of Washington County, Case Nos. CRF-88-106 and CRF-88-108. The evidence at trial revealed that Petitioner held a pair of scissors to the victim's face and her throat and began pushing her toward the couch and hitting her on the side of the head. Once they were on the couch, Petitioner forced the victim to perform oral sodomy. On September 29, 1988, the trial court sentenced Petitioner, in accordance with the jury verdict, to fifteen years imprisonment for Forcible Sodomy and five years of

376

imprisonment for Assault and Battery with a Dangerous Weapon. The trial court ordered the sentences to be served consecutively.

Petitioner alleges he was denied fundamental fairness in the review of his conviction on direct appeal because of the conflict of interest that existed between Petitioner and his appellate counsel. Petitioner further alleges that appellate counsel provided ineffective assistance when she failed to raise on direct appeal the following issues: (1) that the convictions for Forcible Sodomy and Assault and Battery with a Dangerous Weapon violated the constitutional protection against double jeopardy, (2) that Petitioner was arrested and bound over to trial on a violation of 21 O.S. § 886, but was sentenced under 21 O.S. § 888, and (3) that the evidence was insufficient to support a finding of guilty for the crime of Assault and Battery with a Dangerous Weapon.

On December 19, 1995, this Court held the procedural default doctrine was inapplicable to the instant case because Petitioner's appeal from the denial of his application for post-conviction relief was timely filed when petitioner delivered the appeal documents to prison authorities. See Houston v. Lack, 487 U.S. 266 (1988); Woody v. Oklahoma, ex rel. Department of Corrections, 833 P.2d 257 (Okla. 1992). Respondent has moved to reconsider the above ruling. The Court declines to do so.

Next Respondent contends the Antiterrorism and Effective Death Penalty Act, enacted on April 24, 1996, applies retroactively to the instant habeas corpus action. The Supreme Court, in Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483 (1994),

addressed the retroactive application of a statute. The Court stated that "where the congressional intent [as to retroactive application] is clear, it governs." Id. at 1496 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990)). If congressional intent is unclear, the court must determine whether the statute has "retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 114 S. Ct. at 1505. If the statute has a "retroactive effect," then it is subject to the "traditional presumption against retroactive application of a statute." Id. at 1493-95.

With respect to the Antiterrorism Act, Congress specifically mandated that the new procedures for habeas corpus petitions involving capital punishment apply to all pending and subsequently filed cases. Section 107 of the Antiterrorism Act provides "Chapter 154 of title 28, United States Code . . . shall apply to cases pending on or after the date of enactment of this Act." Congress, however, did not include such language in Section 105 which would apply in the case at hand. Consequently, the Court infers that Congress did not intend to apply retroactively section 105 of the Anti-terrorism Act to these proceedings. See also Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991). ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion.")

Even if the Court were unable to discern the "intent of Congress" from the Antiterrorism Act, the Court concludes that the new standards in Section 105 would have a retroactive effect as they would be more burdensome to the Petitioner in this case. Therefore, in accordance with Landgraf, the Court finds that the 1996 amendments to section 2254 are not applicable to the instant case. See Landgraf, 511 U.S. 244, \_\_\_, 114 S. Ct. 1483, 1493-96 (1994) (a statute that has a retroactive effect should not be applied to pending cases).

**A. Conflict of Interest**

In his first ground, Petitioner contends he was denied the effective assistance of appellate counsel due to a conflict of interest. Petitioner asserts the conflict arose as a result of the filing of his original petition for a writ of habeas corpus on the ground of appellate delay. Petitioner contends that his habeas action "exposed the Attorney's incompetence not only in the Petitioner's case but it also open[ed] the door for over 275 other indigent inmates to do so." (Petition, Docket #1, at 6b.)

Petitioner relies on Mathis v. Hood, 937 F.2d 790 (2nd Cir. 1991), where the Second Circuit Court of Appeals addressed a conflict of interest claim arising from appellate counsel's dilatory conduct on direct appeal. In Mathis, counsel failed to file an appellate brief for over two years and ultimately did so only after petitioner filed a grievance with the Disciplinary

Committee. Counsel refused to consult with the petitioner regarding any substantive matters to be raised on direct appeal in spite of the petitioner's expressed wishes that he do so. Counsel also waived oral argument and submitted an appellate brief which was very poor in quality.

The Second Circuit held that "Mathis's attorney had an actual conflict of interest sufficient to undermine its confidence in the outcome of the appeal, a conflict that established a per se violation of Mathis's right to effective assistance of counsel." 927 F.2d at 796. The Court stated as follows:

[i]f a criminal defendant can show that his "counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance'", Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)), "[t]he conflict itself demonstrate[s] a denial of the 'right to have effective assistance of counsel.'" Cuyler, 446 U.S. at 349 (quoting Glasser v. United States, 315 U.S. 60 (1942)). This rule rests on the assumption that "some conflict of interest so affront the right to effective assistance of counsel as to constitute a per se violation of the sixth amendment." United States v. Aiello, 900 F.2d 528, 531 (2d Cir. 1990) (citing Cuyler, 446 U.S. at 349-50). If such a conflict exists, the rationale is that there should be no need to show prejudice. Id.

Mathis, 937 F.2d 790, 794. The Court noted, however, that "this rule is difficult to invoke, and the mere possibility of conflict is insufficient." Id.

Unlike Mathis, the appellate delay in Petitioner's case, as well as 275 other cases, was due to the systemic delay of the Oklahoma Appellate Public Defender System. See Harris v. Champion, 15 F.3d 1538, 1548-52 (10th Cir. 1994). This systemic delay was caused by the inadequate funding of the Appellate Public Defender

System and not due to the negligent conduct of a specific attorney. Id. The record in the instant case further reveals that Petitioner's appellate counsel aggressively pursued Petitioner's direct appeal and even filed a Petition for Rehearing after affirmance. Moreover, as more fully set out below, counsel provided effective assistance to Petitioner on direct appeal. Therefore, the Court finds that Petitioner has not shown that counsel had an actual conflict of interest sufficient to undermine the confidence in the outcome of the appeal.

**B. Ineffective Assistance of Appellate Counsel**

Next Petitioner challenges the assistance of his appellate counsel. He contends counsel was ineffective for failing to raise on direct appeal (1) that the convictions violated the constitutional protection against double jeopardy, (2) that Petitioner was arrested and bound over to trial on a violation of 21 O.S. § 886, but was sentenced under 21 O.S. § 888, and (3) that the evidence was insufficient to support a finding of guilty for the crime of Assault and Battery with a Dangerous Weapon.

To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Although the Strickland test was

formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992), cert. denied, 508 U.S. 912 (1993).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a weak issue").

As set out below, the Court finds Petitioner's claims of ineffective assistance of counsel meritless and, as a result, appellate counsel's decision not to present them on direct appeal did not amount to ineffective assistance under the Sixth Amendment.

1. Double Jeopardy Violation

As his first ground of ineffective assistance of appellate counsel, Petitioner alleges that counsel failed to raise a claim under the Double Jeopardy Clause.

The Double Jeopardy Clause "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). "This test emphasizes the elements of the two crimes. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" Brown v. Ohio, 432 U.S. 161, 166 (1977) (quoted case omitted).

In the instant case, the crimes of assault and battery with a dangerous weapon and forcible sodomy are distinct and separate crimes. Assault and battery with a dangerous weapon is defined as follows:

Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon the person of another with any sharp or dangerous weapon . . . with intent to injure any person . . . is guilty of a felony punishable by imprisonment in the penitentiary not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year.

21 O.S. § 645.

Forcible sodomy is defined as follows:

Any person who forces another person to engage in the detestable and abominable crime against nature, pursuant to Section 886 of this title, upon conviction, is guilty of a felony punishable by imprisonment in the penitentiary for a period of not more than twenty (20) years.

21 O.S. § 888.

Petitioner contends that the crime of assault and battery with a dangerous weapon was used to prove the force element required to establish forcible sodomy and, therefore, that his conviction for both crimes amounts to a double jeopardy violation. This Court disagree. Assault and battery with a dangerous weapon and forcible sodomy require proof of facts which the other does not. Assault and battery with a dangerous weapon necessitates the use of a sharp or dangerous weapon, whereas forcible sodomy may be accomplished by any degree of force or by threats. Therefore, the Court finds that Petitioner's double jeopardy claim lacks any merit and that appellate counsel did not provide ineffective assistance in failing to raise that claim on direct appeal.

2. Improperly Convicted and Sentenced Under 21 O.S. § 888

Next Petitioner contends counsel failed to allege on appeal that he was improperly convicted and sentenced for sodomy under 21 O.S. § 888 rather than under 21 O.S. § 886. Sodomy under section 886 carries a maximum punishment of ten years. Forcible sodomy under section 888 instead carries a maximum punishment of twenty years.

On March 30, 1988, Petitioner was charged by Information with "forcible sodomy" in violation of section 886. The Information did not allude to the force used in committing the alleged sodomy. On

June 2, 1988, the Information was amended to conform with the evidence presented at the preliminary hearing. The Amended Information charged Petitioner as follows:

the said Defendant, Anthony Jerome Harris, . . . on or about the 23rd day of March, 1988, did unlawfully, wilfully and feloniously commit the detestable and abominable crime against nature with one Diann Lunsford, by threatening her with a pair of chrome hair cutting scissors held in his hand, and by then and there having unnatural and carnal copulation by mouth with the said Diann Lunsford, and did, then and there, commit the crime of FORCIBLE SODOMY.

(Ex. K attached to Respondent's response, docket #372.) The amended Information, however, still charged Petitioner with violating section 886 instead of section 888.

In Peninger v. State, 721 P.2d 1338 (Okla. Crim. App. 1986), the defendant was charged with the crime of oral sodomy in violation of section 886 and was sentenced to twenty years imprisonment under section 888. The Oklahoma Court of Criminal Appeals held that the defendant was formally charged with forcible oral sodomy in violation of section 888 and properly sentenced to twenty years imprisonment, rather than ten years imprisonment, because the information and trial court's instruction on the charge of oral sodomy added the language "by forcing."

In the instant case as in Penninger, the Information followed the statutory language of section 888 and explained the force used. Therefore, the Amended Information formally charged Petitioner with the crime of forcible oral sodomy with punishment not to exceed twenty years. Since this claim lacks any merit, appellate counsel did not provide ineffective assistance in failing to raise it on

direct appeal.

3. Insufficiency of the Evidence

Lastly, Petitioner contends that counsel failed to raise on direct appeal that there was insufficient evidence to sustain a conviction for assault and battery with a dangerous weapon. Petitioner contends the alleged weapon was never established to be a dangerous weapon as required by 21 O.S. § 645.<sup>1</sup>

Sufficient evidence exists to support a conviction if any rational trier would accept the evidence as establishing each essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In reviewing a sufficiency claim, the court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 507 U.S. 910 (1993). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of

---

<sup>1</sup> Petitioner further alleges that the State failed to include in the Information the effect produced by the weapon. Sufficiency of an indictment or information is not a matter for federal habeas relief unless the information is so deficient that the convicting court lacked jurisdiction. Heath v. Jones, 863 F.2d 815 (11th Cir. 1989); Uresti v. Lynaugh, 821 F.2d 1099 (5th Cir. 1987). Under the Sixth and Fourteenth Amendments, Petitioner is entitled to fair notice of the criminal charges against him, and claims of due process violations in not providing such fair notice are cognizable in a habeas corpus action. See Hunter v. State of N.M., 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991); Franklin v. White, 803 F.2d 416 (8th Cir. 1986), cert. denied, 481 U.S. 1020 (1987).

In the instant case, the Court finds no such constitutional error in the charge for assault and battery with a dangerous weapon. The information adequately established the state court's jurisdiction and sufficiently informed Petitioner of the offense.

reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993).

Although the Court must apply a federal constitutional standard to determine whether the State presented sufficient evidence, the Court must look to Oklahoma law for the definition of sharp and dangerous weapon in section 645. While a pair of scissors is not a per se dangerous weapon, Oklahoma courts recognize that "[t]he manner of use of an instrument may be controlling factor in determining whether it is a 'dangerous weapon,' within statute providing punishment for assault with a dangerous weapon." Hay v. State, 447 P.2d 447 (1968).

The evidence at trial reveals that Petitioner held a pair of scissors to the victim's face and her throat and began hitting her in the shoulders and on the side of the head and pushing her toward the couch. (Trial tr. at 22-23.) The victim testified that "[t]hey [the scissors] weren't far from my face during all of this. They were just back a little bit and every time he'd start to threaten, he'd put the scissors back up in my face around my throat." (Id. at 23.) The trial court defined dangerous weapon "as any implement likely to produce death or great bodily harm in the manner it is used or attempted to be used." (Ex. N to Respondent's Response, docket #372.) Petitioner contends the victim never claimed that the weapon was ever used in a way that might induce death.

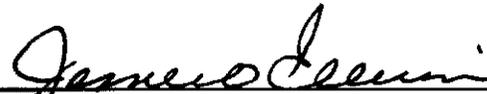
On the basis of the evidence presented at trial, the Court finds that a reasonable juror could have found the evidence sufficient to conclude that the scissors were a sharp or dangerous

weapon for purposes of 21 O.S. § 645. The manner of use of the scissors clearly reveals that they were a sharp and dangerous weapon. Cf. McDaniel v. State, 509 P.2d 675, 679 (Okla. Crim. App. 1973) (holding an opened pocket knife to the face of the victim justified finding that the knife was a dangerous weapon).

As Petitioner's sufficiency of the evidence claim is without merit, counsel was not ineffective in failing to assert this proposition on direct appeal.

ACCORDINGLY, IT IS **HEREBY** ORDERED that Petitioner's application for a writ of habeas corpus and to advance cause and for partial summary judgment (Docket #375) are DENIED.

SO ORDERED THIS 24<sup>th</sup> day of October, 1996.

  
\_\_\_\_\_  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

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

**F I L E D**

OCT 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KELLY JO BEARD, et al., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE HISSOM MEMORIAL CENTER, )  
 )  
 Defendant. )

87-C-704-E /

~~ENTERED ON DOCKET~~

OCT 24 1996

DATE \_\_\_\_\_

**ORDER ALLOWING PAYMENT OF APPROVED INTERIM COMPENSATORY  
EDUCATION EXPENSES**

The Hissom Education Compliance Office was closed by the court effective February 29, 1996. Ms. Janice West was retained as the Hissom Compensatory Education Coordinator as of June 15, 1996. Between those two dates Magistrate Judge Wagner authorized certain interim compensatory education expenses to be incurred, in order to insure continuity for those class members who were then receiving compensatory education services.

The court hereby authorizes and approves payment of those interim expenses, which were incurred between February 29, 1996 and June 15, 1996, and specifically approved by Magistrate Judge Wagner. *IN THE TOTAL AMOUNT OF \$6,405.87.*

In addition to service upon counsel of record, the clerk is directed to also serve a copy of this order upon Compensatory Education Coordinator Janice West, and upon the Trustee, Joe McCormick.

Dated this 21<sup>st</sup> day of OCTOBER, 1995.

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

421

**HISSOM EDUCATION COMPLIANCE OFFICE**  
**COMPENSATORY EDUCATION**

1511 S. Gary Place Tulsa, OK 74104-5225

(918) 745-0552 Home

(918)749-7399 Fax

April 17, 1996

**Hissom Education Compliance Office**

<b>Compliance Officer</b>	<b>21.53</b>
<b>Office Manager</b>	<b><u>113.81</u></b>
	<b>135.34</b>

**Compensatory Education Enhancement Fund**

<b>Ronico Jones</b>	<b>57.19</b>
<b>Pablo DeLaCerde</b>	<b>57.19</b>
<b>John Littrell</b>	<b>113.70</b>
<b>Bridget Becker</b>	<b>161.48</b>
<b>Shaun Rash</b>	<b>176.04</b>
<b>Wendy Jarrett</b>	<b>203.44</b>
<b>Latricia Berry</b>	<b><u>662.05</u></b>
	<b>1431.09</b>

**TOTAL** **1566.43**  
Janice West

**HISSOM EDUCATION COMPLIANCE OFFICE**  
**COMPENSATORY EDUCATION**

1511 S. Gary Place Tulsa, OK 74104-5225

(918) 745-0552 Home

(918)749-7399 Fax

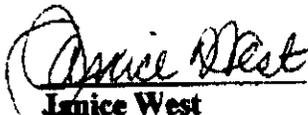
May 7, 1996

**Hissom Education Compliance Office**

<b>Compliance Officer</b>	<b>21.53</b>
<b>Office Manager</b>	<b>132.29</b>
	<b>153.82</b>

**Compensatory Education Enhancement Fund**

<b>Ronico Jones</b>	<b>65.65</b>
<b>Pablo DeLaCerde</b>	<b>300.95</b>
<b>John Littrell</b>	<b>185.70</b>
<b>Bridget Becker</b>	<b>161.48</b>
<b>Shaun Rash</b>	<b>306.33</b>
<b>Latricia Berry</b>	<b>678.20</b>
	<b>1698.31</b>
<b>SUB TOTAL</b>	<b>1698.31</b>
<b>TOTAL</b>	<b>1852.13</b>

  
**Janice West**

**HISSOM EDUCATION COMPLIANCE OFFICE  
 COMPENSATORY EDUCATION**

1511 S. Gary Place Tulsa, OK 74104-5225

(918) 745-0552 Home

(918)749-7399 Fax

**June 11, 1996**

**Office Personnel**

<b>Compliance Officer</b>	<b>398.96</b>
<b>Office Manager</b>	<b>119.97</b>
<b>Tower Group</b>	<b>380.00</b>
	<b>898.93</b>

**Compensatory Education Enhancement Fund**

<b>Ronico Jones</b>	<b>76.13</b>
<b>Bridget Becker</b>	<b>96.89</b>
<b>John Littrell</b>	<b>259.87</b>
<b>Pablo DeLaCerde</b>	<b>297.05</b>
<b>Shaun Rash</b>	<b>464.73</b>
<b>Latricia Berry</b>	<b>893.71</b>

**SUB TOTAL 2088.38**

**TOTAL 2987.31**

  
 Justice West

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

**FILED**  
OCT 22 1996

DONALD MARK NEWMAN,  
Plaintiff,

vs.

BILL BRIMMER, and TERESA  
BRIMMER,

Defendants.

No. 95-C-527-H

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

OCT 24 1996

**JUDGMENT**

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, Donald Mark Newman. Plaintiff shall take nothing on his claim.

IT IS SO ORDERED.

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

  
Sven Erik Holmes  
United States District Judge

43

**FILED**

OCT 22 1996

*Handwritten initials*

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 EUNICE M. THOMPSON, )  
 )  
 Defendant. )

Civil Action No. 96-C-424H

FILED  
OCT 24 1996

DEFAULT JUDGMENT

This matter comes on for consideration this 21<sup>st</sup> day of October, 1996, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Eunice M. Thompson, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Eunice M. Thompson, was served with Summons and Complaint on July 22, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

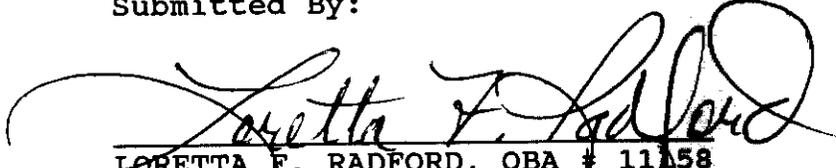
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Eunice M. Thompson, for the principal amount of \$3,107.35, plus accrued interest of \$785.15, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the

*Handwritten mark*

amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.64 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

**FILED**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

OCT 22 1996

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
EUNICE M. THOMPSON, )  
 )  
Defendant. )

Civil Action No. 96-C-424H

ENTERED ON DOCKET  
OCT 24 1996  
DATE \_\_\_\_\_

DEFAULT JUDGMENT

This matter comes on for consideration this 21<sup>st</sup> day of October, 1996, the Plaintiff appearing by Stephen C.

Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Eunice M. Thompson, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Eunice M. Thompson, was served with Summons and Complaint on July 22, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Eunice M. Thompson, for the principal amount of \$3,107.35, plus accrued interest of \$785.15, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the

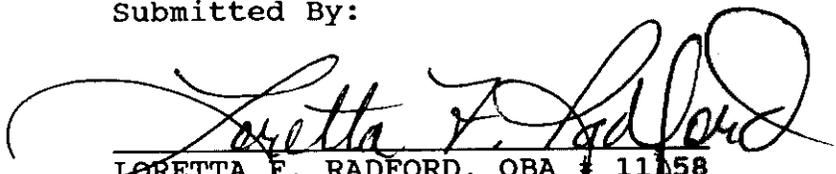
amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.64 percent per annum until paid, plus costs of this action.

S/ SVEN ERIK HOLMES

---

United States District Judge

Submitted By:



LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918)581-7463

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE OCT 24 1996

UNITED STATES OF AMERICA, )  
 )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PEGGY I. THOMPSON aka PEGGY I. )  
 HAYNES aka PEGGY THOMPSON aka )  
 PEGGY IRENE THOMPSON; ROY D. )  
 HAYNES; DONNIE R. JACKSON aka )  
 DONNIE J. JACKSON; JAMES M. )  
 SHANNON; COUNTY TREASURER, )  
 Rogers County, Oklahoma; BOARD OF )  
 COUNTY COMMISSIONERS, Rogers )  
 County, Oklahoma, )  
 Defendants. )

**FILED**

OCT 23 1996

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

*WB*

Civil Case No. 95-C 313BU

**ORDER**

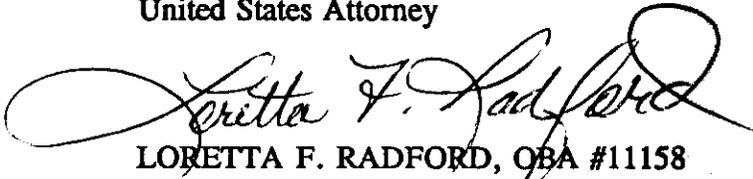
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure filed December 14, 1995 is vacated; the sale of the subject property which took place on April 25, 1996 is vacated; and this action shall be dismissed without prejudice.

Dated this 23<sup>rd</sup> day of October, 1996.

*Michael B. Bunge*  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the typed name of the signatory.

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

LFR/esf

CP.

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

OCT 23 1996

*Le*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MICHAEL H. CHAMPAGNE and KIMBERLY )  
KAY CHAMPAGNE, individually and as )  
parents and next friends of their son, )  
BRANDON M. CHAMPAGNE, a minor, )

Plaintiffs, )

vs. )

Case No. 96-CV-769-H

THE PRUDENTIAL INSURANCE )  
COMPANY OF AMERICA, )

ENTERED ON DOCKET

Defendant. )

DATE OCT 24 1996

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiffs, Michael H. Champagne and Kimberly Kay Champagne, individually and as parents and next friends of their son, Brandon M. Champagne, a minor, and Defendant, The Prudential Life Insurance Company of America, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

The parties are to bear their own attorney's fees and costs.

DATED: Oct 23, 1996.

Respectfully submitted,

*Dennis King*

Dennis King  
Knowles, King & Taylor  
603 Expressway Tower  
2431 East 51st Street  
Tulsa, Oklahoma 74105

ATTORNEYS FOR PLAINTIFFS

(11)

*CP*

*Elsie Draper*

---

Elsie Draper, OBA #2482  
GABLE GOTWALS MOCK SCHWABE  
2000 Boatmen's Center  
15 West 6th Street  
Tulsa, OK 74119-5447

ATTORNEYS FOR THE DEFENDANT,  
THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA

Of Counsel:

Steven H. Frankel  
Cheryl Dyer Berg  
Sonnenschein Nath & Rosenthal  
685 Market Street, 10th Floor  
San Francisco, California 94105  
(415) 882-5000 (Telephone)  
(415) 543-5471 (Telecopier)

PLD/125809.1

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

**F I L E D**

OCT 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HOWARD W. IDDINGS, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 BENEFUND, INC., a Colorado )  
 corporation, VERNON TWYMAN, )  
 JOHN C. EDWARDS, PETER G. )  
 FUTRO, FUTRO & ASSOCIATES, )  
 P.C., a Colorado professional )  
 corporation, PAT GUEST and )  
 GUEST & COMPANY, P.C., an )  
 Oklahoma professional )  
 corporation, )  
 Defendants. )

Case No. 94-C-1056X H

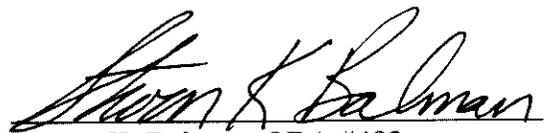
ENTERED ON DOCKET  
OCT 24 1996  
DATE \_\_\_\_\_

**STIPULATION OF DISMISSAL WITH PREJUDICE OF  
CLAIMS AGAINST PETER G. FUTRO AND FUTRO & ASSOCIATES, P.C.**

Plaintiffs, and each of them, and Defendants, Peter G. Futro and Futro & Associates, P.C., stipulate to the dismissal with prejudice of Plaintiffs' claims against Defendants, Peter G. Futro and Futro & Associates, P.C., each party to bear its own costs and expenses.

Dated this 23rd day of October, 1996.

Respectfully submitted,



Steven K. Balman, OBA #492  
Baker & Hoster  
800 Kennedy Building  
321 South Boston Avenue  
Tulsa, Oklahoma 74103  
Telephone: 918/592-5555

ATTORNEYS FOR PLAINTIFFS

158





---

Bobby L. Latham, Jr., OBA #15799  
BEST, SHARP, HOLDEN, BEST  
SULLIVAN & KEMPFERT  
808 ONEOK Plaza  
100 West Fifth Street  
Tulsa, Oklahoma 74103  
Telephone: 918/582-1234

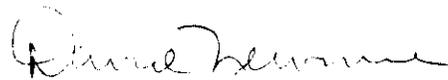
ATTORNEYS FOR DEFENDANTS  
PETER F. FUTRO AND  
FUTRO & ASSOCIATES, P.C.



---

Curtis J. Biram, OBA #801  
Biram & Kaiser  
16 East 16th Street  
Suite 200  
Tulsa, Oklahoma 74103  
Telephone: 918/584-0719

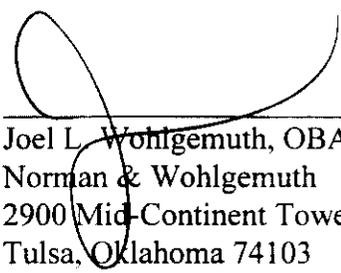
Attorneys for Ronald C. Whittier,  
William J. Cardie and  
Inland Commercial Investments, Inc.



---

P. David Newsome, Jr., OBA #6652  
Conner & Winters  
2400 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4391  
Telephone: 918/586-5711

Attorneys for Mark Todd Loeber



---

Joel L. Wohlgemuth, OBA #9811  
Norman & Wohlgemuth  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103  
Telephone: 918/583-7571

Attorneys for BeneFund, Inc.,  
Vernon Twyman and John C. Edwards

**CERTIFICATE OF MAILING**

I hereby certify that on the 23<sup>rd</sup> day of October, 1996, a true and correct copy of the above and foregoing document was mailed by first-class mail, postage prepaid, to:

Curtis J. Biram  
Biram & Kaiser  
16 East 16th Street  
Suite 200  
Tulsa, Oklahoma 74103

Attorneys for Ronald C. Whittier, William J. Cardie and  
Inland Commercial Investments, Inc.

P. David Newsome, Jr.  
Conner & Winters  
2400 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4391

Attorneys for Mark Todd Loeber

Joel L. Wohlgemuth  
Norman & Wohlgemuth  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103

Attorneys for BeneFund, Inc.,  
Vernon Twyman and John C. Edwards



---

Steven K. Balman

**FILED**

**OCT 23 1996**

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

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

JAMES EDWARD CAFFERY,

Petitioner,

vs.

STEVE HARGETT,

Respondent.

No. 95-CV-1104-B

**OCT 24 1996**

**ORDER**

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections (DOC), contends the State of Oklahoma lost jurisdiction over him when the DOC relinquished him to federal authorities to serve his federal sentence and, as a result, the State of Oklahoma should not require him to serve the remainder of his state sentence. As more fully set out below the Court concludes that Petitioner is not entitled to habeas relief.

On April 3, 1990, Petitioner pled guilty to Uttering a Forged Instrument in Tulsa County Case No. CRF-89-5600. The district court sentenced Petitioner to thirty years of imprisonment and ordered that the sentence would run concurrent with Case Nos. CRF-89-4188, CRF-89-4189, CRF-89-5601, CRF-90-0100, CRF-90-0101, and CRF-90-153.

On September 17, 1991, Petitioner received an eighteen-month sentence in the United States District Court for the Northern District of Oklahoma. On March 11, 1992, the United States Attorney's Office informed the DOC that as a result of Petitioner's assistance in a related criminal case, Petitioner was being

7

permitted to serve a portion of his state sentence concurrently with the subsequently imposed federal sentence. (Response, docket #3, ex C.) On October 28, 1991, Judge Jay Dalton modified Petitioner's state sentence to reflect that it would run concurrent with his federal sentence and that "upon completion of his [federal] sentence . . . if any sentence remains to be served in the State of Oklahoma, that Defendant be returned to the custody of the Oklahoma Department of Corrections for completion of the sentence in this Case No. CF-89-5600."

On November 6, 1991, the DOC released Petitioner to the custody of the United States Marshal's Office to serve his federal sentence. On March 16, 1993, the U.S. Marshal's Office returned Petitioner to the custody of the DOC to serve the remainder of his state sentence.

After exhausting his state remedies, Petitioner filed the instant petition for a writ of habeas corpus. He contends Judge Dalton lacked jurisdiction to modify his state sentence to run concurrent with his federal sentence and that the DOC relinquished custody over Petitioner when he was transferred to federal custody.<sup>1</sup>

28 U.S.C. § 2254(a) permits a federal court to entertain a habeas petition "only on the ground that [the state prisoner] is in custody in violation of the Constitution or laws or treaties of the

---

<sup>1</sup> Petitioner further contends that the ruling of the District Court of Cleveland County on his application for post-conviction relief was incorrect. The Court need not address this contention as it does not raise a federal constitutional claim.

United States." Violations of state law and procedure which do not infringe specific federal constitutional protections are not cognizable under section 2254.

The Court finds Petitioner has not raised any federal constitutional issues in the instant petition. Judge Dalton merely gave Petitioner credit against his State sentence for time served in the federal penitentiary. Moreover, the record in this case shows that Petitioner was discharged from the DOC only long enough to serve his federal sentence. It is now well established that "[a] sovereign does not lose its power to keep a convict in custody by turning the convict to another sovereign for service of a sentence." Tavarez v. U. S. Attorney General, 668 F.2d 805, 809 (5th Cir. 1982). Moreover, "the federal government and a state are perfectly free to make any agreement between themselves concerning which of their sentences will be served first, as long as the prisoner is not compelled unnecessarily to serve his sentence in a piecemeal fashion." Causey v. Civiletti, 621 F.2d 691, 694 (5th Cir. 1980). See also Williams-El v. Carlson, 712 F.2d 685 (D.C.Cir. 1983); Hernandez v. United States Attorney General, 689 F.2d 915 (10th Cir. 1982); United States v. Warren, 610 F.2d 680 (9th Cir. 1980); Floyd v. Henderson, 456 F.2d 1117 (5th Cir. 1972); United States v. Acevedo-Ramos, 605 F.Supp. 190 (D.C.P.R. 1985).

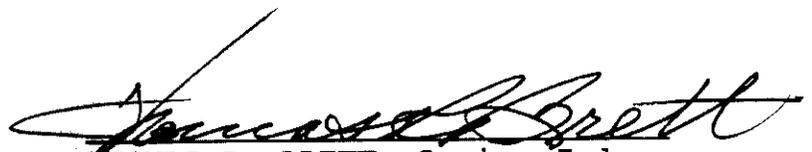
Regardless the Court does not detect any element of unfairness in the instant case. While Petitioner is dissatisfied that he faces unexpired portions of his state sentence, it is undisputed he benefitted from the modification of his state sentence. Petitioner

served time in the better environment afforded by the federal penal system while at the same time receiving credit toward his state sentence. "A prisoner cannot with one hand work a deal for federal time and with the other seek to avoid residual state time." Johnson v. State of West Virginia, 679 F.Supp. 596, 599 (S.D.W. Va. 1988).

Moreover, Petitioner does not dispute that the State of Oklahoma lodged a detainer with the federal authorities to ensure that Petitioner would return to Oklahoma to complete his state sentence after release from the federal penitentiary. Therefore, this Court finds that the State of Oklahoma has not displayed such a fatal lack of interest which would amount to a waiver of jurisdiction over the Petitioner. See Milstead v. Rison, 702 F.2d 216, 217-218 (11th Cir. 1983) (comparing Shields v. Beto, 370 F.2d 1003 (5th Cir. 1967), with Piper v. Estelle, 485 F.2d 245 (5th Cir. 1973)).

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is DENIED.

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

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

**F I L E D**

OCT 17 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY BIG ELK and SAM McCLANE,

Plaintiffs,

-vs-

DONNA KASTNING, et al.,

Defendants.

ENTERED ON DOCKET

DATE OCT 24

CASE NO. 96-C-0087-B ✓

**DEFAULT JUDGMENT ORDER**

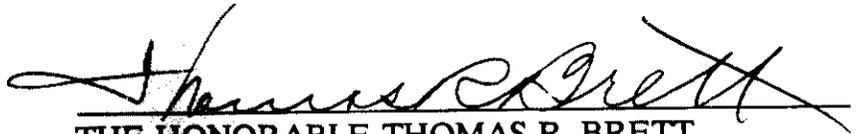
THIS MATTER comes before the Court for consideration of the Plaintiffs' Renewed Application for Default Judgment. Upon consideration thereof and upon consideration of the Federal Rules of Civil Procedure Rule 55(b)(2) and Local Rules for the Northern District of Oklahoma Rule 55.1(C), the Court finds the same should be granted.

IT IS THEREFORE ORDERED that Defendant JANA WELCH was properly served with Summons and Complaint; that she failed to file a written answer to the same, and that Defendant Jana Welch is in default herein.

IT IS FURTHER ORDERED that Judgment of Default be entered against the Defendant, Jana Welch. Damages will be determined at a hearing and/or trial on the

8<sup>th</sup> day of Nov., 1996, at 2:30 P.M.

DATED this 17<sup>th</sup> day of Oct., 1996.

  
THE HONORABLE THOMAS R. BRETT  
UNITED STATES DISTRICT COURT JUDGE

F:\DOC\MIKE\BIGELK\Default2.Ord

35

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
OCT 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAWNA M. SPEARS,

Defendant.

Civil Action No. 96CV 651B ✓

ENTERED ON DOCKET

DATE OCT 24 1996

DEFAULT JUDGMENT

This matter comes on for consideration this 21<sup>ST</sup> day of Oct., 1996, the Plaintiff appearing by Stephen C.

Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Dawna M. Spears, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Dawna M. Spears, acknowledged receipt of Summons and Complaint on August 17, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Dawna M. Spears, for the principal amount of \$1,701.73, plus accrued interest of \$636.13, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the

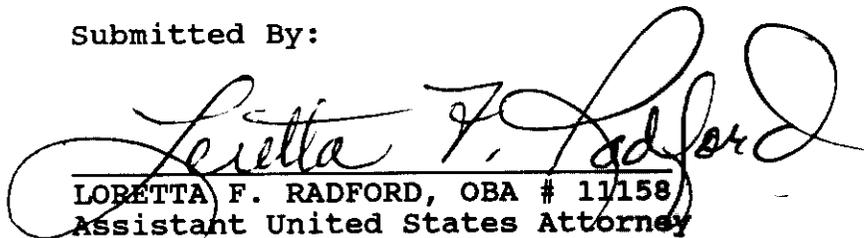
NOTE: THIS CHECK IS TO BE MAILED  
BY THE CLERK OF COURT AND  
PAID TO THE PARTY IMMEDIATELY  
UPON RECEIPT.

5

amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.64 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 23 1996



Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOHN DEERE COMPANY, a division  
of DEERE AND COMPANY, a Delaware  
corporation,

Plaintiff,

vs.

GARY W. FAIN,

Defendant.

Case No. 96 CV 526E

ENTERED ON DOCKET

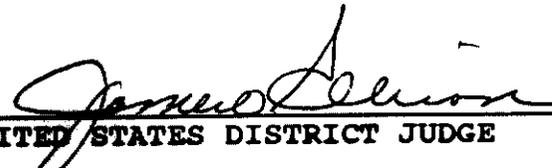
DATE OCT 24 1996

**ORDER**

NOW on this 22<sup>d</sup> day of October, 1996, there comes on for consideration the Joint Motion of John Deere Company, a division of Deere and Company, and Gary W. Fain, to transfer this matter to the Eastern District of Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the clerk of the United States District Court for the Northern District of Oklahoma transfer the above referenced matter to the United States District Court Clerk for the Eastern District of Oklahoma.

IT IS SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

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

**FILED**

OCT 22 1996

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

LARRY D. LONG, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STANLEY GLANZ, et al., )  
 )  
 Defendants. )

No. 96-CV-288-H

OCT 23 1996

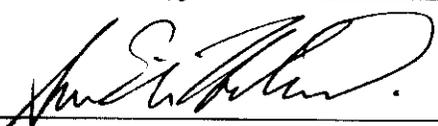
**ORDER**

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on September 23, 1996. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.<sup>1</sup>

**ACCORDINGLY, IT IS HEREBY ORDERED** that Defendants' motion to dismiss or for summary judgment (doc. #11) is **granted** and the above captioned case is **dismissed without prejudice** at this time.

SO ORDERED THIS 21<sup>st</sup> day of October, 1996.

  
SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

<sup>1</sup>Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

ENTERED ON DOCKET  
DATE 10/23/96

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

KENNETH SIZEMORE,  
(SSN: 442-60-7384)

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,

Defendant.

OCT 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 95-C-1165-J ✓

**REPORT AND RECOMMENDATION**

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying Plaintiff Disability Insurance Benefits. The Administrative Law Judge ("ALJ"), James D. Jordan, found that Plaintiff was not disabled because (1) Plaintiff retained the Residual Functional Capacity ("RFC") to perform a limited range of sedentary work, and (2) the Vocational Expert identified significant jobs in the national economy which Plaintiff could still perform despite his limitations.

Plaintiff argues that the ALJ erred by not applying the correct legal standard to (1) assess Plaintiff's subjective complaints of pain, and (2) evaluate a report from Plaintiff's treating physician, R. Michael Eiman, D.O. The undersigned finds that the ALJ applied the correct legal standards in this case and his decision is supported by substantial evidence. Consequently, the undersigned recommends that the Commissioner's denial of benefits be **AFFIRMED**.

1

## I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>1/</sup>

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

---

<sup>1/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

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

## II. MEDICAL/VOCATIONAL EVIDENCE

At the time of the hearing below, Plaintiff was a 39 year old male with a 12th grade education. Plaintiff has received some vocational training in construction. Plaintiff's past relevant work was that of (1) a welder, fitter and inspector from 1982 to June 3, 1993; and (2) an oil field hand from 1978 to 1980. Plaintiff's past relevant work was in the "light" to "heavy" exertional category. *R. at 118-19, 308-11, 336.* See 20 C.F.R. § 404.1567. Plaintiff alleges that he quit working as a welder, fitter, inspector due to (1) pain in his neck, shoulders and back; (2) muscle spasms in his back; (3) tingling and numbness in his legs, shoulders and arms; and (4) headaches. *R. at 114.*

Plaintiff was first injured on September 12, 1987. While at work, a piece of channel fell and struck a glancing blow to Plaintiff's shoulders and mid-back. *R. at 146-47.* Plaintiff was examined on the date of the accident and X-rays were taken. The X-rays of Plaintiff's cervical spine revealed evidence of spasm, but no fracture and only minimal curvature of the spine. The X-rays of Plaintiff's thoracic spine showed no abnormality. No pain was produced when Plaintiff performed straight leg raisings. The diagnosis at the time was strain of the thoracic and cervical spine and pain medication was prescribed. Plaintiff was to be off work for three days, until re-examined. *R. at 146-47.* Plaintiff was re-examined four times over the next 12 days.

At his first visit, Plaintiff reported that he was having pain and stiffness in his cervical and lumbar spine with some radiation of pain into his legs. Plaintiff reported no tenderness in his arms. At his second visit, Plaintiff was still reporting stiffness in

his neck and back, but no pain in his legs. Upon examination, the doctor noted that Plaintiff's neck and mid-lumbar muscles had a good range of motion. At the third visit, Plaintiff reported worsening pain to his thoracic spine and shoulders. Plaintiff also reported that he was not going to work. There was still no pain when Plaintiff performed straight leg raisings. At the fourth visit, Plaintiff reported that he was still a little sore, but that he wanted to return to work. Plaintiff reported no pain or numbness in his arms or legs. Plaintiff stated that he did get stiff if he sat for any significant amount of time. Upon examination, the doctor found that Plaintiff had minimal tenderness in the cervical spine, no tenderness in the thoracic spine, no spasms, and good grip. The doctor's final diagnosis was "resolving thoracic and cervical spine strain." Plaintiff was released to return to work and he was given exercises to perform to relieve the strain in his back. *R. at 141-44.* Plaintiff was not seen by a doctor again for nine months.

The records reflect that sometime in 1988, Plaintiff had a lumbar laminectomy and fusion. There are, however, no medical records in the file regarding this surgery. *R. at 155.*

In June 1988, Plaintiff began to see R. Michael Eiman, D.O. Plaintiff saw Dr. Eiman on and off until May 1993. In June 1988, Plaintiff reported to Dr. Eiman that he had injured his back at home in March 1988 while unloading 125 pound spools from the back of his truck. Plaintiff saw Dr. Eiman three times in June 1988. During this period, Dr. Eiman found that Plaintiff could walk on his heels without any problem and that he could straighten his legs while sitting. Plaintiff did, however, have pain

while performing straight leg raisings at 15°. Dr. Eiman's diagnosis was chronic lumbar strain with radiation into the legs. Dr. Eiman prescribed various medications to control Plaintiff's pain.

A CT scan of Plaintiff's lumbar spine was performed in June 1988. This scan revealed a mild focal bulge at L5-S1 without any evidence of compromise of neural elements. The L3-L4 and L4-L5 vertebrae were within normal limits. There was no evidence of any significant hypertrophic, degenerative changes. The nerve roots in Plaintiff's spine were also within normal limits and there was no evidence of compression. *R. at 254.* Dr. Eiman concluded that the CT scan was not significant enough to warrant surgery. *R. at 245.*

Dr. Eiman referred Plaintiff to a work hardening program at Saint Francis Hospital's RE/Flex center. *R. at 244-45.* At the time of his examination by the RE/Flex center, Plaintiff complained of the following symptoms: (1) pain in his central back and left hip, (2) stiffness in his neck, (3) muscle spasm on both sides of his back and neck, and (4) tingling in both ankles and feet. Plaintiff also reported that on average his pain woke him three times during the night. Plaintiff stated that prolonged standing, walking, sitting or lying increased his pain. Plaintiff denied, however, any complaints of weakness. Upon examination, the doctors at the RE/Flex center found the following: (1) Plaintiff's lumbar range of motion was limited; (2) trunk flexion caused radiating pain into Plaintiff's left hip; (3) straight leg raisings produced pain; (4) weakness in the muscles of the loin, neck, and shoulders; and (5) Plaintiff's reflexes were normal, except for triceps reflex. *R. at 260-61.* The RE/Flex center also

determined that due to Plaintiff's pain, Plaintiff was functioning at a sedentary to light exertional level for walking and a light exertional level for lifting and carrying.

While at RE/Flex, a psychological assessment of Plaintiff was performed by Susan Scheid, a staff psychologist. *R. at 256-57.* Ms. Scheid's report does not provide a clear picture of Plaintiff's psychological state at any given moment.<sup>2/</sup> On the one hand, Ms. Schied suggests that Plaintiff may tend to complain excessively about his various discomforts to garner the attention of doctors, friends and family. On the

---

<sup>2/</sup> Following are the relevant excerpts from Ms. Scheid's report:

The most notable aspect of [Plaintiff was] his inconsistency, his under current [sic] of sadness and tension, which is interspersed with periods of intense moodiness and occasional out bursts [sic]. He tends to be pessimistic, and views himself as being misunderstood and unappreciated by others. Reactions to events may be somewhat unpredictable, with anger and disappointment expressed one time, followed quickly with embarrassment for being so emotional. This moodiness may be both physically and psychologically upsetting, and may, therefore, dispose him to an increased susceptibility to psychosomatic ailments.

[Plaintiff] also responds to illness and health professionals in a somewhat variable manner. Under some circumstances he will freely report his symptoms, complaining excessively about a varied list of discomfort and problems. Getting the attention of doctor and friends and relatives is an important compensation for his physical discomforts. However, [Plaintiff] is likely to be erratic in his relations with health care professionals, alternately distancing and engaging, independent of the objective reality of either his physical state or the treatment regimen. . . .

If [Plaintiff's] sense of masculinity feels threatened, there is a good possibility that he will stop complaining. Being ashamed and upset by the implications of his symptoms, he may attempt to conceal or deny them. He may hesitate to seek help and resist efforts to correct his ailments because of fearing exposure and feeling vulnerable. These fears and preoccupations may increase his discomfort to such a point that he may be unable to grasp or follow medical advice, further adding to his disinclination to comply with treatment regimens.

*R. at 256-57.*

other hand, if Plaintiff's masculinity is threatened, Ms. Schied suggests that Plaintiff may stop complaining and conceal or deny his discomforts. *Id.*

Based on the RE/Flex center's findings, Plaintiff's employer's workers' compensation insurance carrier approved three weeks of full day strength training at RE/Flex. This approval was given on July 15, 1988. *R. at 258.* The record is not clear as to how many days Plaintiff actually attended work hardening session at RE/Flex. The record reflects, however, that as of July 26, 1988, Plaintiff had quit the RE/Flex program. Plaintiff stated that he had increased pain and he felt that if he continued the program, he might aggravate his back's condition. Plaintiff stated also that he wanted Dr. John B. Vosburgh, M.D., an orthopedic surgeon, to look at his X-rays before continuing with the program. *R. at 139, 244, 255.*

Plaintiff saw Dr. Vosburgh on August 8, 1988. Plaintiff reported to Dr. Vosburgh that he had pain in his low back, tailbone and legs. Plaintiff reported that this pain began when he hurt his back trying to move the above-mentioned spools and that the pain had become progressively worse. Plaintiff further noted that he continued to work for Tulsa Steel, but he had marked pain any time he was required to be on his feet for any length of time. Upon examination, Dr. Vosburgh found that Plaintiff: (1) was a well developed, muscular male; (2) was alert and cooperative; (3) moved about without any difficulty; (4) had good alignment of the spine; (5) had 45% of normal range of motion with pain on forward flexion; and (6) had marked pain in his low back when performing straight leg raisings. Dr. Vosburgh ordered a myelogram and a bone scan, both of which were normal. Dr. Vosburgh's final diagnosis was early

spondylitis, which is an inflammation of one or more vertebrae. See Taber's Cyclopedic Medical Dictionary p. 1854 (17th ed. 1993). Dr. Vosburgh prescribed Motrin for pain and told Plaintiff to continue his supervisory job. *R. at 139*. Despite Dr. Vosburgh's report, it does not appear that Plaintiff ever returned to the RE/Flex center for work hardening sessions.

From September 1988 through 1989, Plaintiff had a series of accidents at work, which he alleges exacerbated his back condition. Sometime in September 1988, Plaintiff states that he slipped on a pipe at work. *R. at 243, 249*. In October 1988, Plaintiff states that he slipped on some glass at the shop where he worked. *R. at 241*. In June of 1989, Plaintiff tripped and fell over a ladder at work. Plaintiff reported these incidents to Dr. Eiman, not on the day they allegedly occurred, but usually at some point after the accident. During this period, Plaintiff was reporting to Dr. Eiman that he had pain in his back and tingling in his feet. Plaintiff was also reporting that the pain in his back increased when he was under stress at work. Dr. Eiman prescribed pain medications and Plaintiff continued to work full time. *R. at 231-43*. Dr. Eiman ordered an MRI, which was normal. *R. at 233*. Dr. Eiman's notes indicate that a discogram was performed, which indicated that the bottom half of one of Plaintiff's discs was degenerative. No other information about the discogram is in the record. *R. at 231*. Dr. Eiman's diagnosis during this period was chronic lumbar strain with somatic dysfunction and chronic anxiety. *R. at 233*.

The records reflect that sometime in 1989, Plaintiff had a refusion of a lumbar vertebra. The fusion performed in 1988 had apparently failed. This refusion was accomplished with screws and plates. There are, however, no medical records in the file regarding this surgery. *R. at 155.*

Plaintiff saw Dr. Eiman sporadically during 1990 and 1991. Several of the visits during these years were not directly related to Plaintiff's back problems. For example, Plaintiff saw Dr. Eiman to quit smoking, for vomiting, for stomach problems, for hemorrhoids and for insomnia. *R. at 224-230.* In October 1991, Plaintiff reported that he was working full time and having pain in his back, but by November of that year, he was doing better. *R. at 222-23.* The records reflect that sometime in 1991, the plates and screws used to accomplish the refusion performed in 1989 were removed. *R. at 155.* There are, however, no records in the file regarding this surgery.

Plaintiff saw Dr. Eiman regularly during 1992 (i.e., several times each month). During 1992, Plaintiff complained regularly of pain in his lower back. Plaintiff complained less frequently of pain in his right leg. Dr. Eiman began trigger point injections to help Plaintiff's lower back. Dr. Eiman also encouraged Plaintiff to do lumbar flexion exercises on a daily basis. Dr. Eiman prescribed a TENS unit to help Plaintiff control the pain. Dr. Eiman also prescribed various pain medications during this period, but refused to give Plaintiff stronger medications when asked. These interventions by Dr. Eiman produced varied results. Plaintiff would report good days and bad days. *R. at 163-221.* In March 1992, Dr. Eiman told Plaintiff that if the pain

at work was more than could be controlled by medication, then he needed to go home, rest and put ice on his back. *R. at 214.* In June 1992, Plaintiff reported that he had been off work for approximately a week and a half. *R. at 196.* In August 1992, Plaintiff reports working a 24-hour shift and Dr. Eiman after examination of Plaintiff reported that Plaintiff's back was not as severe as he would have expected. *R. at 181.* Plaintiff reported missing a half day of work in November 1992 and a full day of work in December 1992. *R. at 164 & 167.*

From January 1993 to May 1993, Plaintiff saw Dr. Eiman fairly regularly. Plaintiff complained of pain in his low back and of numbness in his right leg. Plaintiff also stated that he right leg had given out a few times. Plaintiff reported that he fell over some boxes in January and fell again in February. Dr. Eiman continued to give Plaintiff trigger point injections. Plaintiff reported that he was continuing to work. *R. at 156-162.* For some reason not clear from the record, Plaintiff was examined by Stephen Eichert, D.O. on May 24, 1993. Dr. Eichert found that (1) Plaintiff's gait was good; (2) Plaintiff performed heel to toe walking well; and (3) Plaintiff had limited range of motion in the lower back. *R. at 155.*

Plaintiff states that on May 24, 1993, he fell three feet off a skid when a piece of plate gave way. *R. at 262-66.* Plaintiff states that he felt excruciating pain when he fell. *R. at 140.* Plaintiff saw Dr. Eiman on May 28, 1993 and there is no report of this fall. *R. at 154.* Plaintiff had an appointment on June 7, 1993 with Dr. Eiman. On that date, Plaintiff's wife called Dr. Eiman's office to cancel the appointment. Plaintiff's wife told Dr. Eiman's staff that Plaintiff had been referred to another doctor

by his employer. Plaintiff's wife also reported that Plaintiff had been taken off all medication and that there was nothing wrong with his back. *R. at 154.* Plaintiff did not see Dr. Eiman on a regular basis after May 1993.

Plaintiff was seen by his employers' workmens' compensation medical provider on June 3, 1993. The workmens' compensation doctor reports that Plaintiff appeared to be very uncomfortable and he had pain when doing straight leg raisings. The workmens' compensation doctor rated Plaintiff as unable to work and referred Plaintiff to M.A. Haynes, M.D. *R. at 140.*

Dr. Haynes saw Plaintiff on June 4, 1993. At that time, Plaintiff was reporting pain in his neck, pain in his back, tingling in his right leg, numbness in his left shoulder, numbness in his legs, and weakness. Plaintiff also reported to Dr. Haynes that the day before coming to see Dr. Haynes, he had injured himself again at work when he tried to catch a piece of iron as it slipped off a saw-horse. Plaintiff stated that when he tried to catch the piece of iron, he twisted off-balance and injured his neck and butt. *R. at 274.* Upon examination, Dr. Haynes found the following: (1) tenderness at L4-L5 and L5-S1; (2) full range of motion in the neck, with no pain; (3) no cervical compression; (4) limitation of all motion in the back; and (5) pain on performing straight leg raisings. *Id.* Dr. Haynes also reviewed X-rays of Plaintiff and found no objective evidence to justify all the complaints Plaintiff presented. Dr. Haynes' diagnosis was lumbar strain. He prescribed home exercise and a brace. *Id.*

Plaintiff continued to see Dr. Haynes throughout June and July 1993. On June 21, 1993, Dr. Haynes ordered an MRI. After reviewing the MRI, Dr. Haynes reported

that there was no evidence of any disc bulge, herniation or impingement above L5-S1. Dr. Haynes also reported that the fusion looked good, there being no significant granulation or recurrent disc herniation at the old fusion site. *R. at 151, 273.* Dr. Haynes recommended Plaintiff begin a physical therapy program. Dr. Haynes also limited Plaintiff to only doing inspecting and no welding work. On June 26, 1993, Plaintiff reported to Dr. Haynes that he had fallen off of a scaffolding at work. Upon examination, Dr. Haynes found mildly positive straight leg raisings on the left side and no motor or reflex abnormalities. Dr. Haynes placed Plaintiff on off-work status at this point. *R. at 273.* Plaintiff saw Dr. Haynes twice in July and once in August 1993. Each time, Dr. Haynes noted that Plaintiff was doing a little better. *R. at 272.*

At some point, Plaintiff filed a workmens' compensation claim. Plaintiff was referred by the State Insurance Fund to LeRoy E. Young, D.O., for examination on September 24, 1993. Plaintiff reported to Dr. Young that he had attended physical therapy twice a week for two months without any improvement. *R. at 263-66.* There are, however, no records in the file regarding any physical therapy undertaken by Plaintiff. Plaintiff complained to Dr. Young about (1) pain, stiffness, numbness and tingling in his neck; (2) headaches; (3) pain in upper back that radiates into shoulders; (4) pain in lower back that radiates into right knee; (5) numbness and tingling in right leg and foot. Plaintiff also stated that bending, walking more than 75 yards, driving more than 36 miles, lifting more than 10 pounds, sitting more than one hour, and standing more than 15 minutes all caused pain in his back. Upon examination, Dr. Young found the following: (1) no muscle spasms in the spine, (2) good range of

motion in the spine, (3) good hand grip, (4) no permanent impairment as a result of all the injuries since 1989, and (5) 25% permanent, partial disability as a result of Plaintiff's 1989 injury and fusion. *R. at 263-66.*

On month after seeing Dr. Young, Plaintiff saw Dr. Haynes again on October 22, 1993. Upon examination, Dr. Haynes found the following: (1) Plaintiff's neck was good, with full range of motion; (2) some numbness in left arm; (3) no motor or reflex abnormalities. Dr. Haynes diagnosis was mild cervical spondylosis, which is an inflammation of one or more vertebrae in the neck. See Taber's Cyclopedic Medical Dictionary p. 1854 (17th ed. 1993). Dr. Haynes prescribed anti-inflammatory medication and cervical traction. *R. at 271.* Dr. Haynes saw Plaintiff again on December 13, 1993 at which time Dr. Haynes took Plaintiff off all medications and recommended that Plaintiff see a behavioral psychologist for stress management. *R. at 269.* Plaintiff last saw Dr. Haynes in April 1995 at which time another MRI was done and X-rays were taken. Both the X-rays and the MRI were normal. *R. at 303.*

Plaintiff then began seeing R. Chubb, M.D., at the Indian Hospital in Claremore, Oklahoma. Dr. Chubb prescribed pain medication and noted on more than one occasion that Plaintiff appeared to be in a great amount of pain and appeared to be depressed and/or anxious. *R. at 281-89, 298-99.* Dr. Chubb made these observations despite the fact that he also observed that Plaintiff's affect was bright and he was verbally interactive. *R. at 284.*

Plaintiff states in his disability reports that constant, sharp pain in his head, neck, shoulders and back limits his ability to sit, walk or stand for more than 30

minutes at a time. Plaintiff also states that pain and numbness in his legs cause his knees to go out on occasion. Plaintiff also says that he has problems bending, stooping or squatting due to pain and the fusion in his back. Plaintiff also states that he has some grip problems (i.e., cannot hold a glass without dropping it). Plaintiff testified that he can walk for about 15 minutes at a time, stand for 5-10 minutes at a time, sit for 15-20 minutes at a time, and lift 10-15 pounds. Due to the pain, Plaintiff says that he can only sleep three to five hours at a time. Despite his pain, Plaintiff does perform his prescribed exercises for 30 minutes every day. Plaintiff testified that he has driven at least 120 mile round trip, and he tries to help his wife cook meals. However, Plaintiff says that he does not do housework, visit friends, hunt, fish or go to church anymore like he used to do. Plaintiff says that he needs to lay down for about two hours a day to relieve his pain. *R. at 114, 119, 122-30, 133-38, 316-17, 325-27, and 330-31.*

According to Plaintiff, his pain makes it hard for him to concentrate and make decisions. The pain also makes it hard for people to be around him. Plaintiff also states that he cannot handle stressful events because the stress causes his back to tighten up and he cannot control his emotions. Plaintiff indicates that he has been seeing someone at the Indian Hospital for depression and anxiety. There are, however, no records in the file regarding this type of treatment. Plaintiff's wife testifies that Plaintiff tried to attempt suicide once. *R. at 114, 119, 122-30, 133-38, 316-17, 325-27, 330-31 and 335.*

For purposes of this social security claim, Plaintiff was examined by Ronald Passmore, M.D. on January 4, 1994. Plaintiff told Dr. Passmore that he was irritable and could not be around people, that he was having nightmares and that he cried two to three times per week. Plaintiff also stated that he had suicidal thoughts, but he would not act on them for religious reasons. On the date he saw Dr. Passmore, Plaintiff reported that he had no tingling or numbness. Dr. Passmore observed that Plaintiff was well groomed, moved alertly and talked well. Dr. Passmore found that Plaintiff did have some symptoms of depression and anxiety. However, Dr. Passmore felt that these symptoms could be controlled with adjustments to Plaintiff's medications. *R. at 276-78.*

Sally Varghese, M.D., performed a mental RFC assessment of Plaintiff and completed a Psychiatric Review Technique ("PRT") form on January 26, 1994. Dr. Varghese found that Plaintiff had an affective disorder which produces (1) a slight restriction of activities of daily living; (2) frequent deficiencies in concentration; (3) a moderate limitation in his ability to understand and remember detailed instructions; (4) a moderate limitation in his ability to carry out detailed instructions; and (5) a moderate limitation in his ability to interact appropriately with the general public. Dr. Varghese concluded that Plaintiff could "perform simple tasks and some complex tasks with routine supervision" and he could "relate to coworkers and supervisors for work purposes," but he would have "trouble relating with the public." *R. at 81-93.* Dr. Varghese's assessment was affirmed by Janice Boon, Ph.D. on February 18, 1994.

An unknown doctor completed a PRT and concluded that Plaintiff had no medically determinable impairment. *R. at 94-102.*

Thurma Fiegel, M.D. performed a physical RFC of Plaintiff on January 26, 1994. Dr. Fiegel found Plaintiff could (1) occasionally lift 20 pounds, (2) frequently lift 10 pounds, (3) stand and walk for at least two hours in an eight hour day with normal breaks, (4) sit for six hours in an eight hour day with normal breaks, and (5) not stoop. Dr. Fiegel's assessment was affirmed by Vallis Anthony, M.D. on February 19, 1994. *R. at 64-71.* Dr. Chubb was also asked to comment on Plaintiff's physical RFC. Dr. Chubb found that Plaintiff could (1) occasionally lift less than 10 pounds, (2) frequently lift less than five pounds, (3) stand for less than one hour in an eight hour work day, (4) sit for seven to eight hours in an eight hour workday, but for less than an hour at a time without interruption. Dr. Chubb found that Plaintiff's handling and feeling abilities would not be affected, but that his reaching, pushing and pulling abilities would be affected. *R. at 296-97.*

Dr. Eiman was also asked to comment on Plaintiff's physical RFC. Dr. Eiman completed the same form Dr. Chubb completed. Dr. Eiman indicated that Plaintiff's ability to lift, carry, stand, walk and sit would be affected. Unlike Dr. Chubb, however, Dr. Eiman did not attempt to quantify Plaintiff's ability or limitations. Dr. Eiman simply concluded at the end of the form that Plaintiff "is unable to work 40 hours a week due to his continual pain. . . ." *R. at 301-302.*

### III. DISCUSSION

In this case, the ALJ denied **benefits** at step five of the sequential evaluation process. The ALJ presented a **hypothetical** person with various limitations to a Vocational Expert and that expert **identified** several sedentary<sup>3/</sup> jobs in the national economy which the hypothetical **person** could perform despite the identified limitations. Based on the VE's **testimony** that the hypothetical person could still perform certain sedentary jobs, the ALJ found Plaintiff to be not disabled. If there is substantial evidence in the record to **support** the ALJ's conclusion that Plaintiff possess the same limitations as those **attributed** to the hypothetical person presented by the ALJ to the VE then the ALJ's **decision** must be upheld. See, e.g., Kelley v. Chater, 62 F.3d 335 (10th Cir. 1995) (**testimony** from a vocational expert can provide substantial evidence that an individual **is not disabled**).

The hypothetical person **presented** by the ALJ had the same age, education, background, training and experience **as Plaintiff**. The hypothetical person also had the following abilities and limitations: (1) **he was able** to perform simple tasks and some complex tasks with routine supervision; (2) **he could only have** incidental contact with the general public; (3) **he could lift less than** 10 pounds occasionally and less than five pounds frequently; (4) **he could stand no more than** one hour at a time and no more than one hour in an eight hour day; (5) **he could sit for seven to eight hours** in an eight

---

<sup>3/</sup> Sedentary work "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required **occasionally** and other sedentary criteria are met." 20 C.F.R. § 404.1567(b).

hour work day, but for no longer than one uninterrupted hour at a time; (6) he could never climb, balance, stoop, crouch, kneel, or crawl; (7) he has limited ability to reach, handle, push or pull; (8) he cannot work around unprotected heights. *R. at 337-38*. Based upon the above-described medical record, the undersigned finds that there is substantial evidence to support the ALJ's conclusion that Plaintiff had these same limitations.

After being presented with the limitations described above, the VE determined that the hypothetical person could perform the following jobs: (1) entry-level timekeeper (460 in Oklahoma and 43,000 in the United States); (2) entry-level bookkeeping (4,800 in Oklahoma and 379,000 in the United States); (3) sedentary assembly jobs (600 in Oklahoma and 46,500 in the United States); and (4) miscellaneous labor, such as masking items (300 in Oklahoma and 11,000 in the United States). *R. at 338-40*. The undersigned finds that these jobs represent a significant number of jobs in the national economy. See Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992) (refusing to draw a bright line, but indicating the criteria for consideration in determining whether a significant number of jobs is present).

**A. Dr. Eiman's Report**

Plaintiff argues that his limitations are more severe than those attributed to the hypothetical person presented by the ALJ to the VE. Plaintiff points to Dr. Eiman's last report wherein Dr. Eiman stated that Plaintiff "is unable to work 40 hours a week due to his continual pain. . . ." *R. at 301-302*. Plaintiff argues that the ALJ failed to

give Dr. Eiman's report the evidentiary weight it is entitled to as a report from one of Plaintiff's treating physicians.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984); Goatcher v. DHHS, 52 F.3d 288 (10th Cir. 1995). It is also the ALJ's responsibility to resolve conflicts among the opinions of various treating physicians. See Tillery v. Schweiker, 713 F.2d 601, 603 (10th Cir. 1983).

Here the ALJ gave specific and legitimate reasons for according Dr. Eiman's last report little weight. *R. at 43, 1st full paragraph*. In particular, the ALJ points out that Plaintiff quit seeing Dr. Eiman at about the time Plaintiff alleges he became unable to work. Plaintiff only saw Dr. Eiman a few times after Plaintiff alleges that he became unable to work and no significant exam was performed on those occasions. The ALJ also points out that when Plaintiff was seeing Dr. Eiman on a regular basis, Plaintiff was working full time. Dr. Eiman's conclusion is inconsistent with what Plaintiff was actually doing while he was seeing Dr. Eiman. The ALJ also relied on the fact that Dr.

Eiman's last report was conclusory in that Dr. Eiman failed to complete that portion of the form which asked for quantification by example of Plaintiff's actual limitations. Furthermore, at the time Plaintiff alleges he became unable to work, Plaintiff was primarily seeing Drs. Haynes and Chubb. As described above, Dr. Haynes' and Dr. Chubb's reports fully support the limitations presented by the ALJ to the VE. Thus, the ALJ gave specific and legitimate reasons for refusing to give the statement in Dr. Eiman's last report conclusive weight.

**B. Plaintiff's Subjective Complaints of Pain**

Plaintiff alleges that the ALJ applied the wrong legal standard to evaluate Plaintiff's subjective complaints of pain. The familiar nexus test in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) was developed as a guide to explain when an ALJ must consider subjective complaints of pain. If a nexus between pain-producing impairment and alleged pain can be established, Luna requires that an ALJ consider the claimant's subjective complaints of pain.

When the ALJ reaches the last step of Luna and considers subjective complaints of pain, he is still entitled to judge the credibility of the claimant in light of all other evidence. Luna, 834 F.2d at 161-63. The ALJ's credibility determinations are entitled to great deference by this Court. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). Even if the ALJ finds the claimant to be credible, the mere existence of pain is insufficient to support a finding of disability. Claimant's pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling,

pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id.

The undersigned finds sufficient evidence in the ALJ's opinion that he applied the correct legal standard to evaluate Plaintiff's pain. The ALJ did actually consider Plaintiff's subjective complaints of pain as he was required to do by Luna. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not credible in light of the record as a whole. This he is entitled to do so long as his conclusion is supported by substantial evidence. The evidence discussed above is sufficient to support the ALJ's rejection of Plaintiff's subjective complaints of completely disabling pain. The evidence is also sufficient to support the ALJ's conclusion that Plaintiff is capable of performing the sedentary jobs identified by the VE in this case.

#### **CONCLUSION**

The undersigned finds that the ALJ applied the correct legal standard to (1) assess Plaintiff's subjective complaints of pain, and (2) evaluate a report from Plaintiff's treating physician, R. Michael Eiman, D.O. Consequently, the undersigned recommends that the Commissioner's denial of benefits be **AFFIRMED**.

#### **TIME FOR OBJECTIONS**

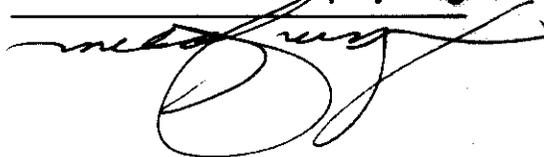
If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b).

W. O. O'Neil, Deputy Clerk  
day of Oct, 1996

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

CERTIFICATE OF SERVICE

Sam A. Joyner  
United States Magistrate Judge



Dated this 21 day of October 1996.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED DOCKET  
10-23-96

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 NAOMI M. JOHNSON; GILCREASE )  
 HILLS HOMEOWNER'S )  
 ASSOCIATION; CITIZENS BANK OF )  
 TULSA; COUNTY TREASURER, Osage )  
 County, Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Osage County, )  
 Oklahoma, )  
 )  
 Defendants. )

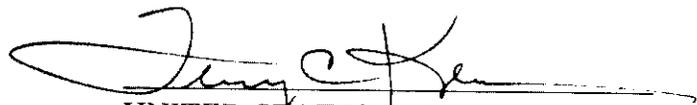
**FILED**  
OCT 21 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95cv 1119K

**ORDER**

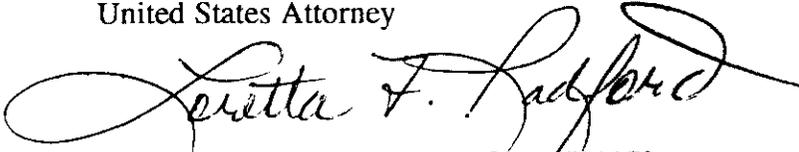
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED**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

Dated this 18<sup>th</sup> day of October, 1996.

  
UNITED STATES DISTRICT JUDGE

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, Oklahoma 74103

(918) 581-7463

LFR:flv

ENTERED ON DOCKET  
DATE 10-23-96

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

EMPLOYERS INSURANCE OF )  
WAUSAU, a Mutual Company, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FREEMAN COMMERCIAL )  
CONCRETE, INC., an Oklahoma )  
Corporation, )  
 )  
Defendant. )

Case No. 96-C-336-K

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

JUDGMENT ON ISSUE OF LIABILITY

Upon Motion for Default Judgment on Issue of Liability filed by Plaintiff Employers Insurance of Wausau, the Court finds as follows:

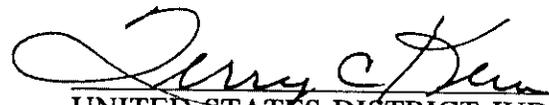
Defendant Freeman Commercial Concrete, Inc. was duly served with Summons and Complaint on May 9, 1996, but has failed and refused to answer said Complaint, and makes default. Pursuant to Rule 8(d), the allegations of Plaintiff's Complaint are deemed admitted except as to damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment on the issue of liability is hereby granted against Defendant Freeman Commercial Concrete, Inc. and in favor of Plaintiff, Employers Insurance of Wausau.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the issue of damages is hereby reserved until the amount of such damages can be ascertained by Plaintiff and proved to this Court.

5

SO ORDERED this 21 day of October, 1996.

  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

10-23-96

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 KV ✓

**F I L E D**

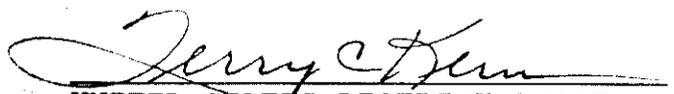
OCT 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 21 day of October, 1996,  
 upon the Joint Stipulation for Order of Dismissal filed  
 herein by all named parties and/or individuals, by and  
 through their attorneys of record, the Court finds that the  
 above entitled cause should be dismissed with prejudice to  
 the bringing of any future action thereon.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the  
 above styled cause is hereby dismissed with prejudice to the  
 bringing of any future action thereon.

  
 UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff, )

v. )

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

Defendant. )

No. 96-C-0037 K

FILED

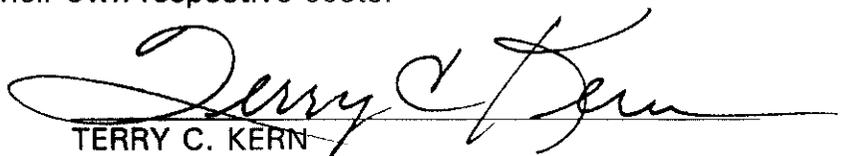
OCT 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL**

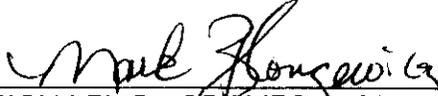
This matter comes on for hearing on the Joint Stipulation of Plaintiff, Webco Industries, Inc., d/b/a Southwest Tube & Manufacturing Company, by and through their attorneys of record, Michael D. Graves and Mark K. Blongewicz, and the Defendant, The Home Indemnity Company, by and through its attorney of record, Timothy L. Martin, for dismissal with prejudice of the above-entitled cause. The Court, being fully advised and having reviewed said Stipulation, finds that the parties hereto have entered into a compromise settlement covering all claims involved in this action, which this Court approves, and that the above-entitled cause should be dismissed with prejudice to the filing of a future action pursuant to said Stipulation.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the Court that the above-entitled cause be and is hereby dismissed with prejudice to the filing of a future action, the parties to bear their own respective costs.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

APPROVED:

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

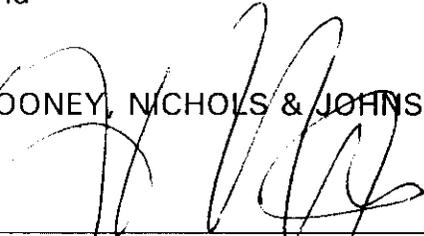


MICHAEL D. GRAVES - OBA #3539  
MARK K. BLONGEWICZ -- OBA #889  
320 South Boston Ave., Suite 400  
Tulsa, OK 74103-3708  
(918) 594-0451

**ATTORNEYS FOR PLAINTIFF**

and

LOONEY, NICHOLS & JOHNSON



TIMOTHY L. MARTIN - OBA #10385  
528-N. W. 12th St. - P. O. Box 468  
Oklahoma City, OK 73101  
(405) 235-7641  
(405) 239-2052 - FAX

**ATTORNEYS FOR DEFENDANT**

272  
12/5/96

ENTERED ON DOCKET

DATE OCT 22 1996

**FILED**  
IN OPEN COURT

OCT 21 1996

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

~~FILED~~

~~OCT 15 1996~~

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CARLOS E. SARDI, On Behalf of  
Himself and All Others Similarly  
Situating,

Plaintiff,

vs.

STRUTHERS INDUSTRIES, et al.,

Defendants.

JOAN DWORKIN, On Behalf of Herself  
and All Others Similarly Situating,

Plaintiff,

vs.

STRUTHERS INDUSTRIES, INC., et al.,

Defendants.

) Civ. No. 94-C-787-H

) CLASS ACTION

) Civ. No. 94-C-838-H

) CLASS ACTION

) DATE: October 21, 1996

) TIME: 9:00 a.m.

) COURTROOM: The Honorable

) Sven E. Holmes

FINAL JUDGMENT AND ORDER OF DISMISSAL

mail

These matters having come before the Court on a joint motion for approval of a Class Action Stipulation and Agreement of Compromise and Settlement dated June 27, 1996 (the "Stipulation") in the above-captioned class actions (the "Actions"), and the Court, having considered all papers filed and proceedings held in connection with said motion, having held a Hearing on October 21, 1996, notice of the Hearing having duly been given in accordance with the Court's Hearing Order dated June 28, 1996, and finding no just reason for delay in entry of this Final Judgment and good cause appearing therefor, it is this 21<sup>st</sup> day of October, 1996,

ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over the subject matter of these Actions and over all parties to these Actions, including all members of the Class. The Class consists of all persons who purchased shares of the common stock of Struthers, Industries, Inc. ("Struthers") on the open market from January 1, 1993 through August 17, 1994, both dates inclusive (the "Class"). Excluded from the Class are each of the defendants, officers and directors of Struthers, members of the immediate family of each of the individual defendants, any entity in which any defendant or any member of his immediate family has or had a controlling interest (including any entity which is a parent, subsidiary or affiliate of, or is controlled by, Struthers), and the legal representatives, heirs, successors or assigns of, or any entity affiliated with, any such excluded person or entity.

2. This Court hereby approves the settlement set forth in the Stipulation (the "Settlement") and finds that said Settlement

and Plan of Allocation is, in all respects, fair, reasonable and adequate to the Class.

3. This Court hereby finds and concludes that the notice given to the Class was in compliance with this Court's Order dated June 28, 1996 and that said notice was the best notice practicable under the circumstances and fully satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, including, but not limited to, the form of notice and methods of identifying and giving notice to the Class.

4. This Court hereby dismisses, on the merits and with prejudice, without costs to any party, other than those designated below, these Actions in favor of each and all of the defendants. Each and every Releasee is forever released and discharged from any and all of the Claims.

5. The plaintiffs and each and every member of the Class (except members who have properly and timely requested exclusion) are permanently barred and enjoined from instituting, maintaining, prosecuting or enforcing, either directly, individually, representatively, or derivatively, against the defendants or any of them (or any of the other Releasees mentioned in the Stipulation) any and all Claims. Those persons appearing on the list annexed hereto as Exhibit 1, who have requested exclusion from the Class, shall not participate in the proceeds of the Settlement hereby approved nor receive any benefits thereunder.

6. The Stipulation and the Settlement described therein are not an admission of the validity of any actions or claims which

arise out of, directly or indirectly, or are in any way connected with the facts, circumstances, transactions or occurrences described directly or indirectly in these Actions, or of any wrongdoing, or of any violation of law; the Stipulation and the Settlement described therein are not a concession and neither shall be used as an admission of any fault or omission in any statement, release, or written document issued filed, or made; and neither the Stipulation nor the Settlement described therein or any related document shall be offered or received in evidence in any civil, criminal, or administrative action or proceeding other than such proceedings as may be necessary to consummate or enforce the Stipulation and the Settlement described therein.

7. Plaintiffs' Counsel are awarded the sum of \$1,125,000.00 as attorneys' fees and \$184,081.73 as reimbursement of their expenses, together with interest on such amounts earned thereon at the same rate and for the same period as earned on the Settlement Fund. Such sums shall be allocated from the Class Escrow Account and allocated and distributed jointly by Wolf Popper Ross Wolf & Jones, L.L.P. and Milberg Weiss Bershad Hynes & Lerach LLP among plaintiffs' counsel and paid in accordance with the Stipulation. Representative Plaintiffs are awarded the sum of \$5,000.00 each.

8. Without affecting the finality of this judgment, the Court hereby reserves and retains continuing jurisdiction over all matters relating to the administration and effectuation of the terms of the Stipulation and the Settlement embodied therein.

9. In the event that the Settlement does not become effective in accordance with the terms of the Stipulation, then

this judgment shall be rendered null and void and be vacated and the Stipulation and all orders entered in connection therewith shall be rendered null and void.

10. All captioned terms used, but not otherwise defined herein shall have the meanings ascribed to them in the Stipulation.

11. Plaintiffs' Counsel shall take such reasonable steps as may be necessary to process the Proofs of Claim and otherwise bring about the consummation of the Settlement, including the retention of any administration agent to receive and process the Proofs of Claim.

12. This order and judgment is certified as final under Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: 10/21/96

  
\_\_\_\_\_  
THE HONORABLE SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

 Printed on Recycled Paper  
20% Post Consumer Waste

Names Of Persons Requesting Exclusion  
From The Settlement Class

1. Joe and Petricia H. Holman
2. L.D. Decker, Trustee, L.D. Decker Living Trust
3. Carmen A. Cimorelli

## MEMORANDUM

**TO:** Struthers Class Action Litigation

**FROM:** Joe Holman & Patricia H. Holman, JT TEN

**RE:** EXCLUSION FROM CLASS ACTION # 94-C-787-H  
 & 94 C-838-H (Struthers Industries, Inc.)

Please exclude us from this class action!  
 Our address is P.O. Box # 819, Okmulgee, OK,  
 74447-0819.

Phone # 918-749-3690.

FAX # 918-749-8255.

SS # 446-24-7996 & 443-34-1295

We own 10 shares (Certificate # SI 0863).

Our stock was purchased on 10/19/93 through A. & Edward Co.

Thank you,  
 Joe Holman  
 Patricia H. Holman

RECEIVED

AUG 27 1996

CLAIM CENTER

# L. D. DECKER

REALTOR

SINCE 1946

ROY E. ROACH  
Associate Broker  
Res. 517 463-5115



330 West Downie At Wright  
Alma, Michigan 48801

FAX 517 463-1509  
CEL 517 330-2616

Office Phone 517 463-2515  
L.D. Decker, Res. 517 463-5941

9/10/96

Struthers Class Action Litigation  
P O Box 990  
Corte Madera, CA 94976-0990

Gentlemen; Re LADE3476

Please excuded me from any CLASS Action Litigation.

Sincerely,

L. D. Decker, TR  
UA 090485  
L. D. Decker Living Trust  
5375 Blue Heron Drive  
Alma, Michigan 48801

1ADE3476

L D DECKER TR  
UA 09 04 85  
L D DECKER LIVING TRUST  
5375 BLUE HERON DR  
ALMA MI 48801

RECEIVED

SEP 16 1996

CLAIM CENTER

2



Sept 30, 1996

Dear Sir

Please exclude me from  
the class action suite against  
Sturthers Industries.

Thank you

Carmen A. Amorelli

154 Monmouth Beach Ct.

Marlton N.J. 08053

RECEIVED

OCT 03 1996

CLAIM CENTER

3

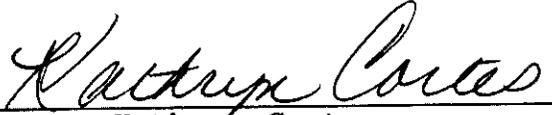
DECLARATION OF SERVICE BY FEDERAL EXPRESS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 West Broadway, Suite 1800, San Diego, California 92101.

2. That on October 11, 1996, declarant caused true copies of FINAL JUDGMENT AND ORDER OF DISMISSAL to be delivered to Federal Express for service on each of the parties listed on the attached Service List on October 14, 1996.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of October, 1996, at San Diego, California.

  
Kathryn Cortes

COUNSEL FOR PLAINTIFF(S)

Kevin J. Yourman  
WEISS & YOURMAN  
10940 Wilshire Blvd., 24th Floor  
Los Angeles, CA 90024  
310/208-2800  
310/209-2348 (fax)

William A. Hinkle  
HINKLE & SMITH  
320 South Boston, Suite 1100  
Tulsa, OK 74103-4700  
918/584-6700  
918/584-6767 (fax)

James R. Hicks  
MORREL, WEST, SAFFA, CRAIGE &  
HICKS, INC.  
5310 East 31st Street, Suite 900  
Tulsa, OK 74135-5014  
918/664-0800  
918/663-1383 (fax)

Lawrence D. Levit  
WOLF POPPER ROSS WOLF & JONES,  
L.L.P.  
845 Third Avenue  
New York, NY 10022  
212/759-4600  
212/486-2093 (fax)

COUNSEL FOR DEFENDANTS

Robert J. Getchell  
KLENDA, GORDON & GETCHELL, P.C.  
100 West 5th Street, Suite 610  
Tulsa, OK 74103  
918/587-9191  
918/587-0054 (fax)

John E. Dowdell  
William W. O'Connor  
NORMAN & WOHLGEMUTH  
2900 Mid-Continent Tower  
Tulsa, OK 74103  
918/583-7571  
918/584-7846 (fax)

R. Thomas Seymour  
C. Robert Burton IV  
F. Randolph Lynn  
R. THOMAS SEYMOUR, ATTORNEYS  
550 ONEOK Plaza  
100 West 5th Street  
Tulsa, OK 74103  
918/583-5791  
918/583-9251 (fax)

Alexander B. Mitchell, II  
KLENDA, MITCHELL, AUSTERMAN &  
ZUERCHER, L.L.C.  
1600 Epic Center, 301 N. Main  
Wichita, KS 67202-4888  
316/267-0331  
316/267-0333 (fax)

10

ENTERED ON DOCKET  
DATE OCT 22 1996

**FILED**  
IN OPEN COURT  
OCT 27 1996

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CARLOS E. SARDI, On Behalf of  
Himself and All Others Similarly  
Situating,

Plaintiff,

vs.

STRUTHERS INDUSTRIES, et al.,

Defendants.

JOAN DWORKIN, On Behalf of Herself  
and All Others Similarly Situated,

Plaintiff,

vs.

STRUTHERS INDUSTRIES, INC., et al.,

Defendants.

) Civ. No. 94-C-787-H ✓

) CLASS ACTION

) Civ. No. 94-C-838-H

) CLASS ACTION

) DATE: October 21, 1996

) TIME: 9:00 a.m.

) COURTROOM: The Honorable

) Sven E. Holmes

[PROPOSED] ORDER APPROVING PLAN OF ALLOCATION

97

This matter having come before the Court on Representative Plaintiffs' application for approval of the Plan of Allocation of class action settlement proceeds in the above-captioned actions; the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. For purposes of this Order, the terms used herein shall have the meanings set forth in the Stipulation of Settlement dated June 27, 1996.

2. Pursuant to and in full compliance with Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finds and concludes that due and adequate notice was directed to all persons and entities who are Settlement Class Members, advising them of the Plan of Allocation and of their right to object thereto, and a full and fair opportunity was accorded to all persons and entities who are Settlement Class Members to be heard with respect to the Plan of Allocation. No one has objected to the Plan of Allocation.

3. The Court hereby finds and concludes that the formula for the calculation of the Claims of Authorized Claimants which is set forth in the Notice of Pendency of Class Actions, Proposed Settlement and Settlement Hearing ("Notice") sent to Class Members provides a fair and reasonable basis upon which to allocate the proceeds of the Settlement Fund established by the Stipulation among the Settlement Class Members, with due consideration having been given to fairness, administrative convenience and necessity. This Court hereby finds and concludes that the Plan of Allocation

described in the Notice is, in all respects, fair and reasonable and the Court hereby approves the Plan of Allocation.

IT IS SO ORDERED.

DATED:

10/21/96

  
\_\_\_\_\_  
THE HONORABLE SVEN E. HOLMES  
UNITED STATES DISTRICT JUDGE

DECLARATION OF SERVICE BY FEDERAL EXPRESS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 West Broadway, Suite 1800, San Diego, California 92101.

2. That on October 11, 1996, declarant caused true copies of [PROPOSED] ORDER APPROVING PLAN OF ALLOCATION to be delivered to Federal Express for service on each of the parties listed on the attached Service List on October 14, 1996.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of October, 1996, at San Diego, California.

  
Kathryn Cortes

STRUTHERS INDUSTRIES  
Service List - 10/09/96  
Page 1

COUNSEL FOR PLAINTIFF(S)

Kevin J. Yourman  
WEISS & YOURMAN  
10940 Wilshire Blvd., 24th Floor  
Los Angeles, CA 90024  
310/208-2800  
310/209-2348 (fax)

William A. Hinkle  
HINKLE & SMITH  
320 South Boston, Suite 1100  
Tulsa, OK 74103-4700  
918/584-6700  
918/584-6767 (fax)

James R. Hicks  
MORREL, WEST, SAFFA, CRAIGE &  
HICKS, INC.  
5310 East 31st Street, Suite 900  
Tulsa, OK 74135-5014  
918/664-0800  
918/663-1383 (fax)

Lawrence D. Levit  
WOLF POPPER ROSS WOLF & JONES,  
L.L.P.  
845 Third Avenue  
New York, NY 10022  
212/759-4600  
212/486-2093 (fax)

COUNSEL FOR DEFENDANTS

Robert J. Getchell  
KLEND, GORDON & GETCHELL, P.C.  
100 West 5th Street, Suite 610  
Tulsa, OK 74103  
918/587-9191  
918/587-0054 (fax)

John E. Dowdell  
William W. O'Connor  
NORMAN & WOHLGEMUTH  
2900 Mid-Continent Tower  
Tulsa, OK 74103  
918/583-7571  
918/584-7846 (fax)

R. Thomas Seymour  
C. Robert Burton IV  
F. Randolph Lynn  
R. THOMAS SEYMOUR, ATTORNEYS  
550 ONEOK Plaza  
100 West 5th Street  
Tulsa, OK 74103  
918/583-5791  
918/583-9251 (fax)

Alexander B. Mitchell, II  
KLEND, MITCHELL, AUSTERMAN &  
ZUERCHER, L.L.C.  
1600 Epic Center, 301 N. Main  
Wichita, KS 67202-4888  
316/267-0331  
316/267-0333 (fax)

\*

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

**F I L E D**

OCT 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CLINTON E. TRUNDLE,

Plaintiff,

vs.

DUAYNE D. MAHONE, an individual, DEBOER,  
INC., a Wisconsin Corp., and VAN LINER INS.  
COMPANY,

Defendants.

No. 96 C 372 BU ✓

ENTERED ON CLERK'S

DATE OCT 22 1996

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

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

Executed the respective dates shown adjacent to each signature.

10/21/96  
Date

Terry L. Weber  
Terry L. Weber (#10149)  
HOWARD & WIDDOWS  
2021 S. Lewis, Suite 470  
Tulsa, OK 74104-5714  
(918) 74104-5714

Attorneys for Plaintiff

10-21-96

Date

Jo Anne Deaton

JO ANNE DEATON (#5938)

RHODES, HIERONYMUS, JONES,

TUCKER & GABLE - OBA #36

100 W. Fifth Street, Suite 400

ONEOK Plaza

P.O. Box 21100

Tulsa, Oklahoma 74121-1100

(918) 582-1173 FAX (918) 592-3390

Attorneys for Defendants deBoer Inc.  
Transportation, Dwayne Mahone and Vanliner  
Insurance Company

GALITV1168\10\STIPDIS

*96-22-96*

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

**F I L E D**

**OCT 18 1996**

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

CHERRY COMMUNICATIONS, INC., )  
 an Illinois corporation, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 WORLDCOM, INC., a Georgia )  
 corporation; WORLDCOM NETWORK )  
 SERVICES, INC., a Delaware )  
 corporation, )  
 )  
 Defendants. )

Case No. 96-CV-933-K

**NOTICE OF VOLUNTARY DISMISSAL**

Plaintiff Cherry Communications, Inc., by and through its attorneys Jenner & Block and Gable Gotwals Mock Schwabe, voluntarily dismisses its claims in the above-captioned matter without prejudice pursuant to Fed. R. Civ. P. 41(a)(1).

Respectfully submitted,



Attorney for Plaintiff

Anton Valukas  
Charles B. Sklarsky  
JENNER & BLOCK  
One IBM Plaza  
Chicago, Illinois 60611  
(312) 222-9350

James M. Sturdivant  
Oliver S. Howard  
Amelia A. Fogleman  
GABLE GOTWALS MOCK SCHWABE  
2000 Boatmen's Bank  
15 W. Sixth Street  
Tulsa, Oklahoma 74119-5447  
(918) 582-9201

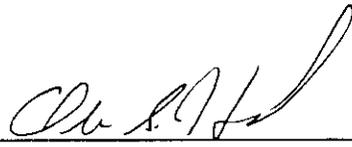
Certificate of Service

The undersigned hereby certifies that on the 18<sup>th</sup> day of October, 1996, a true and correct copy of the foregoing instrument was mailed, postage pre-paid, to:

David O'Melia  
Nichols, Wolfe, Stamper, Nally, Fallis & Robertson, Inc.,  
124 E. 4th Street, Suite 400  
Tulsa, Oklahoma 74103

Robert P. Simons  
Klett Lieber Rooney & Schorling  
40th Floor  
One Oxford Centre  
Pittsburgh, PA 15219-6498

Attorneys for Defendants.

  
\_\_\_\_\_  
Oliver S. Howard

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

OCT 21 1996

INLAND PIPE & SUPPLY COMPANY, )  
a Texas corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WILLIAMS NATURAL GAS CO., )  
a Delaware corporation, )  
 )  
Defendant. )

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

Case No. 96-C-418-BU ✓

ENTERED ON DOCKET  
DATE OCT 22 1996

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 21<sup>st</sup> day of October, 1996.

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

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

VICKIE WROTEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FIRST DATA RESOURCES, INC., )  
 a Delaware Corporation, )  
 )  
 Defendant. )

OCT 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-938-C

ENTERED ON DOCKET

DATE OCT 22 1996

**ORDER**

Currently before the Court is the Notice of Removal filed by defendant, First Data Resources, Inc. ("First Data"), on October 11, 1996. On September 24, 1996, plaintiff, Vickie Wroten, filed her Petition against First Data in the District Court of Tulsa County, alleging negligence and intentional tortious conduct. No motions are currently pending in the present case.

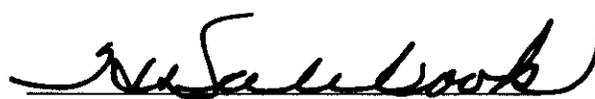
First Data removed the present case pursuant to 28 U.S.C. § 1441 and bases jurisdiction on diversity of citizenship, pursuant to 28 U.S.C. § 1332. In order to invoke diversity jurisdiction, First Data must demonstrate, inter alia, that the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). The Court concludes that First Data has failed to meet the requisite showing of the amount in controversy, and the present case must therefore be remanded to state court.

The Court notes that plaintiff has not filed a motion seeking remand. However, "if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter." Laughlin v. K-Mart Corp., 50 F.3d 871, 873 (10th Cir. 1995), cert. denied, 116 S.Ct. 174 (1995). "[T]he rule . . . is inflexible and without exception, which requires [a] court, of

its own motion, to deny its jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record.” Id. (quoting, Ins. Corp. v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982)). “The 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, 50 F.3d at 873.

The Court finds that Wroten’s Petition **does not** state with any degree of certainty the amount in controversy. The Petition merely seeks **damages** allegedly occasioned by First Data in excess of \$10,000. Thus, the Petition is not **dispositive with respect** to the amount in controversy. Moreover, First Data’s notice of removal does not **provide the Court** with any underlying facts which support First Data’s assertion that diversity jurisdiction exists. The notice of removal merely reiterates the fact that Wroten’s Petition seeks **actual damages in excess** of \$10,000. Clearly, such a representation by First Data fails to establish its burden of proof with respect to the necessary amount in controversy. Since neither the **allegations in the Petition** nor in the Notice of Removal establish the requisite jurisdictional amount, the Court **concludes** that the present case must be and hereby is remanded to the state court in which it was **originally** filed.

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



H. Dale Cook  
U.S. District Judge

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

GORDON TYLER COMPANY, INC., )  
an Oklahoma corporation, )

Plaintiff, )

vs. )

NORTHERN INSURANCE COMPANY )  
OF NEW YORK, a corporation, )

Defendant. )

No. 95-C-1098-K

**FILED**

OCT 17 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

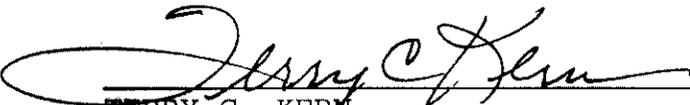
DATE OCT 21 1996

JUDGMENT

This matter came before the Court for consideration of the cross motions for summary judgment pursuant to Fed.R.Civ.P. 56 (Docket #s 7 & 12). The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith, the Court finds summary judgment is appropriate in favor of defendant Northern Insurance Company of New York.

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

ORDERED this 16 day of October, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

23

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

FILED  
OCT 17 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GORDON TYLER COMPANY, INC., )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
NORTHERN INSURANCE COMPANY )  
OF NEW YORK, a corporation, )  
 )  
Defendant. )

No. 95-C-1098-K

ENTERED ON DOCKET  
OCT 21 1996  
DATE

ORDER

Now before the Court are the Motions of the Plaintiff, Gordon Tyler Company, Inc. ("Tyler") and the Defendant, Northern Insurance Company of New York ("Northern") for Summary Judgment (docket #7 & #12).

I. STATEMENT OF FACTS

Tyler is an independent insurance agency which maintained, at the time in question, a commercial general liability insurance policy issued by Northern. On October 5, 1992, a lawsuit was filed against Tyler by Russell Insurance Agency, Inc., Kenneth W. McGill and Thomas R. Byerly, alleging conversion and breach of contract. The dispute centered around an incident in which Tyler wrongfully retained insurance policies and commissions owned by an insurance broker whom Tyler fired on April 10, 1992 (Jerry Russell).

On October 6, 1994, a jury found Tyler liable for conversion and breach of contract and awarded actual damages of \$210,000 and punitive damages of 3,000. Tyler seeks reimbursement from Northern under the commercial general liability insurance policy for the

72

amount of the judgment and for the costs of the litigation. Additionally, Tyler seeks damages for bad faith denial of coverage and refusal to settle the claim.

Northern denied coverage for the judgment award. Northern asserts that the denial was appropriate, and that Tyler is not entitled to damages for bad faith. Northern alleges that (1) conversion and breach of contract are not occurrences as defined in the policy; (2) the liability incurred by Tyler was conversion of *intangible* property, which is not covered under the insurance policy; (3) conversion is an intentional tort, which is specifically excluded from the policy; (4) damages for breaches of contract are specifically excluded from coverage under the policy; (5) liability insurance for punitive damages is prohibited under the public policy of Oklahoma; and (6) the notice of loss was untimely, thus precluding coverage.

In response, Tyler claims that (1) the jury in the underlying claim found that *files* were converted rather than intangibles, and therefore the damages were for conversion of tangible property, which is covered under the insurance policy; (2) the conversion and the breach of contract were occurrences under the policy; (3) not all breaches of contract are excluded under the policy; (4) the acts of conversion and breach of contract were not intentional; and (5) notice to Northern after the trial was timely because the losses covered by the policy were not alleged prior to trial.

Under the terms of the insurance policy at issue, Northern agreed to "pay those sums that the insured becomes legally

obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (Plaintiff's Exhibit 1, p. 467). However, the policy specifically excludes "'bodily injury' or 'property damage' expected or intended from the standpoint of the insured," (Plaintiff's Exhibit 1, p. 467), and "'property damage' to . . . property that has not been physically injured arising out of . . . a delay or failure by [the insured] or anyone acting on [the insured's] behalf to perform a contract or agreement in accordance with its terms." (Defendant's Exhibit 1, p. 56). The policy contains an additional exclusion which excludes coverage for "property damage" for which the insured may be held liable because of "any obligation assumed by any insured, or the failure to discharge, or the improper discharge of, any obligation or duty, contractual or otherwise" with respect to certain types of contracts including contracts or treaties of insurance (Plaintiff's Exhibit 1, p. 169).

In addition to the policy exclusions, damage is only covered under the policy if it occurs pursuant to an "occurrence," defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Defendant's Exhibit 1, p. 64). Similarly, "property damage" is defined as either a "physical injury to tangible property, including all resulting loss of use of that property," or as the "loss of use of tangible property that is not physically injured." (Defendant's Exhibit 1, p. 65).

## II. DISCUSSION

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

The dispute between the parties centers around the underlying state court lawsuit. The parties agree that if the lawsuit and subsequent judgment pertain to conversion of intangible property rights, then there is no coverage under the policy. If, however, the underlying lawsuit and judgment pertain to conversion of *files*, then the property is tangible, and, barring exclusion due to other policy provisions, the claim would be covered. It is apparent from the underlying record that the jury verdict was based, at least in part, on conversion of intangible property, namely good will (Defendant's Exhibit 12, p.144). Thus it is clear under the explicit terms of the policy the damages relating to conversion of

good will are not covered under the policy. As to damages awarded for other property, it is unclear from the record whether the converted property was intangible or tangible; however, assuming the converted property was tangible, and thus covered under the definition of property damage under the policy, the damages in the underlying state claim are excluded by other language in the insurance policy.

A. DAMAGES FOR CONVERSION ARE EXCLUDED UNDER  
THE "EXPECTED OR INTENDED EXCLUSION"

A policy should be construed, as every other contract, according to its terms where it is not ambiguous. Catts Co. v. Gulf Ins. Co., 723 F.2d 1494 (10th Cir. 1983) citing Carraco Oil Co. v. Mid-Continent Cas. Co., 484 P.2d 519 (1971). The policy in question here specifically excludes "'property damage' expected or intended from the standpoint of the insured." Tyler asserts that this clause should be interpreted to mean that it must have intended the injury sustained by the plaintiffs in the underlying actions and cites Lumbermens Mut. Ins. Co., Mansfield, Ohio v. Blackburn, 477 P.2d 62 (Okla. 1970) in support of its contention. The facts of Blackburn, however, are distinguishable from those in this case. In Blackburn, a young boy threw a dirt clod or rock into the air which struck another young boy as it descended. Id. at 63. The parties to the action stipulated that the defendant did not intend to injure the plaintiff. Id. at 64. In this case, there is no such stipulation. Additionally, Tyler claims that the issue of intent was not litigated at the trial level because the

jury instruction for conversion makes no mention of intent to cause an injury. While it is indeed true that intent to cause an injury is not an essential element of a conversion claim, Atwall v. Stifel, Nicolaus & Co., Inc., 13 F.3d 404, 1993 WL 525706 (10th Cir. 1993), the award of punitive damages in this case precludes a finding that the acts of Tyler were not intentional under the policy provision. USAA Cas. Ins. Co. v. Howard, 932 F.Supp. 1305,1306-07 (N.D. Okla. 1996). In Howard, the court found that a claim for malicious prosecution was not covered by a homeowner's insurance policy because it was excluded under the "expected or intended" clause. The court stated that because malice is an essential element of a claim for malicious prosecution, and is defined as "the intentional doing of a wrongful act without justification or excuse," such a claim could not be outside the "expected or intended" exclusion of the policy. Id. Likewise, an award of punitive damages in a conversion case requires a finding of "willful and deliberate intent to deprive plaintiffs of their property," Gilbaugh v. Rose, 239 P.2d 406, 408 (Okla. 1951). Since a jury has determined that the acts of Tyler were deliberate, malicious, and in total disregard of the rights of the plaintiffs in the underlying action, Tyler is precluded from now asserting that the "property damage" resulting from its acts of deliberate and malicious conversion were not expected or intended. It is clear that reasonable minds would not differ as to the fact that willful, deliberate and malicious conversion is "property damage" which is "expected or intended from the viewpoint of the insured."

**B. DELIBERATE BREACH OF A CONTRACT IS NOT  
AN OCCURRENCE UNDER THE POLICY**

Tyler asserts that the judgment for breach of contract should be covered under the insurance policy as an occurrence; however, Tyler's deliberate retention of the insurance policies and its failure to remit commissions does not fit the description of an occurrence. An occurrence is defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Under Oklahoma law, the word "accident" is to be construed according to common speech and usage. Farmers Alliance Mut. Ins. Co. v. Salazar, 77 F.3d 1291, 1297 (10th Cir. 1996) citing United States Fidelity & Guar. Co. v. Briscoe, 239 P.2d 754, 756 (Okla. 1951). Accordingly, "accident" has been defined as "an event from an unknown cause, or an unexpected event from a known cause. An unusual event and unexpected result, attending the performance of a usual or necessary act." Salazar at 1297, quoting Briscoe at 757. Tyler's actions do not fit this description.

Likewise, Tyler's breach of contract does not constitute damage arising out of "continuous or repeated exposure to substantially the same general harmful conditions." Since the Oklahoma courts have not ruled on the scope of this provision, this Court must determine what the Oklahoma courts would likely do if confronted with this issue.

Very few courts have addressed the issue of what is meant by the phrase "continuous and repeated exposure . . .". Of those, one

case specifically held that contract defaults do not constitute either "accidents" or "continuous or repeated exposure . . .". George A. Fuller Co. v. United States Fidelity & Guar. Co., 200 A.D.2d 255, 259-60, 613 N.Y.S.2d 152, 155 (1994). Other cases construing this policy provision have found "continuous or repeated exposure . . ." in reference to damage caused by a *physical condition* rather than a deliberate act such as an intended breach of contract. See, e.g., Miley v. Continental Ins. Co., 645 So.2d 1166, 1168 (La. App. 1994) (toxic fumes, pile-driving activities); Cortland Pump & Equip., Inc. v. Firemen's Ins. Co. of Newark, 194 A.D.2d 117, 120, 604 N.Y.S.2d 633, 636 (1993) (contamination of land from hazardous materials (gasoline)); Matychak v. Security Mut. Ins. Co., 181 A.D.2d 957, 581 N.Y.S.2d 453 (1992) (physical injury to person due to exposure to contaminated drinking water). In light of these decisions and the general rule that contract provisions are to be construed according to their plain language, the Court finds that Oklahoma courts would likely hold that Tyler's breach of contract was not a "continuous or repeated exposure . . .", and therefore not an occurrence under the insurance policy.

**C. BREACH OF CONTRACT DAMAGES EXCLUDED UNDER FAILURE TO PERFORM A CONTRACT EXCLUSION**

Even if Tyler's breach of contract was found to be an "occurrence" under the policy, the claim would still be denied because of the specific language in the policy excluding such claims. The insurance policy in question specifically excludes damages arising from a "delay or failure by you or anyone acting on

your behalf to perform a contract or agreement in accordance with its terms." Despite this rather clear provision, Tyler asserts that the breach of contract damages should be covered because "Northern does not state what contract it refers to nor does Northern attach a copy of the contract. No contract was ever signed between Tyler and Russell Insurance Agency or Byerly and McGill, but the unsigned contracts which were exchanged required Tyler to retain the files (Plaintiff's Response Brief at 14)." Like the claim of conversion, Plaintiff is precluded from re-litigating both the existence and the breach of the contract in the underlying litigation. Wilson v. Kane, 852 P.2d 717, 722 (Okla. 1993). Since a jury in the underlying case determined there was a contract and that it had been breached, there is no reasonable way to interpret the policy clause to cover Tyler's damages for the breach of contract claim. Nat'l Aid Life Ass'n v. May, 207 P.2d 292 (1949) ("Where terms of insurance contract were clear, consistent and unambiguous, no forced or strained construction should be indulged . . ."). Summary judgment for Northern is appropriate as to the judgment damages for breach of contract.

C. Northern is Entitled to Summary Judgment  
As to the Remaining Claims

Tyler has failed to respond to Northern's Motion for Summary Judgment as to the issue of coverage of punitive damages judgment, therefore the issue is rendered confessed under N.D. LR 7.1C. Additionally, since the Court has determined that Northern justifiably denied coverage for the conversion and breach of

contract judgment damages against Tyler, Tyler's claims for bad faith and punitive damages are thereby rendered moot.

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (docket #7) is DENIED, and Defendant's Motion for Summary Judgment (docket #12) is GRANTED.

IT IS SO ORDERED ON THIS 16 OF OCTOBER, 1996.

A handwritten signature in cursive script, reading "Terry C. Kern". The signature is written in black ink and is positioned above the printed name of the judge.

THE HONORABLE TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**FILED**

OCT 17 1996

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

MARKEY CARDEN MCNUTT,

Plaintiff,

v.

SVEN ERIK HOLMES, ET AL.,

Defendants.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Case No. 96-CV-785-B

JUDGMENT

This matter comes before the Court for consideration of Defendants' motion to dismiss, filed August 30, 1996 in this action. During the Case Management Conference of September 13, 1996 and by minute Order, this Court converted the Defendants' motion to dismiss to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. The Court also ordered this action to be consolidated with Case No. 96-CV-566-B. Additional time was allowed to supplement the record as either party saw fit.

The Defendant filed additional materials on October 8, 1996, including full transcripts of all hearings involving the IRS summons enforcement action against Kimberly Darlene McNutt. After consideration of these transcripts and careful review of all pleadings filed in this matter, the Court finds that the Complaint, as well as subsequent filings, by Markey Carden McNutt are substantially incoherent. The issues and allegations presented therein are frivolous and the filing of these pleadings is vexatious and harassing in nature. Consequently, the Court sustains the Defendants's motion and grants judgment against the Plaintiff, in accordance with Federal Rule of Civil Procedure 56(b).

The Court further finds that the **Complaint** and subsequent filings of the Plaintiff warrant sanctions. This action is clearly **frivolous and vexatious**. The government has provided the Court with additional information about the **expenditures** required to respond to the Plaintiff's complaint. The Court finds that a fair and proper sanction in the amount of \$5,106.00 shall be imposed against Markey Carden McNutt, and judgment is hereby entered in the sum of \$5,106.00 against Markey Carden McNutt.

Further, Plaintiff is barred from additional filings of pleadings or other papers with the United States District Court for the Northern District of Oklahoma until such time as this sanction is paid in full. The Clerk of the Court is hereby directed to refuse and return any pleadings presented for filing until the sanction imposed herein is satisfied.



THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:



CATHRYN McCLANAHAN  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

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

**FILED**

OCT 17 1996

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

KIMBERLY DARLENE MCNUTT, )

Plaintiff, )

v. )

SVEN ERIK HOLMES, ET AL., )

Defendants. )

Case No. 96-CV-566-B ✓

OCT 21 1996

JUDGMENT

This matter comes before the Court for consideration of Defendants' motion to dismiss, filed August 23, 1996 in this action. During the Case Management Conference of September 13, 1996 and by minute Order, this Court converted the Defendants' motion to dismiss to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Additional time was allowed to supplement the record as either party saw fit.

The Defendant filed additional materials on October 8, 1996, including full transcripts of all hearings involving the IRS summons enforcement action against Kimberly Darlene McNutt. After consideration of these transcripts and careful review of all pleadings filed in this matter, the Court finds that the Complaint, as well as subsequent filings, by Kimberly Darlene McNutt are substantially incoherent. The issues and allegations presented therein are frivolous and the filing of these pleadings is vexatious and harassing in nature. Consequently, the Court sustains the Defendants's motion and grants judgment against the Plaintiff, in accordance with Federal Rule of Civil Procedure 56(b).

The Court further finds that the Complaint and subsequent filings of the Plaintiff warrant sanctions. This action is clearly frivolous and vexatious. The government has provided the Court

15

with additional information about the expenditures required to respond to the Plaintiff's complaint. The Court finds that a fair and proper sanction in the amount of \$5,106.00 shall be imposed against Kimberly Darlene McNutt; and judgment is hereby entered in the sum of \$5,106.00 against Kimberly Darlene McNutt.

Further, Plaintiff is barred from additional filings of pleadings or other papers with the United States District Court for the Northern District of Oklahoma until such time as this sanction is paid in full. The Clerk of the Court is hereby directed to refuse and return any pleadings presented for filing until the sanction imposed herein is satisfied.



THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:



CATHRYN McCLANAHAN  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103-3809

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

**FILED**

OCT 17 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT LLOYD MORROW, )  
)  
Plaintiff, )  
)  
and )  
)  
THE CHEROKEE NATION, )  
)  
Plaintiff-Intervenor, )  
)  
vs. )  
)  
THE HONORABLE DAVID WINSLOW, )  
JOHN DOE and JANE DOE )  
)  
Defendants. )

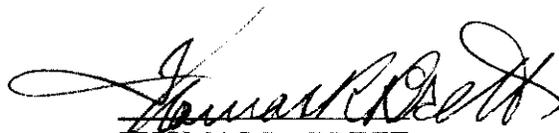
No. 95-C-429-B ✓

RECORDED  
OCT 21 1996

**ORDER**

Pursuant to the mandate in *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996), the judgment in this case is vacated and the Court dismisses the case without prejudice.

ORDERED this <sup>th</sup> 17 day of October, 1996.



THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

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

OCT 16 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHEILA WALKER, CHARITY GRITTS, )  
TERESA GOWER, MARILYN MORTON, )  
JACKIE R. MORTON, LINDA EUBANKS, )  
DANNY WALKER, MICHAEL E. EUBANKS, )  
and DON A EUBANKS individually )  
and on behalf of others, )

Plaintiff(s), )

vs. )

Case No. 95-C-913-B

INDEPENDENT OPPORTUNITIES, INC., )  
DOUGLAS FULTON, AND RAY NICHOLS, )

Defendant(s). )

OCT 21 1996

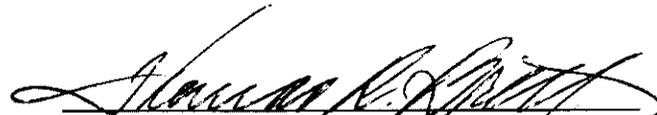
**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

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

**IT IS ORDERED** that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

**IT IS FURTHER ORDERED** that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

**IT IS SO ORDERED** this 16th day of October, 1996

  
THOMAS R. BRETT, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

16

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

**FILED**

OCT 17 1996

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

RICHARD L. WEATLEY, )  
 )  
 Plaintiff(s), )  
 )  
 vs. )  
 )  
 INTERNAL REVENUE SERVICE, et al, )  
 )  
 Defendant(s). )

Case No. 95-C-564-B

ENTERED ON DOCKET

DATE OCT 17 1996

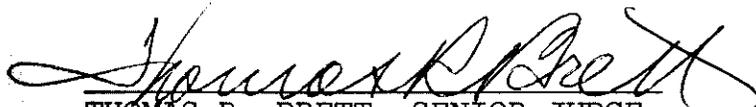
**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

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

**IT IS ORDERED** that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

**IT IS FURTHER ORDERED** that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

**IT IS SO ORDERED** this 17th day of October, 1996.

  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

28

ENTERED ON DOCKET  
DATE 10/21/96

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

**F I L E D**

OCT 17 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NELDA CARTER, )  
)  
Plaintiff, )  
)  
v. )  
)  
SHIRLEY S. CHATER, )  
COMMISSIONER OF SOCIAL )  
SECURITY,<sup>1</sup> )  
)  
Defendant. )

Case No. 92-C-351-W ✓

**ORDER**

This order pertains to the Application by Plaintiff and Motion for Attorney's Fees and Expenses Under the Equal Access to Justice Act (Docket #25), and Defendant's Response in Opposition to Plaintiff's Motion for Attorney Fees and Expenses Under the Equal Access to Justice Act (Docket #27). On January 9, 1996, the United States Court of Appeals for the Tenth Circuit remanded this case for further administrative proceedings (Docket #22) and this court ordered a remand on March 27, 1996 (Docket #23).

The Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), requires that a court "award to a prevailing party . . . fees and other expenses . . . incurred by that

---

<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

256

party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified . . . .” The test for substantial justification is one of reasonableness in law and in fact. Pierce v. Underwood, 487 U.S. 552, 565 (1988).

The defendant concedes that plaintiff is the prevailing party under the EAJA and does not contend that its position was substantially justified. It also concedes that plaintiff’s counsel is entitled to attorney fees, but opposes an award of fees as requested by plaintiff, arguing that the amount is not correctly calculated.

Defendant asks the court to award a cost of living increase using as a base the date that plaintiff’s attorney completed the district court brief, which is the period when a majority of the actual work in this case was performed for plaintiff. Defendant argues that this would adequately compensate counsel, but minimize costs to the taxpayer. In the past, the court has awarded cost of living increases using as a base the date that the court found that claimant was the prevailing party.

Under 2412(d)(2)(A), attorney’s fees shall not be awarded in excess of \$75.00 per hour, “unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.” Complete discretion is afforded district courts in awarding such fees. Id. at 571; Headlee v. Bowen, 869 F.2d 548, 551 (10th Cir.), cert. denied, 493 U.S. 979 (1989).

In addition to this court, other courts have awarded cost-of-living adjustments under the EAJA when a claimant prevails without regard to the year in which the

attorney's services were performed. Garcia v. Schweiker, 829 F.2d 396, 402 (3d Cir. 1987) (concluding that attorneys should not have the purchasing power of their fees eroded by inflation); Rutledge v. Sullivan, 745 F.Supp. 715, 717 (S.D. Ga. 1990) (finding that the award should compensate for the time value of money and the effects of inflation).

However, the courts in Perales v. Casillas, 950 F.2d 1066, 1076 (5th Cir. 1992) and Marcus v. Shalala, 17 F.3d 1033, 1038-40 (7th Cir. 1994), found that cost of living adjustments must reflect the appropriate rate in the year in which the services were rendered. The reasoning of the Perales and Marcus holdings is that a cost-of-living adjustment on EAJA fees for inflation that occurred after counsel's work was performed constitutes an award of interest, from which the United States is immune absent express congressional consent, under Library of Congress v. Shaw, 478 U.S. 310 (1986). See Perales, 950 F.2d at 1074-76; Marcus, 17 F.3d at 1039-40. Because the EAJA expressly provides for post judgment interest on fee awards in 28 U.S.C. § 2412(f), but is silent on the issue of prejudgment interest, the Fifth and Seventh Circuits concluded that the strict construction mandated by Shaw precludes the indexing of EAJA fees at current rates, and instead requires them to be indexed at the rates in effect when the services were performed. Perales, 950 F.2d at 1077; Marcus, 17 F.3d at 1040. See also Chiu v. United States, 948 F.2d 711, 721-22 (Fed. Cir. 1991).

The court finds the Perales, Marcus and Chiu decisions persuasive legal analyses in light of the Supreme Court's decision in Shaw. Absent express

congressional consent to the award of prejudgment interest on EAJA fee awards, cost-of-living adjustments to a social security claimant's counsel's fees must be calculated at a rate which approximately reflects rates in the year services were rendered.

In recent years it has not been unusual for social security cases to extend over four or five years. Finding that it would be unwieldy to have to determine the cost-of-living adjustment for each year in which work was performed, the court adopts the proposal of defendant and will use a single date during the period services have been performed to facilitate a single--and simple--calculation. As the court stated in Chiu, "[b]y holding that a post-performance COLA [cost-of-living adjustment] may not be awarded, we do not mean to preclude the court from adopting, in an appropriate case, a single mid-point inflation adjustment factor applicable to services performed before and after that mid-point." 948 F.2d at 722 note 10.

For purposes of this case, the court selects the date plaintiff's principal brief was filed with the court as the base for calculating a cost of living increase. That date is a matter of public record and easily ascertainable by all parties and the court from the docket sheet. It is also the date before which most of the legal services were performed.<sup>2</sup>

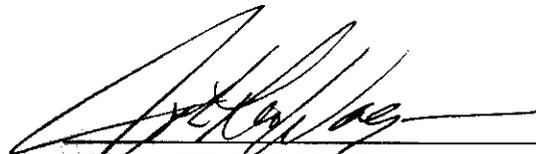
---

<sup>2</sup> The court is granting the relief requested by the government and calculates the fees as of the date the plaintiff's brief was filed, but does not with this opinion intend to set a precedent for awarding fees based upon that date. The court recognizes that this is an efficient way to proceed, but has reservations concerning this method of calculation based on Shaw. These reservations will be addressed at a later date in the event the government urges the court to calculate fees on an annualized basis.

In this appeal, the cost of living increase would be measured from October 1981, the date of enactment of the EAJA, to November 1992, when the claimant's brief was filed. According to the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics (June 1994), the Consumer Price Index for All Urban Consumers ("CPI-U") was 93.40 in 1981 and 142.0 in November of 1992. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves 48.6, and that number is divided by the old CPI-U, which is .52, and multiplied by 100, which results in a 52% change. The base rate for attorney's fees is \$75.00 and 52% of that rate is \$39.00. The total fee is the base rate plus the increase in fee resulting from a higher CPI-U, or a total fee of \$114.00.

Defendant's counsel is entitled to attorney fees for 54.20 hours at \$114.00 per hour (\$6,178.80) plus \$122.25 in expenses, for a total award of \$6,301.05.

Dated this 17<sup>th</sup> day of October, 1996.

  
\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\orders\carter.att