

FILED

FEB 07 1997

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

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

STATE FARM FIRE AND CASUALTY)
COMPANY,)

Plaintiff,)

vs.)

DAVID VAN HORN and PORTIA VAN)
HORN,)

Defendants.)

Case No. 96-CV-1144-B

ENTERED ON DOCKET
DATE FEB 10 1997

DAVID VAN HORN and PORTIA VAN)
HORN,)

Plaintiffs,)

vs.)

STATE FARM FIRE AND CASUALTY)
COMPANY, and RAY M. ROBERTS)
INSURANCE AGENCY, INC.,)

Defendants.)

Case No. 97-CV-69-B

ORDER

Before the Court are numerous motions of the parties filed in the above-styled cases.

First, in Case No. 96-CV-1144-B, Plaintiff State Farm's *Application to File Response to Motion to Dismiss Out of Time* (Docket # 6) is hereby **GRANTED**.

Second, in Case No. 96-CV-1144-B, Defendants' *Motion to Dismiss Action for Declaratory Relief* (Docket # 2) is hereby **DENIED**.

Third, in Case No. 97-CV-69-B, Defendant State Farm's *Motion to Dismiss Defendant Ray Roberts Insurance Agency, Inc., or in the alternative, Motion to Realign Parties Upon Consolidation* (Docket # 4) is **DENIED**. As to the *Motion to Dismiss Defendant Ray Roberts Insurance Agency,*

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Inc., the Court directs the parties attention to A-OK Construction, Inc. v. McEldowney, McWilliams, Deardeuff, & Journey, Inc., 844 P.2d 182 (Okl.App. 1992) and Bane v. Anderson, Bryant & Co., 786 P.2d 1230 (Okl. 1989). The Court concludes an appropriate cause of action is asserted by the Van Horns in the State court against resident defendant Ray M. Roberts Insurance Agency, Inc., and such is not by way of fraudulent joinder. As to the alternative *Motion to Realign the Parties Upon Consolidation*, the Court directs the parties attention to the Court's ruling hereafter in Case No. 97-CV-69-B on *Plaintiffs' Motion to Remand*, as well as, Tower Mortgage Corporation v. Reynolds, 81 F.R.D. 560 (W.D.Okla. 1978). Under the teachings of Tower Mortgage, *supra*, this case does not lend itself to realignment of the parties via a third-party Complaint, as suggested by State Farm.

Fourth, in Case No. 97-CV-69-B, *Plaintiffs' Motion to Remand* (Docket # 10) is hereby **GRANTED**. In light of the Court's denial of Defendant State Farm's *Motion to Dismiss Defendant Ray Roberts Insurance Agency, Inc.*, the Court is without subject matter jurisdiction. See 28 U.S.C. § 1332.

Fifth, in Case No. 97-CV-69-B, Defendant State Farm's *Motion to Consolidate Actions Pending Before the Court* (Docket # 6) and Defendant State Farm's *Motion to Disqualify Plaintiffs' Attorney* (Docket # 5) are **MOOT**.

Sixth, in Case No. 96-CV-1144-B, Plaintiff State Farm's *Motion to Consolidate Actions Pending Before the Court* (Docket # 7) is **MOOT**.

Seventh, in Case No. 96-CV-1144-B, Plaintiff State Farm's *Application to Withdraw Plaintiff's Motion for Summary Judgment* is hereby **GRANTED**.¹ The Court urges the parties to

¹Although this Application was filed January 28, 1997, as of February 7, 1997, the Court Clerk had yet to enter it on the docket. Thus, the Court is unable to identify the Application at this time by a docket number.

carefully read the discussion set forth at page 792 of the Oklahoma Supreme Court opinion Oaks v. Motors Insurance Corporation, 595 P.2d 789 (Okl. 1979) in light of the conflicting Affidavits of Timothy F. Elliott, David Van Horn, and Ray Houchin prior to the filing of any dispositive motions, the success of which depends on an absence of disputed material facts.

Finally, in Case No. 96-CV-1144-B, Plaintiff State Farm's *Motion to Disqualify Defendants' Attorney* (Docket # 5) is **DENIED**. See 5 Okl.St. Ann. Ch.1, App. 3-A, Rules 1.7,1.9, 1.10.

The Case Management Conference previously set in Case No. 96-CV-1144-B for February 21, 1997 at 1:30 p.m. shall go forward.

IT IS SO ORDERED this 7th day of February, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

FEB 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLLAR RENT A CAR SYSTEMS, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
v.)
)
NOB HILL TRANSPORTATION, INC., a)
California corporation; STEPHEN F.)
MILLER, an individual; and KATHLEEN)
M. MILLER, an individual,)
)
Defendants.)

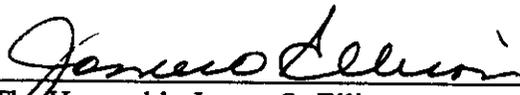
Case No. 96-C-0190E

RECORDED & INDEXED
FEB 10 1997

ORDER

Before the Court for consideration is the Joint Stipulation of Dismissal with Prejudice, filed by the parties. For good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above captioned matter is dismissed with prejudice with each party to bear its own costs and attorneys' fees.



The Honorable James O. Ellison
United States District Court Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

GERALD LEE COBB aka Gerald L. Cobb;
LORI D. COBB aka Lori Deana Cobb
nka Lori Deana Clark;
COMMUNITY BUILDERS, INC.;
STATEWIDE MORTGAGE COMPANY;
STATEWIDE ACCEPTANCE CORPORATION;
BANK ONE TEXAS, N.A. as Trustee for
Statewide Acceptance Corporation
1993-A Title I Trust Fund;
COUNTY TREASURER, Rogers County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Rogers County, Oklahoma;
THOMAS CLARK, III, Spouse of Lori Deana Clark,

Defendants.

FILED

FEB 6 1997

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

ENTERED ON DOCKET

DATE FEB 10 1997

CIVIL ACTION NO. 95-C-1150-H

DEFICIENCY JUDGMENT

This matter comes on for consideration this 5TH day of FEBRUARY, 1997,
upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of
Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D.
McClanahan, Assistant United States Attorney, and the Defendant, Gerald Lee Cobb aka Gerald L.
Cobb, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of
Plaintiff's Motion and Declaration were mailed by first-class mail to Gerald Lee Cobb aka Gerald L.
Cobb, Route 6, Box 526, Claremore, Oklahoma 74017, and by first-class mail to all answering
parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on June 18, 1996, in favor of the Plaintiff United States of America, and against the Defendant, Gerald Lee Cobb aka Gerald L. Cobb, with interest and costs to date of sale is \$61,412.46.

The Court further finds that the appraised value of the real property at the time of sale was \$52,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered June 18, 1996, for the sum of \$44,143.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on January 10, 1997.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Gerald Lee Cobb aka Gerald L. Cobb, as follows:

Principal Balance Plus Pre-Judgment Interest and Administrative and Penalty Charges as of June 18, 1996	\$59,000.55
Interest From Date of Judgment to Sale	1,144.64
Appraisal by Agency	550.00
Abstracting	309.00
Publication Fees of Notice of Sale	183.27
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$61,412.46
Less Credit of Appraised Value	<u>52,000.00</u>
DEFICIENCY	\$9,412.46

plus interest on said deficiency judgment at the legal rate of 5.64 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

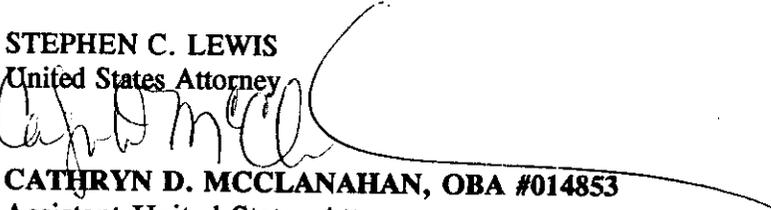
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant,

Gerald Lee Cobb aka Gerald L. Cobb, a deficiency judgment in the amount of **\$9,412.46**, plus interest at the legal rate of 5.64 percent per annum on said deficiency judgment from date of judgment until paid.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Deficiency Judgment
Case No. 95-C-1150-H (Cobb)

CDM:cas

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

MAX TRUE PLASTERING COMPANY,)
)
 Plaintiff,)

v.)
)
 UNITED STATES FIDELITY AND)
 GUARANTY COMPANY,)
)
 Defendant/)
 Third-Party Plaintiff,)

v.)
)
 BOB H. JOHNSON AGENCY and JEFF)
 R. JOHNSON,)
)
 Third-Party Defendants.)

ENTERED ON DOCKET
FEB 10 1997
DATE _____

Case No. 93-C-781-H

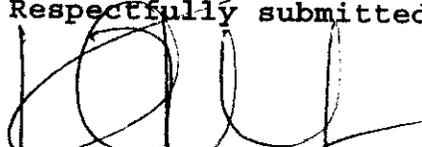
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FEB 6 1997

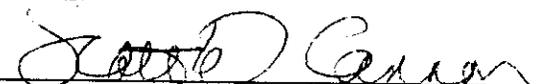
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The undersigned, as counsel for third-party plaintiff, United States Fidelity & Guaranty Company, and third-party defendants, Bob H. Johnson Agency and Jeff R. Johnson, pursuant to Rule 41, Fed.R.Civ.P., stipulate that this matter may be dismissed with prejudice.

Respectfully submitted,


Robert L. Magrini, #12385
Hayes & Magrini
1220 N. Walker, P.O. Box 60140
Oklahoma City, OK 73146-0140
(405) 235-9922; 235-6611 (Fax)
Attorneys for Third-Party Plaintiff
United States Fidelity & Guaranty
Company


Scott D. Cannon, OBA #10755
Wagner Stuart & Cannon
902 South Boulder
Tulsa, Oklahoma 74119-2034
(918) 582-4483; 582-4486 (Fax)
Attorneys for Third-Party
Defendants, Bob H. Johnson Agency
and Jeff R. Johnson

c/s

CERTIFICATE OF SERVICE

On the 6 day of ~~November, 1996~~ ^{Feb 1997}, a copy of the foregoing was mailed to:

Mr. Joseph R. Farris
Ms. Jody R. Nathan
Feldman Hall Franden Woodard & Farris
525 South Main, Suite 1400
Tulsa, OK 74103-4409

Mr. Jerry Reed
Post Office Box 700239
Tulsa, OK 74170-0239

Attorneys for Plaintiff,
Max True Plastering Company

Scott D. Cannon
Wagner Stuart & Cannon
902 South Boulder
Tulsa, OK 74119-2034

Attorneys for Third-Party Defendants, Bob H.
Johnson Agency and Jeff R. Johnson

Scott D Cannon
Robert L. Magrini for RLM

max.usf\jntdisml.prj

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

MAX TRUE PLASTERING COMPANY,

Plaintiff,

v.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

Defendant and Third
Party Plaintiff,

v.

BOB H. JOHNSON AGENCY and
JEFF JOHNSON,

Third Party
Defendants.

Case No. 93-CV-0781-H

ENTERED ON DOCKET
FEB 10 1997
DATE

FILED

FEB - 7 1997

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

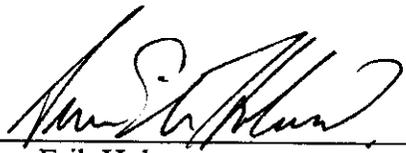
ADMINISTRATIVE CLOSING ORDER

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

If, by April 7, 1997, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 6th day of February, 1997.


Sven Erik Holmes
United States District Judge

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

HOLLY GRACE WINGFIELD,)
)
Petitioner,)
)
vs.)
)
NEVILLE MASSIE,)
)
Respondent.)

No. 96-C-255-K

ENTERED ON DOCKET
FEB 10 1997

FILED

FEB 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the writ of habeas corpus of Petitioner Holly Grace Wingfield.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petition for a writ of habeas corpus is granted, and judgment entered in favor of the Petitioner and against the Respondent.

ORDERED THIS DAY OF 7 FEBRUARY, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

HOLLY GRACE WINGFIELD,)
)
Petitioner,)
)
vs.)
)
NEVILLE MASSIE,)
)
Respondent.)

No. 96-C-255-K

ENTERED ON DOCKET
DATE FEB 10 1997

FILED

FEB 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court for consideration is the petition for a writ of habeas corpus of Petitioner Holly Grace Wingfield. Petitioner, represented by counsel, challenges her first-degree murder conviction from Craig County District Court, Case No. CRF-87-81, on the ground of insufficient evidence. Also before the Court is Petitioner's motion for oral arguments. (Docket #14)¹ As more fully set out below, the Court finds that the petition for a writ of habeas corpus should be granted and the motion for oral argument should be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

Holly Grace Wingfield [Holly] was charged as an adult under Oklahoma's Reverse Certification procedures, and on November 19, 1988, was sentenced to life imprisonment for

¹Numbers in parentheses refer to court documents: federal court docket sheet(Docket #); statement of Holly Wingfield (Stmt.); original State court record (O.R.); transcript of preliminary hearing(P. Tr.); transcript of motion hearing (M. Tr.); transcript of Reverse Certification Hearing (R.C.H.) and transcript of jury trial (Tr.).

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the death of Crete Wingfield [Crete], her adopted 18-month old sister. (O.R. 327)

The charges against Holly arise from events which transpired on Sunday, August 23, 1987. Ty Wingfield [Ty], Petitioner's brother, testified he killed his father, Clint Wingfield, and step-mother, Louise Wingfield, and sister, Crete Wingfield, during the early afternoon at their rural home in Craig County, Oklahoma.

In the days preceding the homicides, Ty admitted to using marijuana, "bathtub crank," Valium, and alcohol. The night before the murders, Ty admitted taking 500mg of Valium, "shooting up" crank, and smoking pot all night. The next morning (the day of the murders) Ty obtained a 6-pack of beer and 25 more Valium tablets. He admitted to drinking most of the beer and taking all but two of the Valium. (Tr. 610.) Holly admitted to drinking a couple of beers and taking two 5mg Valium tablets. (Tr. 612.)

The record indicates Holly was present during the murders, helped her brother load the bodies on the family truck, and, at Ty's instruction, attempted to clean the bloody mess in the house. Again at Ty's instruction, Holly wrote two checks, one of which was apparently cashed. Holly was instructed by Ty to follow him to the home of Joy Mauldin in Hawsville, Texas. It was Ty's idea to go to Texas where he had already made arrangements to sell the truck in Longview, Texas, for cocaine and heroin, and he needed Holly to drive the other vehicle. (O.R. 651.)

Around 3:30 a.m. on Monday morning, Ty arrived at the home of Joy Mauldin, whose daughter he had once dated. Holly "got lost" in Paris, Texas, and did not arrive until around 6:30 a.m. Mrs. Mauldin eventually notified the county officials, and both Ty and Holly were

arrested. Holly and Ty were sixteen and nineteen years old, respectively, at the time of their arrest.

A preliminary hearing was held October 19-22, 1987. Among those who testified was Wendy Mauldin, Ty's former girlfriend. She testified that Holly told her "she had Crete in the kitchen and Ty walked in there and she told Ty not to do anything but he called Crete into the other bedroom and she said she couldn't stop him, she didn't try to stop him." (P.Tr., p. 23.) When questioned about why Holly didn't try to stop Ty, Wendy testified Holly was scared. (P.Tr., p. 23.) Holly admitted to Wendy that she had helped remove the bodies from the house but had stayed at the house, attempting to clean the stains from the carpet. (P.Tr., p. 33.)

Initially, Ty pled not guilty, but on January 20, 1988, Ty withdrew his plea and entered a guilty plea to all three murders. (O.R. 260.) The state court judge sentenced Ty to life imprisonment on each Count, with the sentence in Count 3 to run consecutive to concurrent life sentences in Counts 1 and 2. (O.R. at 246, 283-288.)

During the latter part of March 1988, Ty contacted Holly's attorney and asked him to come to Granite Reformatory. (Tr. 635-637.) Ty expressed a desire to "make a clean break of everything." Ty gave a recorded statement and agreed to a deposition. At the May 20, 1988 deposition and at Holly's jury trial, Ty testified that he was told from the beginning of this case that unless he implicated his sister Holly the State would seek the death penalty. (Deposition Tr. at 25; and Tr. at 656, 659-60.) Ty refused to testify at his deposition or at Holly's trial when asked about the death of Crete and instead claimed immunity under the

Fifth Amendment.

Finally, on September 19, 1988, following a 7-day jury trial in which Ty Wingfield testified on behalf of the State and against his sister, Holly was acquitted of murdering her father and stepmother, but was found guilty of aiding and abetting Ty in the killing of their sister, Crete. In accordance with the jury verdict, Petitioner was sentenced to life imprisonment and she appealed. On August 17, 1994, the Court of Criminal Appeals affirmed the conviction and sentence by summary opinion. Wingfield v. State, Case No. F-89-0480 (Unpublished Opinion). (Attached as Ex. A to Respondent's Response, Docket #12.) Petitioner then filed a petition for rehearing which was denied by the Court of Criminal Appeals.

The evidence at trial reveals the following as to the murder of Crete Wingfield.

Barry Tullis, a neighbor of the Wingfields in rural Craig County, testified that on August 23, 1987, around 2:30 p.m., he went to the Wingfield's home to borrow a trailer. (Tr. 288-295.) As he approached the home, Tullis saw Ty running out of the garage door. A flat bed pickup was parked close to the doorway and Ty had blood on his clothes, legs and hands. Tullis told Ty he wanted to borrow a trailer, so they walked a short distance from the house to see if it was in the field. After checking for the trailer, they walked back to the house, where Holly had come outside. Tullis testified that Holly had blood on her shoes, "cause she ask [sic] me how to get blood out... she pointed them out to me... oh, ...just little blotch here and there." Holly told him that the blood was from squirrels they had been cleaning. (Tr. 291-292.)

Joy Mauldin, a resident of Hawsville, Texas, and mother of Ty's former girlfriend Wendy, testified that Ty fled the murder scene and drove to her house in Texas. Ty had arrived about 3:30 a.m., although he had originally called around 11 or 12 midnight from Longview, Texas. After talking to her daughter, Ty confessed to Mrs. Mauldin that he had killed his father and stepmother. When asked what Ty said about Crete, she testified Ty "said he shot her too." (Tr. 308.) Mrs. Mauldin then contacted the local police and Ty was arrested. (Tr. at 310-311.) As the police were arresting Ty, which was around 6:30 a.m., Holly arrived at the Mauldin's home. The police instructed Mrs. Mauldin to bring Holly to Marshall, Texas, for questioning. Mrs. Mauldin testified that Holly showed no emotion but seemed calm. (Tr. at 312, 316.)

John Woodall, jailer and night dispatcher for Craig County Sheriff's Department, testified he received a report from law enforcement officials in Hawsville, Texas, about a triple homicide near Welch, Oklahoma. He notified his brother, Jack, a deputy, who notified the sheriff. (Tr. 335-36.)

Jess Walker, Sheriff of Craig County, testified that after receiving the homicide report, he went to the Wingfield's home around 7:00 a.m. He and other deputies found blood at the home, secured the crime site, and subsequently discovered the location where the bodies were dumped. (Tr. 339-46.) On cross examination, Walker disclosed that the phone call from jailer John Woodall implicated only Ty Wingfield in the murders. (Tr. 361.)

Dr. O.W. Dehart, a physician employed as a county medical examiner, testified

regarding his examination and identification of the bodies at the dump site. (Tr. 368-378.)

Carey Thurman, an agent with the Oklahoma State Bureau of Investigation (OSBI), testified as to the investigation of the crime scene, the type of guns, and other weapons. (Tr. 387-88.)

Clay Medrano, City Marshall for Hawsville, Texas, testified that Ty confessed killing his father with a rifle and his stepmother with a pistol. (Tr. 391.) Once at the police station, Ty informed Medrano of the location of the bodies. (Tr. 395-96, 401.) On cross examination, Medrano testified that Ty admitted killing his family, including baby sister Crete. (Tr. 405.)

Ken Toon, a deputy sheriff in Harrison County, Texas, took the stand next and reiterated that Ty admitted killing his family.

Q. What did he (Ty) tell you?

A. His story he told us was that his father, step mother and step sister had come home from church and that his father and Holly had got [sic] into an argument, something about she was suppose [sic] to have done the dishes and didn't do it and wanted to wait till tomorrow, and they got in an argument about that and he tried to confront his father at that time, and his father sent him to his room and he went to his room and came back out, I believe he stated that he went to a bathroom and retrieved a rifle and took it back out and shot his father.

Q. Anything else?

A. He stated that after that he had shot Louise, his step mother, and then he shot Crete.

(Tr. 410.) Toon provided similar testimony on cross examination. (Tr. 424-26.)

Dr. Robert Hemphill testified he conducted the autopsy on the bodies of Louise and Crete Wingfield. (Tr. 430-39.) The cause of Crete's death was "the gunshot wound to the

head.” (Tr. 439.)

Arnold Bentz, criminalist supervisor with OSBI, examined the vehicles driven by Ty and Holly to Texas and picked up evidence from officers in Texas, including the suitcases, weapons, the TV and VCR which were found in one of the vehicles. (Tr. 452-487.)

Phill Neff, member of the Church of Jesus Christ of Latter Day Saints, testified that Clint, Louise and Crete Wingfield attended services on Sunday, August 23, 1987, from 10:00 a.m. to 1:00 p.m. and left the church about 1:45 p.m. (Tr. 487-88.)

Dr. Mohammed Merchant then testified regarding the autopsy of Clint Wingfield. (Tr. 490-99.)

Dennis Reimer, criminalist with OSBI, testified about the evidence gathered at the Wingfield's residence and, in particular, the examination of blood stains in and around the house. (Tr. 499-565.)

Connie Layton, owner of a convenience store in Welch, testified that on August 23, 1987, Ty had come to her store to cash a check for \$150.00 supposedly signed by Clint Wingfield. (Tr. 566-69.)

James Looney, forensic ballistics examiner with OSBI, testified regarding the bullets and firearms. (Tr. 572-77.)

The State then called **Ty Wingfield**, Petitioner's brother. Ty admitted having a long history of heavy drug abuse which started in the latter part of 1985. He testified he used marijuana, methamphetamine, cocaine, barbiturates, heroin and alcohol. (Tr. 600-602.) In

early 1987, he spent 8 weeks in the Navy but exaggerated a back injury in order to receive a discharge and return to his drug habit. (Tr. 601-602, 643-44.) Just a few days prior to the murders, Ty had been confronted about the drug paraphernalia his dad had found in Ty's room. The father had also threatened to send Ty to a drug rehab program. The night before the murders, Ty admitted he had taken 500mg Valium and shot up "approximately two and a half grams" of crystal². He did not go to sleep that night but stayed awake, smoking pot. (Tr. 602, 612-13, 644-45.)

The next morning after his parents left for church, Ty decided to drive to Miami, Oklahoma to pick up more Valium tablets and beer. He awakened Holly and took her with him. He testified he obtained 25 more Valium tablets and drank most of a six-pack. (Tr. 610, 613, 644.) He further testified Holly took two Valium tablets (of the 25) and drank "maybe one" beer on Sunday morning. (Tr. 645.)

Although Ty testified he did not remember whether he and Holly had any specific conversations regarding the killings, the State impeached Ty's statement at the trial with his testimony from the preliminary hearing. Ty testified he and Holly had talked about his drug problem, about their Dad finding some of Ty's drug paraphernalia, about the possibility of Ty going to drug rehabilitation, about the bedroom door being locked and the phone restrictions, about taking the van and leaving, and having to kill the parents in order to do that. (Tr. 603-608.) On cross examination, Ty finally admitted testifying at the

²Crystal or "bathtub crank" is a clandestinely manufactured methamphetamine or amphetamine.

preliminary hearing that Holly had made some comments about killing the parents but only when she got mad, only as idle talk, but had never asked him, nor planned with him, to kill them. (Tr. 648; R.C.H. 10.)

Ty did not remember at whose request he kicked in his parents' bedroom door, but the State again impeached him with preliminary hearing testimony. On the witness stand Ty stated he was angry because the parents locked the bedroom door to prevent Holly from using the phone. He became enraged and violently kicked it open. (Tr. 609-610, 615, 652.) After the parents returned home, Ty testified there was an argument about the door. (Tr. 652.) According to Ty, he started down the hallway to the back room, "to get a gun," and said that Holly made some kind of remark, like, "was he really going to do it," or something like that. Although he could not recall whether or not Holly tried to persuade him not to do it, his preliminary hearing testimony indicated Holly "did not do anything"... "did not discourage him." (Tr. 615-617.) On cross examination, Ty agreed that Holly didn't encourage him to shoot his father. "I can't say she did, no." (Tr. 654.) He further admitted he misinterpreted Holly's statement whether he was "going to do it" because of his agitation and loss of control due to drugs. (Tr. 655.)

Ty admitted shooting his father, but took the Fifth amendment when questioned about killing Louise and Crete. He was uncertain about the exact time Crete was killed, but did state she was killed after the murder of his father and stepmother. He remembered Holly had taken Crete into the kitchen. (Tr. 618-21, 640-41.) Ty testified he tried to comfort Crete. "I don't recall exactly what was going through my mind at that time." (Tr. 641.) He

testified Crete was killed outside the bedroom in the hallway, and Holly was not with him at the time. (Tr. 641.) He could not remember, however, whether or not he had told Holly he was going to kill Crete. (Tr. 642.)

Ty testified that Holly worked the "comealong" to help him load the bodies on the truck. (Tr. 628-29.) He further admitted taking the bodies on a flat bed truck to a dumping area not too far from the house, and directing Holly to clean the house, write two checks, and take all the jewelry. (Tr. 618-21.) He admitted loading a TV but denied that Holly loaded the VCR. The State, however, impeached him with a statement from the preliminary hearing that Holly had loaded the VCR. (Tr. 625.) On cross examination he admitted it was his idea to go to Texas and that he needed Holly to drive the van to Texas to sell it, along with the TV and the VCR. (Tr. 651, 653.) Ty also testified that he cashed the checks which he directed Holly to write.

On cross-examination, Ty testified that Holly had nothing to do with the killings and that they were the result of his agitation due to drug intoxication. He testified his state of mind was such that he did not "really care about anything" (Tr. 651) and that he became so enraged and out of control when he discovered that the parents had locked their bedroom door. He stated that he could not think of anything other than his father's threats to send him to drug rehabilitation. (Tr. 654.) He further testified that he told his uncle, Floyd Cress, that Holly was in the kitchen with Crete and she had begged him not to kill the baby, but that Ty had to kill her "because the only other thing that I could think of to do with her, was sell her." (Tr. 661-663.) On re-direct, Ty testified that at the time he shot his father

he had not planned to kill Crete. He stated that when he was thinking whether or not to kill Crete, Holly discouraged him by saying "No." (Tr. 676.) The prosecutor asked Ty why he did not kill Holly; Ty responded that he had "run out of bullets." (Tr. 676.)

Ty admitted giving an unsworn statement to Petitioner's counsel and an investigator in March of 1988 at Granite Correctional Center. (Tr. at 636.)

Sally Randall, cousin of Clint Wingfield, testified about her conversation with Holly at the Rogers County Jail on or about February 14, 1988. She testified Holly admitted helping load the bodies on the truck; that Holly "told Crete to go to Ty;" and that Holly placed Crete in a bag. (Tr. 696, 702.) She admitted that she had not been around her cousin and his family on a regular basis over the past three years. (Tr. 695-696.)

Donna Lewis, deputy sheriff with the Harrison County Sheriff's department, testified about the statement which Holly gave the morning after the murders. (Tr. 725, 727-28.) Mrs. Lewis wrote out Holly's statement of what transpired. She testified Holly told her that Holly and Ty went to Miami, Oklahoma, to buy some Valium and beer, the majority of which Ty consumed. Holly said she took 2 of 25 Valium tablets and drank some beer. They returned to the house around 1:20 p.m., shortly before their parents and little sister returned from church. Their father discovered the bedroom door had been kicked in and wanted to know the reason. Ty told him that he broke it because Holly wanted to use the phone to make arrangements to go to the lake. The father told Holly she wasn't going anywhere. Ty then grabbed a long rifle and went to his parent's bedroom where he told their dad he [Ty] would not be going to drug rehabilitation. After hearing a shot, Holly went into the parents'

bedroom, grabbed Crete and took her to the living room. (Tr. 733.) She then went back to the parents' bedroom where she saw Ty and Louise fighting and Ty shot Louise. Ty then picked up a small steel bat and hit the father twice because he was still alive.

Lewis testified Holly recalled she then took Crete to the kitchen and asked her if she wanted something to eat or drink. Holly said Ty had told her he was going to kill Crete too, although she did not want him to kill Crete. (Tr. 736.) Ty then called Crete and Crete went to Ty. As Crete walked around the corner to the bedroom, Holly heard a shot and "figured that Ty had killed Crete." (St. Ex. 137, p. 2; Tr. 736.) Ty came to the kitchen and told Holly that he hated having to kill Crete but that he had to do it. (Tr. 736.)

Continuing, Lewis testified Holly said that Ty told her to get some bags and start cleaning up; so she put Crete in a white trash bag and laid her beside her Dad on a blanket. (Tr. 737.) Ty then dragged the bodies to the truck and loaded them, getting Holly to work the "comealong." (Tr. 731-38, 741.) While he disposed of the bodies, Ty told Holly to "clean things up." Holly tried to clean the carpets and walls. (Tr. 739.) Ty told Holly to pack her clothes, to get the rings off Louise and whatever money she could find. (Tr. 741.) Ty then took a shower and threw some things in the flatbed truck. The TV and VCR were loaded in the van. He told Holly to write two checks one for \$200 and the other one for \$150, which he was able to cash at the small convenience store. They fled the house about 4:30 in the afternoon. As they were driving toward Hawsville, Texas, Holly and Ty were separated. Holly got lost in Paris, Texas, and stopped at a police station. An officer there got in touch with Ty by telephone. Although Ty had been shooting up drugs, he had

managed to get to Longview, then had turned around, looking for Holly. Apparently Ty was stopped by an officer who contacted the police station where Holly was waiting. Ty spoke with Holly and told her to get directions from the police and to come on to Mauldin's house. (Tr. 738-45.)

Lewis was also the officer who retrieved the plastic bag containing the rings and some other items from Holly's purse. (Tr. 747.) Holly's statement was admitted as State's exhibit no. 137. (Tr. 751.)

Dr. C.B. Pinkerton, a physician with psychiatry experience, was the only witness called by the defense. He testified that individuals who suffer from post traumatic stress disorders would not necessarily express emotion or visible signs of distress. (Tr. 761-765.)

The parties rested, closing arguments were given, and at approximately noon on September 19, 1988, the jury was instructed and retired for deliberation. (O.R. 494; Tr. 844-845.) During deliberations, the jury sent two questions to the trial judge. Question no. 1 reads as follows:

If Holly had nothing at all to do with the actual killing of her dad, mother and sister, but consented to the disposing of the bodies, the cleaning up, putting the baby in the bag, packing and leaving -- not reporting Ty when they were separated -- does this constitute abiding [sic] & abetting?

(O.R. 486.) The Court responded by stating to the jury, "You have the instructions of law to apply to the facts of this case. I'm not allowed to answer this specific question." Counsel for Petitioner objected and moved the Court for a directed verdict based on the question submitted by the jurors. The objection was overruled and the motion denied. (Tr. 847-848.)

The Court subsequently addressed the second question which reads as follows:

Aiding and abetting is it before and during or after or all in combination.
Sheets 27 and 32 conducts [sic] itself.

(O.R. 485.) After a hearing in chambers, the Court's response was "aiding and abetting is used in Instruction 32 and it refers to 'before and/or during' the commission of a crime. The terms 'aid and abet' are defined in Instruction 32 and Instruction 33. Accomplice as used in Instruction 27 is part [of] a group of instructions beginning with Instruction 24 that deals with accomplice's testimony." All objections were overruled by the Court. (Tr. 849-850.)

Close to midnight, the jury announced in open court it was deadlocked. The Court directed the jury to return to the jury room and to continue deliberating. (O.R. 494; Tr. 851-852.) At 1:50 a.m. on the morning of September 20, 1988, after more than twelve hours, the jury returned a verdict of not guilty on Counts I and II but found Petitioner guilty of first-degree murder in the death of Crete Wingfield. After the verdict was announced, counsel for Petitioner moved for judgment n.o.v. as to Count 3. The Court overruled the motion, and on November 18, 1988, Petitioner was sentenced to life imprisonment and judgment was entered.

II. ANALYSIS

A. Sufficiency of the Evidence

"Sufficiency of the evidence can be considered to be a mixed question of law and fact" to be reviewed *de novo*. Case v. Mondragon, 887 F.2d 1388, 1392, 1393 (10th Cir.

1989). This Court reviews such a claim to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); see also Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). "Such review is 'sharply limited' and a court 'faced with a record of historical facts that supports the conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" Messer, 74 F.3d at 1013 (quoting Wright v. West, 505 U.S. 277, 296-97 (1992)). 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, 113 S. Ct. 1255 (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 reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993). However, "[t]o be sufficient, the evidence supporting the conviction must be substantial; that is, it must do more than raise a mere suspicion of guilt." Beachum v. Tansy, 903 F.2d 1321, 1332 (10th Cir.), cert. denied, 498 U.S. 904 (1990).³

The above standard is rigorous. As the Supreme Court recently has reiterated, "the

³The State asserts that the State court's findings of fact on the sufficiency issue are entitled to a presumption of correctness. Sumner v. Mata, 455 U.S. 591, 597 (1982). While the above legal proposition is correct, the Court of Criminal Appeals made no factual findings which would be entitled to deference in this habeas corpus action. As noted above, the decision of the Court of Criminal Appeals was a summary opinion which included no findings of facts or legal conclusions.

writ of habeas corpus has historically been regarded as an extraordinary remedy.” Brecht v. Abrahamson, 113 S.Ct. 1710, 1719 (1993). Nevertheless the writ remains a remedy, “a bulwark against convictions that violate fundamental fairness.” Id. (quoting Engle v. Issac, 456 U.S. 107 (1982)).

Although this Court must apply a federal constitutional standard to determine whether the State presented sufficient evidence, the Court must look to Oklahoma law for the elements the State must prove in order to convict Petitioner of first-degree murder. See Jackson, 443 U.S. at 324 n. 16. The Oklahoma statute governing murder in the first degree provides:

A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

21 O.S. 1991, § 701.7(A); see also Ellis v. State, 834 P.2d 985 (Okla.Crim.App.), *cert. denied*, 113 S.Ct. 472 (1992).

In order for Petitioner to be convicted as a principal in Crete Wingfield’s murder, the State had to establish that she aided and abetted Ty in its commission. Spears v. State, 900 P.2d 431, 437 (Okla.Crim.App. 1995); 21 O.S. 1991, § 172.⁴ In Johnson v. State, 928 P.2d 309, 315 (Okla.Crim.App. 1996), the Court of Criminal Appeals specified that in a malice

⁴ Section 172 reads as follows:

All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present are principals.

murder case, such as this one, the State must prove (1) that the defendant personally intended the victim's death, and (2) that the defendant aided and abetted with full knowledge of the companion's intent to kill the victim. See also Cannon v. State, 904 P.2d 89, 100-102 (Okla.Crim.App. 1995).

"Aiding and abetting' involves acts, words or gestures encouraging the commission of the offense, either before or at the time of the offense." VanWoundenberg v. State, 720 P.2d 328, 333 (Okla.Crim.App. 1986)(emphasis added). In Anglin v. State, 224 P.2d 272, 275 (Okla.Crim.App. 1950), the Court of Criminal Appeals stated:

It is not necessary, however, that he do some act at the time in order to constitute him a principal, but he must encourage its commission by acts or gestures, either before or at the time of the commission of the offense, with full knowledge of the intent of the persons who commit the offense. The mere concurrence of the minds of persons in pursuance of a previously formed design to commit a crime does not alone constitute them principals. To constitute a principal in crime, there must be participancy or the doing of some act at the time of the commission of the crime which is in furtherance of the common design.

See also Sanders/Miller v. Logan, 710 F.2d 645, 651 (10th Cir. 1983) (holding that to uphold a conviction for first-degree murder as an aider and abettor, there must be evidence that defendant participated in the crime with full knowledge of co-defendant's intent to kill the victim).

In Turner v. State, 477 P.2d 76, 83 (Okla.Crim.App. 1970), the court noted that the law which governs aiding and abetting was well stated in two very early cases: Hubbard v. State, 112 P.2d 174 (Okla.Crim.App. 1941), and Moore v. State, 111 P. 822 (Okla.Crim.App. 1910).

'[T]o be concerned in the commission of crime as a principal, one must either commit the crime himself, or procure it to be done, or aid or assist, abet, advise, or encourage its commission. A mere mental assent to or acquiescence in the commission of a crime by one who did not procure or advise its perpetration, who takes no part therein, gives no counsel and utters no word of encouragement to the perpetrator, however, wrong morally, does not in law constitute such person a participant in the crime.'

Turner, 477 P.2d at 83.

It is clearly not the law that one can be guilty of murder without some overt act on the part of the would-be aider/abettor. It is well-established that more than one's presence, more than knowing of the crime or knowing that the offense was being committed is necessary. It is not sufficient to show that the would-be aider/abettor was present and knew the offense was being committed. The proof must go further, and show, beyond a reasonable doubt, that, in this case, Petitioner personally intended Crete's death, and that Petitioner participated in the homicide before or at the time of its commission with the full knowledge of Ty's intent to kill Crete.

Unlike the typical aiding and abetting factual scenario, this case offers no evidence that Petitioner knowingly and intentionally intended the death of Crete. Cf. Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.7, at 139 (1986) (discussing the "easier" class of cases "in which the liability of the accomplice is based upon the fact that he actually did 'aid,' or 'assist' in the commission of the crime") [hereinafter LaFave & Scott]. Petitioner did not give Ty the shotgun, did not encourage him to shoot, or in any other obvious way assist him in shooting Crete. It is thus difficult to see how Petitioner could have had the requisite intent. Cf. id. § 6.7, at 138 ("one does not [generally] become an

accomplice by refusing to intervene in the commission of a crime . . . [and so] courts have experienced considerable difficulty in cases where the defendant was present at the time of the crime and the circumstances of his presence suggest that he might be there pursuant to a prior agreement to give aid if needed").

It was the court in Crabtree v. State, 193 P. 1005 (Okla.Crim.App. 1920), who first concluded that "no one can be properly convicted of a crime that he did not commit, or to the commission of which he has never expressly or impliedly given his assent." While Ty may have ultimately told Petitioner that he would have to kill Crete, the record is devoid of any evidence showing that Petitioner harbored the same intent. As it has been said in the context of federal prosecution: "[T]he most important element [of aiding and abetting] is the sharing of the criminal intent of the principal" U.S. v. Grey Bear, 828 F.2d 1286, 1292 (8th Cir. 1987), vacated in part on other grounds on reh'g en banc, 863 F.2d 572 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 846 (1990); *see also* U.S. v. Andrews, 75 F.3d 552, 555 (9th Cir. 1996); Campbell v. Fair, 838 F.2d 1, 4 (1st Cir. 1988). At trial the State did not introduce any direct or circumstantial evidence that Petitioner had any animosity toward Crete or that Ty and Petitioner had a pre-arranged plan to kill Crete. Rather Ty admitted that at the time he shot his father he had not planned to kill Crete. Moreover, the evidence shows that when Ty informed Petitioner that he would have to kill Crete, Petitioner objected and specifically told Ty not to kill the little one. "He had told me he was going to kill Crete, too, and I didn't want him to." [Stmnt. p. 2; *see also* Tr. 736]

It is axiomatic that a jury may infer criminal intent from actions, but in this case the

State's evidence goes solely to one prong of the test described by the Oklahoma Court of Criminal Appeals in Johnson, i.e., aiding and abetting with knowledge of the intent of the perpetrator. 928 P.2d at 315. To hold that a jury may infer the second prong, that the aider and abetter personally intended the death of the victim, from evidence of the first, effectively collapses the two prongs into one. The general intent to facilitate a crime and the specific intent to facilitate first-degree murder are distinct.

"To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to [her] state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first-degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless [s]he acted with premeditation and deliberation." LaFave & Scott, § 6.7, at 144-45 (footnotes omitted). Immediately prior to Crete's murder, the Petitioner removed Crete from the violence in the bedroom and took her into the living room, eventually taking her to the kitchen to see if she was hungry or wanted some juice. Such acts of comfort and reassurance, and the removal of her little sister from obvious danger, seem to negate any inference of premeditation or deliberation on the part of Petitioner concerning Crete's death. No evidence was offered of any animosity by Petitioner toward Crete at any time. Arguably, the State may have presented sufficient evidence to properly convict Petitioner of some lesser offense, but the jury was not given this option. The evidence of the crime charged was not sufficient. See Commonwealth v. Hartley, 621 A.2d 1023 (Pa. 1993) (accomplice to first-degree murder had to have the "willful, deliberate, and premeditated

specific intent to kill at the time of the killing" in order to be convicted).

The Court in Turner v. State, 477 P.2d 76 (Okla.Crim.App. 1970), addressed this issue of an aider/abettor's intent to kill. There, Ernest Moore, Billy Morgan, and Doyle Turner were charged with the murder of John Elder. Ernest Moore was tried before a jury and was acquitted; Billy Morgan was granted immunity from prosecution in exchange for his testimony; and Doyle Turner was convicted of aiding and abetting first-degree murder and given life imprisonment. After reviewing Turner's appeal, the court held that the evidence did not support Turner's aiding and abetting conviction.

In Turner the victim, John Elder, was approached by Turner outside a tavern East of Talihina. Turner told him that co-defendant Moore wanted to see him at the back of the building. Morgan then approached and told the victim that he was still mad at him for having been whipped by him earlier in the week. Moore joined the group, took the victim by the arm and the four men walked toward the back of the building. The State's evidence of what occurred after the four men went behind the building and later that night was presented through the testimony of co-defendant Morgan. He testified that he, Moore and Turner took the victim from the tavern in a borrowed pickup, that he and the victim had a short scuffle until Moore stepped in and struck the victim several times, knocking him down three times. Thereafter all four men got back in the truck and began driving back toward the tavern when the truck stalled. The victim attempted to run away, but Moore and Turner brought him back to the pick-up. Then Morgan and Turner left to get some gasoline. Morgan testified that the victim was alive at the time they left. When they returned, Moore told Morgan and Turner

that the victim was dead. Turner helped get the victim back into the pickup, and the body was taken to Turner's residence. Turner and Moore then returned to the tavern and brought the victim's car to Turner's home. Some of the victim's clothes were found in a shallow grave about 300 yards from Turner's residence.

The Court of Criminal Appeals held the evidence was insufficient to justify the conviction of Turner as an aider and abettor. Turner, 477 P.2d 76, 80-84. The Court stated:

There is no proof of a conspiracy or pre-arranged plan between defendant and either of the co-defendants to murder, or kill, or even do bodily harm to any person. No words spoken or moves made to indicate malice, or intention to harm, and above all--no participation by this defendant in any way to aid or abet or even assist either of the co-defendants in their action.

Id. at 84.

The State of Oklahoma insists that the circumstantial evidence sufficiently supports the jury's inference that Petitioner had the requisite intent to kill Crete. The State asserts that Petitioner's "hatred toward her parents lends credence to the fact that the Petitioner harbored a premeditated and deliberate intent to kill Crete and that she aided her brother in killing Crete." (Response, Docket #12, at 7.) The State relies on Ty's testimony that, prior to the murders, Petitioner had mentioned killing their parents on several occasions. (Id.) The State also relies on Ms. Mauldin's testimony that Petitioner was not close to her stepmother, Louise, and that one time Petitioner told her she hated Louise and did not like her father. (Id.)

The issue in this case is the murder of Crete and not the murders of Louise and Clint Wingfield. Therefore, the Court finds irrelevant and illogical the State's contention that

Petitioner's intent to kill Crete Wingfield can be inferred from whatever animosity there may have been toward the parents.

Next the State contends that Petitioner participated in the murder of Crete by telling Crete "to go to Ty" knowing that he would kill her. Although the State also draws from Petitioner's statement, it is the testimony of Sally Randall, Petitioner's cousin who visited Petitioner at the Rogers County Jail, that is particularly significant. Ms. Randall testified on direct examination that she asked Petitioner what she had done; that Petitioner replied that when Ty called Crete, she told Crete "to go to Ty." The State asserts this testimony is an admission by Petitioner, knowing that Ty would kill Crete, and is evidence of Petitioner's premeditated intent to kill. However, a review of Petitioner's statement implies that Crete went to Ty on her own when Ty called her name. ("So he called out from the bedroom and said , 'Crete, come here.' She (Crete) went to Ty." (Stmt. at 2; Tr. 736)

Reviewing the evidence in the light most favorable to the State, and taking the testimony of Ms. Randall as true, there is still no evidence of "malice aforethought." It was Ty who first decided something had to be done to Crete; it was Ty who got the gun; it was Ty who had the intent to kill Crete; and it was Ty who ultimately pulled the trigger. Petitioner admitted Ty had told her he was going to kill Crete, but even Ty testified that he had said he would have to kill Crete "or sell her." (Tr. 662.) There was still uncertainty. There was no plan or scheme or design. And there is certainly no proof beyond a reasonable doubt that Petitioner "conspired in the commission of the homicide before its perpetration." Moulton v. State, 201 P.2d 268, 269 (Okla.Crim.App. 1948). Petitioner's own words when

she heard the shot, "I figured..." (Ty had shot Crete), imply she was uncertain of Crete's fate even then. Petitioner had begged Ty not to kill Crete. (Tr. 676.) At least on Petitioner's part, there was still that glimmer of hope, no matter how small, that Ty would not kill Crete.

The only evidence cited by the State which occurred prior to or contemporaneously with the shooting of Crete is Petitioner's failure to *prevent* the murder of Crete. The State contends that Petitioner could have dissuaded Ty from shooting Crete or at least run out of the house with Crete in order to save her. Notwithstanding the fact that the Wingfields lived in rural Craig County, that no neighbors lived close by, that Petitioner was scared and possibly in shock, or that the killings all occurred in a short span of time [See M.Tr. 29; P.Tr. 23], it would be no more than speculation that Petitioner could have escaped or convinced Ty not to kill Crete. At best, the State's evidence has only presented a suspicion of guilt which is an inadequate basis for conviction.

Furthermore, there is no legal duty for Petitioner to protect her sister. While there are cases in which the mother or father has a legal obligation to care for or look after the welfare of a child, the Court is unaware of any cases in which there was a duty imposed upon a sibling to protect another sibling, especially when to do so would endanger her own life.⁵

⁵ See Knox v. Commonwealth, 735 S.W.2d 711 (S.Ct.Ky. 1987) (mother of child had no legal duty to make effort to prevent rape of her daughter by her husband, and thus mother could not be convicted of complicity to commit first-degree rape of daughter); also Pope v. State, 396 A.2d 1054 (Ma. App. 1979) (evidence was insufficient to prove that defendant was guilty of child abuse as a principal in the second degree; Court noted that defendant neither aided the mother in the acts of abuse nor did she counsel, command and encourage her; fact that defendant failed to intervene to help the baby during abuse was not within the reach of the child abuse statute).

"It is plainly not the law that one can be guilty of murder, without overt act, who by neither word nor gesture has done anything to contribute to the commission of the homicide, or to assist, encourage, or evince approval of it at or before the fact, and of whom it only appears that [s]he was present, knew of the crime, and even may have mentally approved of it. The silent thought, however wicked in view of the Searcher of Hearts, is not a crime against our laws, but is left by them to another than a human tribunal." Anderson v. State, 91 P.2d 794, 798 (Okla.Crim.App. 1939). Although Petitioner may have had a strong moral obligation to help the child, she was under no legal duty to do so. Petitioner's lack of action, whether from fear or some other reason, or speculation that Petitioner could have saved the life of Crete do not meet the statutory definition of 'aiding and abetting.'

Additionally, as further support for its theory that Petitioner aided and abetted, the State relies on Ty's testimony that Petitioner helped him load the bodies on the truck, and that Petitioner herself placed Crete's body into a plastic bag. Petitioner also helped clean up some of the blood in the house, wrote two checks, and followed Ty to Texas. This evidence, however, is **after** the fact. See Turner, 477 P.2d 76, 80-84 (in determining whether defendant aided and abetted in the murder of the victim, the Court ignored the fact that defendant helped load the victim's body on the truck and drive the victim's car to his house, and that remains of the victim's clothing were located in a shallow grave near defendants' house). Aiding and abetting is only prior to and during the commission of the crime.

Whatever Petitioner did after the commission of the murders is not sufficient to convict her of aiding and abetting the murder of Crete. Even the jury was confused about

the application of the law to the evidence of what Petitioner did after the commission of the murders. "If Holly had nothing at all to do with the actual killing of her dad, mother and sister, but consented to the disposing of the bodies, the cleaning up, putting the baby in the bag, packing and leaving -- not reporting Ty when they were separated -- does this constitute abiding [sic] & abetting?" (O.R. 486; Tr. 847-848)

Lastly, the State relies on Petitioner's demeanor and failure to show any emotion after the killing. Again, the Court notes that according to the statutes and Oklahoma case law, it is the commission by acts or gestures, either before or at the time of the crime which determines whether an individual is aiding and abetting the commission of a crime. Clearly, the evidence presented of Petitioner's emotional state after the killings could not be relevant as an "overt act" or "encouragement." Even assuming the State is correct, the evidence indicates that her failure to show emotion was consistent with other signs of shock: she asked the neighbor specifically how to clean blood off her shoes; she poured bleach on the floors and attempted to vacuum it; she got lost in Texas and went to the police station where she gave a description of her brother, the vehicle he was driving and asked for assistance in locating him; she arrived at the Mauldin's house and exited the van, leaving it running without putting it in park; she sat idly in a swing and talked with Wendy Mauldin; she asked Mrs. Mauldin to call the school to tell them she couldn't be there because she was worried about her assignments. Those actions are certainly not actions of someone who is thinking clearly.

B. Retroactivity of Habeas Corpus Amendments

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214 ["the 1996 Act"], was signed by the President on April 24, 1996, twenty-one days after the filing of this habeas corpus action. The 1996 Act redesignates the former § 2254(d), which deals with state courts' findings of fact, as § 2254(e). Section 104 of the new statute adds a new § 2254(d) that for the first time specifies the appropriate treatment of legal determinations by state courts. Section 2254(d), as amended, provides as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ---

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court has established that "a statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf v. USI Film Products, 114 S.Ct. 1483, 1499 (1994) (citation and footnote omitted). The Fifth and Seventh Circuit Courts of Appeals have held that while Congress did not specify that it intended to apply section 2254(d)(1) retrospectively, section 2254(d)(1) does

not attach new consequences to pending petitions for habeas corpus. Drinkard v. Johnson, 97 F.3d 751, 765 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856, 863 (7th Cir. 1996); but see Boria v. Keen, 90 F.3d 36, 37 (2d Cir. 1996) (determining with no analysis that the 1996 Act would require a different outcome in the case). The Tenth Circuit has not reached this issue except in passing in Edens v. Hannigan, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996).

Even applying section 2254(d), as amended, to the instant case, this Court's decision would remain unaffected. Reasonable jurists considering the sufficiency of the evidence in this case would conclude that the state court summary opinion was contrary to clearly established U.S. Supreme Court precedent.⁶ See Drinkard, 97 F.3d at 768. Jackson v. Virginia, 443 U.S. 307 (1979), has been the seminal case in sufficiency of the evidence cases for more than fifteen years. Further, relief is appropriate under § 2254(d)(2) as this Court concludes the state court decision was based on an unreasonable determination of the facts. Petitioner, therefore, is entitled to habeas relief under section 2254(d) as amended by the 1996 Act as well as under the pre-amendment standard of review.

III. CONCLUSION

Viewing the evidence in the light most favorable to the prosecution, the Court finds

⁶This Court questions whether the summary opinion of the Oklahoma Court of Criminal Appeals is even entitled to the deferential standard of review set out in section 2254(d), as amended by the 1996 Act. The Court of Criminal Appeals merely stated that Petitioner's conviction was affirmed and did not explain how it applied the law to the facts of the case.

there is insufficient evidence to find Petitioner Holly Grace Wingfield guilty of first-degree murder for aiding and abetting the death of Crete Wingfield. While it may be true there is conflicting evidence on some facts, in particular, the testimony of Ty Wingfield, nevertheless there is no evidence linking Petitioner to a plan to murder Crete. There is no evidence of premeditation or harboring an intent to kill Crete. Instead, the evidence reveals that Petitioner wanted to protect Crete from the moment Ty shot his father. Petitioner grabbed Crete and ran to the living room, then to the kitchen where she tried to comfort Crete. When Ty told Petitioner he was going to kill Crete, she begged him not to kill the child. Even taking Ms. Randall's comments as true, there is still no evidence of a plan or scheme to kill Crete. The Court concludes from the jury's questions and the State's argument that the verdict of the jury may well have been based on the fact Petitioner did *nothing* to save Crete's life. This, however morally wrong, does not constitute first-degree murder under Oklahoma law.

After careful study of the trial record, the original State court record, the preliminary hearing transcript, the motion transcript, the deposition and statements of the parties in this case, the Court finds that the evidence of Petitioner's guilt of the murder of Crete Wingfield was constitutionally insufficient, and thus, that Petitioner is in custody in violation of the Due Process Clause of the Fourteenth Amendment.

Once this Court finds the evidence insufficient under the Constitution of the United States, the Double Jeopardy Clause bars the retrial of Petitioner and, therefore, entitles her to immediate release. See Fagan v. Washington, 942 F.2d 1155, 1157 (7th Cir. 1991);

Young v. Kemp, 760 F.2d 1097, 1105 n.9 (11th Cir. 1985).

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus (Docket #1) is GRANTED. The motion for oral argument (Docket #14) is DENIED.

SO ORDERED THIS 7 day of February, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

FEB - 6 1997

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

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

Plaintiffs,

v.

Case No. 96-C-488-H

SHIRLEY KEITH, an Individual; MICHAEL JOHNSON, d/b/a Architecture Plus; and VAN BUREN PUBLIC HOUSING AUTHORITY,

Defendants.

ORDER

This matter comes before the Court on Defendant Michael Johnson's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(3) and brief in support (Docket # 24 and 25).

This diversity action centers around a contract between Plaintiff CEI, an Oklahoma corporation, and Defendant Van Buren Public Housing Authority ("VBPHA"), an Arkansas public housing authority, for the renovation of 202 dwelling units in Van Buren, Arkansas. Johnson is an architect in Fort Smith, Arkansas who was hired by the VBPHA to draw plans and oversee the renovation of the units in Van Buren. Keith was the manager of the units.

The VBPHA sued CEI in Arkansas for breach of contract for failure to complete the project. Later, on May 30, 1996, CEI and the holder of its performance bond, Aetna Casualty and Surety Company ("Aetna"), filed this lawsuit against the VBPHA, Keith, and Johnson. On June 6, 1996, CEI and Aetna filed an Amended Complaint against Defendants. The Amended Complaint alleged that the VBPHA breached its contract with CEI, and that Keith and Johnson intentionally interfered both with

CEI's contract with the VBPHA and with CEI's contracts with subcontractors involved in the work on the units. In addition, as holder of CEI's performance bond, Aetna sought a declaratory judgment of non-liability for CEI's work under the contract between CEI and the VBPHA. In response to the amended complaint, Defendants filed motions to dismiss for lack of personal jurisdiction and lack of venue.

Before these motions were at issue, Plaintiffs filed a Second Amended Complaint, which added a cause of action against Johnson for negligent preparation and submission of defective drawings and specifications to the VBPHA. Before any Defendant filed an answer or pleading with respect to the Second Amended Complaint, Plaintiffs settled their claims against the VBPHA and Keith (Docket # 26). Thus, the only remaining causes of action are (1) CEI's claim that Johnson intentionally interfered with CEI's contracts with the VBPHA and its subcontractors, and (2) CEI's claim that Johnson was negligent in performing his duties as an architect.

Johnson argues that venue in the Northern District of Oklahoma is improper in this case. Venue in diversity cases is governed by 28 U.S.C. § 1391(a), which states in pertinent part that:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated. . . .

In the Second Amended Complaint, CEI identifies 13 events or occurrences that allegedly involved Johnson and interfered with CEI's contracts with the VBPHA and the subcontractors. All of these events or occurrences, Johnson argues, occurred in Arkansas, not the Northern District of Oklahoma. Furthermore, Johnson claims, none of the conduct alleged in connection with the negligence claim occurred in the Northern District of Oklahoma, but rather occurred in Arkansas. Johnson argues that because no alleged event or omission giving rise to the claims against him occurred in this judicial

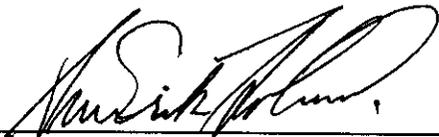
district, this case should be dismissed for improper venue, pursuant to Fed. R. Civ. P. 12(b)(3).

CEI maintains that part of Johnson's alleged conduct did occur in the Northern District of Oklahoma, because Johnson sent many letters and faxes to CEI's office in Tulsa, Oklahoma. CEI argues that this correspondence was a "substantial part" of the acts giving rise to the claims against Johnson. CEI correctly notes that correspondence sent to or from the district in which a case is filed may satisfy the standard set forth in 28 U.S.C. § 1391(a)(2). See Bates v. C & S Adjusters, Inc., 980 F.2d 865, 867-68 (2d Cir. 1992) (interpreting the identical language of 28 U.S.C. § 1391(b)(2), applicable in federal question cases); Sacody Technologies, Inc. v. Avant, Incorporated, 862 F. Supp. 1152, 1157 (S.D.N.Y. 1994). However, there must be "a sufficient relationship between the communication and the cause of action" for venue to be proper under the statute. Sacody, 862 F. Supp. at 1157. In this case, none of the correspondence from Johnson to CEI's office in Tulsa, Oklahoma, was related to any alleged interference with CEI's contracts, or to Johnson's alleged negligence in providing drawings and specifications. The cases cited by CEI are inapposite, because in all of them the correspondence at issue was central to the cause of action. See, e.g., Bounty-Full Entertainment, Inc. v. Forever Blue Entertainment Group, Inc., 923 F. Supp. 950, 958 (S.D. Tex. 1996); Sacody, 862 F. Supp. at 1157; Wachtel v. Storm, 796 F. Supp. 114, 116 (S.D.N.Y. 1992).

None of the "events or omissions" giving rise to CEI's claims against Johnson occurred in this district, and thus venue in this district is improper. Accordingly, Defendant Johnson's motion to dismiss for improper venue (Docket # 24 and 25) is hereby granted.

IT IS SO ORDERED

This 5TH day of February, 1997.



Sven Erik Holmes
United States District Judge

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

FILED

FEB 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LORI R. WEAVER

Plaintiff,

vs.

HILTI, INC.,

Defendant.

Case No. 96-CV-722-H ✓

ENTERED ON DOCKET

DATE 2-7-97

Stipulation of Dismissal
with Prejudice

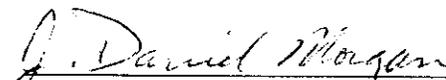
Pursuant to FRCP 41(a)(1), the parties hereby stipulate that this action is hereby dismissed with prejudice. Each party will bear her/its own attorneys fees and costs.

Dated: February 5, 1997



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ATTORNEY FOR PLAINTIFF



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Telephone: 582-9201

ATTORNEY FOR HILTI, INC.

ENTERED ON DOCKET
DATE 2-7-97

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

F I L E D

FEB 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VON PURVIS, an individual,)
)
Plaintiff,)
vs.)
)
MARRIOTT INTERNATIONAL and THE)
PRUDENTIAL INSURANCE COMPANY)
OF AMERICA,)
)
Defendants.)

Case No. 96-CV-927-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Von Purvis, and Defendant, The Prudential 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: February 5, 1997.

ATTORNEYS FOR PLAINTIFF


with permission from
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ATTORNEYS FOR DEFENDANT


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Tulsa, OK 74119

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cbt

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

ASBESTOS HANDLERS, INC.,)

Plaintiff,)

vs.)

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

Defendants.)

No. 96-C-726-K ✓

ENTERED ON DOCKET
FEB 6 1997
DATE

FILED

FEB 04 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

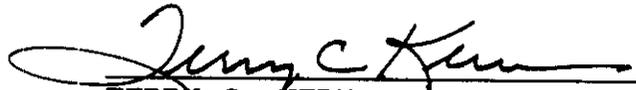
On January 16, 1997, Magistrate Judge Joyner entered his Report and Recommendation regarding Plaintiff's Motion for a Judgment of Default and hearing to determine damages. The Magistrate Judge held an evidentiary hearing on January 9, 1997 at which Defendants failed to appear and present evidence. Based upon the evidence presented by the Plaintiff, the Magistrate Judge determined that the Plaintiff was entitled to actual and punitive damages in the amount of \$348,491.11. The Magistrate also recommended injunctive relief enjoining the Defendants from making further slanderous statements against the Plaintiff and from committing any further acts of unfair competition and deceptive trade practices.

No objection has been filed to the Report and Recommendation and the ten-day time limit of *Fed. R. Civ. Pro.* 72(b) has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

For the foregoing reasons, it is the Order of the Court that

the motion of the respondent for default judgment is hereby GRANTED. The Court hereby awards Plaintiff \$298,491.11 in actual damages, \$50,000 for damages related to slander, and \$50,000 for punitive damages. Additionally, the Court enjoins Defendants from making further slanderous statements against the Plaintiff and from committing any further acts of unfair competition and deceptive trade practices.

ORDERED this 3rd day of February, 1997.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ORIGINAL

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

FILED
FEB 04 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

A. F. ALHAJJI,

Plaintiff,

vs.

SPAGHETTI WAREHOUSE,

Defendant.

§
§
§
§
§
§
§
§

No. 96CV 669K
Title VII, Sec. 1981 Case
Arising in Tulsa County

JURY TRIAL DEMANDED

ENTERED ON DOCKET
DATE FEB 6 1997

AGREED ORDER OF DISMISSAL WITH PREJUDICE

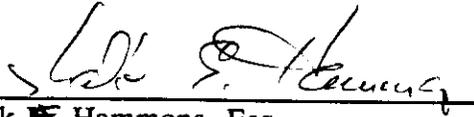
On this day came on to be considered the parties' Stipulation of Dismissal. The Court, having been advised by the parties that all matters in controversy have been fully and finally settled and compromised and that they desire a dismissal of Plaintiff's claims with prejudice, accordingly,

ORDERS that all of Plaintiff's claims which were brought or could have been brought by him against Defendant are dismissed with prejudice to the refileing of same with each party to bear their own costs of Court and attorneys' fees.

DATED: February 3, 1997.


United States District Judge

APPROVED AS TO FORM AND SUBSTANCE:



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ATTORNEYS FOR DEFENDANT
SPAGHETTI WAREHOUSE, INC.

AGREED ORDER OF DISMISSAL WITH PREJUDICE - Page 2

ENTERED ON DOCKET
DATE 2-6-97

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

FILED

FEB 04 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LOWELL POWELL,)
)
Plaintiff,)
)
vs.)
)
BURLINGTON NORTHERN RAILROAD)
COMPANY,)
)
Defendant.)

No. 96-C-266-K ✓

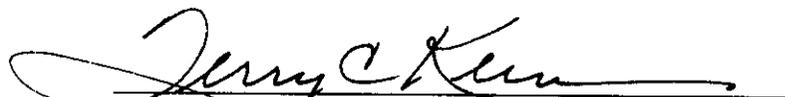
JUDGMENT

This action came on for trial to a jury, the Honorable Terry C. Kern, Chief Judge, presiding. The jury returned a verdict on January 31, 1997, finding the defendant, Burlington Northern Railroad, liable and awarding \$300,000.00 in damages. In addition to finding the defendant liable, the jury also found that the plaintiff, Lowell Powell, was 70% negligent. Under the Federal Employers Liability Act, such a finding reduces, but does not bar, recovery.

Judgment is therefore Ordered in favor of plaintiff and against the defendant, with the damages awarded hereby reduced by the percentage of negligence of the plaintiff.

IT IS THEREFORE ORDERED that the plaintiff recover from the defendant the sum of \$90,000.00 with post-judgment interest thereon at a rate of 5.64% as provided by law.

ORDERED this 4th day of February, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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The filing of an amended complaint, naming current director Saffle, and renewed service has apparently resolved this issue, and the motion will be denied as moot.

Defendant Saffle has filed a motion to dismiss Counts 1 and 3 against him in his individual capacity. He cites authority for the proposition that, under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate. See Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir.1993). Plaintiff responds that both Count 1 and Count 3 name Saffle only in his official capacity and she has no objection to dismissal of Saffle as a named defendant.

Defendant Thompson makes the same argument in his motion, and again plaintiff states she does not object to dismissal of Thompson as to the federal claims. Thompson also moves to dismiss Count 2, arguing such claims may only proceed pursuant to the provisions of the Oklahoma Governmental Tort Claims Act ("the Act"). The Act provides in pertinent part "[i]n no instance shall an employee of the state or political subdivision acting within the scope of his employment be named as defendant [with the exception of resident physicians and interns]." 51 O.S. §163(C). Having named Thompson as an individual defendant, plaintiff's state law claim is also subject to dismissal in Thompson's individual capacity.

Finally, the State moves for dismissal of Count 2 on the ground plaintiff has not complied with the "notice and denial" provisions of the Act. 51 O.S. §157(A) states: "A claim is deemed denied if the state or political subdivision fails to approve the

claim in its entirety within ninety (90) days, unless the interested parties have reached a settlement before the expiration of that period. A person may not initiate a suit against the state or political subdivision unless the claim has been denied in whole or in part."

The purpose of this provision is clear. Plaintiffs are required to exhaust administrative remedies before proceeding with a lawsuit. From an attachment to plaintiff's response, it appears plaintiff filed notice with the state on September 11, 1996, i.e., the same day her original petition was filed in this Court. In other words, plaintiff seeks to accelerate the process by simultaneous filing, reasoning that after ninety days have passed her filing of a federal lawsuit is retroactively valid. This does not comport with the language of the Act or the concept of exhaustion of remedies. The provision quoted above plainly states a suit may not be initiated until the claim has been denied. Although this case remains pending based upon the properly filed federal claims, the Court will not reward plaintiff for seeking to circumvent the Act. Count 2 will be dismissed without prejudice, and plaintiff may seek leave to file a second amended complaint.

It is the order of the Court that the motion of the defendant State of Oklahoma to dismiss (#3) is hereby denied as moot. The motion of defendant Johnny Thompson (#5) and James Saffle (#6) to dismiss are hereby granted. The motion of the State of Oklahoma to dismiss Count 2 (#7) is hereby granted. Count 2 is dismissed

without prejudice. Counts 1 and 3 proceed against defendant State of Oklahoma.

ORDERED this 4th day of February, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FEB 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EUNICE R. MILLER,)
)
 Plaintiff,)
)
 v.)
)
 BRYN MAWR REHAB and)
 U.S. POST OFFICE,)
)
 Defendants.)

Civil Action No. 97-C-2-E

ENTERED ON DOCKET
DATE FEB 05 1997

ORDER OF DISMISSAL

This matter comes on before the Court, upon the stipulation of all parties and the Court being fully advised on the premises, ORDERS, ADJUDGES and DECREES that all claims asserted herein by plaintiff, Eunice R. Miller, against the United States of America and Bryn Mawr Rehabilitation Hospital are hereby dismissed with prejudice.

Dated this 4th day of February 1997.

JAMES O. ELLISON
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 VIRGIL ALEN BLACKSHEAR aka V.)
 Alen Blackshear; CYNTHIA M.)
 BLACKSHEAR; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

ENTERED FEB 03 1997
DATE _____

FILED
FEB 03 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 96C 312K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of February, 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, VIRGIL ALEN BLACKSHEAR aka V. Alen Blackshear, appears by Raymond S. Allred, his attorney; and the Defendant, CYNTHIA M. BLACKSHEAR, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, VIRGIL ALEN BLACKSHEAR aka V. Alen Blackshear, was served with process a copy of Summons and Complaint on June 17, 1996; that the Defendant, CYNTHIA M. BLACKSHEAR, signed a Waiver of Summons on May 2, 1996.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 8, 1996; that the Defendant, VIRGIL ALEN BLACKSHEAR aka V. Alen Blackshear, filed his Answer on July 31, 1996; and that the Defendant, CYNTHIA M. BLACKSHEAR, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, VIRGIL ALEN BLACKSHEAR, is one and the same person as V. Alen Blackshear, and will hereinafter be referred to as VIRGIL ALEN BLACKSHEAR." The Defendant, VIRGIL ALEN BLACKSHEAR, and Cynthia M. Blackshear, were granted a Divorce on April 25, 1990, Case No. FD-89-0965, in Tulsa County, Oklahoma. On May 28, 1990, the Defendant, CYNTHIA M. BLACKSHEAR granted a Quit-Claim Deed to the Defendant, VIRGIL ALEN BLACKSHEAR, recorded on June 22, 1990, in Book 5260, Page 1951, in the records of Tulsa County, Oklahoma, however this does not release her from the financial liability of the Mortgage Note and Mortgage. The Defendants, "VIRGIL ALEN BLACKSHEAR and CYNTHIA M. BLACKSHEAR, are single unmarried persons.

The Court further finds that on October 19, 1988, the Defendants, VIRGIL ALEN BLACKSHEAR and CYNTHIA M. BLACKSHEAR, executed and delivered to PEOPLES FEDERAL SAVINGS & LOAN ASSOCIATION, their mortgage note in the amount of \$74,113.00, payable in monthly installments, with interest thereon at the rate of 10.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, VIRGIL ALEN BLACKSHEAR and CYNTHIA M. BLACKSHEAR, then husband and wife, executed and delivered to PEOPLES FEDERAL SAVINGS & LOAN

ASSOCIATION, a real estate mortgage dated October 19, 1988, covering the following described property, situated in the State of Oklahoma, Tulsa County:

Lot Eight (8), Block Eight (8), LAKERIDGE FIRST ADDITION, an addition to the City of Owasso, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

This mortgage was recorded on October 24, 1988, in Book 5135, Page 2465, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 19, 1988, PEOPLES FEDERAL SAVINGS & LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION. This Assignment of Mortgage was recorded on November 9, 1988, in Book 5139, Page 241, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1989, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, HIS SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on September 6, 1989, in Book 5205, Page 1118, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1989, the Defendant, VIRGIL ALEN BLACKSHEAR, 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 August 20, 1990, June 18, 1991, July 23, 1991, November 19, 1991, July 23, 1992, and August 7, 1992.

The Court further finds that the Defendants, VIRGIL ALEN BLACKSHEAR and CYNTHIA M. BLACKSHEAR, 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, VIRGIL ALEN BLACKSHEAR and CYNTHIA M. BLACKSHEAR, are indebted to the Plaintiff in the principal sum of \$118,312.23, plus interest at the rate of 10.5 percent per annum from September 21, 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, CYNTHIA M. BLACKSHEAR, is in default, and has no right, title or interest in the subject real property.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, VIRGIL ALEN BLACKSHEAR and CYNTHIA M. BLACKSHEAR, in the principal sum of \$118,312.23, plus interest at the rate of 10.5 percent per annum from September 21, 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, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, VIRGIL ALEN BLACKSHEAR, CYNTHIA M. BLACKSHEAR, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

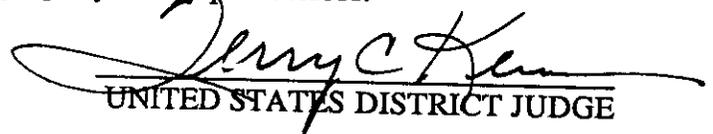
Second:

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

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

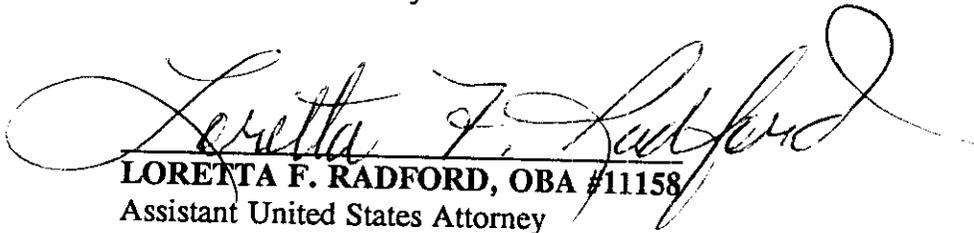
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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:

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United States Attorney



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Virgil Alen Blackshear

Judgment of Foreclosure
Civil Action No. 96-C 312K

LFR:flv

restriction that she should "avoid tasks [with] vibratory action." *Certificate of Treatment, Exhibit D, Plaintiff's Response to Defendants' Motion for Partial Summary Judgment*. The parties dispute whether Plaintiff actually had medical restrictions as to the duties she could perform upon her return to Centrilift. Allegedly pursuant to the Plaintiff's medical restrictions, the Defendants, rather than placing the Plaintiff in her original position as a deburrer, assigned her to duties in the tool shop. On March 3, 1994 Dr. Harrison fully released Plaintiff without restrictions stating that she suffered some minor permanent impairments in both hands, but that she could return to work without specific limitations as long as she "work[ed] smart" to avoid future damage. *See, Dr. Harrison's Report, Exhibit C p.3, Plaintiff's Response to Defendants' Motion For Summary Judgment*. Dr. Harrison's release also recommended that the Plaintiff use anti-vibration gloves to "see if they [would] help." *Id.* Despite this release, Plaintiff was not returned to her position as a deburrer, nor was she provided with anti-vibration gloves. On April 21, 1994, the Defendants informed the Plaintiff that her position would be terminated. Defendants assert that Plaintiff was terminated as a result of a company-wide layoff. Plaintiff merely states that she was terminated, that her reassignment to the tool shop was a means by which the Defendants could circumvent her seniority status, and that no other employees from the first shift parts finishing department were terminated. Plaintiff brought suit against the Defendants alleging violations of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12100 *et seq.* ("ADA") as well as asserting several state law claims. This motion is concerned solely with the validity of Plaintiff's claims under the ADA.

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).

To establish a prima facie claim under the ADA, Plaintiff must show (1) that she is a disabled person within the meaning of the ADA; (2) that she is able, with or without reasonable accommodation, to perform the essential functions of her job; and (3) that the Defendant terminated her because of her disability. *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443 (10th Cir. 1996). In their motion, Defendants assert that Plaintiff has failed to establish the essential elements of a claim under the ADA. Specifically, Defendants claim that the Plaintiff is not disabled within the meaning of the ADA and that, even if she were disabled, she is no longer able to perform the essential elements of her position.

Determining whether or not the Plaintiff is disabled requires a detailed analysis of various definitional provisions within the ADA including the definitions of the terms "disabled", "regarded as", "major life activities", and "substantially limits". These definitions have been outlined in the regulations implementing the ADA. 29 C.F.R. § 1630 *et seq.* The term "disability" has three different definitions under the ADA. A disability can be (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. 29 C.F.R. § 1630.2 (g). Plaintiff asserts that she is disabled under the ADA pursuant to the third definition.

The Tenth Circuit has determined that in order to qualify as disabled under the third prong of the disabled definition, an individual must establish two elements: (1) that her employer regarded her as having a physical or mental impairment; and (2) that the impairment substantially limits one or more of the Plaintiff's major life activities. *Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992). The Plaintiff can establish the first element by showing that (1) she has a physical impairment that does not substantially limit a major life activity, but is *treated* as though the impairment *does* substantially limit a major life activity; (2) she has a physical impairment that substantially limits major life activities *only as a result of* the attitudes of others; or (3) has no impairments, but is *treated* as though she has a substantially limiting impairment. *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1444 (10th Cir. 1996). In other words, "a person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment" regardless of whether the person is in fact impaired. "The focus is on the impairment's effect upon the attitudes of others." *Id.* at 1444 quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995). In addition to meeting the "regarded as having" element, Plaintiff must present evidence that the Defendants perceived her "impairment" as substantially limiting a major life activity. The phrase "major life activities" is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i).

Additionally, "substantially limiting" means

(i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."

29 C.F.R. § 1630.2(j).

Plaintiff has indicated that the Defendants perceived her as being disabled in that they found her incapable of performing in her former position as a deburrer. Specifically, Plaintiff identifies that Defendants perceived Plaintiff to be significantly restricted in her ability to work. The regulations state that with respect to the major life activity of working, the term “substantially limits” means “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” 29 C.F.R. 1630.2(j)(3)(i). Additionally, the regulations specify that “the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” *Id.* There are six factors which may be considered in determining whether or not an individual is “substantially limited” in the ability to perform either a class of jobs or a broad range of jobs in various classes: (1) the nature and severity of the impairment or perceived impairment; (2) the duration or expected duration of the impairment or perceived impairment; (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment or perceived impairment; (4) the geographical area to which the individual has reasonable access; (5) the job from which the individual has been disqualified because of the impairment or perceived impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities within that geographical area, from which the individual is also disqualified because of the impairment or perceived impairment; and/or (6) the job from which the individual has been disqualified because of an impairment or perceived impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities within that geographical area, from which the individual is also disqualified

because of the impairment or perceived impairment. 29 C.F.R. 1630.2(j)(2), (3)(ii); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994). Thus, to establish that she has a disability under the ADA, the Plaintiff must establish that the Defendants regarded her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes. *MacDonald*, 94 F.3d at 1445.

Plaintiff has asserted that the Defendants regarded Plaintiff as having the restricted ability to perform "a whole class of relatively light jobs." The issue thus becomes whether Plaintiff has established sufficient evidence that the Defendants regarded Plaintiff as being substantially limited in her ability to perform a class of jobs or a broad range of jobs in various classes, *MacDonald*, 94 F.3d at 1445, or whether the Defendants merely regarded the Plaintiff as unable to perform her prior job as a deburrer. It is well established that an impairment that an employer perceives as limiting an individual's ability to perform only one job, or that affects only a narrow range of jobs is not a handicap under the ADA. *Bolton*, 36 F.3d at 942; *Welsh*, 977 F.2d at 1417; *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985).

The documentary evidence indicates that the Defendants did in fact believe that Plaintiff had *some* restrictions. For example, Michele McQueen, Defendants' Health and Safety Administrator, states in her deposition that the Plaintiff told her that she could not do "any repetitive work, any vibratory work, any hard pushing or pulling." *McQueen Deposition p. 24, Exhibit B, Plaintiff's Response to Defendants' Motion for Partial Summary Judgment*. Additionally, Ms. McQueen has indicated that she received a release form from Dr. Harrison stating that the Plaintiff should avoid tasks with vibratory action, as well as receiving the Dr. Harrison's report regarding Plaintiff's alleged "full release." Ms. McQueen also testified that she

received a nurse's report regarding the Plaintiff's March 3, 1994 visit to Dr. Harrison which stated that Dr. Harrison "told [Plaintiff] to use common sense in choosing her work duties. He said she would be wise not to choose deburring at this time." *McQueen Deposition p. 36, Defendants' Motion for Partial Summary Judgment*. Thus, the evidence establishes that Defendants clearly thought that the Plaintiff should not perform deburring work during the time relevant to this case. However, it is less clear that the Defendants thought that the Plaintiff's physical limitations impaired her ability to perform a class of jobs or a broad range of jobs in various classes. Considering the six factors enumerated above, it appears that the Plaintiff has not presented sufficient evidence indicating that the Defendants regarded her as being substantially impaired in her ability to perform a class of jobs or a broad range of jobs in various classes. With regard to the first three factors, Defendants' impressions of the nature, severity, duration and impact of the perceived inability, the Plaintiff testified in her deposition that one of Defendants' agents, Mack McGreevy, told her that the Defendants were not going to let her go back over into parts finishing "for a while [sic] until you get your strength built back up on your hands." (emphasis added). Thus the Defendants considered Plaintiff's impairment to be of limited duration and severity - merely a weakness of the hands that prevented her from returning immediately to her deburring job. Plaintiff has presented no evidence that the Defendants thought her impairment was more severe or that it would have a lasting impact on her abilities. In fact, the evidence suggests that the Defendants expected Plaintiff to return to her deburring job at some point in time.

The remaining three factors address issues such as geographical area Plaintiff had access to, the number of similar jobs within that area that the Defendants regarded Plaintiff as unable to perform, and the number of dissimilar jobs in that area that the Defendants perceived Plaintiff

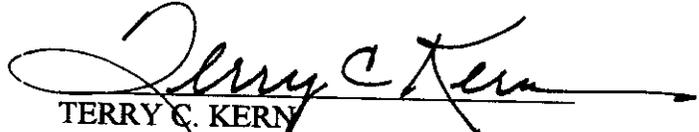
would be disqualified from holding due to her impairment. With regard to these factors, the only evidence the Plaintiff has presented was that Ms. McQueen stated in her deposition that the Plaintiff told Ms. McQueen that she could not do "any repetitive work, any vibratory work, any hard pushing or pulling." The Plaintiff has not presented any evidence that the Defendants believed such restrictions disqualified the Plaintiff from working any number of jobs. Indeed, Defendants perceived that the Plaintiff was capable of performing other positions. In fact, rather than firing Plaintiff upon determining that she should not work in the deburring department, the Defendants placed her in another job within the company where she received the same rate of pay, but did not have to engage in strenuous activity. See, *Plaintiff's Deposition p. 9, Exhibit A, Plaintiff's Response to Defendants' Motion for Partial Summary Judgment*. Plaintiff's situation is similar to that discussed in several cases. For example, in *Elstner v. Southwestern Bell Telephone Co.*, 863 F.2d 881 (5th Cir. 1988), the Court of Appeals affirmed summary judgment for an employer finding that the employer did not regard the employee as having an impairment which substantially limited his ability to work. The employee was a service technician who was injured, and was no longer able to climb telephone poles. *Elstner*, 659 F. Supp. 1328 (S.D. Tex. 1987). The company reassigned him to a lower paying job that did not require him to climb poles, and the employee sued. The district court found that Elstner's injury did not substantially limit his ability to work, but only disqualified him from those positions that required climbing. *Id.* at 1343. The court specifically found that Southwestern's perception that Elstner was able to work in other positions was evidenced by its retention of Elstner in a position that did not require climbing. Likewise in *Gerdes v. Swift-Eckrich*, --- F. Supp. ---, 1996 WL 738523 (N.D. Iowa 1996), the Court found that the employer did not regard the plaintiff's disabilities as substantially limiting his

ability to work where the company specifically considered the other positions within the company that would comply with the plaintiff's work restrictions, and only fired him after finding none available. *See also, Wilmarth v. City of Santa Rosa*, 945 F. Supp. 1271, 1277 (N.D. Cal. 1996) (holding that a senior clerk typist with carpal tunnel syndrome was not perceived as being substantially limited in her ability to work a wide range of jobs even though her employer thought she was unable to perform her previous job. The employer put the plaintiff on light duty and found her another position that required less typing); *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995) (affirming summary judgment for the defendant and finding no issue of fact as to whether the defendant regarded plaintiff as having a disability substantially limiting his ability to work where the defendant based its decision to terminate the plaintiff on physician's restrictions rather than on speculation, stereotype or myth). *Compare, Muller v. The Hotsy Corp.*, 917 F. Supp. 1389, 1411 (N.D. Iowa 1996) (finding that a statement by the employer that he doubted the plaintiff would ever recover from such a severe injury presented a material issue of fact precluding summary judgment as to whether the employer perceived the plaintiff as having an impairment that substantially impaired his ability to work).

Based on the record presented, the Court finds that the Plaintiff has failed to establish that she is disabled within the definition propounded in the ADA. At most, the Defendants perceived that Plaintiff was only restricted from performing jobs which involved repetitive or vibratory work, or which required hard pushing or pulling. Plaintiff has presented no evidence to rebut Defendants' evidence that it regarded Plaintiff's injury and subsequent reassignment as temporary, and that they felt she was capable of performing other positions within the company "until [she] g[ot] the strength built back up on [her] hands."

For the foregoing reasons, Defendants' Motion for Partial Summary Judgment is GRANTED.

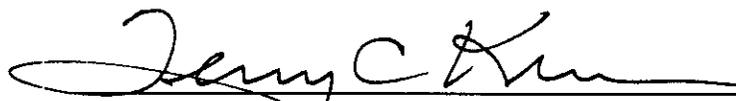
IT IS SO ORDERED THIS 31 DAY OF JANUARY, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

Habeas relief must be brought against the one in whose custody the prisoner is being held. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973). In addition, by reviewing the claims in a petition for a writ of habeas corpus, this court can better monitor compliance with the rules of exhaustion and guard against abuse of the writ.

Plaintiff's complaint is therefore dismissed. The Clerk of the Court shall send Plaintiff a petition for a writ of habeas corpus form, motion for leave to proceed in forma pauperis form, and information and instruction sheets. Plaintiff should file a separate petition for a writ of habeas corpus if he wishes to pursue the claims raised in the instant complaint.

SO ORDERED THIS 3rd day of February, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

BRANDON OVERSEAS SUPPLY, INC.,)
)
Plaintiff,)
)
vs.)
)
PT. RADIANT UTAMA,)
)
Defendant.)

No. 96-CV-916-K

ENTERED ON DOCKET

DATE FEB 05 1997

FILED

FEB 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court are Defendant's Motion to Dismiss Under Federal Rule 12 (docket # 8) and Motion to Dismiss on Ground of Forum non Conveniens or in the Alternative Motion to Transfer Under 28 U.S.C. § 1404 (docket # 6).

Brandon Overseas Supply, Inc. ("Brandon"), is a Texas corporation with its current principal place of business in Tulsa, Oklahoma. Brandon is engaged in the business of supplying drilling rig packages, equipment, supplies, labor and repairs within the worldwide oil industry. Pt. Radiant Utama ("Utama") is an Indonesian corporation with its principal places of business in Jakarta, Indonesia. Utama is engaged in the business of supplying drilling equipment and services for oil and gas exploration in Indonesia.

Although it is somewhat difficult to discern from the Complaint, it appears that the parties established a business relationship in approximately 1993. At the time, Brandon was located in Houston, Texas, and its relationship with Utama was initially established there. According to the allegations in the Complaint, in 1993 Brandon entered into a Joint Venture Agreement with Utama Jasa Persada ("Persada"), a wholly-owned corporate subsidiary of Utama. Under the terms of that agreement, which was negotiated, signed, and to be performed in either Texas or

Indonesia, Brandon was to assemble and ship to Indonesia various parts and supplies for sale or rental to third parties. Utama alleges that some of these parts and supplies were then transferred from Persada to Utama in 1993-94. In Count 3 of the Complaint, Brandon accuses Utama of converting these parts and supplies to its own use without paying Brandon the sale or rental value as agreed upon in the Joint Venture Agreement. Count 4 alleges fraudulent inducement by Utama in relation to the formation of the agreement between Persada and Brandon.

It is unclear from the record whether the parties were involved in a continuing business relationship between 1993 and 1996; however, it appears that in April of 1996, Brandon and Utama began negotiations regarding the purchase of drilling equipment. These negotiations form the basis of the breaches of contract alleged in Counts 1 and 2 of the Complaint.

Sometime in early 1996, Brandon transferred its operations to Tulsa, Oklahoma, but Brandon continued to operate from Houston to some extent through the spring of 1996 (*See Facsimile dated May 8, 1996 - Exhibit E, Brief in Support of Defendant's Motion to Dismiss Under Federal Rule 12*). In April of 1996, Utama successfully negotiated a contract with CalTex which required Utama to furnish specific drilling equipment for an oil exploration venture. Although the parties dispute why and how the relationship was initiated, it is clear that in April 1996, negotiations began between Utama and Brandon regarding supplying some of the equipment needed for the CalTex contract. In the Complaint, Brandon asserts that the parties entered into two agreements whereby Brandon agreed to locate, bid, and purchase drilling equipment in the United States for Utama. Brandon asserts that it proceeded to locate and bid on some equipment, and even purchased other equipment, allegedly in reliance on the agreement between the parties. Utama contradicts these assertions and claims that, upon Utama's gaining of

the CalTex contract, Brandon sought out Utama seeking to serve as a supplier. Utama claims that Brandon made several offers to Utama, but that each offer was either rejected or terminated through a counter-offer. By either account, a series of negotiations took place between the parties and is evidenced by a series of facsimile transmissions. (*See Exhibits B-M, Defendant's Brief in Support of Motion to Dismiss Under Federal Rule 12*). Many of these transmissions originated from Tulsa and were sent to Utama in Indonesia; however, a few originated from Indonesia and were sent to Brandon both in Houston and in Tulsa. The content of the transmissions indicates that Bill Schluneger, Brandon's principal, traveled extensively, and communications were sent to and from wherever Mr. Schlunegar happened to be located at a given time.

It is Utama's position that no agreement was ever reached between the parties, and the negotiations were terminated on June 17, 1996 when Utama decided to utilize a supplier other than Brandon (*See June 17, 1996 facsimile - Exhibit J, Defendant's Brief in Support of Motion to Dismiss Under Federal Rule 12*); however Brandon claims that it had reached an agreement with Utama, (*See June 17, 1996 facsimile - Exhibit K, Defendant's Brief in Support of Motion to Dismiss Under Federal Rule 12*) and that those agreements were breached.

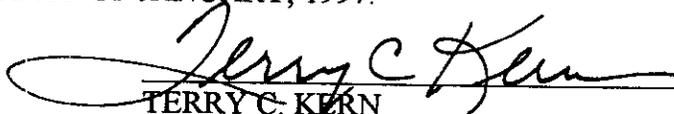
Discussion

In its motion to dismiss, Utama advances several grounds in support including that Brandon lacks the capacity to sue, that the Court cannot assert personal jurisdiction over Utama, and that service was improper. Alternatively, Utama asserts that if the Court finds that it has personal jurisdiction over Utama, venue is improper, and the case should be dismissed or transferred to the Southern District of Texas.

Brandon's Capacity to Sue

In its motion to dismiss, Utama asserts that Brandon cannot bring a lawsuit because its corporate charter was revoked by the Texas Secretary of State. Additionally, Utama claims that Brandon has not been approved to do business within the State of Oklahoma as required by Okla. Stat. tit. 18 § 1130, and therefore cannot maintain a lawsuit within Oklahoma pursuant to Okla. Stat. tit. 18 § 1137. In response, Brandon indicates that its corporate charter has been reinstated in Texas. Brandon admits that it has not followed the proper procedures under Oklahoma law to qualify to do business in Oklahoma, but that its dealings with Utama are purely interstate in nature, therefore exempting Brandon from the statutory prohibition against bringing a lawsuit in Oklahoma. While it is true that a foreign corporation is exempt from § 1130 requirements when its business operations within the state are wholly interstate in character, this is not the case with Brandon. The documentary evidence shows that Brandon is engaged in business which is *intrastate* in nature as well as interstate. (*See, Exhibit O, Defendant's Motion to Dismiss Under Federal Rule 12* ["We are also building a large maintenance bay for United Airlines here at our facility in Tulsa; *as well as packaging new drilling pumps for Parker Drilling and the Omega Pump Company based in Tulsa.*][emphasis added]). It thus appears that Brandon is prohibited by statute from bringing suit within the State of Oklahoma. For this reason, Plaintiff's claim must be dismissed without prejudice pursuant to *Fed. R. C.V. Pro. 12(b)(6)*. Because this issue is dispositive of Defendant's motion, the remainder of Defendant's asserted grounds for dismissal will not be addressed at this time.

IT IS SO ORDERED THIS 3/4th DAY OF JANUARY, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 04 1997

Paul Lombardi, Clerk
U.S. DISTRICT COURT
OF OKLAHOMA

ROSENHECK & CO., INC., an)
Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA ex rel)
INTERNAL REVENUE SERVICE and)
WALTER E. KOSTICH JR.,)
)
Defendants.)

Case No. 97-CV-28-B

FEB 05 1997

ORDER

Before the Court for consideration is Rosenheck & Co., Inc.'s ("Plaintiff") request for an Order directing Plaintiff to pay all monies in its possession which are now or hereafter due to Walter E. Kostich Jr. and/or the Internal Revenue Service into the registry of this Court. See Complaint, p.3. The Court notes Defendant Internal Revenue Service has not filed an Answer as of this date. Nevertheless, the Court is of the opinion such a request is well-taken and it is hereby so **ORDERED** Plaintiff pay all monies in its possession which are now or hereafter due to Walter E. Kostich Jr. and/or the Internal Revenue Service into the registry of this Court. The Court Clerk is hereby **ORDERED** to deposit any and all funds submitted to the Court by Plaintiff, which relate to the instant matter, into an interest-bearing account.

Pursuant to Fed.R.Civ.P. 67, **IT IS ORDERED** that counsel presenting this order serve a copy thereof on the Court Clerk or

the Chief Deputy Court Clerk personally. Absent this service the Clerk is hereby relieved of any personal liability relative to compliance with this order.

IT IS SO ORDERED this 4th day of February, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 04 1997

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

STANLEY GERALD WESTERN,)
)
 Plaintiff,)
)
 vs.)
)
 WAL-MART STORES, INC.,)
)
 Defendant.)

Case No. 96-CV-431-B

ENTERED ON DOCKET

FEB 05 1997

JUDGMENT

In accordance with the jury verdict rendered on February 4, 1997, Judgment is hereby entered in favor of Defendant, Wal-Mart Stores, Inc., a foreign corporation, and against the Plaintiff, Stanley Gerald Western.

Costs are assessed against Plaintiff if timely applied for under Local Rule 54.1. The parties are to pay their own respective attorneys fees.

DATED this 4th day of February, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

4
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB - 3 1997

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

MEI CHU SORY,

Plaintiff,

v.

DOUBLETREE HOTEL
a corporation in the state of Delaware,
et al.,

Defendants.

NO. 95-CV-627-H ✓

ENTERED ON DOCKET

DATE FEB 5 1997

ADMINISTRATIVE CLOSING ORDER

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

If, by April 7, 1997, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 3rd day of February, 1997.


Sven Erik Holmes
United States District Judge

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

FILED

TRIDON COMPOSITES, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
OSPREY, INC., d/b/a)
TALON, INC., and DONALD MOOK,)
)
Defendants.)

FEB 1 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-1157-H /

RECEIVED BY CLERK
DATE FEB 4 1997

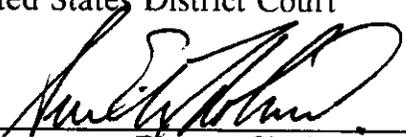
JUDGMENT

This action came on for hearing before the Court, Honorable Sven Erik Holmes, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Tridon Composites, Inc., recover of the Defendant, Donald Mook, the sum of \$49,642.64 with interest thereon at the rate of 5.61% as provided by law.

DATED at Tulsa, Oklahoma, this 30TH day of January, 1997.

~~PHIL LOMBARDI, Clerk~~
United States District Court

By 
Deputy Clerk

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

FILED

1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JAMES A. CHRISTOPHER,
Plaintiff,

vs.

UNIT RIG, INC., KENDAVIS INDUSTRIES
INTERNATIONAL, INC., GREAT WESTERN
DRILLING COMPANY, KENDAVIS HOLDING
COMPANY, AND TEREX CORPORATION,
Defendants.

Civil Action
No. 96CV 905-H

ENTERED ON DOCKET
DATE FEB 4 1997

**Order Granting Plaintiff's Motion To Dismiss
Defendant Great Western Without Prejudice**

IT IS HEREBY ORDERED that the Motion by Plaintiff James A. Christopher ("Christopher"), by and through his undersigned attorney, to dismiss Defendant Great Western without prejudice from this action is GRANTED.



JUDGE SVEN HOLMES

13

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

MYRNA MCKINNEY,)
 DAVID R. MAGNESS,)
 TEDDY OVERTON,)
 an individuals, plaintiffs,)
 v.)
 AMOCO PRODUCTION COMPANY)
 AS EMPLOYER;)
 AMOCO CORPORATION AS PLAN)
 SPONSOR, & PLAN)
 ADMINISTRATOR FOR THE)
 EMPLOYEE RETIREMENT PLAN OF)
 AMOCO CORPORATION AND)
 PARTICIPATING COMPANIES; &)
 THE EMPLOYEE RETIREMENT)
 PLAN OF AMOCO CORPORATION)
 AND PARTICIPATING)
 COMPANIES;)
 defendants.)

Civil No. 96-CV-1015-H

ENTERED ON DOCKET
 FEB 4 1997

ORDER GRANTING
 MOTION TO DISMISS
 WITH PREJUDICE.

FILED

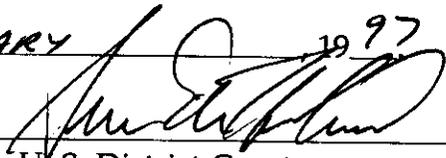
FEB - 3 1997

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

ORDER DISMISSING CLAIMS WITH PREJUDICE.

Plaintiffs, MYRNA MCKINNEY, DAVID MAGNESS, TEDDY OVERTON, made a motion to dismiss their complaint and any and all claims which they have stated against the above named defendants, AMOCO CORPORATION, et al.. The Court having being fully advised, finds good cause, and hereby grants plaintiffs' motion to dismiss their complaint and any and all claims which they have stated against the above named defendants, AMOCO CORPORATION, et al.. Each and every party to this action is to bear his, her or its own costs.

Dated this 30TH day of JANUARY 1997



 Judge, U. S. District Court.

at
2/4/97

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 4 1997

DANIEL STORTS and PAM STORTS,)
Individually and as Next)
Friends of JONATHAN SHANE)
STORTS,)

Plaintiffs,)

) No. 95-C-1007H

v.)

) JURY

GRACO CHILDREN'S PRODUCTS, INC.)
and SERVICE MERCHANDISE)
COMPANY,)

Defendants.)

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

ENTERED ON DOCKET
FEB 4 1997
DATE

STIPULATED ORDER OF DISMISSAL

This matter came before the Court upon the announcement by the parties, Plaintiffs DANIEL and PAM STORTS, individually and as next friends of JONATHAN SHANE STORTS and Defendants GRACO CHILDREN'S PRODUCTS INC. and SERVICE MERCHANDISE COMPANY, INC., by and through their respective counsel, that all matters and things in controversy between them have been compromised and settled.

Accordingly, for good cause shown, it is hereby ORDERED and DECREED:

(1) The Complaint of DANIEL and PAM STORTS, individually and as next friends of JONATHAN SHANE STORTS against GRACO CHILDREN'S PRODUCTS INC. and SERVICE MERCHANDISE COMPANY, INC. is hereby dismissed with prejudice.

(2) Court costs up to \$5,000.00 incident to the filing of this case, are taxed to Defendants and any court costs in excess of this amount are taxed to Plaintiffs, for which

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execution may issue if necessary. The parties shall be responsible for their own remaining costs, expenses, and attorneys' fees respectively.

ENTERED this 30TH day of ~~November, 1996.~~ ^{JANUARY, 1997.}

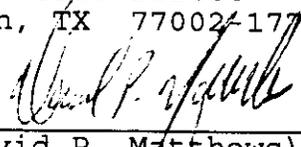

UNITED STATES DISTRICT COURT JUDGE

APPROVED FOR ENTRY:

STOOPS, SMITH & CLANCY, P.C.
2250 East 73 Street, Suite 400
Tulsa, OK 74136-6833

By 
(Fred E. Stoops)

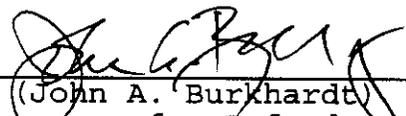
ABRAHAM, WATKINS, NICHOLS,
BALLARD & FRIEND
800 Commerce Street
Houston, TX 77002-1776

By 
(David P. Matthews)
Attorney for Plaintiffs

STOPHEL & STOPHEL, P.C.
500 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402-2571
(423) 756-2333

By 
(Richard W. Bethea, Jr.) ^{with permission} _{MC}

BOONE, SMITH, DAVIS, HURST & DICKMAN
500 ONEOK Plaza
100 West 5th Street
Tulsa, OK 74103
(918) 587-0000

By 
(John A. Burkhardt)
Attorneys for Defendants

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

FILED

FEB 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS WAITE and MARGARET WAITE,

Plaintiffs,

vs.

NEOAX, INC., a Delaware corporation,

Defendant.

Case No. 95 C 263H /

RECEIVED

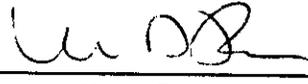
FEB 3 1997

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

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

Dated this 3 day of ^{February}~~January~~, 1997.

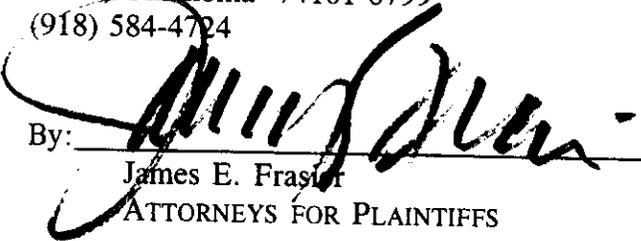
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
Oneok Plaza
100 West 5th Street, Suite 400
Tulsa, Oklahoma 74103-4287
(918) 582-1173

By: 

William D. Perrine
ATTORNEYS FOR DEFENDANT

ct

FRASIER & FRASIER
P. O. Box 799
Tulsa, Oklahoma 74101-0799
(918) 584-4724

By: 

James E. Frasier
ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEPHEN ORICK HEMBREE aka
Stephen O. Hembree; MAVIS VIRGINIA
HEMBREE aka Mavis V. Hembree;
STATE OF OKLAHOMA, *ex rel.*
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

FEB 3 1997

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

ENTERED ON DOCKET

DATE FEB 4 1997

Civil Case No. 96CV 590H

ORDER

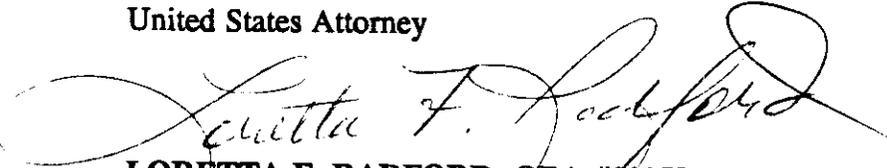
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED**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

Dated this 30TH day of JANUARY, 1997.


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 and contact information.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

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

FILED

FEB 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLLAR RENT A CAR SYSTEMS, INC.,)
an Oklahoma corporation,)

Plaintiff,)

v.)

Case No. 96-C-0190E

NOB HILL TRANSPORTATION, INC., a)
California corporation; STEPHEN F.)

MILLER, an individual; and KATHLEEN)

M. MILLER, an individual,)

Defendants.)

ENTERED IN DOCKET

DATE FEB 04 1997

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Dollar Rent A Car Systems, Inc, and Defendants, Nob Hill Transportation, Inc.,
Stephen F. Miller, and Kathleen M. Miller, jointly stipulate that all claims herein should be
dismissed with prejudice with each party to bear its own costs and attorneys' fees.

DATED this 3rd day of February, 1997.

Respectfully submitted,

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

By: Phil Lombardi
Claire V. Eagan, OBA #554
Kelly S. Kibbie, OBA #16333
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR PLAINTIFF

10

0/5

- AND -

BAKER & HOSTER

By:



J. David Jorgenson, OBA #4839
800 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 592-5555

ATTORNEY FOR DEFENDANTS

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

FILED

JAN 31 1997

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

LOU E. SEYMORE,
SSN: 446-58-2255,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-C-178-M

ENTERED ON DOCKET

DATE

2/3/97

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 31ST day of JAN., 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

LOU E. SEYMORE,
446-58-2255, Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,
Defendant,

Case No. 96-CV-178-M

JAN 31 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
SA

ENTERED ON DOCKET

DATE 2/3/97

ORDER

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

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

¹ Plaintiff's October 18, 1993 application for disability benefits was denied January 18, 1994 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held February 9, 1995. By decision dated March 9, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 12, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its discretion for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born October 13, 1956 and was 39 years old at the time of the hearing. She has a bachelor's degree. She has previously worked as an electrician, office machine servicer, and bonded structure repairer. She claims to be unable to work as a result of back pain and mental impairments. The ALJ determined that although Plaintiff is unable to perform her past relevant work, she is functionally capable of performing work activity that does not require more than minimal contact with the public or co-workers and which can be performed in a low-stress environment. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to consider the RFC assessment of Janice C. Boon, Ph.D., a consultant for the Oklahoma Disability Determination Unit, in accordance with SSR 96-6p; (2) failed to consider the GAF rating of 45 provided by Plaintiff's therapists; and (3) failed to establish Plaintiff's ability to perform work on a sustained basis. The record of the proceedings has been

meticulously reviewed by the Court. The Court finds that the denial decision is supported by substantial evidence.

Social Security regulation, 20 C.F.R. § 404.1527(f)(2), states that the ALJ will consider findings made by State agency medical and psychological consultants at the initial and reconsideration steps in the administrative review process. That regulation has been clarified in Social Security Ruling 96-6p (61 FR 34466), dated July 2, 1996. According to SSR 96-6p, ALJs are required to consider the findings of State agency consultants as opinions of nonexamining physicians and psychologists. Although ALJs are not bound by these opinions, they may not ignore them and must explain the weight given to the opinions in their decisions. Plaintiff maintains the ALJ erred in failing to discuss the RFC assessment of Dr. Boon, a psychologist who evaluated Plaintiff's medical record upon reconsideration of Plaintiff's application for benefits.

Dr. Boon completed a Psychiatric Review Technique form [R. 129-137] in which she assessed the degree of functional limitation resulting from Plaintiff's mental impairments. Dr. Boon found Plaintiff had a "slight" degree of restriction of activities of daily living; "moderate" difficulties in maintaining social functioning; "often" had deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner; and "once or twice" had episodes of deterioration or decompensation in work or work-like setting. Dr. Boon also noted that none of Plaintiff's functional limitations were manifested at the degree of limitation to satisfy the Listings. [R. 136]. Dr. Boon also completed a "Functional Capacity Assessment"

which is a narrative explanation of Dr. Boon's assessment of Plaintiff's mental functional abilities. [R. 127]. According to Dr. Boon:

Claimant is able to understand, remember and carry out simple one-step tasks and some, but not all, more detailed tasks under routine supervision. Her attention & concentration are diminished, but are adequate to complete simple tasks. She cannot relate effectively to the general public. She may have some difficulty relating to supervisors & coworkers, but can work in a setting requiring minimal cooperation with others.

[R. 127]. Plaintiff was denied benefits upon reconsideration based, in part, upon Dr. Boon's opinion. [R. 137].

While it is true the ALJ did not discuss Dr. Boon's opinion, the Court finds that the ALJ adopted Dr. Boon's opinion about Plaintiff's functional capacity. The ALJ found that the record does not reflect functional restrictions that would preclude work activity which does not require more than minimal contact with the public or co-workers and which can be performed in a low-stress environment. This finding encompasses the functional restrictions Dr. Boon found to exist and is supported by substantial evidence in the record. Therefore, SSR 96-6p does not provide a basis for reversal of the ALJ's decision.

Plaintiff also asserts that the ALJ failed to consider the rating of 45 on the Global Assessment of Functioning Scale ("GAF") assigned to Plaintiff by her therapists. A GAF code falling between 41 and 50 indicates:

Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning

(e.g., no friends, unable to keep a job). [capitalization in original].

See The American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, p.11 (3rd Edition, revised, 1987) ("DSM-III-R"). [R. 11]. According to Plaintiff, the existence of this rating in the record contradicts the ALJ's statement that: "none of the claimant's treating physicians have indicated that she cannot perform work activity." [R. 22].

Nothing in the definition of the GAF ratings provided in the DSM-III-R indicates that one with a GAF of 45 is unable to work. A GAF of 45 may also indicate a serious impairment in social or school functioning. According to the narrative information provided by Plaintiff's therapists on the same page of the record containing the GAF of 45, one of Plaintiff's liabilities is her lack of "effective interpersonal skills." [R. 224]. Being unemployed was also listed as a liability, but stable employment history, vocational training, strong motivation for treatment, and being receptive to change/new ideas were listed among her assets. *Id.* A mental status report dated February 7, 1995 was completed by the same therapist who provided the GAF rating of 45. There, Plaintiff's GAF was rated at 50 and the following was reported about her ability to perform job-related tasks:

Client appears to be capable of carrying out simple instructions. Complex instructions may take a longer period of time, given the degree of the client's depressive symptoms. I am unable to comment on client's response to work pressure, supervision or ability to get along with co-workers, although she has reported difficulties with relationships, resulting in few or no friends.

[R. 352]. Given the narrative information in the record, the Court does not view the GAF rating as setting forth an opinion that Plaintiff is unable to perform work activity or keep a job. Consequently, the ALJ was not required to set forth specific reasons for rejecting the GAF as Plaintiff suggests.

Plaintiff's assertion that the evidence failed to establish that Plaintiff was able to perform work on a sustained basis is without merit. At the time of her hearing in February of 1995, Plaintiff had been attending Tulsa Junior College since August of 1994, taking 12 credit hours per semester in a course of study to become a legal assistant. She testified that she attended school periodically before that. [R. 75, 83-84]. She received two "C"s, a "B" and an "A" in her course work in the fall 1994 semester. [R. 84]. While attendance at school does not *necessarily* establish that a person is able to engage in substantial gainful activity, such evidence may be considered along with medical testimony in determining the right of a claimant to receive disability under the Social Security Act. *Markham v. Califano*, 601 F.2d 533, 534 (10th Cir. 1979); *Gay v. Sullivan*, 986 F.2d 1336, 1339 (10th Cir. 1993).

Here the medical evidence establishes Plaintiff suffers from an adjustment disorder and depression. Plaintiff's medical care providers are of the opinion that she is capable of carrying out simple instructions and that complex instructions may take a longer period of time. [R. 352]. In addition to the medical evidence, the ALJ noted that, throughout the alleged period of disability, Plaintiff worked sporadically doing electrical work and carried a beeper so she could be contacted about jobs. She also drew unemployment benefits from February 1993 to December 1993, which required

her to attest that she was ready, willing and able to return to work. [R. 78-79]. The medical evidence was considered together with Plaintiff's activities in determining that she did not meet the definition of disabled under the Social Security Act. In accordance with *Markham*, Plaintiff's full-time attendance at school and grades were considered as part of the whole picture.

The Court finds that the decision of the Commissioner denying benefits is supported by substantial evidence. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 31st day of January, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

JAN 31 1997

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

SHAWN D. YOUNGER,

Plaintiff,

vs.

LARRY FIELDS,

Defendant.

Case No.96-CV-818-B

ENTERED ON DOCKET
FEB 03 1997

ORDER

On October 30, 1996, the Court Clerk returned the U.S. Marshal forms to Plaintiff as they lacked a signature.

On December 13, 1996, the Court entered an order noting that, as of that date, Plaintiff had not returned the signed Marshal forms. The Court notified Plaintiff that the action would be dismissed for lack of prosecution unless he returned the signed Marshal forms within twenty (20) days from the date of the order.

Over 30 days has passed since the Court's December 13, 1996 order and Plaintiff has not returned the signed Marshal forms. Accordingly, this action is dismissed for lack of prosecution.

IT IS SO ORDERED THIS 31st day of Jan., 1997.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EUNICE R. MILLER,

Plaintiff,

v.

BRYN MAWR REHAB and
U.S. POST OFFICE,

Defendants.

Civil Action No. 97-C-2-E

ENTERED ON CLERK

FEB 03 1997

STIPULATION OF DISMISSAL

The *pro se* plaintiff, Eunice R. Miller, and the defendants, United States Postal Service, by and through Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, and Phil Pinnell, Assistant United States Attorney, and Bryn Mawr Rehabilitation Hospital, by and through its attorney, Jim Johnston, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

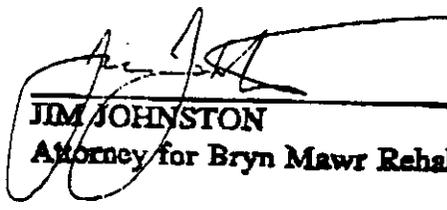
Dated this 31st day of January 1997.

Eunice R. Miller
EUNICE R. MILLER

Phil Pinnell
PHIL PINNELL, OBA #7169

(4)

025



JIM JOHNSTON
Attorney for Bryn Mawr Rehabilitation Hospital

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

FILED

JAN 30 1997

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

KENNETH STEVE PLACE,)
)
Plaintiff,)
)
vs.)
)
RONALD B. STOCKWELL,)
)
Defendant.)

Case No. 94-C-771-H ✓

ENTERED ON DOCKET
DATE FEB 3 1997

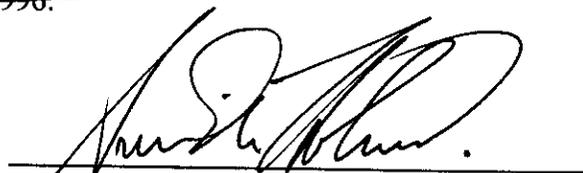
ORDER OF DISMISSAL

THIS MATTER, having come before the Court upon the foregoing Stipulation, it is thereupon:

ORDERED AND ADJUDGED as follows:

1. The Stipulation of the parties as set forth above is hereby approved.
2. All claims which the plaintiff has asserted in the captioned proceeding are dismissed with prejudice
3. The parties shall bear their own costs and attorney's fees incurred in connection with this action.

DONE AND ORDERED in Chambers, United States District Court for the Northern District of Oklahoma this 30TH day of ~~November, 1996.~~ JANUARY, 1997.



Hon. Sven Erik Holmes
United States District Judge

207

2-3-97

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

DEAN WITTER REYNOLDS, INC.

Plaintiff,

vs.

WILBERT H. MAXIMORE, Individually and as
Trustee of the ELZABAD TRUST, an express trust;
the ELZABAD TRUST, an express trust; and the
UNITED STATES OF AMERICA,

Defendants,

UNITED STATES OF AMERICA,

Cross Claim-Plaintiff,

WILBERT H. MAXIMORE, individually and as
Trustee of the ELZABAD TRUST, the ELZABAD
TRUST, and MIDLAND MORTGAGE COMPANY

Defendants on Cross Claim.

Civil No.: 96-CV-847-K ✓

FILED

JAN 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of January 31, 1997 that the defendants, Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, and the Elzabad Trust against whom judgment for affirmative relief is sought in this action, have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants. Dated at Tulsa, Oklahoma on February 3, 1997.

PHIL LOMBARDI,
Clerk, U.S. District Court

S. Schwabke

S. Schwabke, Deputy Clerk

572

ENTERED ON DOCKET

DATE 2-3-97

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

DEAN WITTER REYNOLDS, INC.,)
)
Plaintiff,)

v.)

Civil No. 96-CV-847 K ✓

WILBERT H. MAXIMORE, Individually)
and as Trustee of the ELZABAD TRUST,)
an express trust; the ELZABAD TRUST,)
an express trust; and the UNITED STATES)
OF AMERICA,)

Defendants,)

UNITED STATES OF AMERICA,)

Cross Claim-)
Plaintiff,)

v.)

WILBERT H. MAXIMORE,)
Individually and as Trustee of the)
ELZABAD TRUST,)
the ELZABAD TRUST, and)
MIDLAND MORTGAGE COMPANY,)

Defendants)
On Cross Claim.)

FILED

JAN 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF PRIORITY BETWEEN
THE UNITED STATES AND MIDLAND MORTGAGE CO.

The United States of America and Midland Mortgage Co., through undersigned counsel,
hereby stipulate and agree as follows:

ma
c/m/cf
cf

1. That Midland Mortgage Co. as the loan servicer is entitled to collect payments on a Promissory Note secured by a real estate Mortgage filed of record in the Office of the Tulsa County Clerk at Book 4833, Page 2212 on December 14, 1984. ("Mortgage").

2. The Mortgage described in paragraph 1, above, is a first lien on the real property described as follows:

Lot Twenty (20), Block Three (3), Kendalwood IV, an Addition to the City of Glenpool, Tulsa County, Oklahoma, according to the recorded plat thereof, and also referred to or described as 1097 East 137th Place, Glenpool, Oklahoma 74033.

3. The United States, in the present action, seeks a determination that the above described real property is subject to its federal tax lien for the unpaid tax liability of Wilbert H. Maximore.

4. The United States, in the present action, seeks to foreclose its lien on the above described real property. Upon the sale of the property, the United States seeks the distribution of the proceeds of sale in partial satisfaction of the unpaid federal tax liabilities of Wilbert H. Maximore.

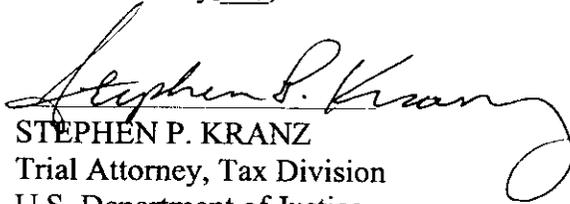
5. The parties hereto agree that the Mortgage serviced by Midland Mortgage Co. is a first lien on the above described real property and that the proceeds of any sale occurring as a result of this action should be applied first, in payment of the expenses of sale, second, in satisfaction of the Promissory Note and Mortgage serviced by Midland Mortgage Co., and third, in partial satisfaction of the unpaid federal tax liabilities of Wilbert H. Maximore.

6. The parties hereto agree that the only issue raised by the complaint against Midland Mortgage Co. was the lien priority of the Mortgage in competition with the lien of the United States. That issue having been resolved by this stipulation, the parties hereto agree that

Midland Mortgage Co. need not have any further role in the litigation, that Midland Mortgage Co. may be dismissed without prejudice, and that upon sale of the property, the United States will notify Midland Mortgage Co., or its counsel, so that a determination can be made as to the value of its claim against the proceeds of such a sale.

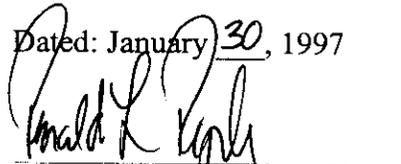
Approved for filing:

Dated: January 29, 1997



STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-0079

Dated: January 30, 1997



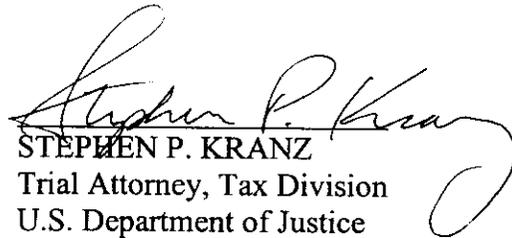
Ronald L. Ripley, Esquire
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
Telephone (405) 239-6781

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing Stipulation of Priority Between the United States and Midland Mortgage Co. was caused to be served upon the following this 29th day of January, 1997, by depositing a true and correct copy thereof in the United States mail, postage prepaid, addressed as follows:

Wilbert H. Maximore, et al.
1097 East 137th Place
Glenpool, Oklahoma 74033

Geister & Whaley
120 North Robinson, Suite 2520
Oklahoma City, Oklahoma 73102


STEPHEN P. KRANZ
Trial Attorney, Tax Division
U.S. Department of Justice

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

F I L E D

JENNY M. MILLER, individually,

Complainant,

vs.

GLASS-BRADFIELD ESTATES, d/b/a,
PANHANDLE PRODUCING COMPANY,
et al.,

Defendants.

ENTERED ON DOCKET

JAN 31 1997

DATE ~~FEB - 3 1997~~

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-455-BU

STIPULATION OF DISMISSAL, WITH PREJUDICE

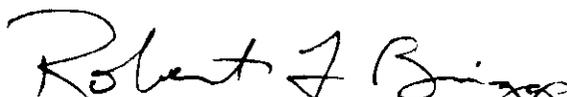
The parties hereto, by and through their attorneys of record, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), hereby stipulate that this action should be, and the same is hereby dismissed, with prejudice. Each party is to bear his, her, or its own attorney's fees and costs.

NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

BRIGGS and GATCHELL



Thomas D. Robertson, OBA No. 7665
Old City Hall Building, Suite 400
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182



Robert L. Briggs, OBA No. 10215
507 S. Main Street, Suite 605
Tulsa, Oklahoma 74103
(918) 599-7780

ATTORNEYS FOR DEFENDANTS

ATTORNEYS FOR PLAINTIFF