

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RICHARD L. FULLER aka Richard Lee)
Fuller; DELORIES JUNE FULLER;)
COUNTY TREASURER, Mayes County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Mayes County,)
Oklahoma; FRED TIMM; UNKNOWN)
SPOUSE OF FRED TIMM, MILDRED)
TIMM,)
)
Defendants.)

ENTERED ON DOCKET
APR 10 1997

Civil Case No. 96CV 511B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of Apr,

1997. 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, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, appear by Charles A. Ramsey, Assistant District Attorney, Mayes County, Oklahoma; and the Defendants, Richard L. Fuller, Delories June Fuller, Fred Timm and Unknown Spouse of Fred Timm who is one and the same person as Mildred Timm, appear not, but make default.

The Court being fully advised and having examined the court file finds that Defendant, County Treasurer, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on June 7, 1996; and that Defendant, Board of County Commissioners, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on June 7,

15

1996; that the Defendants, **Fred Timm and Unknown Spouse of Fred Timm who is the same person as Mildred Timm**, were served with process on November 4, 1996 a copy of the Summons and Complaint.

The Court further finds that the Defendants, **Richard L. Fuller aka Richard Lee Fuller and Delories June Fuller**, were served by publishing notice of this action in the Pryor Daily Times, a newspaper of general circulation in Mayes County, Oklahoma, once a week for six (6) consecutive weeks beginning January 19, 1997, and continuing through February 23, 1997, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Richard L. Fuller aka Richard Lee Fuller and Delories June Fuller**, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Richard L. Fuller aka Richard Lee Fuller and Delories June Fuller**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer

jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Mayes County, Oklahoma, and Board of County Commissioners**, Mayes County, Oklahoma, filed their Answer on June 18, 1996; and that the Defendants, **Richard L. Fuller aka Richard Lee Fuller, Delories June Fuller, Fred Timm and Unknown Spouse of Fred Timm who is one and the same person as Mildred Timm**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, **Richard L. Fuller**, is one and the same person as **Richard Lee Fuller**, and will hereinafter be referred to as **Richard L. Fuller.** The Defendant, **Richard L. Fuller and Jean Renee Fuller**, were granted a Divorce on February 17, 1989, in Mayes County District Court in Case No. JFD-88-88. The Defendants, **Richard L. Fuller and Delories June Fuller**, were granted a Divorce in Mayes County District Court in Case No. JFD 92-124. The Defendant, **Unknown Spouse of Fred Timm**, is one and the same person as **Mildred Timm**, and will hereinafter be referred to as **Mildred Timm**. The Defendants, **Fred Timm and Mildred Timm**, are husband and wife.

The court further finds that on June 3, 1993, **Richard L. Fuller** filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-01851-W. On October 6, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on February 2, 1994. The property was listed in Schedule "A" of the Bankruptcy.

The court further finds that on November 28, 1986, the Defendant, **Richard L. Fuller and Jean r. Fuller**, executed and delivered to **MIDFIRST MORTGAGE CO.**, their

mortgage note in the amount of \$46,917.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The court further finds that as security for the payment of the above-described note, the Defendant, **Richard L. Fuller and Jean R. Fuller**, husband and wife, executed and delivered to MIDFIRST MORTGAGE CO., a real estate mortgage dated November 28, 1986, covering the following described property, situated in the State of Oklahoma, Mayes County:

Beginning at the Northwest Corner of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$; Thence South 300 Feet; Thence East 404.0 Feet; Thence North 300 Feet; Thence West 404.0 Feet to the Point of Beginning, all in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 21 North, Range 18 East of the Indian Base and Meridian, Mayes County, State of Oklahoma, LESS AND EXCEPT that portion of land described in Quit Claim Deed, filed April 5, 1923 in Book 97 at Page 427 in favor of The Board of County Commissioners of Mayes County, Oklahoma.

This mortgage was recorded on December 2, 1986, in Book 667, Page 79, in the records of Mayes County, Oklahoma.

The court further finds that on December 11, 1986, MIDFIRST MORTGAGE CO., assigned the above-described mortgage note and mortgage to MIDLAND MORTGAGE CO. This Assignment of Mortgage was recorded on February 13, 1987, in Book 669, Page 764, in the records of Mayes County, Oklahoma.

The court further finds that on March 13, 1989, MIDLAND MORTGAGE CO., assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 15, 1989, in Book 698, Page 513, in the records of Mayes County, Oklahoma.

The court further finds that on March 1, 1989, the Defendants, **Richard L. Fuller and Delories June Fuller**, 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, April 1, 1990, April 1, 1991 and July 1, 1992.

The Court further finds that the Defendant, **Richard L. Fuller**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Richard L. Fuller**, is indebted to the Plaintiff in the principal sum of \$62,376.06, plus interest at the rate of 9.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, **Richard L. Fuller**, in the principal sum of \$62,376.06, plus interest at the rate of 9.5 percent per annum from April 1, 1995 until judgment, together with interest thereafter at the current legal rate of 6 2/3 percent

per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, Richard L. Fuller, Delories June Fuller, Fred Timm and Mildred Timm, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Richard L. Fuller, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement 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;

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

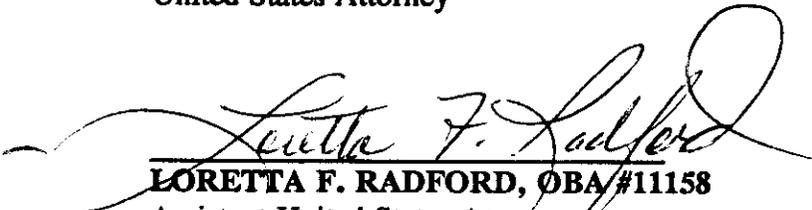
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

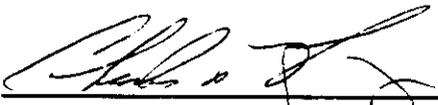
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


CHARLES A. RAMSEY, OBA #10116
Assistant District Attorney
P.O. Box 845
Pryor, OK 74362
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Mayes County, Oklahoma

Judgment of Foreclosure
Civil Action No. 96CV 511B

LFR:flv

FILED

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

APR 09 1997

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

ENTERED ON DOCKET
DATE APR 10 1997

ORDER

Before the Court for consideration is Defendant Internal Revenue Service's ("IRS") Motion to Dismiss Plaintiff Rosenheck & Co.'s ("Rosenheck") Complaint in Interpleader for lack of subject matter jurisdiction (Docket #10). After careful consideration of the record and applicable legal authorities, the Court hereby GRANTS the IRS' Motion to Dismiss.

BACKGROUND

Rosenheck was served by the IRS with a Notice of Levy on Wages, Salary, and Other Income ("Levy") concerning any monies subject to levy held by them for Defendant Walter E. Kostich Jr. ("Kostich"). Prior to compliance with the Levy, Kostich allegedly threatened Rosenheck with a lawsuit if such monies were paid by Rosenheck to the IRS pursuant to the Levy. The monies at issue were allegedly earned by Kostich in the form of insurance policy renewal commissions. Faced with the prospect of being sued by Kostich and/or liable to the IRS if they failed to surrender the subject monies, Rosenheck instituted the instant action.

The Notice of Levy named Walter E. Kostich¹ as the taxpayer and sets the total amount of tax and penalties due at \$22,255.04, as of February 3, 1997. It appears \$21,750.94 is due for tax year 1992 and \$504.10 is due from tax year 1985. See Kostich's Resp., Ex. O, at 3, 4. On February 4, 1997, this Court entered an Order directing Rosenheck to pay all monies in its possession now or hereafter due Kostich and/or the IRS into the registry of the Court (Docket # 5). As of March 21, 1997, Rosenheck had made the following deposits:

- | | | | |
|----|-------------------|-------------|------------------------|
| 1. | February 11, 1997 | \$ 2,765.76 | Certificate of Deposit |
| 2. | February 27, 1997 | \$ 399.25 | Savings Account |
| 3. | March 11, 1997 | \$ 873.23 | Savings Account |

Pursuant to a March 25, 1997, phone conference and agreement by the parties, the Court remitted One Thousand One Hundred and Thirty Three Dollars and Thirty Four Cents (\$1,133.34) of the paid in commissions to Kostich, representing amounts exempt under 26 U.S.C. § 6334(d)(3). The amount remitted accounted for exemptions allowed for February and March, 1997.

THE PARTIES' CONTENTIONS

The IRS moves this Court to dismiss the instant action, arguing the Court lacks subject matter jurisdiction as the action "is ostensibly brought as an interpleader, but is in fact not an interpleader." Motion to Dismiss, at 2. The IRS contends that an interpleader requires at least two parties claiming competing interest in the monies at issue. However, the IRS admits it has no property right or

¹Kostich has made the disingenuous argument the IRS documents at issue here fail to properly identify him as the taxpayer. Defendant Kostich contends his "Christian name" is Walter Edward, Kostich, Junior and since the IRS documents do not contain his "Christian name," he is not the person named in the Notice of Levy. The Court expressly finds Defendant WALTER EDWARD KOSTICH JR. is the person identified in the Notice of Levy, irrespective of the commas, capitalization of letters, or other alleged irregularities Kostich identifies as improper. Similarly, the Court's finding applies to the filed pleadings in this matter.

interest in the property of its own, but pursuant to its levy power can seize property in which Kostich has an interest. Consequently, there are not competing interests in the subject monies, only that of Kostich, which the IRS has seized.

Additionally, the IRS cites 26 U.S.C. § 6331(a) authorizing the IRS to levy on all property or rights to property of a taxpayer and requires any person in possession of such property to surrender it to the IRS. Further, 26 U.S.C. § 6332(e) provides a discharge of liability to the delinquent taxpayer to any person who surrenders to the IRS property of a taxpayer which is subject to levy.

Rosenheck contends the Court has jurisdiction pursuant to 28 U.S.C. § 1331, 26 U.S.C. § 6332(a), (d), and (e), and Fed.R.Civ.P. 22. Rosenheck maintains that interpleader actions sound in equity and that such actions are remedial in nature and should be applied liberally. Rosenheck argues the IRS' position that Kostich has the only interest in the monies hinges on a "subtle distinction that does not amount to a substantive difference." Rosenheck's Resp., at 2. Rosenheck asserts it has a legitimate concern of additional litigation, irrespective of to whom it pays the subject monies. If Rosenheck pays the monies to the IRS, Kostich has threatened suit against Rosenheck; if it pays the monies to Kostich, it will be liable to the IRS for the amounts of monies it possessed subject to the Levy.

Kostich's thirteen (13) page response memorandum is a cornucopia of revenue statutes, largely irrelevant here, addressing the propriety of the tax collection process employed by the IRS as it concerns Kostich and the Levy.

ANALYSIS

Rosenheck is entitled to interpleader if, *inter alia*, it can demonstrate present or potential

subjection to adverse claims resulting in exposure to double or multiple liability. See Fed.R.Civ.P. 22; see also Knoll v. Socony Mobil Oil Co., 369 F.2d 425 (10th Cir. 1966), cert. denied, 386 U.S. 977, 18 L.Ed.2d 138, 87 S.Ct. 1173 (1967), reh'g. denied 386 U.S. 1043, 18 L.Ed.2d 618, 87 S.Ct. 1490, and reh'g. denied 389 U.S. 893, 19 L.Ed.2d 212, 88 S.Ct. 18, and overruled on other grounds Liberty Nat. Bank & Trust Co. v. Acme Tool Div. of Rucker Co., 540 F.2d 1375 (10th Cir. 1976). The particular facts of this case and relevant legal authorities preclude Rosenheck from demonstrating adverse claims to the commissions exist, and that it would be exposed to double or multiple liability if it complied with the Levy.

In a levy proceeding, the IRS "steps into the taxpayer's shoes," United States v. National Bank of Commerce, 472 U.S. 713, 725 (1984) (citing United States v. Rodgers, 461 U.S. 677, 691 (1983)). The IRS cannot recover the insurance policy renewal commissions via the Levy unless Kostich has a property right in the commissions as determined by Oklahoma law. See Queen City Savings & Loan Assoc. v. Sanders, 1980 WL 1642 (W.D.Wash.) (unpublished opinion) (IRS cannot recover funds subject to a levy unless funds were held by plaintiff for taxpayer); see also Aquilino v. United States, 363 U.S. 509, 513 (1960) ("[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property."). The parties do not contest Kostich's property rights in the commissions. As a result, any claim the IRS has to the insurance policy renewal commissions is through Kostich, not against him. See Queen City Savings & Loan Assoc., 1980 WL 1642, at *1. Thus, the fundamental requirement of adverse claims to the commissions is absent in the instant matter.

Persons complying with an IRS levy are immune from liability to the delinquent taxpayer and any other person. See 26 U.S.C. § 6332(e); see also Davis v. Yellow Freight System, Inc., 961 F.2d

219 (10th Cir. 1992); Moore v. General Motors Pension Plans, 91 F.3d 848 (7th Cir. 1996); State Bank of Fraser v. United States, 861 F.2d 954 (6th Cir. 1988); Burroughs v. Wallingford, 780 F.2d 502 (5th Cir. 1986). Rosenheck's fear of double or multiple liability from Kostich or any organization in his behalf for complying with the IRS Levy are unfounded.

As adverse claims to the insurance policy renewal commissions do not exist and Rosenheck is shielded from liability if it complies with the Levy, this is not an appropriate interpleader action. Nor do other bases for federal jurisdiction exist. Accordingly, the Court hereby GRANTS the IRS' Motion to Dismiss and **DISMISSES WITHOUT PREJUDICE** the instant action.

The Court Clerk is hereby directed to return to Rosenheck all monies heretofore deposited by Rosenheck into the registry of the Court pursuant to this Court's Order of February 4, 1997, with interest earnings less the appropriate Registry fee. The monies shall be returned to Rosenheck by April 24, 1997.

Notwithstanding the Judgment previously entered in favor of Rosenheck and against Kostich in the amount of One Thousand One Hundred and Ninety Four Dollars (\$1,194.00) (Docket # 12), each party shall bear it own costs and fees of this action.

IT IS SO ORDERED this 9th day of April, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR - 0 1997

Paul Lombardi, Clerk
U.S. DISTRICT COURT
OKLAHOMA

CRAIG FISHER, an individual,)
)
Plaintiff,)
)
vs.)
)
STATE FARM FIRE AND)
CASUALTY COMPANY,)
)
Defendant.)

Case No. 97-CV-220-B

ENTERED ON CLERK'S
DATE APR 10 1997

ORDER

Based on Plaintiff's admission in his Motion to Remand the requisite amount in controversy does not exceed \$75,000.00, exclusive of interest and costs, and State Farm's Response stating no objection, the Court hereby GRANTS Plaintiff's Motion to Remand.

The matter is hereby REMANDED to the District Court in and for Tulsa County.

SO ORDERED this 8th day of April, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
OKLAHOMA

KEITH CARRUTHERS,)
)
 Plaintiff,)
)
 vs.)
)
 CALIBER SYSTEM, INC., d/b/a)
 ROADWAY PACKAGE SYSTEM, INC.,)
)
 Defendant.)

Case No. 97-CV-278-B

ENTERED ON RECORD
APR 10 1997

ORDER

Based on Plaintiff's admission in his Motion to Remand the requisite amount in controversy does not exceed \$75,000.00, exclusive of interest and costs, the Court hereby GRANTS Plaintiff's Motion to Remand.

The matter is hereby REMANDED to the District Court in and for Tulsa County.

SO ORDERED this 3rd day of April, 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

APR - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TROY ZICKEFOOSE,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN FIDELITY INSURANCE)
 COMPANY d/b/a CIMARRON)
 INSURANCE, a Kansas corporation,)
 and AMERICAN FIDELITY CREDIT)
 CORPORATION, a Kansas corporation,)
)
 Defendants.)

No. 96-C-501-B

ENTERED ON DOCKET
DATE APR 10 1997

ORDER

Before the Court is Defendant Cimarron Insurance Company's ("Cimarron") Motion for Summary Judgment or in the Alternative, Motion for Partial Summary Judgment (Docket No. 31) and Defendant Cimarron's Motion in Limine (Docket No. 36). In reviewing the record on summary judgment, the Court discovered that this case had been improperly removed as there is not complete diversity among the parties. Accordingly, the Court remands this matter to the District Court in and for Tulsa County.

On May 10, 1996 Plaintiff Troy Zickefoose ("Zickefoose") filed this action in the District Court in and for Tulsa County against Defendants American Fidelity Insurance Company ("AFIC"), Cimarron, American Fidelity Credit Corporation ("AFCC") and John Munding ("Munding"). On June 4, 1996, defendants AFIC, Cimarron and Munding¹ filed a notice of removal in this Court representing that

¹AFCC filed its Consent to Removal on June 21, 1996 (Docket No. 9).

(37)

Parties phoned
no

Defendants American Fidelity Insurance Company, d/b/a Cimarron Insurance Company and American Fidelity Credit Corporation were not at the time of the commencement of this suit and are not now corporations doing business in the State of Oklahoma. Defendant John Munding, although a resident of the State of Oklahoma, has been fraudulently joined in the instant case for the purpose of defeating diversity; Defendant Munding was granted summary judgment by Court Order of January 26, 1996 in case number CJ 94 144, filed in the District Court of Pawnee County, State of Oklahoma, which case was dismissed and refiled as the instant case.

Notice of Removal, Docket No. 1. Once removed, Munding filed a motion to dismiss Zickefoose's claims against him based on the doctrine of res judicata. (Docket No. 5).

The Court granted Munding's motion to dismiss, finding that the claims against Munding were barred under the doctrine of res judicata and therefore "Munding was not a proper party to the removed Tulsa County action." *Order of August 2, 1996 (Docket No. 14).* The Court then determined whether it had subject matter jurisdiction over the remaining defendants:

Having determined Zickefoose's present claims against Munding are barred and Munding is dismissed, the Court now turns to the issue of whether it has subject matter jurisdiction over the remaining issues. It is undisputed diversity of citizenship exists between Zickefoose and the named corporate defendants. The Notice of Removal indicates the amount in controversy exceeds \$50,000, exclusive of interest, attorney fees and costs. (Docket #1, pg. 2). Thus, the Court FINDS it has subject matter jurisdiction pursuant to 28 U.S.C. §1332(a)(1).

Order of August 2, 1996 (Docket No. 14). The Court made this finding based on defendants' representation that Munding was the only obstacle to removal of this action, *i.e.* diversity of citizenship exists between Zickefoose and the named corporate defendants - Cimarron, AFIC and AFCC. Nor was the representation challenged by Zickefoose.

However, in reviewing the briefs on summary judgment, the Court read the testimony of Munding in the February 23, 1995 transcript of proceedings before the Honorable Gordon McAllister which was attached to both defendants' and plaintiff's briefs. In the transcript, Munding testified that AFIC was the parent company of Cimarron and that AFIC's "home office" was in Oklahoma City,

Oklahoma. *February 23, 1995 Trial Transcript, pp. 8-10.* As this testimony clearly refuted that diversity existed between Zickefoose and AFIC, the Court further investigated the jurisdictional claims in the petition and answers.

In paragraph 1 of Count I in the state court petition, Zickefoose alleges the following:

That the Plaintiff, at all times material herein, was a resident of the State of Oklahoma. That at all times material herein, **the Defendant, American Fidelity Insurance Company, was a corporation organized and existing under the laws of the State of Oklahoma.**

That the Defendant, Cimarron Insurance Company, is a corporation organized and existing under the laws of the State of Kansas.

That the Defendant, John Munding, is a resident of the State of Oklahoma.²

In the answer it filed upon removal, AFIC "d/b/a Cimarron Insurance Company" made the following jurisdictional claims:

I.

Defendant admits the residency of the parties as alleged in the first paragraph of Plaintiff's First Count.

II.

Defendant denies that this Court has jurisdiction over American Fidelity Insurance Company (hereinafter "AFIC") for the reason that AFIC does not do business as Cimarron Insurance Company (hereinafter "CIC") but rather CIC is a wholly owned subsidiary corporation, lawfully incorporated in the State of Kansas and admitted to do business in the State of Oklahoma.

Answer ¶¶ I and II (Docket No. 7). AFCC filed its answer stating in pertinent part the following:

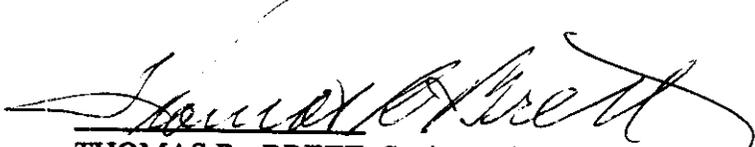
That this Defendant admits that the Plaintiff was a resident of the State of Oklahoma and the Defendant, John Munding, was a resident of the State of Oklahoma, and that the United States District Court for the Northern District of Oklahoma has jurisdiction over the parties and the subject matter of this action.

²There is no reference in the petition or in defendant AFCC's answer as to AFCC's state of incorporation or principal place of business.

Answer ¶ I (Docket No. 8). These answers either do not support or expressly contradict defendants' claim of diversity jurisdiction. AFCC notably provides no information on its state of incorporation or principal place of business, while AFIC admits that it is an Oklahoma corporation. If it were AFIC's intent to argue that it was not a proper party defendant, AFIC should have moved to dismiss itself as well as Munding. AFIC did not so. Therefore, its presence as a nondiverse party defendant in this case defeats this Court's jurisdiction.

“A court lacking jurisdiction . . . must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.” *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (quoting *Tuck v. United States Auto. Assn.*, 859 F.2d 842, 844 (10th Cir. 1988). “Moreover, if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter.” *Id.*; *Koerpel v. Heckler*, 797 F.2d 858, 861 (10th Cir. 1986) (finding on appeal that neither the appellate nor district court had jurisdiction); *Harris v. Illinois-California Express, Inc.*, 687 F.2d 1361, 1366 (10th Cir. 1982) (“Any federal court must, sua sponte, satisfy itself of its power to adjudicate in every case and at every stage of the proceeding, and the court is not bound by the acts or pleadings of the parties.”). Having found that it lacks jurisdiction over this dispute and the case was improperly removed, the Court sua sponte remands the action to the District Court in and for Tulsa County. 28 U.S.C. §1447(c).

ORDERED this 9th day of April, 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

4-10-97

FILED

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

APR 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD POUNDS, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 OTTAWA COUNTY DISTRICT)
 COURT, et al.,)
)
 Defendants.)

Case No. 96-C-895-K ✓

ORDER AND REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This order and report and recommendation pertains to Plaintiffs' Petition to Regain Custody From: C.F.R. Court and Eastern Shawnee Tribe (Docket #3), Plaintiffs' Petition for Expedited Hearing and Order (Docket #4), Plaintiff's Request for Instruction from the Court (Docket #28, part 2), Plaintiffs' Motion to Compel Compliance (Docket #36), Plaintiffs' Motion for Stay of Execution: Ottawa County District Court (Docket #37), Defendants' Motion to Consolidate Actions and to Dismiss (Docket #39), Plaintiffs' Motion for Leave to Proceed In Forma Pauperis on Appeal (Docket #42), Plaintiffs' Motion to Quash Federal Defendants: Motion to Dismiss (Docket #43), Defendants' Reply in Support of Federal Defendants' Motion to Dismiss (Docket #44), the Federal Defendants' Motion to Strike Surreply Materials (Docket #46), Plaintiffs' Addendum to Motion to Quash Federal Defendants: Motion to Dismiss (Docket #47), Plaintiffs' Motion to Quash: Federal Defendants, Motion to Strike Surreptitious Material (Docket #49), and Plaintiff's Motion for Appeal to United States Tenth Circuit Court of Appeals (Docket #51).

Plaintiffs bring this action pro se seeking a writ of habeas corpus and damages in the amount of \$1,000,000.00 for the alleged illegal removal of three minor Indian children from their home and denial of visitation with the family. Plaintiff Mary McRae is apparently the children's grandmother and plaintiff Richard Pounds the children's step-grandfather. The details of this case were discussed in the court's order of March 14, 1997 (Docket #45).

ORDER

Plaintiffs' Petition to Regain Custody From: C.F.R. Court and Eastern Shawnee Tribe (Docket #3), Plaintiffs' Petition for Expedited Hearing and Order (Docket #4), and Plaintiffs' Motion for Stay of Execution: Ottawa County District Court (Docket #37) are denied. Plaintiffs ask the court to return the children to their custody from the custody of the Eastern Shawnee Tribe in an expedited manner and to stay the execution of state court judgments which relate to the custody of the children.

Federal courts cannot enjoin state court proceedings unless the intervention is authorized expressly by federal statute. McFarland v. Scott, 512 U.S. 849 (1994). The federal habeas corpus statute grants any federal judge "before whom a habeas corpus proceeding is pending" power to stay a state court action "for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251. It is clear that the entry of a stay is not mandated, but is allowed at the court's discretion. The court found in its order of March 14, 1997 that the federal courts in which Indian child custody issues have been brought under this section have held that they have no jurisdiction to review child custody decisions, which are within the jurisdiction of the

tribal courts. LeBeau v. Dakota, 815 F.Supp. 1074, 1076 (W.D. Mich. 1993); Sandman v. Dakota, 816 F.Supp. 448, 451 (W.D. Mich. 1992), aff'd, 7 F.3d 234 (6th Cir. 1993); DeMent v. Oglala Sioux Tribal Ct., 874 F.2d 510, 514 (8th Cir. 1989).

Plaintiffs' Motion to Compel Compliance (Docket #36) is denied. Discovery in this case has been stayed pending a ruling on defendants' Motion to Consolidate Actions and to Dismiss (See Court's Order of March 14, 1997, pg. 6 (Docket #45)).

Plaintiffs' Request for Instruction from the Court (Docket #28, part 2) and Plaintiffs' Motion for Leave to Proceed In Forma Pauperis on Appeal (Docket #42) are moot. On March 31, 1997, the Tenth Circuit Court of Appeals dismissed the plaintiffs' appeal from the district court order denying their motion for change of venue and from the order granting the federal defendants' motion to extend the time to file an answer because it was jurisdictionally defective. The district court orders appealed were interlocutory and nonappealable under 28 U.S.C. § 1291 or under any recognized exception to the final judgment rule.

Plaintiffs' Motion to Quash Federal Defendants: Motion to Dismiss (Docket #43) is denied. Defendants' Motion to Dismiss will subsequently be considered in this order and report and recommendation.

The Federal Defendants' Motion to Strike Surreply Materials (Docket #46) is granted. Under Local Rule 7.1 of this court, a response and a reply to that response are allowed. Additional briefing is prohibited. The plaintiffs' addendum is merely repetitive argument of issues already thoroughly briefed.

Plaintiffs' Addendum to Motion to Quash Federal Defendants: Motion to Dismiss (Docket #47) is stricken.

Plaintiffs' Motion to Quash: Federal Defendants, Motion to Strike Surreptitious Material (Docket #49) is denied.

Plaintiffs' Motion for Appeal to United States Tenth Circuit Court of Appeals (Docket #51) is denied. As already discussed, there has been no appealable judgment in this case.

REPORT AND RECOMMENDATION

Defendants' Motion to Consolidate Actions and to Dismiss (Docket #39) should be granted. Defendants ask that Case Nos. 96-C-743-K, 96-C-913-K, and 96-C-895-K be consolidated, because plaintiffs' allegations in these cases arise out of the same series of transactions and occurrences and concern common questions of law. Case No. 96-C-743-K was dismissed on October 3, 1996. However, the two remaining cases do pertain to the same alleged illegal removal of the three minor Indian children from plaintiffs' home and should be consolidated.

Plaintiffs have never properly served the federal government according to the Federal Rules of Civil Procedure. Rule 4(i) of these Rules requires that a plaintiff serve the Attorney General of the United States as well as the United States Attorney for the district in which the action is brought. Plaintiffs have failed to serve the United States Attorney for this district, stating in their "Motion to Quash Federal Defendants Motion for Extension of Time," that they "DID NOT request that the U.S. Attorney Stephen Lewis or his office be served," apparently due to a perceived conflict of

interest.

Courts have found that the requirement of 4(i) must be complied with and that failure to properly serve the United States Attorney will result in dismissal of the complaint. Prisco v. Frank, 929 F.2d 603, 604 (11th Cir. 1991); Frasca v. U.S., 921 F.2d 450, 453 (2nd Cir. 1990). A defendant who has actual notice of a suit but improper service may file a motion to dismiss the action under Fed.R.Civ.P. 12(b)(5). Federal Rule of Civil Procedure 4(m) states that the court "shall dismiss the action without prejudice as to that defendant" unless "plaintiff shows good cause for the failure" to serve the defendant.

Good cause has not been shown in this case. In addition, as the court has discussed, in the cases in which child custody issues have been brought before a federal district court under 25 U.S.C. § 1301, the federal courts have held that they have no jurisdiction to review the decisions.

Plaintiffs state that they seek damages "caused by the defendants' negligence." Such a claim can only be brought under the Federal Tort Claims Act, 28 U.S.C. § 1346. The Act allows a cause of action against the federal government by persons injured due to the tortious activity of any federal employee "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

Plaintiffs allege that the federal regulations or laws were not followed. They cite no Oklahoma law which would make the activity tortious, and the mere allegation

of a breach of duty under federal law does not, by itself, state a valid tort claim against the government. Florida Auto Auction of Orlando, Inc. v. U.S., 74 F.3d 498, 502 (4th Cir. 1996). Plaintiffs have also failed to utilize the administrative tort claims procedure. An administrative claim must be presented to the federal agency employing the person whose act or omission caused the alleged injury. 28 U.S.C. § 2675. If the claim is not presented before commencing suit, the suit must be dismissed even if the claim is subsequently presented. McNeil v. United States, 508 U.S. 106 (1993).

Finally, plaintiffs have failed to name the proper defendant for any federal tort claim, which is the United States. 28 U.S.C. § 2679(a). A Federal Tort Claims Act claim against a federal agency or employee, as opposed to the United States, must be dismissed for want of jurisdiction. Galvin v. OSHA, 860 F.2d 181, 183 (5th Cir. 1988).

In summary, Plaintiffs' Petition to Regain Custody From: C.F.R. Court and Eastern Shawnee Tribe (Docket #3), Plaintiffs' Petition for Expedited Hearing and Order (Docket #4), Plaintiffs' Motion to Compel Compliance (Docket #36), Plaintiffs' Motion for Stay of Execution: Ottawa County District Court (Docket #37), Plaintiffs' Motion to Quash Federal Defendants: Motion to Dismiss (Docket #43), Plaintiffs' Motion to Quash: Federal Defendants, Motion to Strike Surreptitious Material (Docket #49), and Plaintiff's Motion for Appeal to United States Tenth Circuit Court of Appeals (Docket #51) are denied. Plaintiffs' Request for Instruction from the Court (Docket #28, part 2) and Plaintiffs' Motion for Leave to Proceed IFP on Appeal

(Docket #42) are moot. The Federal Defendants' Motion to Strike Surreply Materials (Docket #46) is granted. Plaintiffs' Addendum to Motion to Quash Federal Defendants: Motion to Dismiss (Docket #47) is stricken. Defendants' Motion to Consolidate Actions and to Dismiss (Docket #39) should be granted.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 9th day of April, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

APR 9 1997 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESA Y. GURULE,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
Commissioner of Social Security,¹)
)
Defendant.)

Case No: 95-C-157-W ✓

ENTERED ON DOCKET
DATE 4/10/97

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed April 9, 1997.

Dated this 9th day of April, 1997.



JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action.

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

F I L E D

APR 9 1997 *SLR*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESA Y. GURULE,)
)
 Plaintiff,)
)
 v.)
)
 JOHN J. CALLAHAN,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 96-C-157-W ✓

ENTERED ON DOCKET
DATE 4/10/97

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Richard J. Kallsnick (the "ALJ"), which summaries are incorporated herein by reference. The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant is not disabled within the meaning of the Social Security Act.²

¹ Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

² Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decisions. The

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In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting greater than twenty pounds at a time occasionally or ten pounds at a time frequently. The ALJ concluded that the claimant's past relevant work as a real estate sales agent or waitress did not require the performance of work-related activities precluded by these limitations, so her impairments did not prevent her from performing her past relevant work. Having determined that claimant could perform her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Commissioner's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Commissioner's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ's decision that claimant did not suffer from a totally disabling pain syndrome is not supported by substantial evidence.
- (2) The ALJ erred in relying on claimant's failure to seek treatment from a physician, failure to use a brace, corset, walker, or TENS unit, and daily activities to determine that her pain was not disabling.
- (3) The ALJ erred in substituting his own opinion of the significance of an MRI for the opinions of trained medical doctors.
- (4) The ALJ erred in failing to present a proper hypothetical question to the vocational expert.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that she has been unable to work since August 3, 1992, because of "[s]evere headaches, pain on entire [left] side due to injury." (TR 109). Her treating physician, Dr. James Clayton, reported on May 21, 1993 that she had been involved in a work-related accident in November, 1990, when she landed on her tailbone on a pipe and fractured her coccyx (TR 148).⁴ She had gone through rehabilitation from March through June, 1991, and had returned to work on June 26, 1991 (TR 148). For the next two and a half years she worked with increasing pain in her tailbone and left shoulder and headaches (TR 148). On April 15, 1993, Dr. Clayton evaluated her and stated in an "Initial Report" that x-rays showed:

⁴ Dr. Clayton is a chiropractor, not a medical doctor.

the sacral unleveling of 6.5 degrees and the lateral lumbar curvature. This curvature of the spine to the left is caused by an elevation of the sacrum and ilium on the right. What I believed happened is that when Ms. Gurule landed on the pipe it drove the sacrum and ilium up on the right. This sacro-iliac joint became fixated and the spine compensated by curving to the left. This compensation progressed from the lumbar spine to the upper back and neck.

This may explain why the work hardening program was only temporarily effective. The underlying cause of Ms. Gurule's problem, the fixated sacro-iliac joint, was never treated, and now has had 2 ½ years to heal in this position

Since the last compensation in the spinal column is the upper cervical and skull, it is easy to see why Ms. Gurule has continuing headaches. This reoccurring inflammatory process in the upper cervical spine is probably causing Ms. Gurule's memory loss. Her nervous system is being damaged by the destructive characteristics of the inflammation.

(TR 149).

Dr. Clayton concluded that claimant was temporarily totally disabled from performing her usual occupation, and retraining for a new occupation would be unfruitful until the sacro-iliac joint was repositioned. (TR 150). He began treatment to level the sacral angle through manipulation, muscle stimulation, heat, and traction (TR 150). He found that "prognosis is uncertain at this time. Treatment can take from 18 months to 3 years to reconstruct this low back condition." (TR 150). His prognosis was as follows:

Full recovery from this accident is not expected.

REASON: This fixation and subsequent spinal curvature has had several years to heal incorrectly.

Sending Ms. Gurule to WERC was like tuning up an engine when what was needed was a front-end alignment. It helps the car run better but didn't fix the real problem.

(TR 150).

On November 19, 1993, Dr. Clayton submitted the identical report, calling it a "Final Report," to the Oklahoma Disability Determination Unit (TR 163-166).

Dr. William Fesler treated claimant three times during 1993, in January, April, and November, for congestion, shoulder pain, and breast tenderness, but she did not mention headaches or back pain (TR 143).

On June 11, 1993, Dr. Griffith Miller examined claimant for workers' compensation purposes. The doctor found "a lot of muscle spasm and pain" and limited flexion in her neck and stated as follows:

BACK: There is muscle spasm and pain. She can flex 30, extend 5, flex right and left 10, and rotate right and left 30. Sacral flexion is 20, sacral extension 5. Deep tendon reflexes are normo-active. Straight leg raising is positive on the left to 20 degrees.

NEUROLOGICAL: There is pain and numbness and weakness down the left leg along dermatomal patterns L3, L4, L5, and S1. She has pain in the coccygeal area to palpation that is marked.

(TR 174). Dr. Miller found that she had been temporarily, totally impaired from April 1, 1993, and a determination of the extent of her impairment had to be deferred until she had reached maximum benefit from medical treatment. (TR 175).

On August 10, 1993, Dr. Jerry Patton evaluated claimant for the Social Security Administration (TR 155-157). He noted that she claimed she had headaches and shoulder and neck pain, but he concluded as follows:

The patient was placed through complete range of motion exercises. The patient scored virtually complete normal in all range of motion exercises and was able to get on and off the examination table without any difficulty. She had no problems in the use of her hands in grip

strength and also the use of hands and fingers in a dexterous manner. She was able to walk on her toes and walk on her heels without difficulty. She walked in a very safe manner and she did not use the assistance of a walking device.

It is my impression that the patient may have some left shoulder pain; however, during my office exam and during the range of motion exercises, there was no limitation in range of motion and there was no indication that she was having problems with her left shoulder at that time, as well as the neck.

(TR 156-157) (emphasis added).

On February 18, 1994, Dr. S.V. Vaidya examined claimant (TR 176-177). Dr. Vaidya noted that she was sensitive to medication and had refrained from trying any medications other than taking Advil on a prn basis, and routine x-rays in her doctor's office did not reveal any specific abnormality affecting her cervical spine. (TR 176).

The doctor stated:

Cervical range of motions were restricted and were guarded. Straight leg raising test was positive, more so on the left side. Sciatic notch tenderness was not elicitable. Strength was 5/5 throughout. There was no localized wasting or abnormal movements seen. Muscle stretch reflexes were 1+ throughout, and both plantars were downgoing. Coordination on finger to nose and heel to shin was normal. Gait was normal I suspect she has diffuse somatic dysfunction cervical and lumbar spine. She has muscle tension type headache. Significant lapse of time has occurred from the injury and in spite of that, she continues to have symptoms and hence I have recommended her to undergo MRI scan of the cervical and lumbar spine

(TR 177). The doctor stated that she had questionable lumbosacral radiculopathy on the left side and recommended EMG studies (TR 177). An MRI scan taken that day showed a central bulge of the disc at C5-6, which compressed the thecal sac, and

mild degenerative disc changes at L4-5 and L5-S1, but there was no evidence of spinal stenosis or nerve root encroachment (TR 178-179).

On November 14, 1994, Dr. Vaidya evaluated claimant's ability to be employed and found that she could only sit, stand, and walk for four hours in an eight-hour day, climb, stoop, and reach occasionally, lift twenty pounds or less, and work "initially part-time gradually to full-time." (TR 183-184). He said she required frequent rest periods initially (TR 184). He stated that she was motivated for, and a good candidate for, a work hardening program (TR 184).

On September 16, 1995, claimant was seen in the emergency room following a car accident and the diagnosis was "cervical/thoracic strain" (TR 12). X-rays of her spine showed no acute injury, a normal thoracic spine, and a straightening of the cervical spine secondary to muscle spasm (TR 19). An MRI done on September 26, 1995 showed an "intervertebral disc bulge at the C4-C5 and C5-C6 levels" and an otherwise negative magnetic resonance imaging of the spine (TR 10).

At a hearing on November 9, 1994, claimant contended that she can only walk 100 feet without pain, sit five to ten minutes, and lift ten pounds (TR 60-61). She testified that she does dishes, laundry, and paperwork during the day and goes to church and the grocery store (TR 62). She admitted she hadn't been to see a doctor for months (TR 66).

There is no merit to claimant's first three contentions that no evidence supports the ALJ's decision that claimant did not suffer from a totally disabling pain syndrome, he erred in relying on claimant's failure to seek treatment from a physician, failure to

use a brace, corset, walker, or TENS unit, and daily activities to determine that her pain was not disabling, and he erred in substituting his own opinion of the significance of an MRI for the opinions of trained medical doctors. The ALJ discussed Dr. Clayton's and Dr. Vaidya's reports. He then pointed out that the February 23, 1994 MRI findings given by a specialist in radiology did not offer "any indication of a maligned sacroiliac joint as opined by the claimant's treating chiropractor," Dr. Clayton (TR 34, 149-151, 178-179). The ALJ concluded: "The MRI scans having been studied and interpreted by a specialist in radiology, Administrative Law Judge gives greater weight to these findings." (TR 34-35).

The ALJ also pointed out that Dr. Vaidya did not offer any medical basis for his opinions that claimant was only able to work part-time initially and then gradually go to full-time, was initially required to take frequent rest periods, and was not able to sit, stand, or walk more than four hours each in an eight-hour day (TR 35, 183-184). The ALJ also noted that Dr. Vaidya's conclusions were not consistent "with the findings of his examination and the results of the MRI studies of the cervical and lumbar spine . . . [or] the findings of the MRI scan that there is no nerve root encroachment of the cervical spine or lumbar spine." (TR 35, 176-179, 183-184). The ALJ commented that the doctor's opinion "appears to be based on the claimant's subjective complaints." (TR 35).

The ALJ stated that he had not ignored claimant's complaints of pain, including headaches, but had used the criteria set out in Luna v. Bowen, 834 F.2d 161, 165

(10th Cir. 1987), and the Social Security Rulings to determine that the complaints were "not consistent with the record as a whole." (TR 35).

The court in Luna, 834 F.2d at 165-66, discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment.

[W]e have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems . . . [and] the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive.

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

The ALJ found as follows:

In reviewing the record for type, dosage, effectiveness, and adverse side-effects of any pain medication, the claimant has not been prescribed pain medication on any sustained basis. At the hearing, she submitted a requested list of medications, which reflects 400mg of Skelaxin one to three times a day for headaches, neck pain and spasm. This was prescribed on November 4, 1994. Taking this dosage one to three times a day, is not indicative of severe, debilitating pain

A careful study of the record fails to offer findings of extensive treatment for the claimant's complaints of pain. Indeed, it appears from the record before the undersigned that the claimant had not sought evaluation or treatment by an orthopaedic surgeon or neurologist until February 18, 1994, when she was examined and subsequently evaluated by Dr. Vaidya, a neurologist. There is no evidence of a back brace, corset, recommendation for any surgery, crutches, canes, walkers, wheelchairs, transcutaneous electrical nerve stimulator (TENS) unit, nor any other assistive device or method for treating an impairment to relieve pain. Nor has the claimant sought out evaluation or treatment, but, rather, appears to have been seen only by physicians required for the purposes of her Worker's Compensation claim. It appears from the

record that the claimant's only self-sought source of treatment has been that of James T. Clayton, D.C. Very often relief can be obtained from the services of a chiropractor. However, this is not indicative of debilitating pain.

As to restrictions, the only ones given are those by Dr. Vaidya; however, as stated above these are not all supported by medical findings. The restriction to 20 pounds of lifting is supported by the findings of the MRI scan of the cervical spine. There is no medical record of any mental impairment that would further restrict the claimant.

(TR 36).

The ALJ also noted that claimant's daily activities consisted of cooking, shopping, doing odd jobs, driving, and paying bills (TR 36). Additionally, there was no evidence of muscle atrophy, loss of appetite, or depression, all of which are signs of debilitating pain (TR 36). The ALJ did not, as claimant suggests, substitute his own opinion for the medical tests and doctor's opinions and RFC assessments.

There is substantial evidence in the record to support the ALJ's conclusion that claimant's pain is not of a degree of severity that would preclude her from engaging in light work activity and sitting, standing, or walking for at least six hours in an eight-hour day. The only evidence of claimant's "disabling pain syndrome" is her self-serving testimony. It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits and deference to the fact-finder's assessment of credibility is the general rule." Frey, 816 F.2d at 517. There is no doubt that claimant suffers some pain, but pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). "[T]he absence of an objective medical basis for the degree of severity of pain may affect the weight to be

given to the claimant's subjective allegations of pain." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The court also notes that, while a claimant may submit chiropractic evidence to help the Secretary understand her inability to work, chiropractors are not considered an acceptable medical source. Bunnell v. Sullivan, 912 F.2d 1149, 1152 (9th Cir. 1990) (citing 20 C.F.R. § 404.1513 (1989)). "[T]here is no requirement that the Secretary accept or specifically refute such evidence." Id. at 1152. Dr. Clayton, the chiropractor who found that claimant was temporarily disabled, limited her only from performing her occupation at the time, a pipefitter or utility craftsman in the construction industry (TR 113, 148-151, 163-166). His conclusion does not conflict with the ALJ's conclusion that claimant could return to her past work as a real estate agent or waitress. In addition, the fact that Dr. Clayton's two reports, dated six months apart, were identical makes his opinion somewhat suspect (TR 148-151, 163-166).

The claimant contends that the Appeals Council "reopened the record" to consider additional evidence submitted after the ALJ made his decision. However, this is not correct. The Appeals Council stated in a letter to her attorney dated February 27, 1996, that it had "considered" the new evidence submitted, but concluded that it did not provide a basis to change the ALJ's decision and therefore "there is no basis for reopening the decision." (TR 4). The additional evidence relating to the visit to the emergency room following a car accident, which has been

discussed, did not, as claimant contends, establish a neck impairment capable of causing the debilitating muscle tension headaches she claims she suffers (TR 10-19).

Finally, there is no merit to claimant's contention that the ALJ erred in failing to present a proper hypothetical question to the vocational expert. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis, 945 F.2d at 1492 (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially the ALJ established that the vocational expert was familiar with the claimant's record and testimony (TR 68). The ALJ's hypothetical question assumed that claimant could work, subject to certain limitations (TR 69-70).⁵ The vocational

⁵ The ALJ's hypothetical question was as follows:

Let's assume that we have 42 year old female and has a 12th grade education. Good ability to read, write, and use numbers. Assume that this individual would have the physical capability of performing, I want you to consider light and sedentary work activity. Assume that this individual would have the capability of sitting for up to eight hours in a normal -- in a -- up to eight hours in a workday, a normal workday. That's with normal breaks, standing and or walking for up to eight hours in an eight hour work day with normal breaks. This individual would need to change positions from time to time to seek comfort. And by that is, I mean, perhaps moving in her chair in a sitting position to seek comfort or perhaps standing up or shifting weight when she is standing. This individual would be limited to occasional climbing, stooping,

expert concluded that, with those limitations, claimant could return to her past relevant work as a waitress and real estate agent and do light secretarial work. (TR 71). The ALJ was only able to elicit testimony from the vocational expert that claimant could not return to those past jobs by asking the expert to assume that all of claimant's testimony was credible and verified by medical evidence (TR 72). This opinion, based on unsubstantiated assumptions, was not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 2nd day of April, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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bending, or crawling. And this individual is afflicted with symptomatology from a variety of sources to include mild to moderate to occasional chronic pain that would be of sufficient severity as to be noticeable to her at all times, but nonetheless, she could remain attentive and responsive in a work setting and can perform work assignments satisfactorily within the limitations I've indicated. She does take medication for the relief of her symptomatology but the medication usage would not preclude her from functioning at these levels. And she would remain reasonably alert to perform required functions presented in a work setting. Assuming this hypothetical, could this individual return to any of her past work activities either as she has described them or as they are customarily performed?

(TR 69-70).

F I L E D

APR 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

RITA McPEAK,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
Commissioner of Social Security, ¹)
)
Defendant.)

Case No: 95-C-883-W

ENTERED ON DOCKET

DATE 4/10/97

JUDGMENT

Judgment is entered in favor of the Plaintiff, Rita McPeak, in accordance with this court's Order filed April 9, 1997.

Dated this 9th day of April, 1997.



JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action.

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

F I L E D

APR 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RITA McPEAK,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
COMMISSIONER OF SOCIAL)
SECURITY, ¹)
)
Defendant.)

Case No. 95-C-883-W ✓

ENTERED ON DOCKET
DATE 4/10/97

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Dana E. McDonald (the "ALJ"), which summaries are incorporated herein by reference. The only issue now before the court is whether there is substantial

¹ Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of sedentary work, except for lifting more than ten pounds, performing prolonged walking and standing, being exposed to fumes, dust, and other pollutants, and not more than fair abilities to deal with work stresses and maintain attention and concentration. The ALJ

²Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

concluded that the claimant was unable to perform her past relevant work as presser, checker, marker, and silk finisher in the dry cleaning industry. The ALJ found that the claimant was 43 years old, which is defined as a younger individual, had a high school education, and had acquired work skills, such as knowledge of telephone equipment, which she demonstrated in past work, and which, considering her residual functional capacity, could be applied to meet the requirements of skilled or semiskilled work activities of other work. The ALJ concluded that, although claimant's additional nonexertional limitations did not allow her to perform the full range of sedentary work, there were a significant number of jobs in the national economy which she could perform, such as semiskilled dispatcher, telephone solicitor, and unskilled information clerk. Having determined that claimant can do a substantial number of jobs in the national economy, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ erred in failing to find that claimant did not meet the listing of impairments regarding mental disorders.
- (2) The ALJ failed to consider claimant's headaches, a nonexertional impairment.
- (3) The ALJ erred in failing to follow the treating physician rule and relying on a consultative physician's opinion.
- (4) The ALJ erred in finding that claimant could do sedentary work, which requires sitting six hours in an eight-hour work day, use of hands and fingers for repetitive work, and an ability to deal with stress.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that claimant has severe coronary insufficiency, chronic obstructive pulmonary disease (COPD), arthritis, myositis, obesity, ulcers, migraine headaches, gastritis, esophageal reflux, and is status post cholecystectomy.

There is no merit to claimant's first contention that the ALJ erred in failing to find that she had a mental disorder that met the characteristics of a mental impairment under the Listing of Impairments in Appendix 1 of the Social Security Regulations. Claimant noted that she is required to meet both the A and the B criteria under this listing and that the ALJ found she did not meet Part B. She claims that, under Cruse v. Dept. of Health & Human Servs., 49 F.3d 614 (10th Cir. 1995), the ALJ's finding that she only had a fair ability to deal with work stresses and maintain attention and concentration was the equivalent of "repeated episodes" of deterioration and of a "marked" deficiency in concentration, persistence and pace, which means that she meets Part B and is disabled under the Listing (Plaintiff's Memorandum Brief, Docket #6, pgs. 2-3).

However, claimant has misrepresented the ALJ's conclusions and the law in the Cruse case. The ALJ noted that the medical record revealed that claimant had an anxiety disorder in August 1992 and was treated conservatively and takes medication for depression (TR 20). However, he also noted that she is capable of

performing a variety of activities of daily living, such as cooking, cleaning, shopping, visiting, and driving, which require significant attention and concentration. (TR 20). He concluded that the record did not establish that her mental disorders "have resulted in marked restriction of activities of daily living; marked difficulties in maintaining social functioning; deficiencies of concentration, persistence or pace frequently resulting in failure to complete tasks in a timely manner; or repeated episodes of deterioration or decompensation in work or work-like settings." (TR 20-21). He recorded his conclusions on a Psychological Review Technique Form ("PRT Form") (TR 27-30). He did not conclude that claimant's mental impairment imposed either "frequent" deficiencies of concentration, persistence or pace, or "repeated" episodes of deterioration or decompensation in work-like settings (TR 20-21, 29).

While the ALJ completed a PRT form, the court in Cruse discussed a form called "Medical Assessment Of Ability To Do Work-Related Activities (Mental)," which asks for evaluations of a claimant's abilities in three work-related areas: making occupational adjustments, making performance adjustments, and making personal-social adjustments. Id. at 618. The court noted that, rather than evaluating the severity of a claimant's functional impairments using the same terms as the listing requirements, the mental assessment forms evaluate the claimant's abilities as "unlimited/very good," "good," "fair," and "poor or none." Id. The court concluded that the forms' definition of "fair" was misleading and that "seriously limited but not precluded" was essentially the same as the listing requirements' definition of the term "marked." Id.

The ruling in Cruse is not directly relevant to this case. The ALJ completed a PRT form which evaluated the severity of claimant's impairments using the same terms as the listing, and determined that plaintiff, due to her mental impairment in combination with her asthma and coronary insufficiency, had only a fair ability to deal with job stress and maintain attention and concentration (TR 21). The vocational expert concluded that she could perform other certain jobs with these limitations (TR 330-333).

However, in Carter v. Chater, 73 F.3d 1019, 1022 (10th Cir. 1996), the court held that when a diagnosis of "depression" comes to the attention of the ALJ during the hearing, the ALJ has a duty to "develop the record" concerning depression. The Tenth Circuit has since relied on Carter in a series of unreported decisions, and has, in each instance, reversed the decision of the district court and remanded for the purpose of further development of the record concerning depression. See, Lawson v. Chater, 83 F.3d 432, 1996 WL 195124 (10th Cir. April 23, 1996) (new evidence of depression submitted to, but not considered by, the Appeals Council required further inquiry into the medical extent, and vocational effect, if any, of plaintiff's diagnosed depression); Redfearn v. Chater, 99 F.3d 1150, 1996 WL 594278 (10th Cir. Oct.17, 1996) (plaintiff's testimony that she was taking the antidepressant drug Zoloft, "for nervousness and depression," along with her husband's explanation that she took the medication to help her with "nerves" associated with menopause, was sufficient to trigger an obligation of the ALJ to "further develop the record concerning depression," despite the total absence of any record of psychiatric or psychological

treatment in the record); and, most recently, Pruitt v. Chater, No. 96-5128 (10th Cir. February 18, 1997) (ALJ's acceptance of the diagnosis of depression by a counselor with a bachelor's degree was enough to trigger an obligation to develop the record concerning depression--but the "counselor's one-page summary statement, which contains no discussion of the effect of Mr. Pruitt's depression on his ability to work, is not substantial, competent evidence of Mr. Pruitt's ability to work").⁴ Cf., Ferguson v. Chater, 82 F.3d 425, 1996 WL 165307, at *2 (10th Cir. April 9, 1996) ("two vague, terse references to anxiety and depression on which Ms. Ferguson relies are insufficient to trigger a duty to develop the record"). In light of these decisions, and as this case must be remanded on other grounds, the court also directs the Commissioner, on remand, to fully develop the record with regard to claimant's depression. Such development should include a consultative mental examination.

There is merit to claimant's second claim that the ALJ failed to consider her headaches, a nonexertional impairment. There is a great deal of evidence in the record that she has suffered severe migraine headaches on many occasions (TR 125, 127, 152-153, 208-209, 217-218, 245-246, 274, 284-292). Medication and injections have been prescribed for these (TR 126-127, 208, 289). Dr. Robert Harris, her treating doctor, recommended a neuroevaluation for the problem (TR 245-246).

⁴ The counselor's summary stated: "[t]he current diagnosis for Mr. Pruitt is Depressive Disorder Not Otherwise Specified. This means that Mr. Pruitt reports symptoms of depression which are recurrent, but which do not meet the criteria for any specific mood disorder. In my opinion, this appears to be a chronic state for Mr. Pruitt. Psychosocial stressors such as inadequate finances and chronic pain can complicate or exacerbate the depressive symptoms."

A CAT scan was done on October 18, 1994, but it was normal (TR 289). Dr. Harris concluded that the maximum medication was not controlling her headaches on October 18, 1994 and admitted her to the hospital for four days "for pain control." (TR 290-291). A change in medication improved her condition (TR 289).

While the ALJ noted in his opinion that claimant had "alleged . . . headaches" and that he considered this and other nonexertional impairments and evaluated her pain under the Social Security Regulations and Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), he found that her pain did not prevent her from doing sedentary work (TR 22-24). Given the extent of the medical evidence in the record regarding the severity of her headaches, the ALJ should have questioned the vocational expert concerning the impact of headaches on her ability to work, especially since Dr. Harris, the physician who treated her headaches, found that she was disabled from gainful employment.

There is also merit to claimant's third contention that the ALJ erred in failing to follow the treating physician rule. "A treating physician's opinion must be given substantial weight unless good cause is shown to disregard it." Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995). When the treating physician's opinion is not consistent with other medical evidence, the ALJ must examine the other medical evidence to determine if it outweighs the treating physician's report. Id. at 290. A treating physician's opinion regarding the severity of a claimant's impairments is generally favored over that of a consulting physician. Reid v. Chater, 71 F.3d 372, 374 (10th Cir. 1995).

There are only two opinions in the record regarding whether claimant is totally disabled. Dr. Harris, claimant's treating physician, concluded on October 11, 1994 that "the patient's problems at this time are (1) coronary insufficiency, (2) emphysema, (3) arthritis with pain in the neck and shoulders, (4) myositis involving the upper shoulders and back, (5) gastritis, (6) emphysema, (7) esophageal reflux causing chest pain. It is my opinion that Ms. McPeak is disabled for any gainful employment due to the multiple persistent and to some degree progressive health problems described above." (TR 282).

Dr. Angelo D'Alessandro performed a consultative examination of claimant on July 8, 1993 (TR 211-213). He found that she had angina pectoris, osteoarthritis, chronic obstructive pulmonary disease, gastric ulcers, and migraine cephalgia by history. (TR 213). He then concluded:

This is a 42-year-old female with a normal gait in terms of speed, stability, and safety, and dexterity of gross and fine manipulation. Her grip strength is right 30 kg, left 28 kg. There is tenderness to palpation in the lumbosacral and lumbodorsal areas. Pain also elicited on movement of those areas. At this time, any moderate to heavy work-related activities, such as lifting, moving about, carrying or handling objects, or being in a very stressful situation would be difficult for this patient.

(TR 213).

The ALJ chose to disregard Dr. Harris' opinion, stating:

Normally, the opinions, diagnoses, and medical evidence of a treating physician, who is familiar with claimant's impairments, treatments, and responses over a length of time, should be accorded considerable weight Although the physician noted claimant's recurrent hospitalizations, the opinion is essentially conclusory in that no functional limitations are expressed in arriving at the disability opinion. While conclusory opinions

by physicians on the ultimate issue of disability are entitled to some weight and consideration, they are not necessarily binding unless there is an absence of conflict in the medical evidence and opinions, and all the evidence must point to that conclusion. Such opinions often invade the province of the Secretary and go beyond a physician's medical expertise in passing upon vocational capacity, especially when unsupported by diagnostic testing, laboratory reports or clinical findings, and, as such, are viewed as constituting little probative weight. Accordingly, the undersigned gives greater weight to the opinion of the July 1993 consultative/treating physician whose opinion was based on credible signs, symptoms and medical findings contained in his report (Exhibit 32).

(TR 22) (emphasis added).

It is significant that, after the ALJ's October 27, 1994 opinion, Dr. Harris completed a residual functional capacity evaluation on January 16, 1995, in which he stated that claimant could only sit occasionally (2-3 hours total in an eight-hour day) and stand, walk, or combine sitting and standing/walking infrequently (0-1 hours total in an eight-hour day). This report of her functional limitations meets the ALJ's requirement to make Dr. Harris' opinion that she was totally disabled non-conclusory and therefore credible. The Appeals Council erred in failing to find this new evidence inconsistent with the ALJ's conclusions (TR 5-6).

Finally, there is merit to claimant's contention that the ALJ erred in finding that claimant could do sedentary work except for lifting limitations, performing prolonged walking and standing, being exposed to pollutants, and involving stresses. Dr. Harris'

January 1995 evaluation showed significant limitations in sitting and standing. These were not included in the hypothetical questions to the vocational expert.⁵

⁵ The hypothetical questions of the ALJ to the vocational expert were as follows:

Q Okay. I'd like you to assume if you would, please, Ms. Lewis, that we have an individual who is of the same age as the claimant in this case and the same education and work experience as the claimant in this case and who has an average ability to read, write, and work with numbers. I'd like you to further assume that the hypothetical claimant has the physical capacity to perform light work with the following limitations. And I'm going to describe those limitations. My question is going to be whether there is other work the hypothetical individual could perform. And if so, please identify the jobs. An individual with a fair ability to deal with work stress, a fair ability to maintain concentration and attention, and a shortness of breath which limits the claimant's ability to be exposed to pollutants, dust, and fumes, but otherwise allows the claimant to perform the work at the light level. With those additional limitations, are there jobs existing in the national economy that this individual could perform? (TR 329-330) (emphasis added)....

Q Now, let's take it down to the sedentary level. Are there jobs that exist in the national economy at the sedentary level with exactly the same additional limitations as I gave you for the position at the light level? (TR 331)....

Q Let me add to the hypothetical so that this is going to be cumulative. We're going to add an additional limitation. And we're going to add the limitation with regard to the shortness of breath which I said in the previous hypothetical would not affect the ability to walk, carry, and the other elements that go into the sedentary position. Let us now say that with respect to this hypothetical claimant, that we're adding to the limitation that the shortness of breath would cause this individual to be able to lift no more than five pounds either on an occasional or frequent basis. With that additional limitation, what effect would that have on the jobs you've identified at either of the exertional levels that we've been discussing? (TR 333)

Q Well, let me ask the hypothetical this way with regard to the sedentary level or to something below the sedentary level. The

"Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. "Sedentary work" involves "lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(a).

In Soliz v. Chater, 82 F.3d 373, 375 (10th Cir. 1996), the court noted that Social Security Ruling 82-13 provides that, while professional and managerial jobs

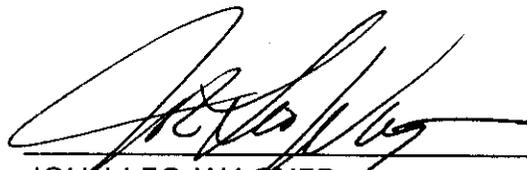
individual or the hypothetical claimant who is -- has a -- let me go through each of these -- has a fair ability to deal with the work stress, a fair ability to maintain concentration and attention. Because of breathing problems, shortness of breath, needs to be limited exposure to pollutants, fumes, and dust and the like and who is only able to lift five pounds on an occasional or frequent basis. Are there jobs which exist in the national economy that this hypothetical claimant could perform? (TR 333-334).

The ALJ's final hypothetical asked the vocational expert to assume that claimant's testimony given at the hearing was credible and substantially verified by third-party medical evidence in the record without any significant contraindications, and the expert concluded that claimant would only be able to do the job of sedentary information clerk but did not identify how many such jobs existed in the region. (TR 334).

often permit a person to alternate between sitting and standing, most jobs require a person to be in a certain place or posture for a certain length of time, and unskilled jobs are particularly structured so that a person cannot ordinarily sit or stand at will. The court stated that in cases of unusual limitation of ability to sit or stand, a vocational expert should be consulted to clarify the implications for the occupational base. Id.

This case is remanded for additional development of the record concerning depression, and for additional testimony by a vocational expert as to whether jobs exist in the national economy which claimant could perform, after considering Dr. Harris' 1995 evaluation and the impact of her headaches on the jobs available, as well as any additional evidence that is developed concerning depression.

Dated this 26 day of April, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

BILLY FLOYD SIMPSON

Petitioner,

vs.

STATE OF OKLAHOMA, et al.

Respondent.

Case No. 97-CV-95-H

FILED

APR 08 1997

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

ENTERED ON DOCKET

DATE APR 10 1997

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge for report and recommendation is Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed on January 31, 1997. [Dkt. 1].

On February 13, 1997, the Court entered an order informing Petitioner that his petition was deficient in that he failed to name the proper party as respondent in accordance with Rule 2(a) the Rules Governing Section 2254 Cases in the United States District Courts. Rule 2(a) requires that when an applicant for habeas corpus relief is presently in custody pursuant to the state judgement in question "the state officer having custody of the applicant shall be named as respondent." Petitioner was also advised of his failure to submit a motion for leave to proceed *in forma pauperis*. Petitioner was granted until March 13, 1997 to submit an *in forma pauperis* motion and a petition naming the proper party as respondent. He was advised that his failure to do so may result in the dismissal of his action. March 13, 1997 has passed and as of the date of this report the Petitioner has not submitted the documents required by the February 13, 1997 order.

The undersigned United States Magistrate Judge RECOMMENDS that the petition be dismissed without prejudice for failure to prosecute.

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

DATED this 8th day of April, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

APR 9 1997

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

RENARD E. NELSON,)
)
Petitioner,)
)
vs.)
)
DISTRICT COURT OF TULSA)
COUNTY and THE TULSA COUNTY)
PUBLIC DEFENDER'S OFFICE)
)
Respondents.)

No. 97-CV-285-H

ENTERED ON DOCKET

DATE APR 10 1997

ORDER

Petitioner, a state prisoner appearing pro se, has filed a petition for a writ of mandamus pursuant to 28 U.S.C. § 1361 and a motion for leave to proceed in forma pauperis. Petitioner requests an order compelling the Tulsa County District Court and the Tulsa County Public Defender's Office to notify him of his right to appeal and to provide to him "all copys (sic), transcripts, filing dates of appeals, and brif (sic) submitted for appeal" on his behalf. Petitioner also alleges that Defendants interfered with the prompt disposition of his case during the trial process.¹

¹Petitioner fails to provide any supporting facts whatsoever for this allegation. Although a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, Haines v. Kerner, 404 U.S. 519, 520-521 (1972), it is not the proper function of the district court to assume the role of advocate for the pro se litigant. Hall v. Bellmon, 935 F.2d 1106, 110 (10th Cir. 1991). If the court can reasonably read the pleadings to state a valid claim for relief, it should do so. Id. However, where a pro se litigant completely fails to provide factual support for his claim, as in this case, the Court cannot consider the claim. Furthermore, a petition for writ of mandamus is not the proper procedure for securing a

Even if the Court liberally construes Petitioner's action as a one in the nature of mandamus,² the Court lacks subject matter jurisdiction to compel state officials from the Tulsa County District Court and the Tulsa County Public Defender's Office to perform a duty owed to Plaintiff. See 28 U.S.C. § 1361 (providing that federal court has jurisdiction to compel an officer or employee of the United States to perform a duty owed to plaintiff). Therefore, Petitioner's action in the nature of mandamus is hereby **dismissed for lack of subject matter jurisdiction**. Petitioner's motion for leave to proceed in forma pauperis (Docket #2) is **granted**.

IT IS SO ORDERED.

This 8TH day of APRIL, 1997.



Sven Erik Holmes
United States District Judge

remedy for this claim. See 28 U.S.C. § 1361.

²The writ of mandamus has been abolished, see Fed. R. Civ. P. 81(b).

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

IN RE:)
 SUNRISE ISLAND, LTD.,)
)
 Debtor,)
)
 GOLDMAN SACHS & CO.,)
 for the Benefit of Claude M. Ballard)
 IRA Account No. 005990189,)
)
 Appellant,)
)
 vs.)
)
 SUNRISE ISLAND, LTD.,)
)
 Appellee.)

APR 9 1997
 Phil Lombardi, Clerk
 U.S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

Bankr. Case No. 96-00396-C

District Case No. 96-C-786-H

ENTERED ON DOCKET
 DATE 4-10-97

ORDER

This order pertains to the appeal of Goldman Sachs & Co. ("Goldman Sachs") from the final order of the United States Bankruptcy Court for the Northern District of Oklahoma which denied relief from an automatic stay based on the fact that the Debtor, Sunrise Island, Ltd. ("Sunrise"), had failed to file a plan within ninety days of the order for relief in a single asset real estate case.

On June 15, 1995, Sunrise executed a note in favor of Goldman Sachs in the amount of \$500,000, and executed a deed of trust granting Goldman Sachs a mortgage lien in a 3,200 acre island in the Mississippi River. Debtor defaulted on the note. On February 9, 1996, prior to foreclosure by Goldman Sachs, Sunrise filed for Chapter 11 bankruptcy relief. Sunrise's Schedules and Operating Reports filed in the bankruptcy case showed the island, personal property and equipment to operate the

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real estate, and contracts relating to the operation of the island as assets, and income from the operation of the real estate, including income from timber sales and a hunting lease. Sunrise failed to file a plan of reorganization within ninety days.

On May 13, 1996, Goldman Sachs filed a Motion for Relief from Automatic Stay under 11 U.S.C. § 362, asking the bankruptcy court to permit it to foreclose on its collateral. Goldman Sachs claimed that the case was a "single asset real estate" case, as defined by Section 101 (51B) of the Bankruptcy Code, and Sunrise had failed to file a plan of reorganization within ninety days of the date of the Order for Relief, as required in single asset real estate cases by Section 362(d)(3) of the Bankruptcy Code. Sunrise filed an objection, contending that this was not a "single asset real estate" case. At a hearing on June 5, 1996, the bankruptcy court denied Goldman Sachs' motion for relief from the automatic stay. Goldman Sachs appealed.

The district court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). An order denying a motion for relief from the automatic stay is a final appealable order. Christensen v. Tucson Estates, Inc., (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir. 1990). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact. In re Burkart Farm & Livestock, 938 F.2d 1114, 1115 (10th Cir. 1991). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. Id.; In re Osborn, 24 F.3d 1199, 1203 (10th Cir. 1994). This appeal challenges the legal conclusion drawn from the facts

presented at trial, so de novo review is proper.

The issue in this case is whether the bankruptcy court erred in determining that Sunrise's estate did not constitute "single asset real estate" and therefore denying Goldman Sachs' motion for relief from the automatic stay. Debtor failed to file a plan within ninety days of the entry of the Order for Relief, and relief from the stay is mandatory under 11 U.S.C. § 362(d)(3) in a "single asset real estate" case.

Under 11 U.S.C. § 101(51B), "single asset real estate" is:

real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than \$4,000,000.

If the assets of a debtor fall within this definition, the debtor has an obligation to file a reasonably confirmable plan of reorganization or commence monthly interest payments to creditors within ninety days of the entry of the order for relief, and if the debtor fails to do so, a creditor whose claim is secured by the real estate is entitled to relief from the automatic stay. 11 U.S.C. § 362(d)(3).

There is little authority concerning the definition of "single asset real estate" under § 101(51B) or the application of § 362(d)(3). The legislative history made the purpose of § 362(d)(3) clear that "[t]his amendment will ensure that the automatic stay provision is not abused, while giving the debtor the opportunity to create a workable plan." S.Rep. No. 168, 103rd Cong., 1st Sess. (1993). But the history does not indicate what Congress meant by "operation" of the real property.

Courts construing the Code sections have turned to earlier case law granting dismissal or relief from the § 362 automatic stay defining "single asset real estate." See, In re Oceanside Mission Associates, 192 B.R. 232 (Bankr. S.D. Cal. 1996) (holding that raw land which generated no income was single asset real estate); In re Kkemko, Inc., 181 B.R. 47 (Bankr. S.D. Ohio 1995) (holding that marina was not single asset real estate); In re Philmont Development Co., 181 B.R. 220, 223-224 (Bankr. E.D. Pa. 1995) (applying § 362(d)(3) to apartment buildings).

The court in Philmont justified its reliance on pre-1994 case law by saying:

The terms single asset case, or single asset real estate case, are well-known and often used colloquialisms which essentially refer to real estate entities attempting to cling to ownership of real property in a depressed market . . . rather than businesses involving manufacturing, sales or services. The drafters of sections of 101(51B) and 362(d)(3) were aware of the colloquial use of the phrase "single asset real estate," and the Court believes that their intention in using that phrase grew out of its previous colloquial and common usage.

Id. at 223. (citations omitted).

The court in In re CBJ Development Inc., 202 B.R. 467, 471 (B.A.P. 9th Cir. 1966) noted that pre-1994 cases considering the issue have examined not only whether the debtor has only one asset, but also whether the debtor has employees other than its principals.

In Kkemko, the court considered the operation of a marina and noted that in common usage the term "single asset real estate" referred to raw land or buildings which were intended to be income producing. 181 B.R. at 51. It concluded that the marina was not within the Section 101(51) term "single asset real estate," after

considering the various nonrental activities which the debtor engaged in at its marina, including providing moorage, selling fuel and other provisions to boaters, providing storage of boats, and offering boat winterizing and boat repair. 181 B.R. at 50-51.

The court finds that this is a single asset real estate case under the four criteria found in § 101(51B). The asset of Sunrise is a single piece of real property, a 3200-acre island, and is non-residential. While Sunrise owns some personal property, such as a barge and vehicles, in addition to the land, this is necessary to perform the income-producing activities on the island and does not defeat the "single-asset" characterization. The court in In re Humble Place Joint Venture, 936 F.2d 814, 818 (5th Cir. 1991), found that a partially developed thirty-acre piece of land was a "single asset," even though the debtor listed other assets, such as cash, promissory notes, furniture, fixtures and equipment.

The real property also generates all of the income of Sunrise. Debtor's Statement of Financial Affairs shows that all income earned in 1994 and 1995 was derived from the sale of timber and crops from the island and from the grant of hunting rights on the island.

Sunrise is not involved in any substantial business other than the operation of its real property and activities incidental thereto. The only businesses conducted by Sunrise are selling timber from the island, cattle ranching on it, growing wheat to enhance the hunting operation, and leasing rights to hunt on it. There is no contention that Sunrise has employees other than its principals involved in these activities. Without these, the land sits unused. The wheat crop and the ranching did

not generate substantial income in 1994 or 1995, and thus do not constitute substantial businesses outside the operation of the land. Finally, the aggregate noncontingent, liquidated secured debt of Sunrise is less than \$4,000,000.00.

The bankruptcy judge erred in concluding that Sunrise was not merely renting out the real estate, but "operating a substantial timber harvesting business, a hunting lodge business and a crop and cattle raising business on the island." All the businesses related to "operating" the real estate.

This is a single asset real estate case. Debtor failed to file a confirmable plan within the time period provided under the Bankruptcy Code or adequately protect Goldman Sachs by paying interest on its claim. The bankruptcy court should have modified the stay to permit Goldman Sachs to realize on its collateral. The decision of the bankruptcy court is reversed and the stay is modified to permit Goldman Sachs to realize on its collateral.

Dated this 8TH day of APRIL 1997.

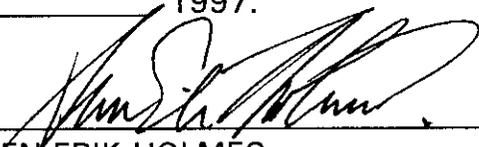

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

RADCO, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)

vs.)

MOHAWK STEEL COMPANY, INC.,)
an Oklahoma corporation; **SHELL OIL**)
COMPANY, a Delaware corporation;)
FOSTER WHEELER USA, CORP.,)
a Delaware corporation; **ABB LUMMUS**)
GLOBAL INC., a Delaware corporation;)
LYONDELL-CITGO REFINING COMPANY,)
L.L.C., a Texas limited liability)
company, **PETRO-CHEM DEVELOPMENT**)
CO., INC., a Delaware corporation;)
and **MARATHON OIL COMPANY**, an)
Ohio corporation.)
)
Defendants.)

ENTERED ON DOCKET
DATE APR 10 1997

CIVIL ACTION NO. 93-C 1102H /

FILED
APR 10 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

Radco, Inc. (Radco"), having filed its Complaint against ABB Lummus Global, Inc. ("Lummus"), and Lummus having filed counterclaims against Radco and Lummus having resolved their differences and moved for entry of this Order,

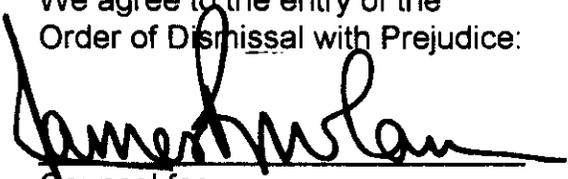
IT IS ORDERED, ADJUDGED and DECREED that all claims and counterclaims that have been brought herein by Radco against Lummus or by Lummus against Radco are dismissed with prejudice. This Court retains jurisdiction over disputes concerning the Settlement Agreement.

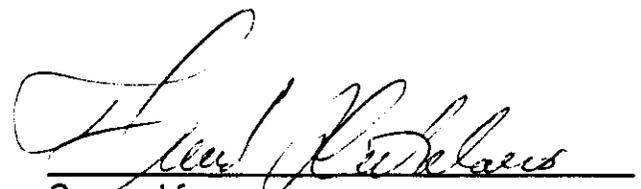
Signed this 8TH day of April, 1997.


UNITED STATES DISTRICT JUDGE

101

We agree to the entry of the
Order of Dismissal with Prejudice:


Counsel for
ABB LUMMUS GLOBAL, INC.


Counsel for
RADCO, INC.

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

FILED

APR 7 1997

Phii Lombardi, Clerk
U.S. DISTRICT COURT

DAVID SACK,

Plaintiff,

v.

RON CHAMPION, et al.,

Defendants.

Case No. 96-C-203-H

ENTERED ON DOCKET

DATE APR 9 1997

**ORDER AND REPORT AND RECOMMENDATION
OF U. S. MAGISTRATE JUDGE**

This order and report and recommendation pertains to Defendants Jim Owen's and Gary Cardinale's Motion for Protective Order (Docket #25), Petitioner's Response to Defendants' Motion for Protective Order (Docket #26), Plaintiff's Motion to Compel Discovery or Alternatives (Docket #27), Defendants Jim Owen's and Gary Cardinale's Reply to Petitioner's Response to Defendants' Motion for Protective Order (Docket #29), Petitioner's Response to Motion for Protective Order (Docket #30), Plaintiff's Response to Owen's and Cardinale's Reply to Petitioner's Response to Motion for Protective Order (Docket #31), Defendants Jim Owen's and Gary Cardinale's Response to Plaintiff's Motion to Compel Discovery or Alternatives (Docket #32), Plaintiff's Supplement of Claims, Jurisdiction and Non-Immunity; Motion Reurging Injunction(s) and TRO; Motion to Allow Amendment of Complaint (Docket #34), and Defendants Jim Owen's and Gary Cardinale's Response to Plaintiff's Supplement of Claims, Jurisdiction and Non-Immunity; Motion Reurging Injunction(s) and TRO; Motion to Allow Amendment of Complaint (Docket #35).

42

Plaintiff's civil rights complaint alleges violations of his rights during his imprisonment in a prison in Mansfield, Texas under a contract with the Oklahoma Department of Corrections to house Oklahoma inmates in facilities outside the state. The only remaining defendants, Jim Owen and Gary Cardinale, who were served by mail in Mansfield, have filed a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction (Docket #11). They contend that they do not have minimum contacts with the state to subject them to personal jurisdiction in the Northern District of Oklahoma.

ORDER

Defendants ask the court to stay discovery, including requiring a response to plaintiff's Interrogatories and Requests for Production of Documents, until the motion to dismiss is ruled upon by the court. The defendants state that their counsel has conferred by telephone with plaintiff, as required by Rule 26(c) of the Federal Rules of Civil Procedure and Local Rules 7.1(E) and 37.1(A), and they were unable to reach an accord concerning whether discovery should proceed during the pendency of the motion to dismiss.

Defendants point out that in their First Amended Original Answer (Docket #18), they plead that plaintiff's claims against them are barred by qualified immunity, which is not simply a defense to liability, but a defense to a suit in its entirety. The Supreme Court has found that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987), the Court concluded that one of the purposes of this qualified immunity is to protect public officials from the “broad-ranging discovery” that can be “peculiarly disruptive of effective government.” Id. (quoting Harlow, 457 U.S. at 817). The court in Sawyer v. County of Creek, 908 F.2d 663, 665 (10th Cir. 1990), stated that “[q]ualified immunity protects a defendant from discovery, trial, and the other burdens of litigation.” Id. The issue of whether defendants can be characterized as public actors will be discussed subsequently.¹

However, some discovery is usually necessary to determine whether qualified immunity exists. The Tenth Circuit in Maxey by Maxey v. Fulton, 890 F.2d 279, 282 (10th Cir. 1989), agreed with the Fifth Circuit’s conclusion in Lion Boulos v. Wilson, 834 F.2d 504, 507-508 (5th Cir. 1987):

Harlow, . . . Mitchell v. Forsyth, 472 U.S. 511 (1985)], and Jacquez v. Procnier, 801 F.2d 789 (5th Cir. 1986)] make clear that qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad. Discovery designed to flesh out the merits of a plaintiff’s claim before a ruling on the immunity defense or discovery permitted in cases where the defendant is clearly entitled to immunity would certainly fall within this category Harlow, Mitchell, and Jacquez require that immune defendants be exempt from avoidable, burdensome pretrial matters Discovery orders entered when the defendant’s immunity claim turns at least partially on a factual question; when the district court is unable

¹ It seems problematic that these defendants claim, on one hand, that they are [presumably Oklahoma] “public officials” entitled to qualified immunity, and then, on the other hand, claim that they have “no minimum contacts” with the State of Oklahoma.

to rule on the immunity defense without further clarification of the facts; and which are narrowly tailored to uncover only those facts needed to rule on the immunity claim are neither avoidable or overly broad.

See also, Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1387 (10th Cir. 1994).

Defendants Jim Owen's and Gary Cardinale's Motion for Protective Order (Docket #25) and Plaintiff's Motion to Compel Discovery or Alternatives (Docket #27) are granted in part and denied in part. Discovery is stayed as to those matters outside the limited issue of defendants' contacts with the State of Oklahoma. Defendants are to respond to plaintiff's Interrogatories and Requests for Production of Documents Nos. 1, 2, 3, 9, and 10 (Ex. A to Defendants Jim Owen's and Gary Cardinale's Motion for Protective Order (Docket #25)), which relate to the contacts of their employer, Mansfield Law Enforcement Center, with the State. Additional discovery, including responses to the remainder of plaintiff's Interrogatories and Requests for Production, is stayed and will go forward only if defendants' motion to dismiss is denied.

REPORT AND RECOMMENDATION

Plaintiff's Supplement of Claims, Jurisdiction and Non-Immunity; Motion Reurging Injunction(s) and TRO; Motion to Allow Amendment of Complaint (Docket #34) should be granted in part and denied in part. Plaintiff asks the court to grant an injunction compelling his transfer to Oklahoma from Texas and a temporary restraining order prohibiting any further transfer. To establish entitlement to a preliminary injunction or a temporary restraining order, the moving party must show (1) he will suffer irreparable harm if an injunction is not granted, (2) the threatened injury to the

moving party outweighs any injury the requested injunction may cause the nonmoving party, (3) the injunction would not be detrimental to the public interest, and (4) a substantial likelihood the moving party will succeed on the merits. Walmer v. U.S. Dept. of Defense, 52 F.3d 851, 854 (10th Cir.), cert. denied, _____ U.S. _____, 116 S.Ct. 474, 133 L.Ed.2d 403 (1995).

There is a substantial likelihood that the district court will find that it has personal jurisdiction over the defendants. To bring his claim against defendants, plaintiff must show that they were "state actors" who violated his rights. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982). There, the Court emphasized that a determination of state action is "necessarily fact bound."

In Cruz v. Donnelly, 727 F.2d 79, 82 (3d Cir. 1984), the court concluded that "the critical issue . . . is whether the state, through its agents or laws, has established a formal procedure or working relationship that drapes private actors with the power of the state."

Many courts have discussed the obligations of a state when it commits one of its citizens. When the state curtails an individual's liberty through the civil commitment process, it assumes affirmative obligations, imposed by the Constitution, for the individual's care and well-being. Youngberg v. Romeo, 457 U.S. 307, 315-19 (1982). If it chooses to delegate these responsibilities, and a private company chooses to assume them, neither can then argue that the private company's acts and omissions do not occur under the color of state law. See, Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc., 556 F.Supp. 677, 679-680 (D.

Mass. 1983). To hold otherwise would allow the state to avoid its constitutional obligations simply by delegating its responsibility for the care of individuals it involuntarily confines and would render meaningless the recognized rights of the involuntarily committed. Davenport v. Saint Mary Hosp., 633 F.Supp. 1228, 1234 (E.D. Pa. 1986).

Many courts have made findings of state action under such circumstances in the civil context. Id. Fewer cases have discussed criminal commitment. However, in Milonas v. Williams, 691 F.2d 931, 939-40 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983), the court found that owners and operators of a private detention school for troubled youths in which students were involuntarily placed by the state acted under color of state law.

The State of Oklahoma curtailed plaintiff's liberty when he was imprisoned and assumed the obligation for his care. It chose to delegate its responsibilities to a private company, as allowed by Okla. Stat. tit. 57, § 561, and the company assumed the responsibilities and was required by the statute to meet standards established by the Oklahoma Board of Corrections. It therefore assumed the role of a state actor, as did its employees. The similarities between a private prison corporation and a private detention center such as that in Milonas are many. Like the center in Milonas, the prison has a contract with the state (or with a company which has contracted with the state), is paid by the state (or the company which contracted with the state), and must follow state regulations. If the court applies the ruling in Milonas, it will find that the actions of defendants constituted state actions for the purposes of

Section 1983 liability.

However, there is also a likelihood that the district court will find that defendants are entitled to qualified immunity as public actors. The court concluded in DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714, 721 (10th Cir. 1988), that, in cases in which private party defendants are required to act in a certain manner under a contract with a government body, the private party defendants should not be deprived of the qualified immunity defense. In DeVargas, a private corporation provided security inspectors for a research laboratory operated under an agreement between the United States Department of Energy ("DOE") and the University of California and was sued by a plaintiff whose application for employment was not considered because DOE regulations disqualified one-eyed persons.

The DeVargas court said that this type of case, where the contract requires certain actions controlled by governmental statutes, presents the strongest arguments for extending qualified immunity to private party defendants.

[T]he governmental authority involved requires private defendants to act as they do. Indeed, were they to act otherwise they would likely be liable for breach of contract to the governmental body with whom they contracted

[T]he functions which the private parties performed pursuant to contract are functions which governmental employees would perform had the government not contracted them out. The Supreme Court instructs courts to examine the function of individual defendants -- the nature of the individual responsibilities -- not their status, in resolving immunity defenses. We conclude that when private party defendants act in accordance with the duties imposed by a contract with a governmental body, perform a governmental function, and are sued solely on the basis of those acts performed pursuant to contract, qualified immunity is proper.

Id. (citations omitted).

If the district court concludes that the defendants acted in accordance with their duties under the contract to house Oklahoma prisoners, a finding of qualified immunity will be proper.

Plaintiff has not shown that he will suffer irreparable harm if an injunction is not granted. He has successfully initiated and maintained this lawsuit from the Texas prison. He has not shown a substantial likelihood of succeeding on the merits of this case. His request for an injunction and TRO should be denied.

Plaintiff asks to amend his complaint to rewrite it in "a more fact driven and educated form." Federal Rule of Civil Procedure 15 discusses the amendment of pleadings and 15(a) states:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

The rule requires leave to amend to be freely given by the court in the absence of prejudice to the opposing party. The Supreme Court in Foman v. Davis, 371 U.S. 178, 182 (1962), stated:

In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue

prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."

See also, *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir. 1996).

Plaintiff's motion to amend his complaint should be granted.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 4th day of April, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\r&r\sack.rr

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

F I L E D

APR - 0 1997

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

DENNIS MATTHEW GRANT,)
)
Petitioner,)
)
vs.)
)
MARY PUNCHES,)
)
Respondent.)

No. 96-C-77-B

ENTERED ON CLERK
APR 0 0 1997

ORDER

This matter is before the Court on *pro se* Petitioner's petition for a writ of habeas corpus filed January 5, 1996.

On April 13, 1992, Petitioner appeared with his counsel before the District Court of Osage County, Oklahoma, pursuant to a plea agreement, following waiver of a preliminary hearing. Petitioner pled *nolo contendere* to possession of cocaine in violation of Okla. Stat. tit. 63, § 2-402. Without entering a judgment of guilty, the court ordered Petitioner to be placed on deferred probation for a period of three years, until April 14, 1995. On the same date, Petitioner waived his statutory right of appeal.

On October 22, 1993, the State, due to Petitioner's probation violations, filed a motion to accelerate, and on May 20, 1994, following a hearing, the Court accelerated Petitioner's three-year deferred sentence, entered a finding of guilt and imposed a sentence of ten years imprisonment. The order of acceleration was appealed by Petitioner to the Oklahoma Court of Criminal Appeals, which the appellate court affirmed on April 18, 1995. Petitioner then

sought post-conviction relief alleging denial of due process, newly discovered evidence, and ineffective assistance of counsel. The District Court of Osage County denied the application for post-conviction relief and such denial was affirmed by the Oklahoma Court of Criminal Appeals on October 11, 1995. This Court, by its order of July 2, 1996, determined that Petitioner has exhausted his state court remedies.

Petitioner urges the following three grounds in support of his application for writ of habeas corpus pursuant to 28 U.S.C. § 2254:

1. The State of Oklahoma denied the Petitioner his constitutional rights to due process of law as provided for under the Fifth and Fourteenth Amendments to the United States Constitution when it denied Petitioner's application for post-conviction relief without entering Findings of Fact and Conclusions of Law as prescribed under Okla. Stat. tit. 22, § 1083.
2. The State of Oklahoma denied the Petitioner his constitutional rights and guarantees to a fair trial and due process of law as provided for under the Sixth and Fourteenth Amendments to the United States Constitution when it failed to conduct an evidentiary hearing of the issues presented as prescribed under Okla. Stat. tit. 22, § 1084.
3. The State of Oklahoma denied the Petitioner his constitutional right to effective assistance of counsel as provided for under the Sixth Amendment to the United States Constitution.

The transcript of Petitioner's *nolo contendere* plea to the charge in Count I, under

oath, in pertinent part reveals the following: Petitioner was mentally competent. (Tr. 5, Plea Hearing). Petitioner was knowledgeable of the charge in Count I as well as the range of punishment (two to ten years) if he were found guilty following his *nolo* plea. Petitioner waived his right against self-incrimination and his right to a jury trial. (Tr. 6, Plea Hearing). Petitioner had discussed the charges and the potential punishment with his counsel, with whom he was satisfied. Count II (possession of a firearm during a felony) and Count III (possession of drug paraphernalia) were to be dismissed pursuant to the plea agreement. Petitioner stated he desired to change his not guilty plea to Count I (possession of cocaine) to a plea of "no contest." (Tr. 7, Plea Hearing). The record reveals Petitioner's plea of "no contest" was voluntary and free of coercion. (Tr. 8-9, Plea Hearing). Then, under oath, Petitioner stated he would not contest that the State could prove through the investigating officer that the substance he possessed in Count I was in fact cocaine. The pertinent record colloquy reads as follows: (Tr. 8, Plea Hearing)

"Mr. Woodyard (Defendant's counsel): I will advise the court that we had an opportunity before the preliminary hearing to become aware of what the testimony would be from the officer in this case and that the officer, if called upon to testify, would indicate that possession was found either on the person of Mr. Grant or in the room where he had exclusive possession and control and they had sufficient factual information for which a jury would find that he was in possession of the controlled dangerous substance. He realizes that's what the evidence of the State would be and advised the court that he does not wish to contest that evidence; is that a correct statement, Mr. Grant?"

The Defendant: Yes, sir."

The court thereafter stated:

“The court finds that the plea of no contest as to Count I entered herein by the Defendant has been knowingly and voluntarily entered and there exists a factual basis for the entering of the same.”

The trial court then deferred a finding of guilt as to Count I for three years until April 14, 1995. (Tr. 10, Plea Hearing). The Petitioner was then placed on supervised probation and acknowledged he had reviewed the rules and conditions of probation with his attorney and Petitioner attached his signature thereto. (Tr. 11, Plea Hearing). Pursuant to the plea agreement the court dismissed Counts II and III. The trial judge carefully advised the Petitioner of his right to appeal and Petitioner stated on the record he did not wish to appeal. (Tr. 11, Plea Hearing).

The record of the May 20, 1994 acceleration of deferral sentence hearing reveals the following: The probation rules and conditions were explained by the probation officer to Grant on May 15, 1992, and Grant confirmed same by signing them. (State's Ex. 1 and 2 to the Transcript of Motion to Accelerate-5/20/94). The record reveals Grant violated numerous rules and conditions of his probation. For a period of approximately twenty-four months, from June 1992 to May 1994, Grant failed to report in person each month and failed to file a monthly written report. (Tr. pp.6-7, Motion to Accelerate; State's Ex. 1 and 2).

Grant violated rule 5 of the rules and conditions of probation concerning the supervising probation officer having the right to visit his home and place of employment because Grant never provided an accurate home address or address of employment.

Grant also failed to report for structured life style and intensive alcohol and drug-related counseling at the 12 and 12 Transition Center as he had agreed. Grant admitted he

had a drug problem (Tr. 30, Motion to Accelerate Hearing). Further, Grant failed to submit UAs. In effect, Grant "absconded supervision and failed to abide by the order of the court." (Tr. 10, Motion to Accelerate Hearing).

The acceleration hearing revealed that on May 20, 1994, Grant was a resident of the Oklahoma Department of Corrections, Washita Correction Center. (Tr. 19, Motion for Acceleration Hearing). In March or April 1993, Grant was arrested and charged in reference to a crack cocaine offense. (Tr. 38-39, Motion to Accelerate Hearing). The record reveals that Grant, pursuant to pleas of guilty, on December 17, 1993, in the District Court of Tulsa County, was sentenced to 20 years, 10 years, and 10 years, respectively, on the following three counts to run concurrently in Case No. CF-95-1706:

Count I - Unlawful delivery of controlled drug.

Count III - Receiving and/or acquiring proceeds derived from illegal drug activity.

Count VI - Unlawful possession of a controlled drug. (State's Ex. 4, 5 and 6 - Motion for Acceleration Hearing).

Such were violations of the deferred probation rules and conditions to refrain from violation of any city, state or federal law.

As a result of the plethora of significant violations of the deferred sentence probation, the trial judge concluded there was adequate basis to accelerate the sentence. The trial judge found Petitioner guilty of Count I herein and sentenced Petitioner to ten years' imprisonment to run consecutive to the above-mentioned state convictions. (Tr. 55-56, Motion to Accelerate Hearing). Petitioner's appeal rights were explained to him and he stated he

desired to appeal. (Tr. 56, Motion to Accelerate Hearing).

Legal Analysis and Conclusion

Petitioner's first ground for error asserts that he was denied his constitutional rights when the trial court denied his post-conviction relief without entering Findings of Fact and Conclusions of Law as provided in Okla.Stat. tit. 22, §§ 1083(c) and § 1084 (1991). The record reveals the trial court *inter alia* made the following finding and conclusion regarding Petitioner's application for post-conviction relief:

“Defendants (sic) whole argument is that the 'newly discovered evidence' which is the grounds for this application, is that the white powdery substance he was caught with was not a controlled dangerous substance. All the evidence about this that is in the record of this case, proves the contrary to be true.”

The record confirms the trial court's finding. Although succinct, the finding is adequate in light of the record before the trial court of which it took judicial notice.

Further, Petitioner's claimed error regarding Okla. Stat. tit. 22, §§ 1083(c) and 1084 (1991) is a claim of procedural error under state law and does not present a federal question cognizable under federal habeas corpus. Bond v. State, 546 F.2d 1369 (10th Cir. 1976), and Brinlee v. Crisp, 608 F.2d 839 (10th Cir. 1979).

Petitioner's post-conviction relief claims newly discovered evidence in the form of an unsupported statement of the Petitioner that he was told by an officer after his plea that the substance in Count I had tested not to be cocaine. There is no documentary support for this hearsay allegation of Petitioner and it is contrary to his representation to the court, under oath, at the time of his plea.

Facts supporting a claim of newly discovered evidence on a motion for post-conviction relief must not have been discoverable for trial or original appeal in the exercise of due diligence. Romano v. State, Okl.Crim.App. 917 P.2d 12, 15 (1996). See, U.S. v. Stevens, 978 F.2d 565, 569-70 (10th Cir. 1992); Lewis v. U.S., 771 F.2d 454, 456-57 (10th Cir. 1985), and U.S. v. Allen, 554 F.2d 398, 403 (10th Cir. 1977). Due diligence exercised prior to Petitioner's plea could have produced an independent test of the substance of Count I, were there any serious question that it was, as alleged, cocaine.

In Keeney v. Tamayo-Reyes, 504 U.S. 1, 11 (1992), the Supreme Court held that a petitioner is entitled to an evidentiary hearing only “. . . if he can show cause for his failure to develop the facts in the state-court proceedings and actual prejudice resulting from that failure.” Petitioner's hearsay allegation herein regarding subsequent negative test results does not satisfy this evidentiary hearing criteria. A reviewing federal court is to give deference to a state court's findings developed in full and fair state proceedings. Osborn v. Shillinger, 861 F.2d 612, 622 (10th Cir. 1988).

Regarding Petitioner's claim of ineffective assistance of counsel, to establish ineffective assistance of counsel Petitioner must show that his attorney's performance “fell below an objective standard of reasonableness”, Strickland v. Washington, 466 U.S. 668, 688 (1984), and second, that there is a “reasonable probability” that the outcome would have been different had those errors not occurred, *id.*, at 694. See also, Lockhart v. Fretwell, 506 U.S. 364, 368-370 (1993) (emphasizing that prejudice also requires that errors produced an unfair or unreliable trial). That proof must overcome the “strong presumption” that counsel

was effective. Strickland, 466 U.S. at 689. See also, United States v. Owens, 882 F.2d 1493, 1501 (10th Cir. 1989); Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989); United States v. Voigt, 877 F.2d 1465, 1468 (10th Cir. 1989). Laycock states, at page 1186, the test to establish ineffective assistance of counsel, i.e., that defendant must show that counsel's performance was deficient and prejudiced Defendant's defense, also extends to guilty pleas. Hill v. Lockhart, 476 U.S. 52, 58 (1985). Furthermore, the Supreme Court has also held that judicial scrutiny must be deferential and avoid second-guessing in the form of hindsight. Strickland, 466 U.S. at 689.

Petitioner's asserted claim of ineffective assistance of counsel herein apparently pertains to his counsel acceding to the government's representation the offending substance was cocaine. The state's brief in opposition to Petitioner's application for post-conviction relief in the trial court states:

Petitioner's allegations are neither valid nor correct for five reasons. First, Petitioner's counsel stated and Petitioner agreed under oath that Petitioner had been made aware of sufficient evidence to allow a jury to find Petitioner guilty of the crime charged. Said evidence included the testimony of the officer who had conducted a field test on the substance taken into evidence, the substance itself, which tested positive as cocaine, and exclusive possession of said substance by the Petitioner. Second, Petitioner, under oath indicated that he did not wish to contest the evidence. Third, laboratory analysis of the substance found in Petitioner's possession did, in fact, confirm that said substance was cocaine. Fourth, if Petitioner had not waived his right to a preliminary hearing, the aforementioned evidence would have been submitted to the Court in said hearing. Fifth, pursuant to 22 O.S. 1080(d), Petitioner has failed to meet his burden that there exists evidence of material fact that requires vacation of the conviction or sentence in the interest of justice."

It was Petitioner who, at the plea hearing, under oath, conceded and advised the court the appropriate government witness could establish the substance alleged in Count I was cocaine. Counsel could reasonably have relied upon his client's and the government's representations in this regard. A thorough review of the record does not support that Petitioner has overcome the strong presumption that his trial court counsel was effective or that counsel's representation fell below the objective standard of reasonableness.

Conclusion

Because Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States, Petitioner's application for writ of habeas corpus is hereby denied.

IT IS SO ORDERED this 9th day of April, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KAREN REIL,

Plaintiff,

vs.

Case No. 92-C-513 E ✓

ERNEST GRANT, GERALD GORMAN,
BEVERLY HILL, and DAVID
WILMOTH, Each Individually
and as Duly Elected Trustees
of the BOARD OF TRUSTEES OF
THE TOWN OF FAIRLAND,
OKLAHOMA and Also A Duly
Appointed TRUSTEES OF THE
FAIRLAND PUBLIC WORKS
AUTHORITY and the TOWN OF
FAIRLAND, OKLAHOMA,

Defendants.

ENTERED
APR 08 1997

FILED

APR 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Town of Fairland, Beverly Hill, David Wilmoth, Gerald Gorman, and Earnest Grant, are hereby dismissed with prejudice.

Karen Reil
KAREN REIL, PLAINTIFF

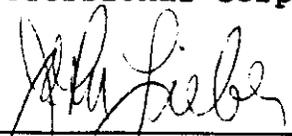
By: *Rex Earl Starr*
REX EARL STARR, OBA# 8568
108 N. First
P.O. Box 918
Stilwell, Oklahoma 74960

ATTORNEY FOR PLAINTIFF,
KAREN REIL

44

89

ELLER AND DETRICH
A Professional Corporation

By: 

JOHN W. LIEBER, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEY FOR DEFENDANTS

3.MAG\Reil\Stip.Dis

Respondents contend that dismissal of this action is required because petitioner is not in custody pursuant to the conviction he is attacking. The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). In Carafas v. LaVallee, 391 U.S. 234, 238 (1968), the Supreme Court interpreted the statutory language as requiring that the habeas petitioner be "in custody" under the conviction or sentence under attack at the time his petition is filed.

In Maleng v. Cook, 490 U.S. 488 (1989), the Court held that when a sentence has fully expired, the collateral consequences of that conviction are not sufficient to render a petitioner "in custody" for purposes of a habeas petition. The Court did not address the situation where the prior conviction was used to enhance punishment for a later conviction under which the petitioner is presently incarcerated.

However, in Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir.) cert. denied, 498 U.S. 879 (1990), the Tenth Circuit held that a petitioner could challenge a fully expired conviction where the petitioner was currently in custody on a conviction which had been enhanced by the expired conviction. Other circuits have approved of Gamble's reading of Maleng. See Allen v. Collins, 924 F.2d 88, 89 (5th Cir. 1991); Battle v. Thomas, 923 F.2d 165, 166 & n. 8 (11th Cir. 1991). Additional circuits have reached the same conclusion as Gamble regarding the meaning of Maleng. See Crank v. Duckworth, 905 F.2d 1090, 1091 (7th Cir. 1990), cert. denied, 498 U.S. 1040 (1991); Feldman v. Perrill, 902 F.2d 1445, 1448-49 (9th Cir.

1990); Clark v. Pennsylvania, 892 F.2d 1142, 1143 n. 2 (3d Cir. 1989), cert. denied, 496 U.S. 942 (1990); Taylor v. Armontrout, 877 F.2d 726, 727 (8th Cir. 1989).

Respondents have submitted documentation to the court, including the felony information and judgments and sentences in Washington County Case CRF-89-150, showing that the twenty-year sentence the Petitioner is presently serving for the offense of injury to a minor child was not enhanced by his prior conviction in CRF-88-14. While the court may liberally construe a habeas action as challenging the present confinement as enhanced by an expired conviction, a petitioner must show that "if he prevails in challenging his prior expired conviction, the sentence that he is currently serving will be reduced." Collins v. Hesse, 957 F.2d 746, 748 (10th Cir. 1992).

As Petitioner has discharged the sentence on the conviction for which he was certified to stand trial as an adult (CRF-88-14), it is clear that he was not in custody pursuant to CRF-88-14. He has failed to show the court that the sentence he is now serving in CRF-89-150 was enhanced by the earlier conviction. Petitioner's Petition for a Writ of Habeas Corpus (Docket #1) should be dismissed, as there is no relief which can be provided by the court.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 8th day of April, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\r&r\starr.rr

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

APR 8 - 1997

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

up

MAYOLA FOSTER,

Plaintiff,
vs.

HILLCREST MEDICAL CENTER,

Defendant.

Case No. 97-CV-140-BU ✓

ENTERED ON DOCKET
DATE APR 9 1997

ORDER

Upon reviewing Plaintiff's Motion to Dismiss With Prejudice and finding that Defendant has no objection to this dismissal, the Court hereby **GRANTS** Plaintiff' Motion to Dismiss with Prejudice. Plaintiff's action against Defendant is **DISMISSED WITH PREJUDICE**.

ENTERED this 7th day of April, 1997.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FRED E. WASHINGTON

Petitioner,

vs.

TULSA COUNTY JAIL, DAMON
CANTRELL, CHAD GREER

Respondents.

Case No. 97-CV-84-B ✓

FILED

APR 04 1997

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

ENTERED ON DOCKET

DATE APR 08 1997

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge for report and recommendation is Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed on January 30, 1997. [Dkt. 1].

On February 13, 1997, the Court entered an order informing Petitioner that his petition was not submitted on the proper form. Petitioner was granted until March 13, 1997 to submit his petition on a proper form and was advised that his failure to do so may result in the dismissal of this action. March 13, 1997 has passed and as of the date of this report the Petitioner has not submitted his petition on an appropriate form.

The undersigned United States Magistrate Judge RECOMMENDS that the petition be dismissed without prejudice for failure to prosecute.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections

Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

APR -7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KELLEE JO BEARD, by her parents and)
next friends, Patty and Bill Beard, *et al.*,)

Plaintiffs,)

vs.)

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

Defendants.)

No. 87-C-704-E ✓

ENTERED ON DOCKET

DATE APR 08 1997

**ORDER APPROVING SETTLEMENT AGREEMENT
AND REQUIRING PAYMENT WITHIN 30 DAYS**

The Court has reviewed the Settlement Agreement entered into between the Plaintiffs, the Oklahoma State Department of Human Services (DHS) and the Oklahoma State Department of Education (SDE) (hereinafter collectively referred to as "Defendants") on March 24, 1997, which definitively resolves all claims for fees and expenses which were made, or which could have been made, through January 1997.

The settlement is hereby approved, and the Defendants are ORDERED to pay the sum referenced in the Settlement Agreement by April 25, 1997.

Dated this 7th day of April, 1997.


James O. Ellison
United States District Judge

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

FILED

APR 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KELLEE JO BEARD, by her parents and
next friends, Patty and Bill Beard, *et al.*,

Plaintiffs,

vs.

THE HISSOM MEMORIAL CENTER, *et al.*,

Defendants.

No. 87-C-704-E

APR 9 1997

SETTLEMENT AGREEMENT

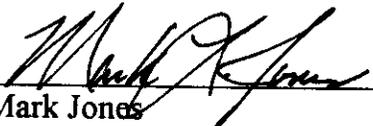
1. Payment of \$1,399.00 to plaintiffs within thirty (30) days.
2. Confidentiality -- as to amount (except as required to be disclosed by law).
3. Settlement will not be used by any party to establish any precedential effect, including, but not limited to:
 - (i) hourly rates;
 - (ii) compensation for due process proceedings;
 - (iii) compensation for representation of individual clients.
4. This agreement disposes of all fees and expenses that have been claimed, or could have been claimed, by plaintiffs in this matter through January 1997.

Dated this 24th day of March, 1997.

Kay Harley
Kay Harley
State Department of Education

mail
4/15/97
0/5

427



Mark Jones
Office of the Attorney General

Louis W. Bullock
Bullock & Bullock

SA-March.97

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

FILE 807

MDL-1417
Asbestos

CHAIRMAN:
Judge John F. Nangle,
United States District Court
Southern District of Georgia

MEMBERS:
Judge Robert R. Merhige, Jr.
United States District Court
Eastern District of Virginia

Judge John F. Grady
United States District Court
Northern District of Illinois

Judge William B. Enright
United States District Court
Southern District of California

Judge Barefoot Sanders
United States District Court
Northern District of Texas

Judge Clarence A. Brimmer
United States District Court
District of Wyoming

Judge Louis C. Bechtel
United States District Court
Eastern District of Pennsylvania

DIRECT REPLY TO:

Patricia D. Howard
Clerk of the Panel
One Columbus Circle, NE
Thurgood Marshall Federal
Judiciary Building
Room G-255, North Lobby
Washington, DC 20002-8004

Telephone: [202] 273-2800
Fax: [202] 273-2810

February 27, 1997

Michael E. Kunz, Clerk
U.S. Courthouse, Room 2609
601 Market Street
Philadelphia, PA 19106

ENTERED ON DOCKET 97-CV-3-BU ✓
DATE FEB 28 1997
RECEIVED
MAR 3 1997
cc: Heidi

Re: MDL-875 -- In re Asbestos Products Liability Litigation (No. VI)

(See Attached Schedule CTO-103)

Dear Mr. Kunz:

Phil Lombardi, Clerk
U.S. DISTRICT COURT

I am enclosing a certified copy and additional copies of a conditional transfer order filed by the Panel in the actions listed in the attached schedule on February 11, 1997. The Panel's governing statute, 28 U.S.C. §1407, requires that the transferee clerk "...transmit a certified copy of the Panel's order to transfer to the clerk of the district court from which the action is being transferred." As stipulated in the Panel's Rule 12(c), execution of the order has been stayed 15 days to give any party an opportunity to oppose the transfer if they wish to do so. The 15-day period has now elapsed, no opposition was received, and the orders are directed to you for filing.

Transferor courts are reminded that Rule 17, R.P.J.P.M.L., remains suspended in accordance with the transfer order filed on July 29, 1991, cited at 771 F.Supp. 415, 424 (1991). Please DO NOT forward your files to the Clerk's Office in the Eastern District of Pennsylvania. Also, Judge Weiner's Pretrial Order No. 1 filed on September 17, 1991, provides that (1) "[a]ll papers in the individual asbestos cases consolidated herein shall be filed with the transferor court...", and (2) sets forth a procedure for when copies of motions should be sent to the transferee judge for action.

A list of counsel is attached hereto.

Very truly,

Patricia D. Howard
Clerk of the Panel

By Patricia Howard
Deputy Clerk

Attachments

Transferee Judge: Hon. Charles R. Weiner
Transferor Judges: (See Attached List)
Transferor Clerks: (See Attached List)

JPML Form 38A

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED
Feb. 11, 1997
PATRICIA D. HOWARD
CLERK OF THE PANEL

DOCKET NO. 875

**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)**

(SEE ATTACHED SCHEDULE CTO-103)

CONDITIONAL TRANSFER ORDER

On July 29, 1991, the Panel transferred 27,696 civil actions to the United States District Court for the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 33,140 additional actions have been transferred to the Eastern District of Pennsylvania. With the consent of that court, all such actions have been assigned to the Honorable Charles R. Weiner.

It appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Eastern District of Pennsylvania and assigned to Judge Weiner.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Eastern District of Pennsylvania for the reasons stated in the opinion and order of July 29, 1991, 771 F.Supp. 415, as corrected on October 1, 1991, October 18, 1991, November 22, 1991, December 9, 1991, January 16, 1992, and March 5, 1992, with the consent of that court, assigned to the Honorable Charles R. Weiner.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Eastern District of Pennsylvania. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:



Patricia D. Howard
Clerk of the Panel

Inasmuch as no objection is pending
at this time, the stay is lifted and
this order becomes effective

FEB 27 1997

Patricia D. Howard
Clerk of the Panel

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

Feb. 11, 1997

PATRICIA D. HOWARD
CLERK OF THE PANEL

SCHEDULE CTO-103 — TAG ALONG CASES
DOCKET NO. 875
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>
ALABAMA NORTHERN			CAS	3	96-2144	MASSACHUSETTS			OHN	1	96-15251
ALN	2	96-2804	CAS	3	96-2145	MA	1	95-10273	OHN	1	96-15252
ARIZONA			CAS	3	96-2147	MA	1	95-11750	OHN	1	96-15253
AZ	2	97-67	CAS	3	96-2149	MAINE			OHN	1	96-15254
AZ	2	97-68	CAS	3	96-2150	ME	2	97-6	OHN	1	96-15255
AZ	2	97-69	CAS	3	96-2151	ME	2	97-10	OHN	1	96-15256
AZ	2	97-70	CAS	3	96-2152	ME	2	97-11	OHN	1	96-15257
AZ	2	97-71	CAS	3	96-2153	ME	2	97-13	OHN	1	96-15258
AZ	2	97-72	CAS	3	96-2155	ME	2	97-16	OHN	1	96-15259
AZ	2	97-86	CAS	3	96-2157	MINNESOTA			OHN	1	96-15260
AZ	2	97-87	CAS	3	96-2158	MN	3	96-1200	OHN	1	96-15261
AZ	2	97-88	COLORADO			MN	4	96-1268	OHN	1	96-15262
AZ	2	97-89	CO	1	97-64	MN	4	97-87	OHN	1	96-15263
AZ	2	97-90	GEORGIA NORTHERN			MN	4	97-88	OHN	1	96-15265
AZ	2	97-91	GAN	1	97-79	MN	4	97-89	OHN	1	96-15266
AZ	2	97-92	GEORGIA SOUTHERN			MN	4	97-90	OHN	1	96-15267
CALIFORNIA CENTRAL			GAS	1	96-222	MN	4	97-92	OHN	1	96-15268
GAS	8	96-1360	IDAHO			MN	5	96-371	OHN	1	96-15269
CALIFORNIA NORTHERN			ID	4	96-123	MISSOURI EASTERN			OHN	1	96-15270
GAN	3	97-9	ID	4	96-124	MOE	4	96-482	OHN	1	96-15271
CAN	3	97-107	ID	4	96-125	MOE	4	96-1481	OHN	1	96-15272
CAN	3	97-108	ID	4	96-126	MISSOURI WESTERN			OHN	1	96-15273
CAN	3	97-112	ID	4	96-127	MOW	3	96-5132	OHN	1	96-15274
CAN	3	97-116	ILLINOIS NORTHERN			NORTH CAROLINA MIDDLE			OHN	1	96-15275
CAN	4	97-104	ILN	1	94-3658	NCH	4	97-36	OHN	1	96-15276
CAN	4	97-106	ILN	1	96-6872	NEVADA			OHN	1	96-15277
CAN	4	97-115	ILN	1	96-8601	NV	2	97-5	OHN	1	96-15278
CALIFORNIA SOUTHERN			ILN	3	96-50458	NEW YORK SOUTHERN			OHN	1	96-15279
CAS	3	96-2118	KENTUCKY EASTERN			NYS	1	97-138	OHN	1	96-15280
CAS	3	96-2120	KYE	7	96-431	OHIO NORTHERN			OHN	1	96-15281
CAS	3	96-2121	KENTUCKY WESTERN			OHN	1	96-15282	OHN	1	96-15282
CAS	3	96-2122	KYW	4	96-191	OHN	1	96-15283	OHN	1	96-15283
CAS	3	96-2123	KYW	4	96-192	OHN	1	96-15284	OHN	1	96-15284
CAS	3	96-2124	KYW	4	96-193	OHN	1	96-15285	OHN	1	96-15285
CAS	3	96-2125	KYW	4	97-7	OHN	1	96-15286	OHN	1	96-15286
CAS	3	96-2128	LOUISIANA EASTERN			OHN	1	96-15287	OHN	1	96-15287
CAS	3	96-2130	LAE	2	97-47	OHN	1	96-15288	OHN	1	96-15288
CAS	3	96-2131	LAE	2	97-48	OHN	1	96-15289	OHN	1	96-15289
CAS	3	96-2132	LAE	2	97-120	OHN	1	96-15290	OHN	1	96-15290
CAS	3	96-2133	LAE	2	97-121	OHN	1	96-15291	OHN	1	96-15291
CAS	3	96-2134	LAE	2	97-122	OHN	1	96-15292	OHN	1	96-15292
CAS	3	96-2135				OHN	1	96-15293	OHN	1	96-15293
CAS	3	96-2137				OHN	1	96-15294	OHN	1	96-15294
CAS	3	96-2138				OHN	1	96-15295	OHN	1	96-15295
CAS	3	96-2139				OHN	1	96-15296	OHN	1	96-15296
CAS	3	96-2140				OHN	1	96-15297	OHN	1	96-15297
CAS	3	96-2141				OHN	1	96-15298	OHN	1	96-15298
						OHN	1	96-15299	OHN	1	96-15299
						OHN	1	96-15249	OHN	1	96-15300
						OHN	1	96-15250	OHN	1	96-15301

SCHEDULE CTO-103 TAG ALONG CASES (Cont.)

— MDL NO. 875 —

P. 2

<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL AC</u>
OHN	1	96-15302	OHN	1	96-15365	OHN	1	96-15428	OHN	1	96-15491
OHN	1	96-15303	OHN	1	96-15366	OHN	1	96-15429	OHN	1	96-15492
OHN	1	96-15304	OHN	1	96-15367	OHN	1	96-15430	OHN	1	96-15493
OHN	1	96-15305	OHN	1	96-15368	OHN	1	96-15431	OHN	1	96-15494
OHN	1	96-15306	OHN	1	96-15369	OHN	1	96-15432	OHN	1	96-15495
OHN	1	96-15307	OHN	1	96-15370	OHN	1	96-15433	OHN	1	96-15496
OHN	1	96-15308	OHN	1	96-15371	OHN	1	96-15434	OHN	1	96-15497
OHN	1	96-15309	OHN	1	96-15372	OHN	1	96-15435	OHN	1	96-15498
OHN	1	96-15310	OHN	1	96-15373	OHN	1	96-15436	OHN	1	96-15499
OHN	1	96-15311	OHN	1	96-15374	OHN	1	96-15437	OHN	1	96-15500
OHN	1	96-15312	OHN	1	96-15375	OHN	1	96-15438	OHN	1	96-15501
OHN	1	96-15313	OHN	1	96-15376	OHN	1	96-15439	OHN	1	96-15502
OHN	1	96-15314	OHN	1	96-15377	OHN	1	96-15440	OHN	1	96-15503
OHN	1	96-15315	OHN	1	96-15378	OHN	1	96-15441	OHN	1	96-15504
OHN	1	96-15316	OHN	1	96-15379	OHN	1	96-15442	OHN	1	96-15505
OHN	1	96-15317	OHN	1	96-15380	OHN	1	96-15443	OHN	1	96-15506
OHN	1	96-15318	OHN	1	96-15381	OHN	1	96-15444	OHN	1	96-15507
OHN	1	96-15319	OHN	1	96-15382	OHN	1	96-15445	OHN	1	96-15508
OHN	1	96-15320	OHN	1	96-15383	OHN	1	96-15446	OHN	1	96-15509
OHN	1	96-15321	OHN	1	96-15384	OHN	1	96-15447	OHN	1	96-15510
OHN	1	96-15322	OHN	1	96-15385	OHN	1	96-15448	OHN	1	96-15511
OHN	1	96-15323	OHN	1	96-15386	OHN	1	96-15449	OHN	1	96-15512
OHN	1	96-15324	OHN	1	96-15387	OHN	1	96-15450	OHN	1	96-15513
OHN	1	96-15325	OHN	1	96-15388	OHN	1	96-15451	OHN	1	96-15514
OHN	1	96-15326	OHN	1	96-15389	OHN	1	96-15452	OHN	1	96-15515
OHN	1	96-15327	OHN	1	96-15390	OHN	1	96-15453	OHN	1	96-15516
OHN	1	96-15328	OHN	1	96-15391	OHN	1	96-15454	OHN	1	96-15517
OHN	1	96-15329	OHN	1	96-15392	OHN	1	96-15455	OHN	1	96-15518
OHN	1	96-15330	OHN	1	96-15393	OHN	1	96-15456	OHN	1	96-15519
OHN	1	96-15331	OHN	1	96-15394	OHN	1	96-15457	OHN	1	96-15520
OHN	1	96-15332	OHN	1	96-15395	OHN	1	96-15458	OHN	1	96-15521
OHN	1	96-15333	OHN	1	96-15396	OHN	1	96-15459	OHN	1	96-15522
OHN	1	96-15334	OHN	1	96-15397	OHN	1	96-15460	OHN	1	96-15523
OHN	1	96-15335	OHN	1	96-15398	OHN	1	96-15461	OHN	1	96-15524
OHN	1	96-15336	OHN	1	96-15399	OHN	1	96-15462	OHN	1	96-15525
OHN	1	96-15337	OHN	1	96-15400	OHN	1	96-15463	OHN	1	96-15526
OHN	1	96-15338	OHN	1	96-15401	OHN	1	96-15464	OHN	1	96-15527
OHN	1	96-15339	OHN	1	96-15402	OHN	1	96-15465	OHN	1	96-15528
OHN	1	96-15340	OHN	1	96-15403	OHN	1	96-15466	OHN	1	96-15529
OHN	1	96-15341	OHN	1	96-15404	OHN	1	96-15467	OHN	1	96-15530
OHN	1	96-15342	OHN	1	96-15405	OHN	1	96-15468	OHN	1	96-15531
OHN	1	96-15343	OHN	1	96-15406	OHN	1	96-15469	OHN	1	96-15532
OHN	1	96-15344	OHN	1	96-15407	OHN	1	96-15470	OHN	1	96-15533
OHN	1	96-15345	OHN	1	96-15408	OHN	1	96-15471	OHN	1	96-15534
OHN	1	96-15346	OHN	1	96-15409	OHN	1	96-15472	OHN	1	96-15535
OHN	1	96-15347	OHN	1	96-15410	OHN	1	96-15473	OHN	1	96-15536
OHN	1	96-15348	OHN	1	96-15411	OHN	1	96-15474	OHN	1	96-15537
OHN	1	96-15349	OHN	1	96-15412	OHN	1	96-15475	OHN	1	96-15538
OHN	1	96-15350	OHN	1	96-15413	OHN	1	96-15476	OHN	1	96-15539
OHN	1	96-15351	OHN	1	96-15414	OHN	1	96-15477	OHN	1	96-15540
OHN	1	96-15352	OHN	1	96-15415	OHN	1	96-15478	OHN	1	96-15541
OHN	1	96-15353	OHN	1	96-15416	OHN	1	96-15479	OHN	1	96-15542
OHN	1	96-15354	OHN	1	96-15417	OHN	1	96-15480	OHN	1	96-15543
OHN	1	96-15355	OHN	1	96-15418	OHN	1	96-15481	OHN	1	96-15544
OHN	1	96-15356	OHN	1	96-15419	OHN	1	96-15482	OHN	1	96-15545
OHN	1	96-15357	OHN	1	96-15420	OHN	1	96-15483	OHN	1	96-15546
OHN	1	96-15358	OHN	1	96-15421	OHN	1	96-15484	OHN	1	96-15547
OHN	1	96-15359	OHN	1	96-15422	OHN	1	96-15485	OHN	1	96-15548
OHN	1	96-15360	OHN	1	96-15423	OHN	1	96-15486	OHN	1	96-15549
OHN	1	96-15361	OHN	1	96-15424	OHN	1	96-15487	OHN	1	96-15550
OHN	1	96-15362	OHN	1	96-15425	OHN	1	96-15488	OHN	1	96-15551
OHN	1	96-15363	OHN	1	96-15426	OHN	1	96-15489	OHN	1	96-15552
OHN	1	96-15364	OHN	1	96-15427	OHN	1	96-15490	OHN	1	96-15553

<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>									
OHN	1	96-15554	OHN	1	96-15617	OHN	1	96-15680	OHN	1	96-15743
OHN	1	96-15555	OHN	1	96-15618	OHN	1	96-15681	OHN	1	96-15744
OHN	1	96-15556	OHN	1	96-15619	OHN	1	96-15682	OHN	1	96-15745
OHN	1	96-15557	OHN	1	96-15620	OHN	1	96-15683	OHN	1	96-15746
OHN	1	96-15558	OHN	1	96-15621	OHN	1	96-15684	OHN	1	96-15747
OHN	1	96-15559	OHN	1	96-15622	OHN	1	96-15685	OHN	1	96-15748
OHN	1	96-15560	OHN	1	96-15623	OHN	1	96-15686	OHN	1	96-15749
OHN	1	96-15561	OHN	1	96-15624	OHN	1	96-15687	OHN	1	96-15750
OHN	1	96-15562	OHN	1	96-15625	OHN	1	96-15688	OHN	1	96-15751
OHN	1	96-15563	OHN	1	96-15626	OHN	1	96-15689	OHN	1	96-15752
OHN	1	96-15564	OHN	1	96-15627	OHN	1	96-15690	OHN	1	96-15753
OHN	1	96-15565	OHN	1	96-15628	OHN	1	96-15691	OHN	1	96-15754
OHN	1	96-15566	OHN	1	96-15629	OHN	1	96-15692	OHN	1	96-15755
OHN	1	96-15567	OHN	1	96-15630	OHN	1	96-15693	OHN	1	96-15756
OHN	1	96-15568	OHN	1	96-15631	OHN	1	96-15694	OHN	1	96-15757
OHN	1	96-15569	OHN	1	96-15632	OHN	1	96-15695	OHN	1	96-15758
OHN	1	96-15570	OHN	1	96-15633	OHN	1	96-15696	OHN	1	96-15759
OHN	1	96-15571	OHN	1	96-15634	OHN	1	96-15697	OHN	1	96-15760
OHN	1	96-15572	OHN	1	96-15635	OHN	1	96-15698	OHN	1	96-15761
OHN	1	96-15573	OHN	1	96-15636	OHN	1	96-15699	OHN	1	96-15762
OHN	1	96-15574	OHN	1	96-15637	OHN	1	96-15700	OHN	1	96-15763
OHN	1	96-15575	OHN	1	96-15638	OHN	1	96-15701	OHN	1	96-15764
OHN	1	96-15576	OHN	1	96-15639	OHN	1	96-15702	OHN	1	96-15765
OHN	1	96-15577	OHN	1	96-15640	OHN	1	96-15703	OHN	1	96-15766
OHN	1	96-15578	OHN	1	96-15641	OHN	1	96-15704	OHN	1	96-15767
OHN	1	96-15579	OHN	1	96-15642	OHN	1	96-15705	OHN	1	96-15768
OHN	1	96-15580	OHN	1	96-15643	OHN	1	96-15706	OHN	1	96-15769
OHN	1	96-15581	OHN	1	96-15644	OHN	1	96-15707	OHN	1	96-15770
OHN	1	96-15582	OHN	1	96-15645	OHN	1	96-15708	OHN	1	96-15771
OHN	1	96-15583	OHN	1	96-15646	OHN	1	96-15709	OHN	1	96-15772
OHN	1	96-15584	OHN	1	96-15647	OHN	1	96-15710	OHN	1	96-15773
OHN	1	96-15585	OHN	1	96-15648	OHN	1	96-15711	OHN	1	96-15774
OHN	1	96-15586	OHN	1	96-15649	OHN	1	96-15712	OHN	1	96-15775
OHN	1	96-15587	OHN	1	96-15650	OHN	1	96-15713	OHN	1	96-15776
OHN	1	96-15588	OHN	1	96-15651	OHN	1	96-15714	OHN	1	96-15777
OHN	1	96-15589	OHN	1	96-15652	OHN	1	96-15715	OHN	1	96-15778
OHN	1	96-15590	OHN	1	96-15653	OHN	1	96-15716	OHN	1	96-15779
OHN	1	96-15591	OHN	1	96-15654	OHN	1	96-15717	OHN	1	96-15780
OHN	1	96-15592	OHN	1	96-15655	OHN	1	96-15718	OHN	1	96-15781
OHN	1	96-15593	OHN	1	96-15656	OHN	1	96-15719	OHN	1	96-15782
OHN	1	96-15594	OHN	1	96-15657	OHN	1	96-15720	OHN	1	96-15783
OHN	1	96-15595	OHN	1	96-15658	OHN	1	96-15721	OHN	1	96-15784
OHN	1	96-15596	OHN	1	96-15659	OHN	1	96-15722	OHN	1	96-15785
OHN	1	96-15597	OHN	1	96-15660	OHN	1	96-15723	OHN	1	96-15786
OHN	1	96-15598	OHN	1	96-15661	OHN	1	96-15724	OHN	1	96-15787
OHN	1	96-15599	OHN	1	96-15662	OHN	1	96-15725	OHN	1	96-15788
OHN	1	96-15600	OHN	1	96-15663	OHN	1	96-15726	OHN	1	96-15789
OHN	1	96-15601	OHN	1	96-15664	OHN	1	96-15727	OHN	1	96-15790
OHN	1	96-15602	OHN	1	96-15665	OHN	1	96-15728	OHN	1	96-15791
OHN	1	96-15603	OHN	1	96-15666	OHN	1	96-15729	OHN	1	96-15792
OHN	1	96-15604	OHN	1	96-15667	OHN	1	96-15730	OHN	1	96-15793
OHN	1	96-15605	OHN	1	96-15668	OHN	1	96-15731	OHN	1	96-15794
OHN	1	96-15606	OHN	1	96-15669	OHN	1	96-15732	OHN	1	96-15795
OHN	1	96-15607	OHN	1	96-15670	OHN	1	96-15733	OHN	1	96-15796
OHN	1	96-15608	OHN	1	96-15671	OHN	1	96-15734	OHN	1	96-15797
OHN	1	96-15609	OHN	1	96-15672	OHN	1	96-15735	OHN	1	96-15798
OHN	1	96-15610	OHN	1	96-15673	OHN	1	96-15736	OHN	1	96-15799
OHN	1	96-15611	OHN	1	96-15674	OHN	1	96-15737	OHN	1	96-15800
OHN	1	96-15612	OHN	1	96-15675	OHN	1	96-15738	OHN	1	96-15801
OHN	1	96-15613	OHN	1	96-15676	OHN	1	96-15739	OHN	1	96-15802
OHN	1	96-15614	OHN	1	96-15677	OHN	1	96-15740	OHN	1	96-15803
OHN	1	96-15615	OHN	1	96-15678	OHN	1	96-15741	OHN	1	96-15804
OHN	1	96-15616	OHN	1	96-15679	OHN	1	96-15742	OHN	1	96-15805

DISTRICT	DIV	CIVIL ACTION#	DISTRICT	DIV	CIVIL ACTION#	DISTRICT	DIV	CIVIL ACTION#	DISTRICT	DIV	CIVIL AC
OHN	1	96-15806	OHN	1	96-15869	OHN	1	96-15932	SOUTH CAROLINA		
OHN	1	96-15807	OHN	1	96-15870	OHN	1	96-15933	SC	2	97-390pp
OHN	1	96-15808	OHN	1	96-15871	OHN	1	96-15934	SC	2	97-70
OHN	1	96-15809	OHN	1	96-15872	OHN	1	96-15935	SC	2	97-1240pp
OHN	1	96-15810	OHN	1	96-15873	OHN	1	96-15936	SC	2	97-4250pp
OHN	1	96-15811	OHN	1	96-15874	OHN	1	96-15937	SC	3	97-66
OHN	1	96-15812	OHN	1	96-15875	OHN	1	96-15938	SC	3	97-67
OHN	1	96-15813	OHN	1	96-15876	OHN	1	96-15939	SC	3	97-68
OHN	1	96-15814	OHN	1	96-15877	OHN	1	96-15940	SC	3	97-71
OHN	1	96-15815	OHN	1	96-15878	OHN	1	96-15941	SC	3	97-72
OHN	1	96-15816	OHN	1	96-15879	OHN	1	96-15942	SC	4	97-69
OHN	1	96-15817	OHN	1	96-15880	OHN	1	96-15943	TEXAS SOUTHERN		
OHN	1	96-15818	OHN	1	96-15881	OHN	1	96-15944	TXS	4	96-44880pp
OHN	1	96-15819	OHN	1	96-15882	OHN	1	96-15945	UTAH		
OHN	1	96-15820	OHN	1	96-15883	OHN	1	96-15946	UT	2	97-28
OHN	1	96-15821	OHN	1	96-15884	OHN	1	96-15947	UT	2	97-29
OHN	1	96-15822	OHN	1	96-15885	OHN	1	96-15948	UT	2	97-30
OHN	1	96-15823	OHN	1	96-15886	OHN	1	96-15949	UT	2	97-31
OHN	1	96-15824	OHN	1	96-15887	OHN	1	96-15950	VIRGINIA EASTERN		
OHN	1	96-15825	OHN	1	96-15888	OHN	1	96-15951	VAE	2	96-1229
OHN	1	96-15826	OHN	1	96-15889	OHN	1	96-15952	VAE	2	97-48
OHN	1	96-15827	OHN	1	96-15890	OHN	1	96-15953	VAE	2	97-49
OHN	1	96-15828	OHN	1	96-15891	OHN	1	96-15954	VAE	2	97-50
OHN	1	96-15829	OHN	1	96-15892	OHN	1	96-15955	VAE	2	97-51
OHN	1	96-15830	OHN	1	96-15893	OHN	1	96-15956	VAE	2	97-52
OHN	1	96-15831	OHN	1	96-15894	OHN	1	96-15957	VAE	2	97-53
OHN	1	96-15832	OHN	1	96-15895	OHN	1	96-15958	VAE	2	97-54
OHN	1	96-15833	OHN	1	96-15896	OHN	1	96-15959	VAE	2	97-55
OHN	1	96-15834	OHN	1	96-15897	OHN	1	96-15960	VAE	2	97-56
OHN	1	96-15835	OHN	1	96-15898	OHN	1	96-15961	VAE	2	97-57
OHN	1	96-15836	OHN	1	96-15899	OHN	1	96-15962	VAE	2	97-58
OHN	1	96-15837	OHN	1	96-15900	OHN	1	96-15963	VAE	2	97-59
OHN	1	96-15838	OHN	1	96-15901	OHN	1	96-15964	VAE	2	97-60
OHN	1	96-15839	OHN	1	96-15902	OHN	1	96-15965	VAE	2	97-61
OHN	1	96-15840	OHN	1	96-15903	OHN	1	96-15966	VAE	2	97-62
OHN	1	96-15841	OHN	1	96-15904	OHN	1	96-15967	VAE	2	97-63
OHN	1	96-15842	OHN	1	96-15905	OHN	1	96-15968	VAE	2	97-64
OHN	1	96-15843	OHN	1	96-15906	OHN	1	96-15969	VAE	2	97-65
OHN	1	96-15844	OHN	1	96-15907	OHN	1	96-15970	VAE	2	97-66
OHN	1	96-15845	OHN	1	96-15908	OHN	1	96-15971	VAE	2	97-67
OHN	1	96-15846	OHN	1	96-15909	OHN	1	96-15972	VAE	2	97-68
OHN	1	96-15847	OHN	1	96-15910	OHIO SOUTHERN			VAE	2	97-69
OHN	1	96-15848	OHN	1	96-15911	OHS	1	96-1189	VAE	2	97-70
OHN	1	96-15849	OHN	1	96-15912	OHS	1	96-1190	VAE	2	97-71
OHN	1	96-15850	OHN	1	96-15913	OHS	2	96-756	VAE	2	97-72
OHN	1	96-15851	OHN	1	96-15914	OHS	2	96-1231	VAE	2	97-73
OHN	1	96-15852	OHN	1	96-15915	OHS	2	96-1322	VAE	2	97-74
OHN	1	96-15853	OHN	1	96-15916	OKLAHOMA NORTHERN			VAE	2	97-75
OHN	1	96-15854	OHN	1	96-15917	OKN	4	97-3	VAE	2	97-76
OHN	1	96-15855	OHN	1	96-15918	OKLAHOMA WESTERN			VAE	2	97-77
OHN	1	96-15856	OHN	1	96-15919	OKW	5	97-10	VAE	2	97-78
OHN	1	96-15857	OHN	1	96-15920	OKW	5	97-11	VAE	2	97-79
OHN	1	96-15858	OHN	1	96-15921	OKW	5	97-12	VAE	2	97-80
OHN	1	96-15859	OHN	1	96-15922	OKW	5	97-13	VAE	2	97-81
OHN	1	96-15860	OHN	1	96-15923	OKW	5	97-14	VAE	2	97-82
OHN	1	96-15861	OHN	1	96-15924	OKW	5	97-15	VAE	2	97-83
OHN	1	96-15862	OHN	1	96-15925	PENNSYLVANIA WESTERN			VAE	2	97-84
OHN	1	96-15863	OHN	1	96-15926	PAW	2	97-2	VAE	2	97-85
OHN	1	96-15864	OHN	1	96-15927	PAW	2	97-3	VAE	2	97-86
OHN	1	96-15865	OHN	1	96-15928	WASHINGTON EASTERN			VAE	2	97-87
OHN	1	96-15866	OHN	1	96-15929	WAE	2	97-6	VAE	2	97-88
OHN	1	96-15867	OHN	1	96-15930	WAE	2	97-7	VAE	2	97-89
OHN	1	96-15868	OHN	1	96-15931	WAE	2	97-12	VAE	2	97-90
						WAE	2	97-13	VAE	2	97-91
						WAE	2	97-14	VAE	2	97-92
						WAE	2	97-15	VAE	2	97-93
						WAE	2	97-16	VAE	2	97-94
						WAE	2	97-17	VAE	2	97-95
						WAE	2	97-18	VAE	2	97-96
						WAE	2	97-19	VAE	2	97-97
						WAE	2	97-20	VAE	2	97-98
						WAE	2	97-21	VAE	2	97-99
						WAE	2	97-22	VAE	2	98-00
						WAE	2	97-23	VAE	2	98-01
						WAE	2	97-24	VAE	2	98-02
						WAE	2	97-25	VAE	2	98-03
						WAE	2	97-26	VAE	2	98-04
						WAE	2	97-27	VAE	2	98-05
						WAE	2	97-28	VAE	2	98-06
						WAE	2	97-29	VAE	2	98-07
						WAE	2	97-30	VAE	2	98-08
						WAE	2	97-31	VAE	2	98-09
						WAE	2	97-32	VAE	2	98-10
						WAE	2	97-33	VAE	2	98-11
						WAE	2	97-34	VAE	2	98-12
						WAE	2	97-35	VAE	2	98-13
						WAE	2	97-36	VAE	2	98-14
						WAE	2	97-37	VAE	2	98-15
						WAE	2	97-38	VAE	2	98-16
						WAE	2	97-39	VAE	2	98-17
						WAE	2	97-40	VAE	2	98-18
						WAE	2	97-41	VAE	2	98-19
						WAE	2	97-42	VAE	2	98-20
						WAE	2	97-43	VAE	2	98-21
						WAE	2	97-44	VAE	2	98-22
						WAE	2	97-45	VAE	2	98-23
						WAE	2	97-46	VAE	2	98-24
						WAE	2	97-47	VAE	2	98-25
						WAE	2	97-48	VAE	2	98-26
						WAE	2	97-49	VAE	2	98-27
						WAE	2	97-50	VAE	2	98-28
						WAE	2	97-51	VAE	2	98-29
						WAE	2	97-52	VAE	2	98-30
						WAE	2	97-53	VAE	2	98-31
						WAE	2	97-54	VAE	2	98-32
						WAE	2	97-55	VAE	2	98-33
						WAE	2	97-56	VAE	2	98-34
						WAE	2	97-57	VAE	2	98-35
						WAE	2	97-58	VAE	2	98-36
						WAE	2	97-59	VAE	2	98-37
						WAE	2	97-60	VAE	2	98-38
						WAE	2	97-61	VAE	2	98-39
						WAE	2	97-62	VAE	2	98-40
						WAE	2	97-63	VAE	2	98-41
						WAE	2	97-64	VAE	2	98-42
						WAE	2	97-65	VAE	2	98-43
						WAE	2	97-66	VAE	2	98-44
						WAE	2	97-67	VAE	2	98-45
						WAE	2	97-68	VAE	2	98-46
						WAE	2	97-69	VAE	2	98-47
						WAE	2	97-70	VAE	2	98-48
						WAE	2	97-71	VAE	2	98-49
						WAE	2	97-72	VAE	2	98-50
						WAE	2	97-73	VAE	2	98-51
						WAE	2	97-74	VAE	2	98-52
						WAE	2	97-75	VAE	2	98-53
						WAE	2	97-76	VAE	2	98-54
						WAE	2	97-77	VAE	2	98-55
						WAE	2	97-78	VAE	2	98-56
						WAE	2	97-79	VAE	2	98-57
						WAE	2	97-80	VAE	2	98-58
						WAE	2	97-81	VAE	2	98-59
						WAE	2	97-82	VAE	2	98-60
						WAE	2	97-83	VAE	2	98-61
						WAE	2	97-84	VAE	2	98-62
						WAE	2	97-85	VAE	2	98-63
						WAE	2	97-86	VAE	2	98-64
						WAE	2	97-87	VAE	2	98-65
						WAE	2	97-88	VAE	2	98-66
</											

INVOLVED CLERKS FOR SCHEDULE CTO—103

Cameron S. Burke
Federal Building, #263
250 South 4th Avenue
Pocatello, ID 83201

Francis E. Dosal
Warren E. Burger Federal Bldg.
Room 708
316 N. Robert Street
St. Paul, MN 55101

Francis E. Dosal
514 U.S. Courthouse
110 South Fourth Street
Minneapolis, MN 55401

Francis E. Dosal
417 Federal Building
515 West First Street
Duluth, MN 55802

Geri M. Smith
102 U.S. Courthouse
201 Superior Avenue, East
Cleveland, OH 44114

H. Stuart Cunningham
Everett McKinley Dirksen Bldg.
219 South Dearborn Street
Chicago, IL 60604

H. Stuart Cunningham
211 South Court Street
Federal Bldg., Room 252
Rockford, IL 61101

Henry R. Crumley, Jr.
P.O. Box 1130
Augusta, GA 30903

J.P. Creekmore
P.O. Box 2708
Greensboro, NC 27402

James A. Drach
U.S. District Court
P.O. Box 1805
Pittsburgh, PA 15230

James M. Parkison
U.S. Courthouse
500 Pearl Street
New York, NY 10007

James R. Larsen
U.S. District Court
P.O. Box 1493
Spokane, WA 99210

James R. Manspeaker
U.S. Courthouse, Room C-145
1929 Stout Street
Denver, CO 80294

Jeffrey A. Apperson
Room 126, Federal Building
423 Frederica Street
Owensboro, KY 42301

Joseph W. Skupniewitz
U.S. District Court
P.O. Box 432
Madison, WI 53701

Kenneth J. Murphy
260 U.S. Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Kenneth J. Murphy
Potter Stewart U.S. Courthouse
Room 326
100 East Fifth Street
Cincinnati, OH 45202

Lance S. Wilson
Foley Federal Building
300 Las Vegas Blvd., South
Las Vegas, NV 89101

Larry W. Propes
U.S. District Court
1845 Assembly Street
Columbia, SC 29201

Larry W. Propes
U.S. District Court
P.O. Box 835
Charleston, SC 29402

Larry W. Propes
U.S. District Court
P.O. Box 2317
Florence, SC 29503

Leslie G. Whitmer
203 Federal Building
102 Main Street
Pikeville, KY 41501

Loretta G. Whyte
U.S. Courthouse, Room C-151
500 Camp Street
New Orleans, LA 70130

Luther D. Thomas
Richard B. Russell Fed. Bldg.
& U.S. Courthouse, Room 2211
75 Spring Street, S.W.
Atlanta, GA 30303

Markus B. Zimmer
Frank E. Moss U.S. Courthouse
Room 150
350 South Main Street
Salt Lake City, UT 84101

~~Michael N. Milby
P.O. Box 61010
Houston, TX 77208~~

Norman H. Meyer, Jr.
193 U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Norman H. Meyer, Jr.
P.O. Box 494
Newport News, VA 23607

Perry Mathis
Hugo L. Black U.S. Courthouse
Room 140
1729 5th Avenue, North
Birmingham, AL 35203

Richard H. Weare
U.S. Courthouse, Room 1400
230 North First Ave.
Phoenix, AZ 85025

Richard M. Lawrence
Page Belcher Federal Bldg.
& U.S. Courthouse, Room 411
333 W. 4th Street
Tulsa, OK 74103

William S. Brownell
Edward T. Gignoux U.S.
Courthouse
156 Federal Street
Portland, ME 04101

Richard W. Wieking
U.S. Courthouse
450 Golden Gate Avenue
P.O. Box 36060
San Francisco, CA 94102

Richard W. Wieking
Fed. Bldg. & U.S. Courthouse
Suite 400 South
1301 Clay Street
Oakland, CA 94612

Robert D. Dennis
1210 U.S. Courthouse
200 N.W. 4th Street
Oklahoma City, OK 73102

Robert D. St. Vrain
U.S. Court & Custom House
1114 Market Street
St. Louis, MO 63101

Robert F. Connor
U.S. Courthouse, Room 201
811 Grand Avenue
Kansas City, MO 64106

Robert J. Smith, Jr.
John W. McCormack Post Office
& Courthouse, Rm 700
90 Devonshire Street
Boston, MA 02109

Roberta E. Westdal
Edward J. Schwartz Courthouse
& Federal Bldg., Suite 4290
880 Front Street
San Diego, CA 92101

Sherri R. Carter
101 U.S. Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

W
A CERTIFIED TRUE COPY
FEB 27 1997
ATTEST *Howard*
FOR THE JUDICIAL PANEL OF
MULTIDISTRICT LITIGATION

RECEIVED
MAR 3 1997
MICHAEL E. KUNZ, Clerk
By *[Signature]* Dep. Clerk
DOCKET NO. 875

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED
Feb. 11, 1997
PATRICIA D. HOWARD
CLERK OF THE PANEL

1861

**BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)**

(SEE ATTACHED SCHEDULE CTO-103)

CONDITIONAL TRANSFER ORDER

On July 29, 1991, the Panel transferred 27,696 civil actions to the United States District Court for the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 33,140 additional actions have been transferred to the Eastern District of Pennsylvania. With the consent of that court, all such actions have been assigned to the Honorable Charles R. Weiner.

It appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Eastern District of Pennsylvania and assigned to Judge Weiner.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Eastern District of Pennsylvania for the reasons stated in the opinion and order of July 29, 1991, 771 F.Supp. 415, as corrected on October 1, 1991, October 18, 1991, November 22, 1991, December 9, 1991, January 16, 1992, and March 5, 1992, with the consent of that court, assigned to the Honorable Charles R. Weiner.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Eastern District of Pennsylvania. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective
FEB 27 1997
Patricia D. Howard
Clerk of the Panel

RECEIVED

MAR 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FOR THE PANEL:

Patricia D. Howard

Patricia D. Howard
Clerk of the Panel

A TRUE COPY CERTIFIED TO FROM THE RECORD

DATED: 3/4/97

ATTEST: *[Signature]*
DEPUTY CLERK, UNITED STATES DISTRICT COURT

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

Feb. 11, 1997

PATRICIA D. HOWARD
CLERK OF THE PANEL

SCHEDULE CTO-103 — TAG ALONG CASES
DOCKET NO. 875
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>
ALABAMA NORTHERN			CAS	3	96-2144	MASSACHUSETTS			OHN	1	96-15251
ALN	2	96-2804	CAS	3	96-2145	MA	1	95-10273	OHN	1	96-15252
ARIZONA			CAS	3	96-2147	MA	1	95-11750	OHN	1	96-15253
AZ	2	97-67	CAS	3	96-2149	MAINE			OHN	1	96-15254
AZ	2	97-68	CAS	3	96-2150	ME	2	97-6	OHN	1	96-15255
AZ	2	97-69	CAS	3	96-2151	ME	2	97-10	OHN	1	96-15256
AZ	2	97-70	CAS	3	96-2152	ME	2	97-11	OHN	1	96-15257
AZ	2	97-71	CAS	3	96-2153	ME	2	97-13	OHN	1	96-15258
AZ	2	97-72	CAS	3	96-2155	ME	2	97-16	OHN	1	96-15259
AZ	2	97-86	CAS	3	96-2157	MINNESOTA			OHN	1	96-15260
AZ	2	97-87	CAS	3	96-2158	MN	3	96-1200	OHN	1	96-15261
AZ	2	97-88	COLORADO			MN	4	96-1268	OHN	1	96-15262
AZ	2	97-89	CO	1	97-64	MN	4	97-87	OHN	1	96-15263
AZ	2	97-90	GEORGIA NORTHERN			MN	4	97-88	OHN	1	96-15265
AZ	2	97-91	GAN	1	97-79	MN	4	97-89	OHN	1	96-15266
AZ	2	97-92	GEORGIA SOUTHERN			MN	4	97-90	OHN	1	96-15267
CALIFORNIA CENTRAL			GAS	1	96-222	MN	4	97-92	OHN	1	96-15268
GAS	8	96-1260 <i>opposed</i>	IDAHO			MN	4	97-92	OHN	1	96-15269
CALIFORNIA NORTHERN			ID	4	96-123	MN	5	96-371	OHN	1	96-15270
GAN	3	97-9 <i>opposed</i>	ID	4	96-124	MISSOURI EASTERN			OHN	1	96-15271
CAN	3	97-107	ID	4	96-125	MOE	4	96-482	OHN	1	96-15272
CAN	3	97-108	ID	4	96-126	MOE	4	96-1481	OHN	1	96-15273
CAN	3	97-112	ID	4	96-127	MISSOURI WESTERN			OHN	1	96-15274
CAN	3	97-116	ILLINOIS NORTHERN			MOW	3	96-5132	OHN	1	96-15275
CAN	4	97-104	ILN	1	96-3658	NORTH CAROLINA MIDDLE			OHN	1	96-15276
CAN	4	97-106	ILN	1	96-6872	NCN	4	97-36	OHN	1	96-15277
CAN	4	97-115	ILN	1	96-8601	NEVADA			OHN	1	96-15278
CALIFORNIA SOUTHERN			ILN	3	96-50458	NV	2	97-5	OHN	1	96-15279
CAS	3	96-2118	KENTUCKY EASTERN			NEW YORK SOUTHERN			OHN	1	96-15280
CAS	3	96-2120	KYE	7	96-431	OHIO NORTHERN			OHN	1	96-15281
CAS	3	96-2121	KENTUCKY WESTERN			OHN	1	96-15238	OHN	1	96-15282
CAS	3	96-2122	KYW	4	96-191	OHN	1	96-15239	OHN	1	96-15283
CAS	3	96-2123	KYW	4	96-192	OHN	1	96-15240	OHN	1	96-15284
CAS	3	96-2124	KYW	4	96-193	OHN	1	96-15241	OHN	1	96-15285
CAS	3	96-2125	KYW	4	97-7	OHN	1	96-15242	OHN	1	96-15286
CAS	3	96-2128	LOUISIANA EASTERN			OHN	1	96-15243	OHN	1	96-15287
CAS	3	96-2130	LAE	2	97-47	OHN	1	96-15244	OHN	1	96-15288
CAS	3	96-2131	LAE	2	97-48	OHN	1	96-15245	OHN	1	96-15289
CAS	3	96-2132	LAE	2	97-120	OHN	1	96-15246	OHN	1	96-15290
CAS	3	96-2133	LAE	2	97-121	OHN	1	96-15247	OHN	1	96-15291
CAS	3	96-2134	LAE	2	97-122	OHN	1	96-15248	OHN	1	96-15292
CAS	3	96-2135	NEW YORK SOUTHERN			OHN	1	96-15249	OHN	1	96-15293
CAS	3	96-2137	NYS	1	97-138	OHN	1	96-15250	OHN	1	96-15294
CAS	3	96-2138	OHIO NORTHERN			OHN	1	96-15251	OHN	1	96-15295
CAS	3	96-2139	OHN	1	96-15238	OHN	1	96-15252	OHN	1	96-15296
CAS	3	96-2140	OHN	1	96-15239	OHN	1	96-15253	OHN	1	96-15297
CAS	3	96-2141	OHN	1	96-15240	OHN	1	96-15254	OHN	1	96-15298
			OHN	1	96-15241	OHN	1	96-15255	OHN	1	96-15299
			OHN	1	96-15242	OHN	1	96-15256	OHN	1	96-15300
			OHN	1	96-15243	OHN	1	96-15257	OHN	1	96-15301
			OHN	1	96-15244	OHN	1	96-15258	OHN	1	
			OHN	1	96-15245	OHN	1	96-15259	OHN	1	
			OHN	1	96-15246	OHN	1	96-15260	OHN	1	
			OHN	1	96-15247	OHN	1	96-15261	OHN	1	
			OHN	1	96-15248	OHN	1	96-15262	OHN	1	
			OHN	1	96-15249	OHN	1	96-15263	OHN	1	
			OHN	1	96-15250	OHN	1	96-15264	OHN	1	

<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>									
OHN	1	96-15302	OHN	1	96-15365	OHN	1	96-15428	OHN	1	96-15491
OHN	1	96-15303	OHN	1	96-15366	OHN	1	96-15429	OHN	1	96-15492
OHN	1	96-15304	OHN	1	96-15367	OHN	1	96-15430	OHN	1	96-15493
OHN	1	96-15305	OHN	1	96-15368	OHN	1	96-15431	OHN	1	96-15494
OHN	1	96-15306	OHN	1	96-15369	OHN	1	96-15432	OHN	1	96-15495
OHN	1	96-15307	OHN	1	96-15370	OHN	1	96-15433	OHN	1	96-15496
OHN	1	96-15308	OHN	1	96-15371	OHN	1	96-15434	OHN	1	96-15497
OHN	1	96-15309	OHN	1	96-15372	OHN	1	96-15435	OHN	1	96-15498
OHN	1	96-15310	OHN	1	96-15373	OHN	1	96-15436	OHN	1	96-15499
OHN	1	96-15311	OHN	1	96-15374	OHN	1	96-15437	OHN	1	96-15500
OHN	1	96-15312	OHN	1	96-15375	OHN	1	96-15438	OHN	1	96-15501
OHN	1	96-15313	OHN	1	96-15376	OHN	1	96-15439	OHN	1	96-15502
OHN	1	96-15314	OHN	1	96-15377	OHN	1	96-15440	OHN	1	96-15503
OHN	1	96-15315	OHN	1	96-15378	OHN	1	96-15441	OHN	1	96-15504
OHN	1	96-15316	OHN	1	96-15379	OHN	1	96-15442	OHN	1	96-15505
OHN	1	96-15317	OHN	1	96-15380	OHN	1	96-15443	OHN	1	96-15506
OHN	1	96-15318	OHN	1	96-15381	OHN	1	96-15444	OHN	1	96-15507
OHN	1	96-15319	OHN	1	96-15382	OHN	1	96-15445	OHN	1	96-15508
OHN	1	96-15320	OHN	1	96-15383	OHN	1	96-15446	OHN	1	96-15509
OHN	1	96-15321	OHN	1	96-15384	OHN	1	96-15447	OHN	1	96-15510
OHN	1	96-15322	OHN	1	96-15385	OHN	1	96-15448	OHN	1	96-15511
OHN	1	96-15323	OHN	1	96-15386	OHN	1	96-15449	OHN	1	96-15512
OHN	1	96-15324	OHN	1	96-15387	OHN	1	96-15450	OHN	1	96-15513
OHN	1	96-15325	OHN	1	96-15388	OHN	1	96-15451	OHN	1	96-15514
OHN	1	96-15326	OHN	1	96-15389	OHN	1	96-15452	OHN	1	96-15515
OHN	1	96-15327	OHN	1	96-15390	OHN	1	96-15453	OHN	1	96-15516
OHN	1	96-15328	OHN	1	96-15391	OHN	1	96-15454	OHN	1	96-15517
OHN	1	96-15329	OHN	1	96-15392	OHN	1	96-15455	OHN	1	96-15518
OHN	1	96-15330	OHN	1	96-15393	OHN	1	96-15456	OHN	1	96-15519
OHN	1	96-15331	OHN	1	96-15394	OHN	1	96-15457	OHN	1	96-15520
OHN	1	96-15332	OHN	1	96-15395	OHN	1	96-15458	OHN	1	96-15521
OHN	1	96-15333	OHN	1	96-15396	OHN	1	96-15459	OHN	1	96-15522
OHN	1	96-15334	OHN	1	96-15397	OHN	1	96-15460	OHN	1	96-15523
OHN	1	96-15335	OHN	1	96-15398	OHN	1	96-15461	OHN	1	96-15524
OHN	1	96-15336	OHN	1	96-15399	OHN	1	96-15462	OHN	1	96-15525
OHN	1	96-15337	OHN	1	96-15400	OHN	1	96-15463	OHN	1	96-15526
OHN	1	96-15338	OHN	1	96-15401	OHN	1	96-15464	OHN	1	96-15527
OHN	1	96-15339	OHN	1	96-15402	OHN	1	96-15465	OHN	1	96-15528
OHN	1	96-15340	OHN	1	96-15403	OHN	1	96-15466	OHN	1	96-15529
OHN	1	96-15341	OHN	1	96-15404	OHN	1	96-15467	OHN	1	96-15530
OHN	1	96-15342	OHN	1	96-15405	OHN	1	96-15468	OHN	1	96-15531
OHN	1	96-15343	OHN	1	96-15406	OHN	1	96-15469	OHN	1	96-15532
OHN	1	96-15344	OHN	1	96-15407	OHN	1	96-15470	OHN	1	96-15533
OHN	1	96-15345	OHN	1	96-15408	OHN	1	96-15471	OHN	1	96-15534
OHN	1	96-15346	OHN	1	96-15409	OHN	1	96-15472	OHN	1	96-15535
OHN	1	96-15347	OHN	1	96-15410	OHN	1	96-15473	OHN	1	96-15536
OHN	1	96-15348	OHN	1	96-15411	OHN	1	96-15474	OHN	1	96-15537
OHN	1	96-15349	OHN	1	96-15412	OHN	1	96-15475	OHN	1	96-15538
OHN	1	96-15350	OHN	1	96-15413	OHN	1	96-15476	OHN	1	96-15539
OHN	1	96-15351	OHN	1	96-15414	OHN	1	96-15477	OHN	1	96-15540
OHN	1	96-15352	OHN	1	96-15415	OHN	1	96-15478	OHN	1	96-15541
OHN	1	96-15353	OHN	1	96-15416	OHN	1	96-15479	OHN	1	96-15542
OHN	1	96-15354	OHN	1	96-15417	OHN	1	96-15480	OHN	1	96-15543
OHN	1	96-15355	OHN	1	96-15418	OHN	1	96-15481	OHN	1	96-15544
OHN	1	96-15356	OHN	1	96-15419	OHN	1	96-15482	OHN	1	96-15545
OHN	1	96-15357	OHN	1	96-15420	OHN	1	96-15483	OHN	1	96-15546
OHN	1	96-15358	OHN	1	96-15421	OHN	1	96-15484	OHN	1	96-15547
OHN	1	96-15359	OHN	1	96-15422	OHN	1	96-15485	OHN	1	96-15548
OHN	1	96-15360	OHN	1	96-15423	OHN	1	96-15486	OHN	1	96-15549
OHN	1	96-15361	OHN	1	96-15424	OHN	1	96-15487	OHN	1	96-15550
OHN	1	96-15362	OHN	1	96-15425	OHN	1	96-15488	OHN	1	96-15551
OHN	1	96-15363	OHN	1	96-15426	OHN	1	96-15489	OHN	1	96-15552
OHN	1	96-15364	OHN	1	96-15427	OHN	1	96-15490	OHN	1	96-15553

<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL ACTION#</u>	<u>DISTRICT</u>	<u>DIV</u>	<u>CIVIL AC</u>
OHN	1	96-15554	OHN	1	96-15617	OHN	1	96-15680	OHN	1	96-15743
OHN	1	96-15555	OHN	1	96-15618	OHN	1	96-15681	OHN	1	96-15744
OHN	1	96-15556	OHN	1	96-15619	OHN	1	96-15682	OHN	1	96-15745
OHN	1	96-15557	OHN	1	96-15620	OHN	1	96-15683	OHN	1	96-15746
OHN	1	96-15558	OHN	1	96-15621	OHN	1	96-15684	OHN	1	96-15747
OHN	1	96-15559	OHN	1	96-15622	OHN	1	96-15685	OHN	1	96-15748
OHN	1	96-15560	OHN	1	96-15623	OHN	1	96-15686	OHN	1	96-15749
OHN	1	96-15561	OHN	1	96-15624	OHN	1	96-15687	OHN	1	96-15750
OHN	1	96-15562	OHN	1	96-15625	OHN	1	96-15688	OHN	1	96-15751
OHN	1	96-15563	OHN	1	96-15626	OHN	1	96-15689	OHN	1	96-15752
OHN	1	96-15564	OHN	1	96-15627	OHN	1	96-15690	OHN	1	96-15753
OHN	1	96-15565	OHN	1	96-15628	OHN	1	96-15691	OHN	1	96-15754
OHN	1	96-15566	OHN	1	96-15629	OHN	1	96-15692	OHN	1	96-15755
OHN	1	96-15567	OHN	1	96-15630	OHN	1	96-15693	OHN	1	96-15756
OHN	1	96-15568	OHN	1	96-15631	OHN	1	96-15694	OHN	1	96-15757
OHN	1	96-15569	OHN	1	96-15632	OHN	1	96-15695	OHN	1	96-15758
OHN	1	96-15570	OHN	1	96-15633	OHN	1	96-15696	OHN	1	96-15759
OHN	1	96-15571	OHN	1	96-15634	OHN	1	96-15697	OHN	1	96-15760
OHN	1	96-15572	OHN	1	96-15635	OHN	1	96-15698	OHN	1	96-15761
OHN	1	96-15573	OHN	1	96-15636	OHN	1	96-15699	OHN	1	96-15762
OHN	1	96-15574	OHN	1	96-15637	OHN	1	96-15700	OHN	1	96-15763
OHN	1	96-15575	OHN	1	96-15638	OHN	1	96-15701	OHN	1	96-15764
OHN	1	96-15576	OHN	1	96-15639	OHN	1	96-15702	OHN	1	96-15765
OHN	1	96-15577	OHN	1	96-15640	OHN	1	96-15703	OHN	1	96-15766
OHN	1	96-15578	OHN	1	96-15641	OHN	1	96-15704	OHN	1	96-15767
OHN	1	96-15579	OHN	1	96-15642	OHN	1	96-15705	OHN	1	96-15768
OHN	1	96-15580	OHN	1	96-15643	OHN	1	96-15706	OHN	1	96-15769
OHN	1	96-15581	OHN	1	96-15644	OHN	1	96-15707	OHN	1	96-15770
OHN	1	96-15582	OHN	1	96-15645	OHN	1	96-15708	OHN	1	96-15771
OHN	1	96-15583	OHN	1	96-15646	OHN	1	96-15709	OHN	1	96-15772
OHN	1	96-15584	OHN	1	96-15647	OHN	1	96-15710	OHN	1	96-15773
OHN	1	96-15585	OHN	1	96-15648	OHN	1	96-15711	OHN	1	96-15774
OHN	1	96-15586	OHN	1	96-15649	OHN	1	96-15712	OHN	1	96-15775
OHN	1	96-15587	OHN	1	96-15650	OHN	1	96-15713	OHN	1	96-15776
OHN	1	96-15588	OHN	1	96-15651	OHN	1	96-15714	OHN	1	96-15777
OHN	1	96-15589	OHN	1	96-15652	OHN	1	96-15715	OHN	1	96-15778
OHN	1	96-15590	OHN	1	96-15653	OHN	1	96-15716	OHN	1	96-15779
OHN	1	96-15591	OHN	1	96-15654	OHN	1	96-15717	OHN	1	96-15780
OHN	1	96-15592	OHN	1	96-15655	OHN	1	96-15718	OHN	1	96-15781
OHN	1	96-15593	OHN	1	96-15656	OHN	1	96-15719	OHN	1	96-15782
OHN	1	96-15594	OHN	1	96-15657	OHN	1	96-15720	OHN	1	96-15783
OHN	1	96-15595	OHN	1	96-15658	OHN	1	96-15721	OHN	1	96-15784
OHN	1	96-15596	OHN	1	96-15659	OHN	1	96-15722	OHN	1	96-15785
OHN	1	96-15597	OHN	1	96-15660	OHN	1	96-15723	OHN	1	96-15786
OHN	1	96-15598	OHN	1	96-15661	OHN	1	96-15724	OHN	1	96-15787
OHN	1	96-15599	OHN	1	96-15662	OHN	1	96-15725	OHN	1	96-15788
OHN	1	96-15600	OHN	1	96-15663	OHN	1	96-15726	OHN	1	96-15789
OHN	1	96-15601	OHN	1	96-15664	OHN	1	96-15727	OHN	1	96-15790
OHN	1	96-15602	OHN	1	96-15665	OHN	1	96-15728	OHN	1	96-15791
OHN	1	96-15603	OHN	1	96-15666	OHN	1	96-15729	OHN	1	96-15792
OHN	1	96-15604	OHN	1	96-15667	OHN	1	96-15730	OHN	1	96-15793
OHN	1	96-15605	OHN	1	96-15668	OHN	1	96-15731	OHN	1	96-15794
OHN	1	96-15606	OHN	1	96-15669	OHN	1	96-15732	OHN	1	96-15795
OHN	1	96-15607	OHN	1	96-15670	OHN	1	96-15733	OHN	1	96-15796
OHN	1	96-15608	OHN	1	96-15671	OHN	1	96-15734	OHN	1	96-15797
OHN	1	96-15609	OHN	1	96-15672	OHN	1	96-15735	OHN	1	96-15798
OHN	1	96-15610	OHN	1	96-15673	OHN	1	96-15736	OHN	1	96-15799
OHN	1	96-15611	OHN	1	96-15674	OHN	1	96-15737	OHN	1	96-15800
OHN	1	96-15612	OHN	1	96-15675	OHN	1	96-15738	OHN	1	96-15801
OHN	1	96-15613	OHN	1	96-15676	OHN	1	96-15739	OHN	1	96-15802
OHN	1	96-15614	OHN	1	96-15677	OHN	1	96-15740	OHN	1	96-15803
OHN	1	96-15615	OHN	1	96-15678	OHN	1	96-15741	OHN	1	96-15804
OHN	1	96-15616	OHN	1	96-15679	OHN	1	96-15742	OHN	1	96-15805

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

FILED

APR 8 1997

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

ORAL ROBERTS UNIVERSITY,
an Oklahoma corporation,

Plaintiff,

v.

TRAVIS ANDERSON, an individual, and
METROPLEX PROPERTIES, L.L.C., a
Colorado limited liability company,

Defendants.

Case No. 95-CV-583-H

ENTERED ON DOCKET

DATE APR 8 1997

AMENDED JUDGMENT

This Court entered an order on January 8, 1997, granting Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Motion for Summary Judgment. Subsequently, this Court entered an order on April 7, 1997, granting Plaintiff's Motion to Alter or Amend Judgment.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Option and Agreement for Purchase and Sale of Real Estate dated September 27, 1994, is no longer in effect and the Memorandum of Option and Agreement for Purchase and Sale recorded November 22, 1994, in the Office of the County Clerk for Tulsa County in Book 5673 at pages 0776-0778 no longer creates any right or interest in the property described therein.

IT IS SO ORDERED.

This 7th day of April, 1997.



Sven Erik Holmes
United States District Judge

105

CLM

COMMISSIONERS, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on June 20, 1996, by Certified Mail.

The Court further finds that the Defendants, Trig E. Mullins and Brenda L. Mullins, were served by publishing notice of this action in the Sapulpa Legal News, a newspaper of general circulation in Creek County, Oklahoma, once a week for six (6) consecutive weeks beginning December 26, 1996, and continuing through January 30, 1997, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Trig E. Mullins and Brenda L. Mullins, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendants, Trig E. Mullins and Brenda L. Mullins. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, filed their Answer on August 2, 1996; that the Defendant, State of Oklahoma, *ex rel.* Oklahoma Tax Commission, filed its Answer on July 17, 1996; and that the Defendants, Trig E. Mullins and Brenda L. Mullins, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, Trig E. Mullins and Brenda L. Mullins, are husband and wife.

The Court further finds that on April 15, 1992, Trig E. Mullins and Brenda L. Mullins filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-70477. The Discharge of Debtor was entered on July 22, 1992.

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

**LOT EIGHT (8), BLOCK TWO (2), CROWLEY
HEIGHTS ADDITION TO THE CITY OF SAPULPA,
CREEK COUNTY, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT
THEREOF.**

The Court further finds that on April 17, 1985, Rocky A. Wood and Patricia A. Wood, executed and delivered to Firstier Mortgage Co., their mortgage note in the amount of \$33,750.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Rocky A. Wood and Patricia A. Wood, husband and wife, executed and delivered to Firstier Mortgage Co., a mortgage dated April 17, 1985, covering the above-described property. Said mortgage was recorded on April 22, 1985, in Book 185, Page 1495, in the records of Creek County, Oklahoma.

The Court further finds that on June 6, 1988, Firstier Mortgage Co., assigned the above-described mortgage note and mortgage to Leader Federal Savings & Loan Association. This Assignment of Mortgage was recorded on September 19, 1988, in Book 239, Page 1772, in the records of Creek County, Oklahoma.

The Court further finds that on February 21, 1991, Leader Federal Bank for Savings f/k/a Leader Federal Savings and Loan Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, 451 Seventh Street, SW, Washington, D.C. 20410, his successors and assigns. This Assignment of Mortgage was recorded on February 21, 1991, in Book 273, Page 1351, in the records of Creek County, Oklahoma.

The Court further finds that Defendants, Trig E. Mullins and Brenda L. Mullins, currently hold title to the property by virtue of a General Warranty Deed dated August 1, 1989, and recorded on August 8, 1989, in Book 252, Page 444, in the records of Creek County, Oklahoma and are the current assumptors of the subject indebtedness.

The Court further finds that on February 11, 1991, the Defendants, Trig E. Mullins and Brenda L. Mullins, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Trig E. Mullins and Brenda L. Mullins, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Trig E. Mullins and Brenda L. Mullins, are indebted to the Plaintiff in the principal sum of \$50,543.96, and interest at the rate of 12 percent per annum from April 1, 1995 until judgment, and interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, County Treasurer, Creek County, Oklahoma and Board of County Commissioners, Creek County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$20.16 which became a lien on the property as of 1991; and in the amount of \$21.57 which became a line on the property as of 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of \$75.58, together with penalties and interest accrued and accruing which became a lien on the property as of May 16, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, Trig E. Mullins and Brenda L. Mullins, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, Trig E. Mullins and Brenda L. Mullins, in the principal sum of \$50,543.96, and interest at the rate of 12 percent per annum from April 1, 1995 until judgment, together with interest thereafter at the current legal rate of 6.00 percent per annum until paid, and the costs of this action, together with any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Creek County, Oklahoma and Board of County Commissioners, Creek County, Oklahoma, have and recover judgment in the amount of \$41.73, and costs and interest, for personal property taxes for the years 1990 and 1991, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, have and recover judgment In Rem in the amount of \$75.58, together with penalties and accrued and accruing interest for state income taxes, and the costs of this action.

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

First:

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

Second:

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

Third:

In payment of Defendants, County Treasurer, Creek County, Oklahoma and Board of County Commissioners, Creek County, Oklahoma, in the amount of \$41.73, personal property taxes which are currently due and owing.

Fourth:

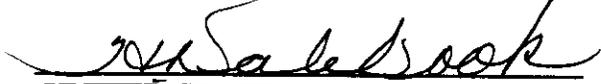
In payment of Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, in the amount of \$75.58,

together with penalties and accrued and accruing interest
for state income taxes

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

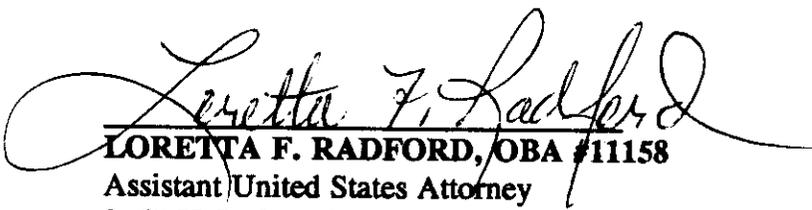
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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



MICHAEL S. LOEFFLER, OBA #12753

Assistant District Attorney

110 West 7th

P.O. Box 567

Bristow, OK 74010

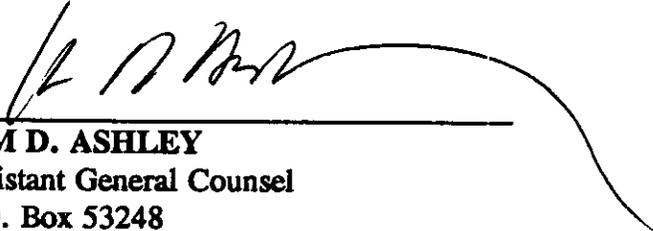
(918) 367-3331

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Creek County, Oklahoma



KIM D. ASHLEY

Assistant General Counsel

P.O. Box 53248

Oklahoma City, OK 73152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma, ex rel.

Oklahoma Tax Commission

Judgment of Foreclosure

Civil Action No. 96CV 551C

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENDAY GAY OWENS; SAMMY REX
OWENS; COUNTY TREASURER, Tulsa
County, Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

APR -7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON BOOKS

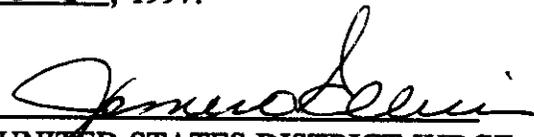
DATE APR 08 1997

Civil Case No. 96CV 165E

ORDER

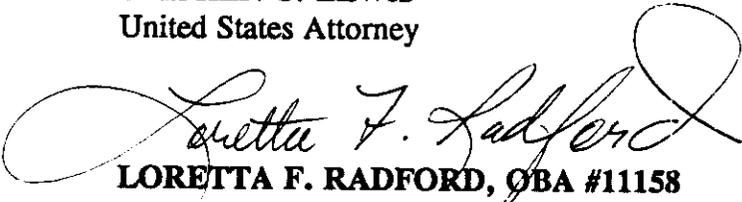
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED**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

Dated this 2^d day of April, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

F I L E D

APR -7 1997

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

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

B. WILLIS, C.P.A., INC.,)
)
Plaintiff,)
)
vs.)
)
PUBLIC SERVICE COMPANY OF OKLAHOMA,)
an Oklahoma Corporation, and)
BURLINGTON NORTHERN RAILROAD COMPANY)
a foreign corporation,)
)
Defendants.)

Case No. 96-C-59-E
(Consolidated with
Case No. 96-C-172-E)

ENTERED ON DOCKET
APR 08 1997
DATE

O R D E R

Now before the Court is the Motion to Dismiss (Docket #9 in 96-C-172-E) of the Defendant Public Service Company (PSO) in the above captioned matter.

This case arises out of a condemnation action which is taking place in state court, in Rogers county. On October 28, 1992, PSO initiated a condemnation action seeking to take a perpetual easement and right of way for a single track industrial railroad spur tract which would cover property owned by Plaintiff in this action, B. Willis, C.P.A., Inc. (Willis). Commissioners were appointed, and a Report of the Commissioners was filed on December 28, 1992. Willis objected to the Report of the Commissioners, claiming that the taking by PSO was not necessary for a public use or purpose, and contesting the value placed on the property. Subsequently, a hearing was held in state court. Willis denies that the hearing afforded him a meaningful opportunity to litigate the right to take, and argues that the hearing was instead for the purpose of arguing a motion to compel he had filed attempting to

secure certain documents from PSO. After that hearing, on March 8, 1994 the court overruled the pending discovery motions as well as Willis' exceptions to the Report. Willis perfected an appeal to the Court of Appeals, which held, on March 21, 1995, that the act of filing the petition raised a rebuttable presumption that the condemnation was necessary for a public use, but that the landowner was entitled to rebut that presumption. The Court of Appeals, on March 21, 1995, held that Willis was not given a proper opportunity to rebut the presumption, and remanded in order to give Willis an opportunity to do so. Both parties filed Petitions for Certiorari with the Oklahoma Supreme Court. Although the Petitions were granted, the Supreme Court has not yet ruled on the matter.

Shortly after the trial court overruled Willis' exceptions, PSO began construction on the railroad spur, and construction was completed on March 1, 1995. During the construction of the spur, Willis sought extraordinary relief, and a stay of the district court' decision, from the Supreme Court, which was denied on June 21, 1994. After the spur was completed, and the Court of Appeals had ruled, Willis demanded that PSO cease use of the railroad line. PSO sought an injunction and temporary restraining order in district court. On May 2, 1995, after a hearing, an injunction was entered, restraining Willis from "directly or indirectly interfering in any manner with the construction, maintenance and operation of [PSO's] railroad spur. . . ."

Willis responded by filing an action for trespass against Burlington Northern (BN), due to BN running a coal train over the

1069 feet of standard railroad track that lies on his property. Subsequently, Willis filed an action against PSO and BN for trespass and violation of civil rights. The essence of Willis' civil rights claim is that Willis was denied his civil rights when his property was taken prior to a hearing on the right to take.

The two cases were consolidated, and dispositive motions were filed by all parties. The parties agree that the facts are undisputed and that the key issue¹ is whether Willis' constitutional rights were infringed by the court's failure to afford him a hearing on the taking of his property prior to PSO's taking possession of the property for purposes of building the spur. Put differently the question is whether in a condemnation action, due process requires the court to have a hearing on the right to take (if that is an issue) before the condemnor can take possession of the property. Plaintiff concedes that if his rights under the Fourteenth Amendment have not been violated, he has no standing in this court. Implicit in the issue before the court is the constitutionality of Okla.Stat.tit. 66, §53(a), or its application in this case, which provides, in pertinent part:

And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

¹ Claims of trespass, and that the rail spur required approval of the ICC were apparently dropped by Willis inasmuch as he failed to respond to the motion to dismiss regarding these claims. Nevertheless, the trespass claim, at least, depends on the issue to be resolved here.

With the issue framed in this manner, the Court finds that Willis does not have a constitutional right to a hearing prior to PSO taking a possessory interest in his land. The reasoning of the court in Joiner v. City of Dallas, 380 F. Supp. 754, 764-65 (N.D. Tex. 1974), aff'd 419 U.S. 1042 (1974) is persuasive:

That the power of eminent domain must be exercised in accordance with due process of law is an explicit requirement under the Fourteenth Amendment. The perimeters of the Due Process requirement in eminent domain proceedings have been sharply defined through a series of Supreme Court decisions, however, and the customary "due process" attack has limited chance of success. For example, the Court has repeatedly characterized the condemnor's decision on the necessity for a taking and the quantity to be appropriated as legislative, and has, therefor, denied to land-owners the right to participate in that decision-making process or to litigate of federal constitutional grounds the decision to condemn private property.

* * * * *

The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

Having noted this, the Joiner Court went on to reject Joiner's objection on constitutional grounds to prejudgment possession by the city. Joiner, at p. 771. The court stated:

Any owner who believes that the condemnor is without authority to initiate condemnation proceedings or that there is no public purpose for the condemnation has two avenues of judicial review. First, by including these issues in the written objections filed in response to the Report of the Special Commissioners in condemnation, the property owner may litigate these matters in the county Court at Law with the right of appellate review of any final judgment. . . . As an alternative, however, property owners may commence a simultaneous collateral injunctive action in district court.

* * * * *

Although plaintiffs contend in is "unconstitutional" to place the burden on property owners to request judicial review of the propriety of condemnation, they fail to substantiate this allegation with federal case law.

Joiner, at p. 771-72.

Similarly, in Government of the Virgin Islands v. 19,623 Acres of Land, 536 F.2d 566, 571 (3rd Cir. 1976), the court, relying on Joiner held that "the due process clause does not require that a landowner whose property is to be condemned be given a hearing in advance to determine whether the taking is necessary." The court in Virgin Islands specifically noted that the Supreme Court had rejected the notion that due process required a hearing on necessity of taking in Bragg v. Weaver, 251 U.S. 57, 58-59, 40 S.Ct. 62, 64 L.Ed. 135 (1919). Virgin Islands, 536 F.2d at p. 570.

While Willis attempts, unsuccessfully, to distinguish Joiner, he makes two additional arguments. First, Willis relies on garnishment and replevin cases, Sniadach v. Family Finance Corp. Of Bay View, 395 U.S. 337, 89 S.Ct. 1820 (1960) and Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), which hold that a property owner has a constitutional right to a hearing before his property can be taken. Joiner, however, rejects the notion that the reasoning in Sniadach can appropriately be applied to an eminent domain case. Joiner, 380 F.2d at 774.

Second, Willis relies on Oklahoma cases, Wrightsmen v. Southwestern Natural Gas Co., 46 p.2d 925 (Okla. 1935) and Town of Ames v. Wybrant, 220 P.2d 693 (Okla. 1950), holding that the landowner has a constitutional right to a hearing before

deprivation. These cases, however are distinguishable on their facts, and are not persuasive in light of Bragg.

Having determined that this case should be dismissed in that no federal constitutional right is implicated, the court now turns to the issue of sanctions. PSO seeks sanctions against Willis and his counsel for the filing of this Complaint asserting that it was "filed for an improper purpose: i.e., to unnecessarily and improperly commence litigation in this Court with respect to matters already pending before the Supreme Court of Oklahoma, and the District Court for Rogers County, thereby multiplying the expense of final adjudication of the parties disputes." Although Willis' claims were ultimately dismissed, the Court does not conclude that Willis "unnecessarily and improperly commenced litigation in this Court." Willis sincerely believed that he was pursuing a legitimate federal constitutional right. While this Court did not adopt Willis' position, the Court does not find that it was so lacking in merit as to warrant sanctions.

PSO's Motion to Dismiss (Docket #9) is granted. PSO's Motion for Sanctions (Docket # 31 in 96-C-59-E) is denied.

IT IS SO ORDERED THIS 7th DAY OF APRIL, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED

APR 07 1997 *[Signature]*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
OKLAHOMA

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

JOHNNY O'BRYAN,)
)
 Petitioner,)
)
 vs.)
)
 KENNETH KLINGER,)
)
 Respondent.)

Case No. 96-CV-106-B

ENTERED ON DOCKET
DATE APR 08 1997

ORDER

At issue before the Court is O'Bryan's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Docket # 1). After careful review of the record and applicable legal authorities, the Court is of the opinion O'Bryan has failed to show the adjudication of his claims by the State courts was contrary to, or involved an unreasonable interpretation of, clearly established federal law, or that the adjudication of his claims by the State courts was the result of an unreasonable determination of the facts in light of the evidence presented in the State courts. See 28 U.S.C. § 2254 (d). Therefore, the Court hereby **DENIES** O'Bryan's Petition for a Writ of Habeas Corpus.

I. Facts

O'Bryan pled guilty to False Impersonation, after former conviction of a felony, and misdemeanor Failure to Signal before the Honorable Clifford Hopper, Tulsa County District Judge. In following the recommendation of the prosecutor, Judge Hopper sentenced O'Bryan to the statutory maximum ten (10) years imprisonment, plus certain monetary fines, assessments, and court costs on the False Impersonation charge, and a fine and court costs on the Failure to Signal charge. Judge Hopper advised O'Bryan of his right to appeal his convictions and his right to withdraw his pleas of guilty, which O'Bryan did not exercise. O'Bryan was represented by an attorney in the Tulsa

7

County Public Defender's Office.

O'Bryan sought post-conviction relief in the Tulsa County District Court, raising the following issues therein:

1. He was subjected to double jeopardy because he had already had an administrative hearing at the Oklahoma Department of Corrections wherein he lost 365 days of earned credits, and that the evidence used at the administrative hearing was the same which the State would have used to prove the crimes in this case.
2. Ineffective assistance of counsel in that counsel failed to discover that Petitioner had been placed in double jeopardy. Further, that Petitioner's attorney failed to visit him during the ten days following sentencing to discuss with Petitioner whether an appeal should be taken.

Judge Hopper denied O'Bryan's Application for Post-Conviction Relief on the merits. On appeal, the Oklahoma Court of Criminal Appeals affirmed.

In the instant Petition, O'Bryan alleges three (3) grounds of error requiring habeas corpus relief. The first is an ineffective assistance of counsel claim predicated on the failure of counsel to visit with him during the ten (10) day period following sentencing to insure any waiver of the right to appeal was knowingly and intelligently made. Second, O'Bryan asserts the trial and appellate court misapplied the doctrine of waiver of an appeal, thereby depriving O'Bryan of his due process and equal protection rights. Finally, O'Bryan contends he was convicted under two (2) state statutes, 57 Okl.St. Ann. § 510 (8) and 21 Okl.St. Ann. § 1531, which constitutes double/former jeopardy.

II. Exhaustion

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). To exhaust a claim, O'Bryan must have "fairly presented"

that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Connor, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

As to the second ground of error asserted by O'Bryan, the trial court and appellate court misapplied the doctrine of waiver of an appeal, the Court is of the opinion said assertion is nothing more than argument in support of O'Bryan's first ground of error, that he was denied effective assistance of counsel during the ten (10) day period following sentencing. Since O'Bryan has presented the ineffective assistance of counsel claim and his third claim herein, double jeopardy, to the Oklahoma Court of Criminal Appeals, this Court finds O'Bryan has exhausted his state remedies.

III. Ineffective Assistance of Counsel

O'Bryan argues his counsel's failure to visit with him during the ten (10) day period following sentencing to discuss the issue of an appeal resulted in ineffective assistance of counsel. The undersigned reviews *de novo* the state court's determination of whether an attorney's performance was so deficient it violated a defendant's right to effective assistance. See Dever v. Kansas State Penitentiary, 36 F.3d 1531 (10th Cir. 1994).

To prove ineffective assistance of counsel, O'Bryan must show that counsel's performance was deficient and that this deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). O'Bryan must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689.

Where, as here, a conviction is obtained through a guilty plea, an attorney has no absolute duty in every case to advise a defendant of his appeal rights or to file an appeal following a guilty plea conviction. Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Leverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also, Hardiman v. Reynolds, 971 F.2d 500 (10th Cir. 1992); Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Failure to notify O'Bryan of the limited right to appeal is not in itself ineffective assistance. Laycock, 880 F.2d at 1188 (citing Marrow, 772 F.2d at 527; Carey, 605 F.2d at 746).

Generally, when a defendant pleads guilty, he has foreclosed his right to appeal. Laycock, 880 F.2d at 188. Only "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Id. at 1188; see also, Shaw v. Cody, No. 94-6172, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion). "This duty arises when counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506 (quoting Marrow, 772 F.2d at 529).

O'Bryan does not allege he inquired about an appeal right. There is no indication O'Bryan's counsel should have known of other constitutional grounds for appeal. Further, the state court's determination O'Bryan waived his right to a direct appeal is entitled to a presumption of correctness. See 28 U.S.C. § 2254 (e)(1); Jones v. Cowley, 28 F.3d 1067 (10th Cir. 1994); Meeks v. Cabana, 845 F.2d 1319, 1323 (5th Cir. 1988) (holding state court's finding of a waiver of the right to appeal

constitutes a finding of fact).

O'Bryan's ineffective assistance of counsel claim fails.

IV. Double Jeopardy

O'Bryan contends he was convicted under two (2) state statutes, 57 Okl.St. Ann. § 510 (8) and 21 Okl.St. Ann. § 1531, which constitutes double/former jeopardy. 21 Okl.St. Ann. § 1531 is the Oklahoma statute criminalizing the false impersonation of another under certain circumstances to which O'Bryan pled guilty. 57 Okl.St. Ann § 510 (8) is not a criminal statute. It is a provision of the Prisons and Reformatories Corrections Act of 1967, 57 Okl.St. Ann. § 501, *et seq.*, which empowers the Director of the Oklahoma Department of Corrections to implement rules governing the conduct, management, and operation of each institution, including rules for the demeanor of prisoners and punishment of recalcitrant prisoners or the treatment of incorrigible prisoners. O'Bryan attempts to implicate the double jeopardy clause by arguing that the loss of the 365 days good time credit pursuant to a prison administrative proceeding was based on the same evidence which would have been used to convict him of the charge of False Impersonation (to which he pled guilty). The claim is frivolous.

Administrative punishment imposed by prison officials does not render a subsequent judicial proceeding, criminal in nature, violative of the double jeopardy clause. See United States v. Rising, 867 F.2d 1255, 1259 (10th Cir. 1989); United States v. Boomer, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978); United States v. Acosta, 495 F.2d 60 (10th Cir. 1974); United States v. Hedges, 458 F.2d 188 (10th Cir. 1972); and Hutchison v. United States, 450 F.2d 930 (10th Cir. 1971).

As O'Bryan has failed to show that the State court adjudication of his double jeopardy claim

resulted in a decision that was contrary to clearly established federal law, as determined by the Supreme Court, or was based on an unreasonable application of the facts in light of the evidence presented, the Court hereby DENIES habeas corpus relief on this claim.

V. Conclusion

O'Bryan's Petition for a Writ of Habeas Corpus is DENIED in its entirety.

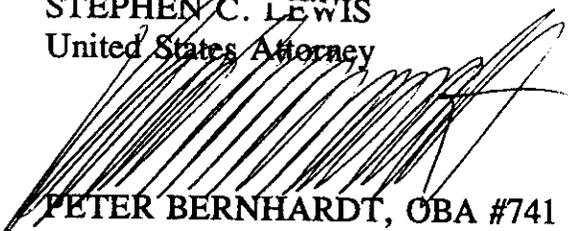
IT IS SO ORDERED this 7th day of April, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

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

BARBARA JOHNSON,
Plaintiff,
v.
JOHN J. CALLAHAN, Acting
Commissioner of the Social Security
Administration,
Defendant.

CASE NO. 96-cv-667-M

FILED

APR 07 1997

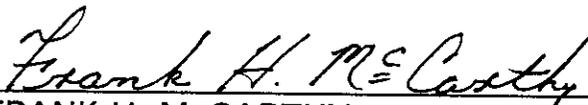
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 4/8/97

JUDGMENT

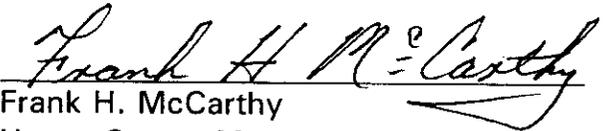
Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 7th day of APRIL, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

and the Petition for Writ of Habeas Corpus [Dkt. 1] be DENIED for Petitioner's failure to exhaust state remedies.

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

DATED this 4th day of April, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE 4-4-97

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

FILED
APR 3 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RANDOLPH JOHN AMEN,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendant(s).

Case No. 95-C-004-H

ORDER

This matter comes before the Court on remand from the Tenth Circuit Court of Appeals. By order of this Court on April 9, 1996, Magistrate Judge Sam A. Joyner's Report and Recommendation (Docket #63) was adopted, and this case was dismissed (Docket #67). Magistrate Judge Joyner also denied Plaintiff's motion to file a second amended complaint (Docket #68) on April 10, 1996. Plaintiff's motion for reconsideration of the April 9 order granting dismissal was denied by this Court on June 24, 1996 (Docket #74). Finally, Plaintiff's motion for leave to appeal in forma pauperis (Docket #71) was denied on July 12, 1996 (Docket #75).

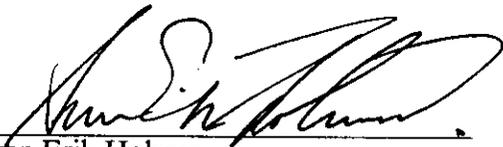
Plaintiff appealed this Court's dismissal, Magistrate Judge Joyner's denial of leave to file a second amended complaint, this Court's dismissal of 31 parties for misjoinder (Docket #49), and this Court's denial of Plaintiff's motion for leave to appeal in forma pauperis. The Tenth Circuit entered an order on April 1, 1997 denying Plaintiff's motion to proceed on appeal without prepayment of fees or costs, and remanding the matter to this Court with instructions to vacate the orders previously entered on the merits of the case and to enter a judgment of dismissal without prejudice.

76

Thus, the Court hereby vacates the order of dismissal entered on April 9, 1996 (Docket #67) and the order denying reconsideration entered on June 24, 1996 (Docket #74). Further, this matter is hereby dismissed without prejudice due to Plaintiff's failure to pay the district court filing fee.

IT IS SO ORDERED.

This 3RD day of April, 1997.

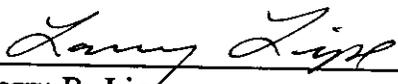


Sven Erik Holmes
United States District Judge

Approved as to Content:


Ken Ray Underwood
Attorney for Plaintiff
525 S. Main, Ste. 680
Tulsa, OK 74103

Richard W. Wassall
Knight, Wilkerson, Parrish & Wassall
Attorneys for Defendant
P.O. Box 1560
Tulsa, OK 74101-1560

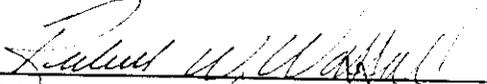

Larry B. Lipe
3700 First Place Tower
15 East 5th Street, Suite 3700
Tulsa, Oklahoma 74103-4344
(918) 599-9400

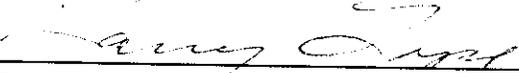
**PARTIES AGREE THIS DOCUMENT CAN BE EXECUTED WITH ORIGINAL
SIGNATURES CONTAINED ON SEPARATE PAGES.**

jdk\grueahof\settle2.ord

Approved as to Content:

Ken Ray Underwood
Attorney for Plaintiff
525 S. Main, Ste. 680
Tulsa, OK 74103


Richard W. Wassall
Knight, Wilkerson, Farrish & Wassall
Attorneys for Defendant
P.O. Box 1560
Tulsa, OK 74101-1560


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15 East 5th Street, Suite 3700
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(918) 599-9400

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

FILED

APR 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES L. GADDY,)
)
Plaintiff,)
)
v.)
)
ONEOK, INC., a Delaware)
corporation, d/b/a)
OKLAHOMA NATURAL GAS)
COMPANY,)
)
Defendant.)

No. 96-C-434-K

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the parties, Charles L. Gaddy, Plaintiff, and Oneok, Inc., Defendant, and hereby voluntarily dismiss the above-styled matter without prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.



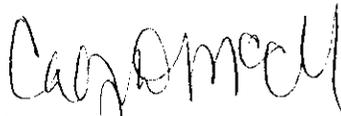
PAUL T. BOUDREAUX
Attorney for Plaintiff



LARRY HENRY
PATRICK CIPOLLA
Attorneys for Defendant

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

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

RADCO, INC.,
an Oklahoma corporation,

Plaintiff,

vs.

Case No. 93-C-1102-H

MOHAWK STEEL COMPANY, INC.,
an Oklahoma corporation;
SHELL OIL COMPANY, a Delaware
corporation; FOSTER WHEELER
USA, CORP., a Delaware
corporation; ABB LUMMUS GLOBAL
INC., a Delaware corporation;
LYONDELL-CITGO REFINING
COMPANY, L.L.C., a Texas
limited liability company;
PETRO-CHEM DEVELOPMENT CO.,
INC., a Delaware corporation;
and MARATHON OIL COMPANY, an
Ohio corporation,

Defendants.

FILED

ENTERED ON DOCKET
DATE APR 03 1997

APR 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**JOINT STIPULATION FOR ORDER OF DISMISSAL
WITHOUT PREJUDICE**

Radco, Inc., an Oklahoma corporation ("Radco"), and Mohawk Steel Company, Inc., an Oklahoma corporation ("Mohawk"), hereby respectfully request that this Court enter an Order of Dismissal Without Prejudice.

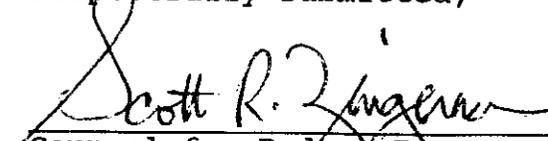
Radco filed its original Complaint herein against Mohawk, among others, and Mohawk has filed Counterclaims against Radco. Mohawk and Radco have resolved their differences and request that the Court enter an Order of Dismissal dismissing all claims each has against the other without prejudice. A proposed form for the Order of Dismissal Without Prejudice is attached hereto and has been signed by counsel for Mohawk and Radco.

159

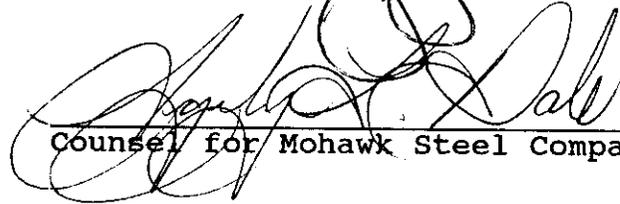
dlj

WHEREFORE, premises considered, Radco and Mohawk respectfully request that the Court enter this Order of Dismissal Without Prejudice.

Respectfully submitted,



Counsel for Radco, Inc.



Counsel for Mohawk Steel Company, Inc.

CERTIFICATE OF MAILING

I certify that on the 3rd day of April, 1997, a true and correct copy of the above and foregoing Stipulation for Order of Dismissal Without Prejudice (Mohawk Steel Company, Inc.) was mailed, via first class mail, with postage thereon fully prepaid, to the following counsel of record:

Angelyn L. Dale, Esq.
Steven M. Kobos, Esq.
Nichols, Wolfe, Stamper, Nally & Fallis, Inc.
Suite 400, Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-5010

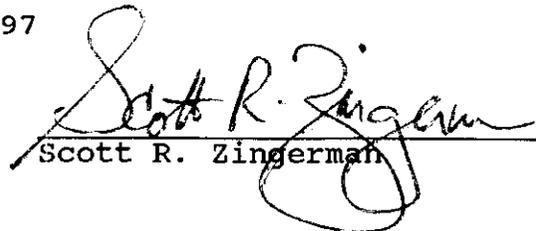
Albert J. Santorelli, Esq.
Dirk D. Thomas, Esq.
Finnegan, Henderson, Farabow, Garrett & Dunner
1300 I Street, N.W., Suite 700
Washington, D.C. 20005-3315

Timothy J. Lanagan, Esq.
Marvin A. Naigur, Esq.
c/o Foster Wheeler Corporation
Perryville Corporate Park
Clinton, New Jersey 08809-4000

Gene L. Mortensen, Esq.
4814 South Florence Avenue
Tulsa, Oklahoma 74105

James P. McCann, Esq.
Doerner, Saunders, Daniel & Anderson
320 South Boston Building, Suite 500
Tulsa, Oklahoma 74103-3125

V. Bryan Medlock, Jr., Esq.
Gary Ray, Esq.
Paul Storm, Esq.
Sidley & Austin
4500 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2197



Scott R. Zingerman

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

F I L E D

APR - 3 1997



Phil Lombardi, Clerk
U.S. DISTRICT COURT

PETER JOSEPH MCMAHON,)
)
 Petitioner,)
)
 vs.)
)
 DREW EDMONDSON, Attorney General)
 of the State of Oklahoma,)
)
 Respondent.)

No. 96-C-697-B

ENTERED ON CLERK'S
DATE APR 03 1997

ORDER

Petitioner Peter Joseph McMahon ("McMahon"), a federal prisoner in the custody of the Federal Correctional Institute in Florence, Colorado, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 to vacate the judgments of conviction in Tulsa County District Court Case Nos. CRF-81-414 (possession of marijuana, second offense), CRF-81-1495 (delivery of marijuana), CRF-81-1496 (possession of controlled drug), CRF-81-2966 (unauthorized use of a motor vehicle), and CRF-81-3636 (burglary in the second degree) (hereinafter referred to as the "1981 convictions"). McMahon alleges that the 1981 convictions are unconstitutional because the trial court accepted his guilty pleas to the foregoing offenses and imposed judgment and sentences without properly ascertaining either the voluntariness of the plea or the factual basis for a finding of guilt, in violation of the Due Process Clause of the Fourteenth Amendment.

In response to an order to show cause why the writ should not issue, the Attorney General of Oklahoma, Drew Edmondson ("Edmondson"), moved to dismiss the petition asserting that he is not a proper party defendant because McMahon is in federal, not state custody. McMahon concedes

that the sentences for the 1981 convictions have been discharged. However, McMahon argues that he meets the threshold requirement of "custody" to invoke this Court's habeas corpus jurisdiction, because he is currently serving a 295-month sentence pursuant to a judgment and commitment entered against him by the Honorable Michael Burrage in *United States v. McMahon*, Case No. 94-CR-176-Bu, and his eligibility for sentencing as an "Armed Career Criminal" and in part his criminal history category for purposes of the Sentencing Guidelines in that case were determined by the 1981 convictions.¹ The Court does not reach the issue of proper party defendant because the Court determines that McMahon must seek review of the 1981 convictions pursuant to 28 U.S.C. §2255, and not §2241.

"A petition under 28 U.S.C. §2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). Section 2255, on the other hand, attacks the legality of the detention and must be filed in the district where sentence was imposed. *Id.*; *Johnson v. Taylor*, 347 F.2d 365, 366 (10th Cir. 1965) ("The purpose of section 2255 is to provide a method of determining the validity of a judgment by the court which imposed the sentence, rather than by the court in the district where the prisoner is confined."). Thus, a petition for writ of habeas corpus under §2241 "is not an additional, alternative, or supplemental remedy to 28 U.S.C. §2255"; rather, §2255 "supplants habeas corpus, unless it is shown to be inadequate or ineffective to test the legality of the prisoner's detention." *Williams v. United States*, 323 F.2d 672, 673 (10th Cir.1963), *cert. denied*, 377 U.S. 980 (1964); *see also Baker v. Sheriff of Santa Fe County*, 477 F.2d 118, 119 (10th Cir.1973) ("A federal

¹McMahon's conviction under 18 U.S.C. §924(c) in Case No. 94-CR-176-Bu was vacated by the district court pursuant to McMahon's 28 U.S.C. §2255 motion on May 21, 1996 [and later on appeal, on August 22, 1996] as a result of the U.S. Supreme Court's intervening decision in *Bailey v. United States*, 116 S.Ct. 501 (1995). Presently, McMahon is scheduled for resentencing in that case on May 19, 1997.

prisoner seeking relief from his federal sentence has section 2255 as his exclusive remedy."). Because §2255 is the exclusive remedy for testing the validity of a sentence,

[Section] 2255 prohibits a district court from entertaining an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to §2255 "if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Bradshaw, 96 F.3d at 166 (quoting 28 U.S.C. §2255).

McMahon's §2241 petition is procedurally defective not only because it has been filed in district of sentencing rather than confinement, but because he cannot show that a §2255 challenge of the judgment and sentence in Case No. 94-CR-174-Bu based on the unconstitutionality of the 1981 convictions would be "inadequate or ineffective." McMahon argues that should the Court treat the petition as a §2255 motion, it would be "a premature attack on the federal sentence itself, thereby forcing a subsequent attack on the federal conviction by 2255 motion subject to dismissal as an abuse of the writ." The Court disagrees. First, the Court cannot "treat" the petition as a §2255 motion as any §2255 motion must be filed in the criminal case, Case No. 94-CR-174-Bu. Second, according to the provisions of §2255, the Court cannot entertain a §2241 petition for writ of habeas corpus if McMahon has not filed a §2255 motion or has been denied §2255 relief, unless a §2255 motion is "inadequate or ineffective." Third, there is no legal basis for the proposition that a properly filed §2255 motion before the sentencing court would be inadequate or ineffective so as to render §2241 the appropriate procedural remedy. Indeed, the exclusive remedy to attack the validity of a federal sentence based on unconstitutional state convictions is provided by 28 U.S.C. §2255. *Bradshaw*

v. *Story*, 86 F.3d 164, 166 (10th Cir. 1996).²

For the reasons set forth above, the Court dismisses McMahon's petition for writ of habeas corpus pursuant to 28 U.S.C. §2241 without prejudice. In so doing, Edmondson's motion to dismiss Respondent as a party in this action (Docket No. 6) is moot.

SO ORDERED THIS 3rd day of April, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

²Section 2255 is truly an "exclusive" remedy in this case. Not only is McMahon precluded from §2241 relief, but he cannot collaterally attack the 1981 convictions when sentenced (or resentenced) under 18 U.S.C. §924(e) or under the career offender provisions of the sentencing guidelines. *Custis v. United States*, 114 S.Ct. 1732, 1738 (1994) ("§924(e) does not permit [defendant] to use the federal sentencing forum to gain review of his state convictions"); *United States v. Garcia*, 42 F.3d 573, 581 (10th Cir. 1994) ("applying *Custis*, we hold that with the exception of a collateral attack based on the complete denial of counsel, a district court sentencing a defendant under the career offender provisions of the Guidelines cannot consider a collateral attack on a prior conviction").

interest thereafter at the current legal rate until paid, plus the costs of this action.

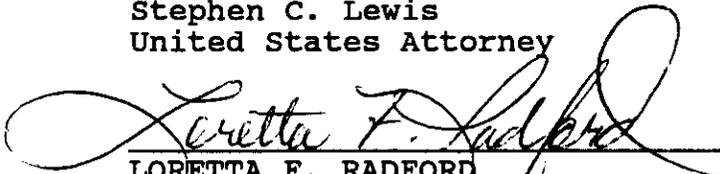
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$500.00, plus accrued interest in the amount of \$151.60, plus interest thereafter at the rate of 5% per annum until judgment, plus a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

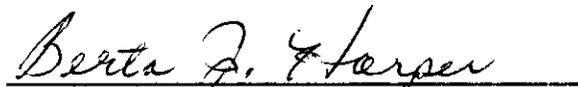

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD
Assistant United States Attorney


BERTA HARPER

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHER DISTRICT
STATE OF OKLAHOMA

SPHERE DRAKE INSURANCE,)
P.L.C.,)
)
Plaintiff,)
)
vs.)
)
TRITON ENERGY CORPORATION,)
)
Defendant.)

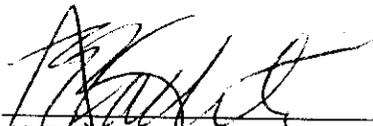
Case No. 96-C-329K ✓

FILED
APR 2 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), the parties stipulate that all claims and counterclaims regarding this matter may be dismissed without prejudice to further litigation.

Respectfully submitted,



ANNE E. ZACHRITZ, OBA No. 15608
Niemeyer, Alexander, Austin & Phillips
300 North Walker
Oklahoma City, Oklahoma 73102
Telephone: 405/232-2725



KENNETH H. BLAKLEY, OBA No. 11227
Edinger & Blakley, P.C.
2950 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73102
Telephone: 405/232-3300

ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

*mailed
4/3/97*

JCD/jo/3/13/97

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

JORDAN F. MILLER)
CORPORATION, a California)
corporation, and JORDAN F.)
MILLER, an individual, and)
AMERICAN EAGLE INSURANCE)
COMPANY, a foreign insurance)
corporation,)

Plaintiffs,)

vs.)

MID-CONTINENT AIRCRAFT)
SERVICE, INC., an Oklahoma)
corporation, and JET CENTER)
TULSA, INC., an Oklahoma)
corporation,)

Defendants)
and Third-)
Party)
Plaintiffs)

vs.)

E.U. BAIN, JR.,)

Third-Party)
Defendant,)
Plaintiff,)

vs.)

VICTOR MILLER,)

Third-Party)
Defendant.)

F I L E D

APR 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No.: 95-C-469-B

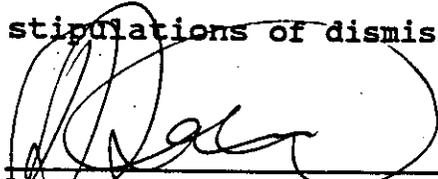
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APR 02 1997
DATE _____

JOINT STIPULATION OF DISMISSAL PURSUANT
F.R.C.P. RULE 41(A)(1)(ii)

COME NOW the defendants and third-party plaintiffs,
Mid-Continent Aircraft Service, Inc., and Jet Center Tulsa,
Inc., and stipulate that its action against the third-party
defendant, E.U. Bain, Jr., may be dismissed, without prejudice
to the refileing of the same, by the Court.

COMES NOW the third-party defendant, E.U. Bain, Jr., and stipulates that his action herein against the third-party defendant, Victor Miller, may be dismissed, without prejudice to the refiling of the same, by the Court.

The undersigned, attorneys for all parties who have appeared in this action, hereby agree to each of the above stipulations of dismissal.


RICHARD B. O'CONNOR
Attorney for Jordan F.
Miller Corporation and Jordan
F. Miller

- SEE Following PAGES -

KENT WATSON
Attorney for American Eagle
Insurance Company


JAMES C. DANIEL
Attorney for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

- SEE Following PAGES -

RICHARD GARREN
Co-counsel for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

- SEE Following PAGES -

JOEL WOHLGEMUTH
Attorney for E.U. Bain, Jr.

- SEE Following PAGES -

JOE CLARK
Attorney for Victor Miller

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F. Miller

KENT WATSON
Attorney for American Eagle
Insurance Company

JAMES C. DANIEL
Attorney for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

RICHARD GARREN
Co-counsel for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

JOEL WOHLGEMUTH
Attorney for E.U. Bain, Jr.

JOE CLARK
Attorney for Victor Miller

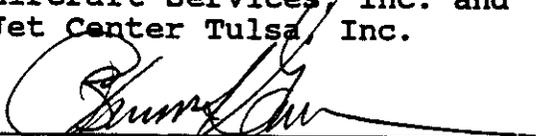
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Attorney for Jordan F.
Miller Corporation and Jordan
F. Miller

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Attorney for American Eagle
Insurance Company

JAMES C. DANIEL
Attorney for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.



RICHARD GARREN
Co-counsel for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

JOEL WOHLGEMUTH
Attorney for E.U. Bain, Jr.

JOE CLARK
Attorney for Victor Miller

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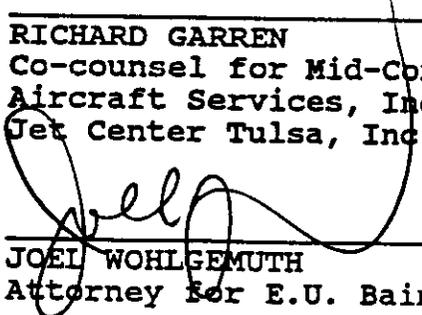
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Attorney for Jordan F.
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F. Miller

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Attorney for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

RICHARD GARREN
Co-counsel for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.


JOEL WOHLGEMUTH
Attorney for E.U. Bain, Jr.

JOE CLARK
Attorney for Victor Miller

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Attorney for Jordan F.
Miller Corporation and Jordan
F. Miller

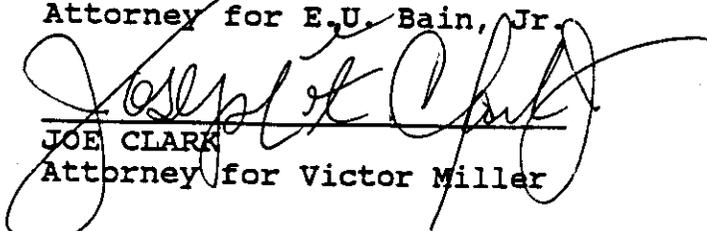
KENT WATSON
Attorney for American Eagle
Insurance Company

JAMES C. DANIEL
Attorney for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

RICHARD GARREN
Co-counsel for Mid-Continent
Aircraft Services, Inc. and
Jet Center Tulsa, Inc.

JOEL WOHLGEMUTH
Attorney for E.U. Bain, Jr.

JOE CLARK
Attorney for Victor Miller



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

FILED
APR -1 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN DARNELL HOPSON,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA CITY/COUNTY JAIL,)
 et al.,)
 Defendants.)

No. 96-CV-103-E

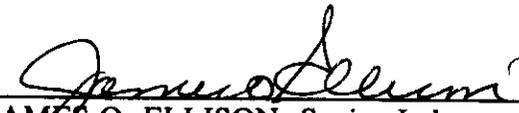
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DATE APR 02 1997

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant, Satyabama Johnson, M.D., and against the Plaintiff.

ORDERED THIS 15 day of April, 1997.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

20

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

APR -1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN DARNELL HOPSON,)
)
Plaintiff,)
)
vs.)
)
TULSA CITY/COUNTY JAIL,)
et al.,)
Defendants.)

No. 96-CV-103-E

ENTERED ON DOCKET

DATE APR 02 1997

ORDER

Before the court are Defendant's motion for summary judgment (Docket #6), Plaintiff's response (Docket #13) and Defendant's reply (Docket #17).

I. BACKGROUND

Plaintiff Marvin Darnell Hopson ("Hopson"), arrested on February 9, 1995 for possession of cocaine, was a pretrial detainee in the Tulsa City/County Jail ("TCCJ") from February 10, 1995 until he was transferred to Dick Conner Correctional Center following his conviction and sentencing. Plaintiff filed this civil rights action on February 14, 1996, naming TCCJ, Stanley Glanz, Satyabama Johnson, M.D., K. Staats, Roy Owens, John Powell, and Joel Spitler as defendants. In Count I of his complaint, Plaintiff alleges that his "4, 5, 6, 8 and 14 Constitutional Amendment were violated," and in Count II, he alleges that "Dr. Cook M.D. made a statement that my condition could have been treated better."

In support of his allegations, Hopson states that during his arrest, the arresting officer used his flashlight to strike Hopson in the head, left clavicle and left shoulder. Hopson claims his left clavicle was broken as a result of the blows. Subsequent to

his arrest, while being held in TCCJ, Plaintiff received medical treatment for his injuries. However, Plaintiff alleges that the defendants failed to provide adequate medical care in violation of his constitutional rights. He seeks monetary relief for his injuries, including pain and suffering.

On February 28, 1996, this Court entered its Order dismissing without prejudice Defendants Glanz, Owens, Powell, Staats, Spitler and TCCJ, and ordering service of the summons and complaint as to the only remaining defendant, Dr. Johnson.

On June 13, 1996, Defendant Satyabama Johnson, M.D., filed her motion for summary judgment arguing that no material facts are in question and that she is entitled to judgment as a matter of law. Further, Defendant asserted that Plaintiff had not shown that Defendant exhibited deliberate indifference to a serious medical need, and that the alleged medical negligence did not give rise to an action under 42 U.S.C. § 1983.

Plaintiff responded to Defendant's motion for summary judgment on August 27, 1996. Without contesting Defendant's statement of material facts, he argued that Defendant was deliberately indifferent to his serious medical needs. Plaintiff specifically complained that "he did not receive his desired method of medical attention for an injured left clavicle" and that "his general medical needs were not promptly met."

Defendant replied to Plaintiff's response arguing that she was entitled to the entry of judgment in her favor since Plaintiff's failure to refute her statement of material facts constitutes an

admission of those facts for summary judgment purposes and those facts clearly establish that Plaintiff can not demonstrate that Defendant acted with deliberate indifference.

II. SUMMARY JUDGMENT STANDARDS

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Conclusory allegations are insufficient to establish a genuine issue of fact. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgement. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The court must also construe Plaintiff's pro se pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall v. Belmon, 935 F.2d 1106, 1110 (10th

Cir. 1991).

III. DISCUSSION

In considering Defendant's motion for summary judgment, the Court has examined the medical records and affidavits submitted by the parties. Although Plaintiff has responded to the motion, he has presented no evidence to refute or controvert the facts in defendant's motion. Plaintiff's response merely contains conclusory allegations that the medical treatment provided was inadequate and was not the treatment he desired. Therefore, because Plaintiff has not presented conflicting evidence, the court accepts the statement of facts provided by Defendant. See Hall, 935 F.2d at 1111.

Since this Court dismissed all defendants but Dr. Johnson, only a portion of Plaintiff's Count I claim, that his Eighth and Fourteenth Amendment rights were violated by defendant Johnson, and his Count II claim, premised on an alleged statement by "Dr. Cook," remain for this Court's consideration. Because Hopson was a pretrial detainee and not a convicted prisoner at the time of Defendant's alleged actions, this claim is governed by the Due Process Clause of the Fourteenth Amendment rather than the Eight Amendment's prohibition against cruel and unusual punishment. City of Revere v. Massachusetts Gen. Hosp. 464 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983). However, under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that

afforded convicted inmates under the Eighth Amendment. Frohman v. Wayne, 958 F.2d 1024 (10th Cir. 1992) (citing Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 406 (10th Cir. 1990)). The standard and requisite components are the same: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending official act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991). With regard to the subjective component, "allegations of 'inadvertent failure to provide adequate medical care' or of a 'negligent . . . diagnos[is]' simply fail to establish the requisite culpable state of mind." Id. At 2323; see also El'Amin v. Pearce, 750 F.2d 829, 832-33 (10th Cir. 1984). Plaintiff must show that Defendant demonstrated deliberate indifference to his medical needs, i.e., he must show that Defendant acted recklessly, that Defendant disregarded a substantial risk of harm to Plaintiff's health. See Farmer v. Brennan, 114 S.Ct. 1970 (1994) (discussing deliberate indifference standard in the Eighth Amendment context).

After carefully reviewing the record in this case, the Court concludes that Plaintiff has failed to make any showing that the Defendant possessed the requisite culpable state of mind or that Plaintiff's medical needs were of sufficiency or seriousness to meet the objective standard. Plaintiff was treated by Defendant and other members of the TCCJ medical staff on numerous occasions and with a variety of medications. The medical records and other evidence submitted by Defendant demonstrate that Plaintiff's left

clavicle and/or shoulder were X-rayed, at least four (4) times between February 9, 1995, the date of arrest, and May 11, 1995. The initial X-rays, taken at Tulsa Regional Medical Center on the night of the arrest, showed that Plaintiff's clavicle was broken but that, based on the presence of bone calluses, it had also been broken before his arrest. Subsequent X-rays showed that during his incarceration at TCCJ, the fractured clavicle demonstrated signs of progressive healing. Between February 10 and August 11, 1995, Dr. Johnson examined Plaintiff's shoulder and/or clavicle at least eight (8) times. Other physicians or the nursing staff examined Plaintiff's clavicle and/or shoulders at least eight (8) additional times. The records also indicate that the medical staff evaluated Plaintiff's pain complaints with reasonable promptness and treated Plaintiff according their evaluations.

At most, Plaintiff differs with the medical judgment of the Defendant who opted for conservative treatment of his injured clavicle and shoulder. It is well established, however, that a difference of opinion between the prison's medical staff and the inmate does not support a claim of cruel and unusual punishment. Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); McCraken v. Jones, 562 F.2d 22 (10th Cir. 1977), cert denied, 435 U.S. 917 (1978); Smart v. Villar, 547 F.2d 112 (10th Cir. 1976).

Furthermore, Plaintiff's allegations premised on "Dr. Cook's" statement implying that Dr. Johnson was negligent in choosing a conservative course of treatment or in failing to order that he be

placed in a "figure-8" restraint are meritless. Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle, 429 U.S. at 104-05; Ramos, 639 F.2d at 575.

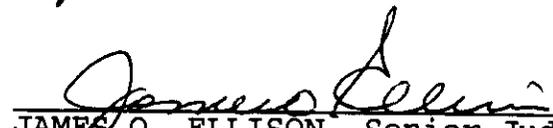
The court concludes that plaintiff has failed to make any showing that Defendant possessed the requisite culpable state of mind to raise these complaints of inadequate medical care to the level of a constitutional violation. In addition, the Court finds that there is no genuine issue of material fact, and that Defendant is entitled to judgment as a matter of law on Plaintiff's claims.

IV. CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendant has made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendant's summary judgment evidence, and that Defendant is entitled to judgement as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion for summary judgment [docket #6] is **granted**.

DATED this 1st day of April, 1997.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

MAR 31 1997

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

TERRY WINCHESTER

Plaintiff,

vs.

T. LOGAN BROWN, attorney at law,
and THE OKLAHOMA BAR
ASSOCIATION,

Defendants.

Case No.97-CV-31-E

ENTERED ON DOCKET

DATE APR 02 1997

REPORT AND RECOMMENDATION

Plaintiff, an Oklahoma Department of Corrections inmate, has filed a pauper's affidavit seeking to prosecute his 42 U.S.C. § 1983 civil rights complaint and "Motion of Quo Warranto" [sic] in forma pauperis pursuant to 28 U.S.C. § 1915.

Section 1915(b)(1) provides that if a prisoner brings a civil action or files an appeal in forma pauperis, "the prisoner shall be required to pay the full amount of a filing fee," which is currently \$150. 28 U.S.C. § 1915(b)(1) [emphasis supplied]. The Court is required to collect "an initial partial filing fee of the greater of -- (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month immediately preceding the filing of the complaint." *Id.*

In accordance with § 1915(b) this Court entered an order requiring payment of an initial filing fee in the amount of \$8.85 on or before March 15, 1997. Plaintiff was advised that his action would be subject to dismissal unless he either paid the initial partial filing fee or showed cause in writing for the failure to pay. [Dkt. 8]. The

Court Clerk received a letter on March 11, 1997 advising that Plaintiff was unable to do anything about the payment due this month. Rather than consider whether Plaintiff has shown sufficient cause for this failure to pay the initial filing fee, the undersigned

United States Magistrate Judge recommends that the case be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(I).

Section 1915(e)(2) provides:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

- (A) the allegation of poverty is untrue; or
- (B) the action or appeal--
 - (i) is frivolous or malicious;
 - (ii) fails to state a claim on which relief may granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief.

A suit is frivolous if "it lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Olson v. Hart*, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." *Denton v. Hernandez*, 504 U.S. 25, 112 S. Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (quoting *Neitzke*, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." *Id.* Having liberally construed Plaintiff's pro se pleadings, see *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law

and should be dismissed as frivolous.

Under 42 U.S.C. § 1983, a plaintiff must allege that the defendants deprived him of a right secured by the United States Constitution while they acted under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Plaintiff has alleged violation of the Sixth Amendment due to ineffective assistance of counsel. He has named his appointed counsel as defendant and seeks an order freezing counsel's assets and \$2.1 million in compensatory and punitive damages. He has also named the Oklahoma Bar Association as a defendant in its capacity as "supervisors of attorney of said bar," he claims the Oklahoma Bar Association is responsible for the actions of his attorney. Plaintiff cannot maintain a civil rights action against the named defendants.

Court-appointed counsel does not act under color of state law and therefore is not subject to a civil rights complaint under § 1983. Public defenders performing in the traditional role of attorney for the defendant in a criminal proceeding represent their client, not the state, and therefore cannot be sued in a 42 U.S.C. § 1983 action. *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). *See also Brown v. Schiff*, 614 F.2d 237, 238-39 (10th Cir.1980), cert. denied, 446 U.S. 941 (1980). In most circumstances, respondeat superior, or vicarious liability does not attach under § 1983. "Personal participation is an essential allegation in a § 1983 claim." *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996) quoting *Bennet v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976); *See Ruark v. Solano*, 928 F.2d at 950 (no respondeat superior liability under § 1983). Accordingly, there

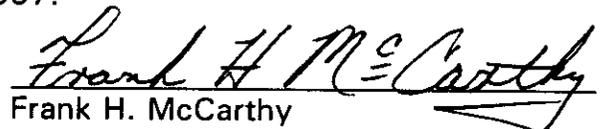
can be no § 1983 liability on behalf of the Oklahoma Bar Association as "supervisors" of Plaintiff's attorney.

Therefore, the undersigned United States Magistrate Judge RECOMMENDS that the claims against T. Logan Brown, attorney, and the Oklahoma Bar Association be DISMISSED under 28 U.S.C. § 1915(e)(2)(B) as frivolous.

Plaintiff is notified that this dismissal counts as one of his three allocated dismissals under 28 U.S.C. § 1915(g).

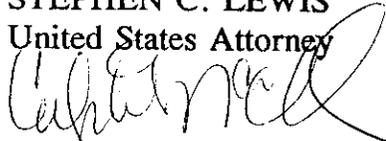
In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal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

DATED this 31st day of March, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

F I L E D

MAR 31 1997 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ROBERT T. THORNBURG,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
Commissioner of Social Security, ¹)
)
Defendant.)

Case No: 95-C-1152-W ✓

ENTERED ON DOCKET
DATE 4/2/97

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed March 31, 1997.

Dated this 31st day of March, 1997.



 JOHN LEO WAGNER
 UNITED STATES MAGISTRATE JUDGE

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action.

B

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

F I L E D

MAR 31 1997 SAC

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT T. THORNBURG,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN,)
)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Case No. 95-C-1152-W ✓

ENTERED ON DOCKET
DATE 4/2/97

ORDER

This order pertains to Plaintiff's Statement of Specific Errors and Motion to Remand (Docket #7) and Defendant's Response to Plaintiff's Motion to Remand (Docket #9).

Plaintiff asks the court to remand this action to the Commissioner for consideration of certain materials, which are attached to his motion. He points out that he had a hearing before Administrative Law Judge R.J. Payne ("ALJ") of the Social Security Administration in June of 1994, and the ALJ denied his request for Social Security Disability on September 16, 1994. Plaintiff claims that his counsel requested copies of the tape of the Administrative hearing so that an appeal could be completed in September of 1994 and again in October. He shows that on June 22, 1995, the materials for an appeal were hand-delivered to the Social Security Administration (Attachment to Plaintiff's Statement of Specific Errors and Motion to

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

Remand (Docket #7)). On September 22, 1995, he received notice from the Appeals Council that his Request for Review was denied. He then filed his complaint in this court to review that decision.

Plaintiff states that, when he received a copy of the certified record of his case, neither the brief, which was submitted to the Appeals Council, nor the medical records, which were attached, were included in the record. Therefore, he requests the court to remand this action to the Social Security Administration so that the brief and medical records submitted can be considered.

Social security regulation 20 C.F.R. § 404.970(b) authorizes a social security disability claimant to submit new and material evidence to the Appeals Council when seeking review of an ALJ's decision. If the evidence relates to the period on or before the date of the decision, the Appeals Council "shall evaluate the entire record including the new and material evidence submitted . . . [and] then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record." *Id.* A claimant need not show "good cause" before submitting the new evidence to the Appeals Council. See O'Dell v. Shalala, 44 F.3d 855, 858 (10th Cir. 1994).

If the Appeals Council denies review, the ALJ's decision becomes the Secretary's final decision. See 20 C.F.R. § 404.981. This decision, in turn, is reviewed for substantial evidence, based on "the record viewed as a whole." Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1028 (10th Cir. 1994). The new evidence becomes part of the administrative record to be considered

when evaluating the Secretary's decision for substantial evidence. O'Dell, 44 F.3d at 859.

Plaintiff has shown that his brief and attached materials were filed with the Social Security Administration on June 22, 1995. The letter denying his request for a reversal of the denial of benefits stated that the Appeals Council had considered the materials, but there is no explanation as to why the certified record of his case does not contain the brief and medical records submitted to the Appeals Council.

Under Section 405(g) of Title 42 of the United States Code, this court has the "power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding for a rehearing The court . . . may, at any time, on good cause shown, order additional evidence to be taken before the Secretary" Under that section, a claimant may submit new evidence regarding a disability, but several requirements must be met before the court remands the case for reconsideration. The evidence must be new and not merely additional and cumulative of what is already in the record, because a plaintiff may not relitigate the same issues. Bradley v. Califano, 573 F.2d 28, 30-31 (10th Cir. 1978). The evidence must also be material, that is, relevant and probative.

The courts have also found that there must be a reasonable possibility that the new evidence would have changed the Secretary's decision had it been before him. Cagle v. Califano, 638 F.2d 219, 221 (10th Cir. 1981), cert. den. 451 U.S. 993 (1982). Implicit in the materiality requirement is the idea that new evidence should

relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition. Haywood v. Sullivan, 888 F.2d 1463, 1471-72 (5th Cir. 1989) (citing Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985)). The final requirement is that plaintiff must demonstrate good cause for not having incorporated the new evidence into the administrative record. Id.

This court may only consider the new evidence proffered to determine whether the case should be remanded under 42 U.S.C. 405(g). Selman v. Califano, 619 F.2d 881, 885 (10th Cir. 1980). There is some doubt whether this is "new evidence," since the Appeals Council clearly considered some materials when it did its review. However, giving plaintiff's argument the benefit of the doubt, the court has reviewed the evidence to determine if the case should be remanded for its consideration.

The medical evidence is dated after September 16, 1994, the date of the ALJ's decision. Most importantly, the ALJ found that claimant only met the special earnings requirements of the Social Security Act through March 31, 1993, and therefore had to establish onset of disability on or before that date. In Potter v. Secretary of Health & Human Serv., 905 F.2d 1346 (10th Cir. 1990), the court addressed an application for disability benefits by a claimant suffering from multiple sclerosis which was diagnosed four years after her insured status expired and affirmed the denial of benefits even though the claimant introduced numerous retrospective opinions diagnosing her disease. The court stated: "the relevant analysis is whether the claimant was actually disabled prior to the expiration of her

insured status. A retrospective diagnosis without evidence of actual disability is insufficient." Id. at 1348-49.

The records submitted by plaintiff introducing a diagnoses of arthritis and a doctor's note that claimant was taking medication for depression fifteen months after March 31, 1993 do not relate to the time period for which benefits were denied. The records do not contain any medical opinions that the arthritis or depression are disabling. Claimant did not even mention arthritic complaints in his applications for benefits or testimony. (TR 34-73, 104-119). It was only on March 19, 1994, a year after his disability status ended, that he filed a request for disability stating that he had "been put on trazodone HCL 50 MG twice a day for depression."² (TR 118).

Plaintiff's Motion to Remand (Docket #7) is denied. The new evidence submitted by plaintiff is not relevant to the period prior to March 31, 1993, which is the time period for which benefits were denied.

The court now considers Plaintiff's Statement of Specific Errors. He has brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Social Security ("Commissioner") denying his application for disability insurance benefits under §§ 216(i) and 223 of the Social

²The only "new evidence" which is applicable to the ALJ's decision is claimant's high school record, Ex. "A" to Plaintiff's Statement of Specific Errors and Motion to Remand, Docket #7, which shows that he did not graduate from high school. The ALJ found that he had a high school education (TR 20-21) and stated this in his hypothetical question to the vocational expert (TR 65), but the court finds that this error would not affect the outcome of the case, as many of the jobs which the ALJ found that claimant could perform do not require a high school education, such as parking lot attendant, assembler, and hand packager (TR 20, 22).

Security Act, as amended. The procedural background of the matter was summarized adequately by the parties in their briefs and in the decision of the "ALJ."

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant is not disabled within the meaning of the Social Security Act.³

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.⁴ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of light work, except for more than the occasional lifting of up to twenty pounds and more than the

³Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decisions. The Commissioner's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Commissioner's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

⁴The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

frequent lifting or carrying of up to ten pounds performed in a pollutant-free environment. The ALJ concluded that the claimant was unable to perform his past relevant work as an electrical lineman, laborer, and concrete finisher, and that his residual functional capacity for the full range of light work was reduced by the requirement that he avoid dust, fumes, smoke, and chemicals. The ALJ found that the claimant was 48 years old as of his alleged onset date of January 1, 1992 and was 49 years old as of his date last insured, which ages are defined as younger individuals, had a high school education, and had acquired work skills, such as knowledge of electricity and soldering, which he demonstrated in his past work, and which, considering his residual functional capacity, could be applied to meet the requirements of semiskilled work functions of other work. The ALJ concluded that, although the claimant's additional nonexertional limitations did not allow him to perform the full range of light work, there were a significant number of jobs in the national economy which he could perform, such as sedentary and light solderer, assembler, parking lot attendant, electrical maintenance, and hand packager. Having determined that there were a significant number of jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ's decision that claimant can perform light work was not supported by substantial evidence, since his treating doctors found him disabled and he cannot do the majority of jobs under the category of light work.

- (2) The ALJ's hypothetical question to the vocational expert did not accurately reflect claimant's impairments, because he did not have a high school education and the question did not include his nonexertional impairments such as depression.
- (3) The ALJ erred in failing to hold that claimant met Social Security Listing 9.09 relating to obesity.
- (4) The ALJ erred in failing to consider claimant's reduced capabilities due to nonexertional impairments.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that he has been unable to work since January 1, 1992, because of high blood pressure, nose bleeds, lack of strength or stamina, dizziness, and depression (TR 104, 113, 118). As already discussed, he met the disability insurance status requirements of the Social Security Act through March 31, 1993, and therefore had to establish the onset of his disability on or before that date. There are very few medical records for the relevant period, and the diagnoses of arthritis and depression came after his insured status ended.

On January 16, 1990, claimant was given medication for hypertension and elevated blood pressure (TR 180). On February 26, 1990, he was treated at the hospital for a nosebleed that would not stop, and his hypertension was noted (TR 191-195). His blood pressure was 142/116 at first and then went down to 130/98 (TR 192).

There are no medical records from February, 1990 until a letter dated October 22, 1993 written by Dr. L.W. Ghormley, which stated that he had examined claimant, who "complained of the onset of hypertension in June of 1993" and had been feeling light-headed upon exertion and seeing "silver spots" in front of his eyes (TR 134). He was having no gastrointestinal symptoms, but reported that he had had a peptic ulcer ten years earlier (TR 134). His weight was 294, his blood pressure 184/110, and he showed "dyspnea on the slightest exertion, gasping for air." (TR 134). The doctor concluded that he had hypertension and morbid obesity (TR 135). He was treated at the Pawhuska Hospital emergency room on November 2, 1993 for a nosebleed that would not stop (TR 140-157). His blood pressure was elevated initially, but dropped to 150/100 upon follow-up (TR 141-142).

There is no merit to claimant's contentions which are based largely on evidence after his insured status ended. Claimant first argues that the ALJ's decision that claimant can perform light work is not supported by substantial evidence. The ALJ did not conclude that claimant can do light work; rather, he found that claimant can do light work, except for more than occasional lifting of up to twenty pounds and more than frequent lifting or carrying of up to ten pounds, and must work in a pollutant-free environment. No doctor during the relevant period concluded that claimant could not work before March 31, 1993. His elevated blood pressure and ulcer were successfully controlled by medication. The physician who noted on November 21, 1993 that claimant had a history of depression stated it was probably

“situational” and medication-related (TR 16, 142).⁵ The ALJ’s conclusion is supported by substantial evidence.

There is also no merit to claimant’s second contention that the ALJ’s hypothetical question did not accurately reflect claimant’s impairments. As already discussed, the ALJ erred in saying in his hypothetical question that claimant had completed high school, when he had not, but this error would not affect the outcome of the case since many of the jobs which the ALJ found that claimant could perform do not require a high school education.

It is true that “testimony elicited by hypothetical questions that do not relate with precision all of a claimant’s impairments cannot constitute substantial evidence to support the Commissioner’s decision.” Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

⁵ The court is aware that the Tenth Circuit found in Tolbert v. Chater, No. 96-5120 (10th Cir. filed Feb. 11, 1997), that an ALJ is required to evaluate every medical opinion he receives and consider all medical evidence of record. In that case, the court found that the ALJ had not sufficiently evaluated a doctor’s diagnosis of somatoform pain disorder. Also in Pruitt v. Chater, No. 96-5128 (10th Cir. filed Feb. 18, 1997), the court found that the ALJ had failed to fully develop the record concerning claimant’s depression and its effect on his ability to work when he did not obtain an evaluation from a qualified mental health professional. In the case at bar, however, the court concludes that any depression which the claimant has suffered occurred after his insured status expired and therefore the ALJ correctly found that the disorder had not restricted his activities during the relevant period. (TR 16).

Initially the ALJ established that the vocational expert had reviewed claimant's record and heard his testimony (TR 64). The ALJ's hypothetical question assumed that claimant could do sedentary work, with the limitations already discussed (TR 65-66). The ALJ concluded that an individual with such limitations could do jobs that existed in the national economy (TR 67-68). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to conclude that claimant's testimony was fully credible and to assume impairments that the ALJ properly deemed unsubstantiated (TR 70-72). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

There is no merit to claimant's third contention that he meets Social Security Listing 9.09 for obesity. That Listing states in relevant part:

Weight equal or greater than the values specified in Table I . . . and one of the following:

- A: History of pain and limitation of motion in any weight bearing joint or the lumbosacral spine (on physical examination) associated with findings on medically acceptable imaging techniques of arthritis in the effected joints or lumbosacral spine; or
- B: Hypertension with diastolic blood pressure persistently in excess of 100mm. Hg measured with appropriate size cuff; or
- C: Chronic venous insufficiency with superficial varicosities in a lower extremity with pain on weight bearing and persistent edema; or
- D: Respiratory disease with total forced vital capacity equal to or less than 2.0 L. or a level of hypoxemia at rest equal to

or less than the values specified in Table III-A or III-B or III-C.

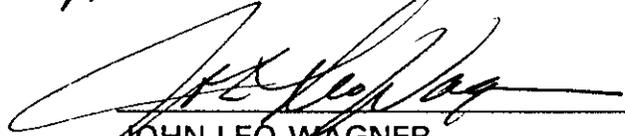
The ALJ properly concluded that, although claimant reached the 310 pound weight for his 69 inch height to be considered obese under § 9.09 in June of 1994 (TR 15-16, 246), there was no evidence that this weight had been maintained for any continuous 12-month period. His obesity had been noted to be exogenous, and claimant had been significantly below the listing weight in the past. Claimant weighed 248 in July of 1988 (TR 182), 253 in January of 1990 (TR 181), 281 in July of 1993 (TR 126, 129), 283 on August 4, 1993 (TR 123), and 294 on October 22, 1993 (TR 121). As the ALJ noted, pulmonary function studies were within normal limits, and his hypertension had not resulted in significant end-organ damage (TR 16).

There is also no merit to claimant's contention that the ALJ did not consider claimant's nonexertional impairments, such as depression. As already noted, the ALJ discussed claimant's obesity and hypertension (TR 16). He recognized claimant's inability to work around fumes, dust, and other contaminants in his hypothetical question and conclusions (TR 21-22, 65-66). The only support for claimant's other "impairments," such as decreased endurance and spots before his eyes, is his self-serving testimony (TR 46, 59). There is no objective medical evidence to support such contentions. The filing of a request for disability stating that there had been a change in his condition since December 13, 1993 because he had been put on trazodone HCL 50 MG. twice a day for depression (TR 118) is clear evidence that he

did not suffer from depression at the time of the ALJ's decision and therefore the ALJ could not have included it in a hypothetical question.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 31st day of March, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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FILED

APR -1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA

Plaintiff,

vs.

KENNETH S. FRAZIER,

Defendant.

CIVIL ACTION NO. 96CV1182C ✓

ENTERED ON DOCKET
DATE APR 3 2 1997

AGREED JUDGMENT

This matter comes on for consideration this 1st
day of ~~March~~ ^{April}, 1997, the Plaintiff, United States of America, by
Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant
United States Attorney, and the Defendant, Kenneth S. Frazier,
appearing pro se.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Kenneth S. Frazier,
acknowledged receipt of Summons and Complaint on February 26,
1997. The Defendant has not filed an Answer but in lieu thereof
has agreed that Kenneth S. Frazier is indebted to the Plaintiff
in the amount alleged in the Complaint and that judgment may
accordingly be entered against Kenneth S. Frazier in the
principal amount of \$1,752.89, plus accrued interest in the
amount of \$358.54, plus interest thereafter at the rate of 8% per
annum until judgment, plus a surcharge of 10% of the amount of
the debt in connection with the recovery of the debt to cover the
cost of processing and handling the litigation, plus filing fees
in the amount of \$120.00, plus interest thereafter at the current

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legal rate until paid, plus the costs of this action.

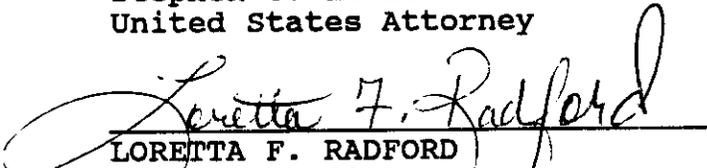
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$1,752.89, plus accrued interest in the amount of \$358.54, plus interest thereafter at the rate of 8% per annum until judgment, plus a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation, plus filing fees in the amount of \$120.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD
Assistant United States Attorney


KENNETH S. FRAZIER

that he had failed to state a sufficient reason why the claims had not been raised on his direct appeal, the Oklahoma Court of Criminal Appeals barred him from raising the claims. (See Exhibit "D" to Docket No. 9).

The Oklahoma Court of Criminal Appeals has consistently held that issues which could have been raised on direct appeal and were not raised are waived. Smith v. State, 826 P.2d 615, 616-617 (Okla. Crim. App.), cert. denied, 506 U.S. 952 (1992); Moore v. State, 809 P.2d 63, 64 (Okla. Crim. App.), cert. denied, 502 U.S. 913 (1991). The determination of the state court mandates the application of a procedural bar in this federal habeas corpus case.

In Coleman v. Thompson, 501 U.S. 722, 750 (1991), the Supreme Court held that when a petitioner has defaulted claims pursuant to an independent and adequate state procedural rule, habeas review is barred unless he can establish cause for the default and actual prejudice or demonstrate that a fundamental miscarriage of justice will result if the claim is not addressed.

The Tenth Circuit has held that inquiry into whether a fundamental miscarriage of justice would result involves three prongs: (1) a constitutional violation; (2) a probable effect on the jury's determination; and (3) the conviction of an innocent man. Parks v. Reynolds, 958 F.2d 989, 995 (10th Cir.), cert. denied, 503 U.S. 928 (1992). The fundamental miscarriage of justice is a very narrow exception to the procedural bar, which applies only in "extraordinary" cases to one "innocent of the crime" for which he has been convicted. Id. (quoting McClesky v. Zant, ____ U.S. ____, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)). Factual innocence must mean "at

least sufficient claims and facts that - had the jury considered them - probably would have convinced the jury that the defendant was factually innocent." Id.

The court in Parks emphasized that the showing of factual innocence "necessarily goes beyond the introduction of additional evidence or claims that merely suggest additional doubts that - had the claims or evidence been presented - might have loomed in the far-reaches of the jurors' minds as they individually contemplated the line that determines guilt" Id.

In this case, the petitioner has failed to establish cause and prejudice for his failure to raise his claims in his direct appeal. His only excuse is ignorance:

Its [sic] ludicrous to expect a [sic] illiterate person to bring issues on a Appeal Specifies, an indigent person that dosen't [sic] have a choice of representation and soley [sic] relies on court appointed attorneys that offer their seVICES [sic] to the indiegent [sic] defense system for the purpose of supplementing their income offering a bare bone defense, if that to poor and ignorant people. The Petitioner [sic] Wesley Cox can't even spell jurisdiction more or less know what it means.

(Docket No. 10, pg. 1-2).

In addition, the only evidence of his innocence which he presents is self-serving statements that he was only "disciplining" his children and trying "to keep the boys in line." (Docket No. 10, pg. 3). His excuses do not suggest to the court that, had the jury considered them, it would have found him innocent of the crimes.

A fundamental miscarriage of justice will not result if the issues raised by petitioner are not considered by this court. His petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 should be denied.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from

the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 31st day of March, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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CERTIFICATE OF SERVICE

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

1st Day of April, 1997.
C. Pachillo, Deputy Clerk

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

SUN COMPANY, INC. (R&M), a
Delaware corporation, and
TEXACO, INC., a Delaware
corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a
Delaware corporation, et al.,

Defendants.

ENTERED ON DOCKET
DATE APR 1 1997

No. 94-C-820-K

F I L E D

MAR 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court is the Defendant Bank IV Oklahoma N.A.'s ("Bank IV") Motion for Summary Judgment (docket # 129).

Statement of Facts

This case arises out of a claim for contribution pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et. seq.* Plaintiff's have asserted a contribution claim against Bank IV on the grounds that Bank IV's predecessor in interest owned and operated a hazardous waste "Superfund" site known as the Compass Industries Landfill in Tulsa, Oklahoma, and thus should be held responsible for all or part of the costs of remediation incurred by the Plaintiffs as a result of the cleanup order by the Environmental Protection Agency ("EPA").

Bank IV's predecessor in interest executed a mortgage note and security interest in the Compass Industries Landfill on July 5, 1972. When the mortgagee defaulted on the loan, Bank IV's

3288

predecessor foreclosed, and on October 18, 1979, the deed to the Compass Industries Landfill ("the landfill") was transferred. On May 2, 1980, the property was appraised, and was subsequently listed with a broker on November 25, 1980. The property was eventually sold by the bank on October 30, 1981 without the assistance of the real estate broker.

Bank IV seeks summary judgment on the grounds that it is entitled to the security interest exemption of CERCLA, 42 U.S.C. §§9606(b)1 & 9601 (20)(A). According to Bank IV, it acquired the landfill as the result of a foreclosure. It did not operate the property as a landfill, but rather took immediate steps to divest itself of the property. Alternatively, Bank VI asserts that even if the security interest exemption doesn't apply, it cannot be held liable because no disposal of hazardous waste took place during its period of ownership.

Plaintiffs claim that Bank IV is not entitled to the security interest exemption because it failed to divest itself of the property at the earliest practicable, commercially reasonable time. Specifically, Plaintiffs argue that waiting seven months to appraise the property, and thirteen months to list the property with a broker, was not commercially reasonable. Plaintiffs likewise assert that Bank IV does not fall within the exemption because it was not acting merely to protect its security interest, but had a profit motive for retaining the property for such an extended period of time. Plaintiffs indicate that there is evidence suggesting that Bank IV, rather than trying to sell the property, sought out alternative ways to utilize the land including the feasibility of operating a quarry. Plaintiffs also allege that Bank IV was directly responsible for the continued contamination of the landfill site because it failed to take action to prevent unauthorized dumping of which it knew, and because at least one bank employee contributed to the lead contamination at the site by firing shotgun shells at the landfill during a skeet-shooting demonstration.

Summary Judgment Standard

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). However, "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . ." *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513; *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 533 (10th Cir.1994).

Discussion

The Court finds that this case is not appropriate for summary judgment as genuine issues of material fact exist as to whether or not Bank IV's predecessor in interest acted to divest itself of the Compass Industries landfill property at the earliest practicable, commercially reasonable time. Although Bank IV has produced testimony calling into question the reliability of Joe Brandt's expert opinion regarding the commercial reasonableness of the bank's actions, the credibility of an expert's testimony is not appropriate for summary judgment. *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 269 (3d Cir.1991). Bank IV went to incredible efforts to identify factors that Mr. Brandt failed to consider in reaching his conclusions; however, Bank IV, the party bearing the burden of establishing a lack of genuine factual issues, failed to produce any evidence that the bank employees

were in fact qualified to market the property themselves, that the market conditions between 1979 and 1981 were such that sale of the landfill property could not have been achieved in a more expeditious manner, or that the numerous persons who were interested in the property were contacted as a result of the bank's marketing efforts rather than those of the broker. Similarly, the Plaintiffs have provided circumstantial evidence that there may have been purchase offers prior to the offer by Mr. Jackson, the ultimate purchaser. Although Bank IV has produced many employees who testify that they don't recall whether other offers were made or not, only one, George Carson, who joined the bank in 1981, testified that there were no other offers made prior to Mr. Jackson's offer in the fall of 1981.

Additionally, the Plaintiffs have presented sufficient circumstantial evidence to create a factual question as to whether Bank IV's predecessor acted to protect its security interest, or whether it retained the property and took other actions in order to explore the investment opportunities offered by the landfill property. Despite the fact that Mike Davis agreed that the bank was "considering the possibility of marketing the property based on its quarrying potential," such testimony is not dispositive of the fact that the bank may have been looking at the potential of the landfill property for other purposes as well. When asked why he met with Williams Brothers Engineering Company, Davis testified:

In May of 1980 I had talked with Cooper of Anchor Stone and, of course is July of '80, so in the meantime there were some subsequent conversations about whether or not Anchor Stone could go in there and quarry. And this second paragraph here talks about -- this is what brings this to mind. Anchor Stone had to shut down their production or the neighbors were successful in preventing blasting. I don't remember the legality of how they prevented it, but it became apparent that Anchor Stone was not going to blast nor was Fourth National Bank going to allow the blasting on this piece of property at that time.

But we did -- and, again, Williams Brothers Engineering was a customer of Fourth National Bank and came through either our present or board members to have someone that knew what they were doing other than the bank senior vice president or president look at this piece of property from the standpoint of the mining operations. And this pretty much is a summation of -- much like a real estate appraisal that Ron Palmer did for us on this as a stone quarry from this guy.

Additionally, although Bank IV treats the evidence rather dismissively, the Plaintiff's did present evidence that the bank allowed Anchor Stone to conduct some mining on the property, that it granted an easement over the property to Colorado Gas Compression, Inc., and executed a quit claim deed to the County of Tulsa for a portion of the property. Each of these actions arguably devalued or encumbered the property, and provides circumstantial evidence of a lack of the bank's intent to divest itself of the property at the earliest practicable, commercially reasonable time.

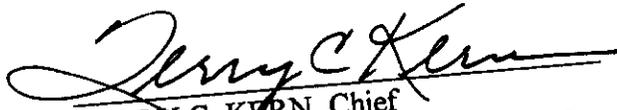
Lastly, the Plaintiff's have presented some evidence that Bank IV's predecessor may have contributed, to a minor extent, to the release and disposal of hazardous substances. Plaintiff's have indicated that Bank IV's predecessor knew that the area was being used for unauthorized dumping, and yet failed to take preventative action. The Plaintiff's have provided evidence that one item being dumped was tires, which are a hazardous substance under CERCLA. Bank IV has not rebutted this, stating only that an affirmative duty to prevent unauthorized dumping is not contemplated by CERCLA. This does not seem to be the case under the plain language of CERCLA, which holds owners or operators strictly liable for any dumping which occurred on the property during the time such person or persons owned the property. Unless Bank IV qualifies under the security interest exemption, it could be held liable for any tires or other hazardous substances which were dumped during the two years that the landfill was owned by Bank IV's predecessor.

Bank IV has also failed to address Plaintiff's' allegation that shooting of shotgun shells on the

property contributed, although a *de minimis* amount, to the lead contamination on the property, insisting that "Plaintiffs cannot seriously contend that the discharge of a few shotgun shells at the site on one occasion should give rise to CERCLA liability." Contrary to Bank IV's argument, Plaintiffs can indeed seriously contend that the discharge of shotgun shells could give rise to CERCLA liability. *See, Kamb v. United States Coast Guard*, 869 F. Supp. 793, 798 (N.D. Cal. 1994) (holding that discharge of firearms could constitute contribution to contamination of a hazardous waste site); *United States v. United Nuclear Corporation*, 814 F. Supp. 1552, 1557-58 (D.N.M. 1992) (holding that the definition of a hazardous substance is not in any way dependent upon the amount of the substance released).

For the foregoing reasons, Defendant Bank IV Oklahoma, N.A.'s Motion for Summary Judgment (docket # 129) is DENIED.

IT IS SO ORDERED THIS 28 DAY OF MARCH, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

SAR

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

FILED

MAR 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES F. SAMS,

Plaintiff,

v.

KOCH ENGINEERING COMPANY,
INC., d/b/a JOHN ZINK COMPANY,

Defendant.

Civil Action No. 96-CV-830-B

FILED ON DOCKET

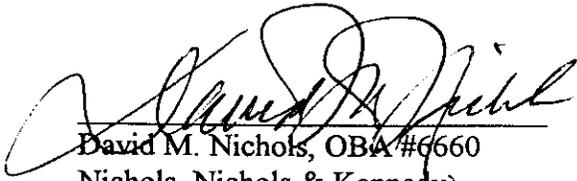
APR 01 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), Plaintiff James F. Sams and Defendant Koch Engineering Company, Inc. (improperly sued herein as "Koch Engineering Company, Inc. d/b/a John Zink Company") (hereafter referred to as "Defendant") stipulate to the dismissal of Plaintiff's complaint against Defendant with prejudice to refile, each party to bear his own costs and fees.

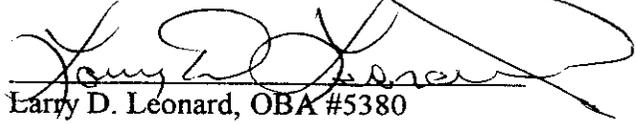
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cf



David M. Nichols, OBA #6660
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(918) 744-4407

Respectfully submitted,



Larry D. Leonard, OBA #5380
Leonard & Fehrle
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(918) 583-8700

- and -

Mark V. Holden
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Wichita, KS 67201
(316) 828-3654
FAX: (316) 828-4780

ATTORNEY FOR PLAINTIFF

Dated: 3/27, 1997

ATTORNEYS FOR DEFENDANT

Dated: 2-21, 1997

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

FILED

MAR 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NORMAN CROWSON,

Plaintiff,

v.

**KOBE MANUFACTURING, INC., a/d/a KOBE
MACHINE COMPANY OR KOBE JAPAN a/k/a
KOBE MACHINERY CO., LTD. - KOBE JAPAN,**

Defendant.

Case No. 95 C 546B

COPIES ON DOCKET

APR 01 1997

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the Plaintiff hereby serves notice that the above captioned cause is dismissed without prejudice.

Respectfully submitted,

STIPE LAW FIRM

By



Anthony M. Laizure, OBA # 5170
2417 E. Skelly Drive,
P.O. Box 701110
Tulsa, OK 74170-1110
Phone (918) 749-0749
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Attorneys for Plaintiff

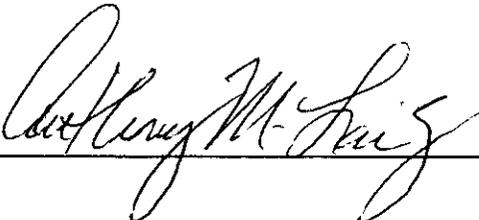
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 31st day of March, 1997, a true and correct copy of the above and foregoing document with proper postage prepaid and affixed was mailed First Class to:

Norman Crowson
930 L Street N.W.
Miami, OK 74354



RECORDED ON DOCK
41-97

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

NMP CORPORATION,)
)
Plaintiff,)
)
vs.)
)
PARAMETRIC TECHNOLOGY CORPORATION,)
)
Defendant.)

No. 96-C-116-K ✓

FILED

MAR 31 1997 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendants Motion for Summary Judgment pursuant to *Fed. R. Civ. P.* 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on 3-31-97, 1997, the Court finds summary judgment is appropriate in favor of Defendant Parametric Technology Corporation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Parametric Technology Corporation and against the Plaintiff.

ORDERED this 31 day of March, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE 4-1-97

NOAH HARJO,)
)
 Petitioner,)
)
vs.)
)
RON WARD,)
)
 Respondent.)

No. 93-C-285-K ✓

FILED

MAR 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

By Order and Judgment, the United States Court of Appeals for the Tenth Circuit affirmed this Court's Order of July 27, 1995, which conditionally granted the petitioner's petition for writ of habeas corpus. This Court held that the writ shall issue unless, within one hundred twenty (120) days of entry of the Order, the State had commenced proceedings to retry petitioner. On September 13, 1995, this Court granted the respondent's motion for stay pending appeal.

In the Order and Judgment, the Tenth Circuit erroneously concluded that no stay order had been entered, and the parties apparently did not bring the September 13, 1995 Order to the appellate court's attention. The Tenth Circuit panel remanded the case to this Court to "clarify" its July 27, 1995 Order.

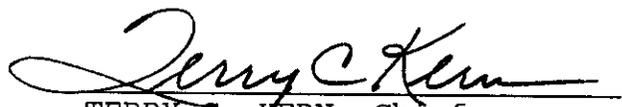
By Order filed December 2, 1996, the Court vacated its stay order and again directed the State to commence proceedings to retry petitioner within 120 days. The Order directed the State to file a status report on or before April 1, 1997. The State filed its status report March 7, 1997. From the report, it appears the State

has taken a liberal construction of "commencement" of proceedings. The State advises that a bond hearing was set for March 7, 1997, a pretrial hearing is set for April 30, 1997 and the case is set for jury trial May 19, 1997. In response to the status report, petitioner has filed a motion to enforce writ of habeas corpus, in which he essentially argues for a strict construction of the Court's Order, meaning that a May 19, 1997 trial date is beyond the 120-day limit.

Under the circumstances, the Court elects to adopt the State's timetable. However, if the trial does not commence May 19, 1997, (aside from delay caused or consented to by petitioner), the petitioner may file a motion to reopen this case, and the Court will consider granting the writ.

It is the Order of the Court that the motion of the petitioner to enforce writ of habeas corpus (#36) is hereby DENIED without prejudice. The Court Clerk is directed to administratively close this case.

SO ORDERED THIS 31 day of March, 1997, ~~1996~~.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
4-1-97

NMP CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 PARAMETRIC TECHNOLOGY)
 CORPORATION,)
)
 Defendant.)

No. 96-C-116-K ✓

F I L E D

MAR 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendant's Motion for Summary Judgment (docket # 9).

Statement of Facts

The Plaintiff, NMP Corporation ("NMP") is an Oklahoma corporation in the business of manufacturing and designing large mechanical switchboards, mostly for use by the United States Navy. The Defendant, Parametric Technology Corporation ("Parametric"), is a Massachusetts corporation that develops and manufactures software to assist mechanical engineers in product development and manufacturing. The dispute at issue arises out of Parametric's granting of a license to NMP to use Parametric's ProENGINEER® ("Pro/E") software to assist in NMP's design and manufacture work.

In July of 1993, Parametric contacted NMP to introduce the Pro/E software and its capabilities. Several demonstrations of the Pro/E software were conducted prior to Parametric's licensing of the software to NMP. The first demonstration was conducted in July, 1993. Two Parametric employees, John Forbes and Richard Barrett, met with Marcus Jones and other NMP

engineers to present an initial software demonstration. A second demonstration was conducted in August, 1993 for the NMP engineers, and at that time a decision was made to present a software demonstration to the NMP management. Parametric personnel were given a tour of the NMP facilities, and the engineers from NMP and Parametric worked together to develop a demonstration. Since the demonstration model was not completed, NMP supplied Parametric engineers with a production drawing, and Parametric engineers completed the demonstration model at Parametric facilities. The allegations of fraud, misrepresentation and gross misconduct arise out of the third demonstration of the Pro/E software which was presented to NMP management in September, 1993. The parties dispute what exactly the demonstration model represented, although the parties agree that it depicted a portion of an NMP switchboard with circuit breakers. Marcus Jones, NMP's engineering manager, asserts that the model appeared to be a fully detailed switch, although he admits that the model was not a fully detailed switchboard since it did not contain all the parts represented in the production drawing submitted to Parametric. Parametric engineers assert that the demonstration model was merely a prototype of something that NMP could do with the Pro/E software. Parametric claims that the demonstration was never intended to be an example of NMP's largest assemblies, but was merely meant to show Pro/E's capabilities in a way that non-engineering upper management at NMP could understand. The parties do not dispute that the demonstration was presented to NMP management using a Silicon Graphics computer and that the regeneration of the model and drawings in the demonstration took place in a matter of 30 seconds to a couple of minutes. It appears from the record that there was never any discussion at the demonstration regarding the number of parts displayed in the demonstration model or whether the software would operate at the same speed when using more complex designs.

After the demonstration, it became clear that NMP management would seek a license from Parametric to utilize the Pro/E software. At that point, Marcus Jones and John Forbes, Parametric's district sales manager, discussed selection of hardware to run the Pro/E software. Jones admits that Forbes would not recommend any one hardware over another, but rather mentioned several brands which could operate the Pro/E software. It is undisputed that Jones decided to choose the Silicon Graphics computer, the same model computer utilized in the demonstration. Parametric and NMP executed the Pro/E licensing agreement on September 17, 1993. Sometime in the fall of 1993, NMP purchased Silicon Graphics computers and installed the Pro/E software. The software apparently performed successfully on small assemblies, and NMP did not have any difficulties until April, 1994. At that point, NMP was attempting to utilize the Pro/E software in some of its larger assembly pieces. NMP notified Parametric of the difficulties, and Parametric engineers visited NMP in June, 1994 and made several recommendations. Specifically, Parametric recommended that NMP increase the computer memory on the Silicon Graphics machines; utilize configuration states, a function which had recently become available in the latest release of Pro/E (rev 13.), and which NMP had recently installed; hire an on-site consultant from Parametric to ease the implementation process; work in shaded or wireframe mode now available in rev 13.; and send engineers to advance design and assembly classes. NMP implemented all of these recommendations with the exception of hiring a consultant and sending their engineers to advanced training. NMP asserts that implementation of these changes took place over the course of several months - from June to November, 1994. According to NMP, new problems arose despite the memory upgrades and new methods implemented. Parametric was once again consulted, and the parties worked together from November, 1994 until August, 1995 to try to work out the difficulty. According to Parametric, the problem lay

in NMP's choice to use the Silicon Graphics hardware, which had been discontinued sometime after it was purchased, and which now was having difficulty handling the needs of NMP at the speed level required by NMP. Marcus Jones became concerned at some point during the November, 1994 through August, 1995 period that the problems could be the result of NMP personnel. NMP went so far as to advertise on the Internet for an engineer with Pro/E experience.

According to NMP, in August, 1995 it first began to suspect that the problems it was experiencing were caused by the Pro/E software itself. Eventually, the decision was made to abandon the software, and Parametric was advised of this decision September 25, 1995. NMP requested that Parametric refund the money spent on the Pro/E software, as well as compensating NMP for the additional moneys expended trying to implement the Pro/E software. Parametric refused to meet this demand, and NMP filed this lawsuit on February 16, 1996 alleging that Parametric fraudulently represented in the September demonstration to NMP management that the Pro/E software could be used to create and detail a typical NMP switchboard. NMP further asserted in its Complaint that Parametric made the following additional misrepresentations:

- A. Use of the software would allow development of models which would allow NMP to check physical interference between mechanical and electrical components.
- B. Two dimensional drawings would be developed automatically from the model and only require minor dimensional placement corrections and adding of notes thereby eliminating a large majority of drafting.
- C. The drawings and models provided by the software would be parametric; therefore, any changes in the models would automatically update the drawing or a change in the drawing would update the models.
- D. The software would allow parts lists to be automatically developed from the models, thereby eliminating the manual development of parts lists.
- E. The software would allow process sheets to be developed from the models.

- F. The software would allow significant switchboard changes to be made almost immediately with complete detail update.

Pursuant to these claims, NMP seeks rescission of the contract and recovery of monies paid in attempting to utilize the Pro/E software.

In the event that the Court determines that rescission is not an appropriate remedy, NMP also asserts a claim for breach of contract under the Licensing Agreement. NMP claims that the Pro/E software was defective, not merchantable, and not fit for the particular purpose for which it was sold. NMP seeks recovery of money paid for the hardware, and expenses related to the software and hardware.

NMP also asserts a claim for gross negligence. NMP contends that Parametric had a duty to comply with the standard of reasonable care in selecting a software program which would be sufficient to meet the needs of NMP, and that Parametric was grossly negligent in recommending Pro/E software to NMP.

Parametric seeks summary judgment on all of NMP's claims asserting that 1) all causes of action are barred by the one year limitations period stated in the Licensing Agreement; 2) the alleged fraudulent misrepresentations regarding the capabilities of Pro/E software are all true features of the software; 3) NMP personnel knew that the demonstration did not purport to represent a fully detailed NMP switchboard; 4) NMP's claim for gross negligence is barred pursuant to the economic loss rule; and 5) even if NMP's claims are valid, the damages must be limited to recovery of amounts actually paid to Parametric by NMP as required under the Licensing Agreement.

Summary Judgment Standard

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, 106 S.Ct. 2505, 2510-12, 91 L.Ed.2d 202 (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).

Discussion

I. Choice of Law

Before considering the merits of each party's contentions, the Court must first determine what law applies to each of the Plaintiff's claims. In actions where jurisdiction is based upon diversity, the substantive law, including the choice of law rules, of the forum state are applied. *Moore v. Subaru of America*, 891 F.2d 1445, 1448 (10th Cir. 1989).

Under the terms of the Licensing Agreement, the parties determined that the Agreement would be governed by and "interpreted, construed and enforced as a sealed instrument in accordance with" Massachusetts law. *Appendix to Plaintiff's Response, Exhibit 2 ¶ 13(a)*. The Agreement further states that

PTC's [Parametric's] maximum liability arising out of the creation, license, supply, or use of the licensed products, whether based upon warranty, contract, tort or otherwise, shall not exceed the actual payments received by PTC from customer in connection therewith. In no event shall PTC be liable for special, incidental or consequential damages, including, but not limited to, loss of profits, loss of data or loss of use damages arising out of this agreement or the creation, license or supplying of the licensed products. Even if PTC has been advised of the possibility of such damages, customers shall not bring any suit or action against PTC for any reason whatsoever more than one year after the related cause of action has accrued.

Appendix to Plaintiff's Response, Exhibit 2 ¶ 9. NMP asserts that the choice of law provision applies only to the breach of contract claim. It further contends that Oklahoma law governs the tort causes of action, and thus a limitations period of two years from the date of discovery of the tort applies to Plaintiff's tort claims pursuant to Okla. Stat. tit. 12 § 95. NMP also submits that even if the contractual choice of law applies to the tort claims, the one year limitations period is unenforceable under Oklahoma law pursuant to Okla. Stat. tit. 15 § 216.

In response, Parametric claims Okla. Stat. tit. 15 § 216 does not apply to tort claims, *citing McDonald v. Amtel, Inc.*, 633 P.2d 743 (Okla. 1981). Parametric also asserts that the Oklahoma Uniform Commercial Code, which allows contractual limitations on commencement of a lawsuit, applies to the Licensing Agreement, and thus such provisions do not violate Oklahoma public policy, *citing Graphic Sales, Inc. v. Sperry Univac Division, Sperry Corp.*, 824 F.2d 576 (7th Cir. 1987) (implying that the Uniform Commercial Code applied to leases of computer equipment); *Colonial Life Ins. v. Electronic Data Systems*, 817 F.Supp. 235 (D.N.H. 1993) (holding that the Uniform Commercial Code specifically encompassed a software licensing agreement).

A. NMP's Breach of Contract Claim

The Oklahoma choice of law rules governing contracts require application of the law of the state chosen by the parties unless (1) a provision violates law in the forum state; (2) the forum state has a materially greater interest in the issue; and (3) the forum state would be the proper state chosen under ordinary choice of law provisions. *Moore*, 891 F.2d at 1449; Restatement (Second) Conflict of Laws § 187 (1971 & Supp. 1988). Thus, Massachusetts law will generally apply to the provisions of the Licensing Agreement, unless a certain provision is contrary to Oklahoma law, Oklahoma has a materially greater interest in the issue, and Oklahoma law would be applied under ordinary conflict

of law rules.

The first issue to be resolved is to determine whether limiting the time in which a party may initiate a cause of action violates Oklahoma law. As to the Plaintiff's breach of contract claim, whether a contractual statute of limitations violates Oklahoma law depends upon whether the Licensing Agreement constitutes a sale of goods. Under Okla. Stat. tit. 12A § 2-725, parties to a contract for the sale of goods can limit the time in which a cause of action can be brought to no less than one year; however, under Okla. Stat. tit. 15 § 216, such limitations are prohibited as to all other contracts.¹

Software licenses are difficult to categorize as goods because they possess elements of both intangibles and goods which are treated differently under the Uniform Commercial Code ("UCC"). See, Bonna L. Horovitz, *Note, Computer Software As a Good Under the Uniform Commercial Code: Taking the Byte Out of the Intangibility Myth*, 65 B.U.L.Rev. 129, 149 (1985). Additionally, software licenses such as the one currently at issue involve elements of service contracts, which are specifically excluded from Article 2 coverage. *Id.* at 138. Oklahoma courts have not addressed the issue of whether a software license would constitute a sale of goods; however, Massachusetts has considered the issue, at least indirectly. In *Vmark Software v. EMC Corp.*, 642 N.E.2d 587, 590, n. 1 (Mass. App. Ct. 1994), the Massachusetts Court of Appeals assumed that Article 2 of the UCC applied to a software licensing agreement and held that the licensee met its burden of proof regarding allegations of misrepresentation by the licensor of a software program. This application is consistent

¹ Okla. Stat. tit. 15 § 216 states in relevant part that "[e]very stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

with the holding in the majority of cases addressing the issue. *See e.g., Colonial Life Ins. Co. v. Electronic Data Sys. Corp.*, 817 F. Supp. 235 (D.N.H. 1993) (holding that the UCC applies to a computer software license with an additional obligation to provide incidental services where the predominant thrust of the contract was the sale and support of the software); Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply*, 35 Emory L.J. 853 (1986) (arguing that computer software licensing agreements should be considered sales of goods for UCC purposes); Stephen J. Sand, Annotation, *Validity, Construction, and Application of Computer Software Licensing Agreements*, 38 A.L.R. 5th 1, 20-21 (1996) (citing 20 cases in which the UCC was either directly or indirectly held to apply to agreements involving computer software licenses). This Court adopts the reasoning of the New Hampshire district court in *Colonial Life Ins. Co. v. Electronic Data Sys. Corp.*, 817 F. Supp. 235 (D.N.H. 1993), and holds that the licensing agreement at issue in this case constitutes a sale of goods under the Oklahoma Uniform Commercial Code. Although the Licensing Agreement contemplated that Parametric would provide services to NMP, the purpose and main thrust of the agreement was to support implementation of the Pro/E software at NMP.

Since the Court has determined that the Licensing Agreement constitutes a sale of goods governed by the Oklahoma Uniform Commercial Code, the contractual limitations period does not violate Oklahoma public policy. Similarly, the warranty exclusion and remedy limitation provisions of the Licensing Agreement are valid under Oklahoma law. Oklahoma Uniform Commercial Code allows parties to contractually exclude all implied warranties as long as the language is clear, unambiguous, and conspicuous. Okla. Stat. tit. 12A § 2-316. Oklahoma law likewise permits limitation of remedies for breach of contract unless such limit would be unconscionable. Okla. Stat.

tit. 12A § 2-719. For the foregoing reasons, Massachusetts law will be applied to NMP's breach of contract claim.

B. NMP's Tort Claims

Although the Licensing Agreement does not appear to contain a choice of law clause specifically covering tort claims which might arise from the pre-Licensing Agreement negotiations, it does contain language which impacts NMP's tort claims. The choice of law clause states that the Agreement itself would be governed by, interpreted, construed, and enforced as a sealed instrument in accordance with Massachusetts law; thus, Massachusetts law will generally apply to these provisions of the Licensing Agreement, unless a certain provision is contrary to Oklahoma law, Oklahoma has a materially greater interest in the issue, and Oklahoma law would be applied under ordinary conflict of law rules.

NMP asserts that Okla. Stat. tit. 15 § 216 renders application of the limitations clause void. In response, Parametric claims Okla. Stat. tit. 15 § 216 does not apply to tort claims, *citing McDonald v. Amtel, Inc.*, 633 P.2d 743 (Okla. 1981). While it is true that the Oklahoma Supreme Court in *McDonald* held that Okla. Stat. tit. 15 § 216 does not apply to tort claims, Parametric fails to address the ultimate finding in that case. In *McDonald*, the parties had entered into a contract to supply gasoline, oil, and accessories to a service station. *McDonald*, 633 P.2d at 744. The contract between the parties provided that “no civil or equitable action under the provisions of any Federal or State anti-trust laws by either party against the other shall be brought unless instituted within two (2) years of the date of the transaction upon which the action is based.” *Id.* The court held that, although the contractual provision did not violate Okla. Stat. tit. 15 § 216, it *did* violate Article 23, § 9 of the Oklahoma Constitution which states that “[a]ny provision of any contract or agreement, express or

implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void.” Thus it appears that under the reasoning of *McDonald*, the provision in the Licensing Agreement requiring that any suit or action against Parametric be brought within one year after the cause of action has accrued, is null and void under Oklahoma law as applied to NMP's tort claims. Likewise, under Oklahoma law, a party cannot contractually limit damages incurred as a result of its own gross negligence or fraud.² *Elsken v. Network Multi-Family Security Corp.*, 49 F.3d 1470, 1475 (10th Cir. 1995); *Sumner v. Southwestern Bell Yellow Pages, Inc.*, 110 B.R. 377 (N.D. Okla. 1990); *Vails v. Southwestern Bell Telephone Co.*, 504 F. Supp. 740 (W.D. Okla. 1980); *Elsken v. Network Multi-Family Security Corp.*, 838 P.2d 1007, 1010 (Okla. 1992).

Since both of the contractual provisions pertaining to limitation of damages and limitation of time to file suit as applied to NMP's tort claims violate Oklahoma public policy, the Court must determine whether Oklahoma has a greater interest in the tort claims, and whether Oklahoma law would govern after applying ordinary conflict of law rules. Under Oklahoma conflict of law rules, the rights and liabilities of parties in a tort action are to be determined by the substantive law of the state having the most significant relationship to the occurrence and to the parties involved. *Childs v. State of Oklahoma ex. rel. Oklahoma State University*, 848 P.2d 571, 578, n.41 (Okla. 1993); *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974) (rejecting the *lex loci delicti* rule in favor of the approach taken in the Restatement (Second) Conflict of Laws § 145). The factors to be taken into account and to be evaluated according to their relative importance with respect to a particular issue,

² Parties can contractually limit damages arising from ordinary negligence claims, but the Court does not understand NMP to be asserting any allegations based on ordinary negligence.

shall include: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties occurred. *Brickner*, 525 P.2d at 637. It is clear under analysis of these factors both that Oklahoma law would be applied under ordinary conflict of law rules, and that Oklahoma has a materially greater interest in the tort claims than does Massachusetts. Parametric came to Oklahoma in an effort to sell its Pro/E software to NMP, an Oklahoma corporation with its principal place of business in Oklahoma. The three demonstrations, and, in particular, the demonstration giving rise to the tort claims, occurred in Oklahoma. The Licensing Agreement was signed in Oklahoma, and all significant interactions between the parties took place at NMP's headquarters in Oklahoma.

The contractual provisions affecting NMP's tort claims violate Oklahoma public policy, Oklahoma has a materially greater interest in the tort causes of action than does Massachusetts, and Oklahoma's conflict of laws rules would apply Oklahoma law. Because these three criteria have been met, those contractual provisions relating to limitations of damages and time restraints on instituting a cause of action are stricken as to NMP's tort claims, as required under the severability clause of the Licensing Agreement.³ Since the severance of those portions of the Licensing Agreement leaves no mention of tort causes of action in the Licensing Agreement, the Court, in accordance with ordinary conflict of law rules as applied in the preceding paragraph, will apply Oklahoma law to NMP's tort causes of action.

³ Paragraph 13(g) of the Licensing Agreement states that “[i]t is intended that this Agreement shall not violate any applicable law and the unenforceability or invalidity of any provision . . . shall not affect the force and validity of the remaining provisions and such invalid provisions shall be deemed severed herefrom.”

Now that the Court has determined the legal standards applicable to NMP's claims, it is necessary to resolve whether NMP has presented sufficient evidence to warrant a trial on the merits of each of its causes of action.

II. Fraud and Misrepresentation

To establish a cause of action for fraud under Oklahoma law, NMP must prove with reasonable certainty (1) a material false representation, (2) made with the knowledge of its falsity, or recklessly made without knowledge of its truth, and as a positive assertion, (3) with the intention that it be relied upon by another, and (4) reliance by another party to its injury. *Whitson v. Oklahoma Farmers Union Mut. Ins. Co.*, 889 P.2d 285, 287 (Okla. 1995). A cause of action for fraud must be brought within two years of the discovery of the fraud. Okla. Stat. tit. 12 § 95.

Parametric asserts that it is entitled to summary judgment on two grounds: (1) the cause of action is time barred; and (2) there is no evidence that Parametric ever made a false representation about the capabilities of the Pro/E software; or alternatively, if there were false representations made, they were not knowingly or recklessly made. The Court finds that a genuine issue of material fact exists as to when the alleged fraud should have been discovered; therefore summary judgment will not be granted as to NMP's fraud claim on the ground that it is time barred.

As to Parametric's second ground for summary judgment, Parametric contends that all of the allegedly fraudulent statements made regarding the capabilities of Pro/E are true features of the software. Parametric has provided evidence suggesting that the software is performing as expected at other manufacturing sites creating products which are more complex than those manufactured at NMP. Additionally, Parametric has provided testimony from NMP employees admitting that many of Pro/E's professed benefits have been successfully utilized at NMP.

The Court finds that Parametric has presented conclusive evidence that the allegedly misleading statements listed in the Complaint regarding Pro/E's capabilities are in fact true statements, and thus summary judgment as to those statements is granted. Not only are other companies using the Pro/E software to perform those functions (*Exhibit 3, Defendant's Response to Plaintiff's Supplemental Brief*), NMP engineers have admitted that they have successfully implemented each of Pro/E's functions when using it on smaller assemblies (*Exhibits 1 & 2, Defendant's Response to Plaintiff's Supplemental Brief*). Thus, any misrepresentation that may have occurred must be attributed to the visual demonstration of the Pro/E software.

Parametric asserts that NMP knew that the computer demonstration did not represent a fully detailed NMP switchboard, and thus any misrepresentation based upon the demonstration is groundless. NMP has produced the following evidence in support of its contention that a genuine issue of material fact exists as to whether or not Parametric defrauded NMP as to Pro/E's capabilities: (1) in an internal memo from Mark Jones to Ernie McKee, Jones states that he was told by Bruce Sumpter, the local Parametric support representative, that it was possible that Pro/E was not going to work for NMP's particular application, *Exhibit 11, Appendix to Plaintiff's Response to Defendant's Motion for Summary Judgment*; (2) the Pro/E software never did perform for NMP despite numerous attempts and modifications implemented by NMP; and (3) Parametric's "solutions" to the various problems NMP was experiencing with the Pro/E software kept changing; thus Parametric's inability to properly diagnose the problem presents evidence that the software was incapable of performing as represented. NMP has also "clarified" its fraud claim to base the misrepresentation element on the fact that the demonstration purported to present fully detailed NMP *components* rather than a fully detailed switchboard.

According to Parametric, NMP has propounded yet another theory of misrepresentation based on the fact that Parametric allegedly misrepresented how the Pro/E software would perform on the Silicon Graphics machine. Parametric vigorously opposes NMP's attempts to "clarify" their fraud claim, asserting that under *Fed. R. Civ. Pro.* 9(b), fraud claims must be pled with particularity, and that NMP's "clarification" is really an attempt to amend their Complaint. Parametric also opposes the alleged statement of Bruce Sumpter, contending that a statement in an internal memorandum constitutes double hearsay, and thus may not be considered by the Court. Even considering all of the various theories of misrepresentation as well as the hearsay evidence, the Court finds insufficient evidence of fraud.

The issue to be resolved here is if a question of fact exists as to whether the visual demonstration suggested that Pro/E could be implemented by NMP to create large, complex assemblies using a Silicon Graphics computer. Parametric has admitted that John Forbes told Marcus Jones that the Pro/E software would work on a Silicon Graphics computer. The parties do not dispute that a Silicon Graphics computer was used in the visual demonstration, and that the demonstration model created, altered, and produced a parts list for part of an NMP switchboard in a short amount of time. It is also uncontested that John Forbes did not recommend the Silicon Graphics hardware over any other choice, and in fact suggested that Jones experiment with a variety of hardware types before making a selection. The evidence indicates that no one at the demonstration thought to question whether the software and hardware would perform comparably when utilized in larger, more complex assemblies. It appears that the majority of NMP's unmet expectations with the Pro/E software involved functions that Parametric never represented Pro/E could perform, such as creating combined parts lists and creating automatic drawings (*Fagg Deposition, Exhibit 4, Plaintiff's*

Supplemental Response to Defendant's Motion for Summary Judgment). Although Parametric arguably represented at the demonstration that a fully detailed component could be modified and updated quickly using the Pro/E software on a Silicon Graphics machine, this was a true representation since the Pro/E software and the Silicon Graphics hardware were successfully implemented by NMP for several months on smaller assemblies (*Fagg deposition, supra*). No one from Parametric ever stated that one of NMP's larger, more complex assemblies could be designed, modified, and updated at the same or similar rate of speed using the Silicon Graphics hardware.

Apparently NMP wanted Pro/E to perform highly complex tasks on the Silicon Graphics machine at a certain speed, but never questioned whether the software would perform at the same rate at which it did during the demonstration when utilized on larger assemblies. The evidence indicates that NMP knew that the demonstration was not a fully detailed switchboard. Even if the demonstration did appear to be a fully detailed component, a fully detailed component is not the equivalent of a 1,000 to 20,000 part assembly. NMP seeks to hold Parametric responsible for NMP's failure to question how the software would perform when implemented to design or modify a more complex assembly; however, Parametric was not hired to select and design a computer system that would utilize the Pro/E software most effectively for NMP. They were merely the seller of a product. NMP has presented no evidence whereby a reasonable juror could find that Parametric made any misrepresentations regarding the capabilities of the Pro/E software.

For the foregoing reasons, the Defendant's Motion for Summary Judgment as to the Plaintiff's fraud and misrepresentation claim is GRANTED.

III. Gross Negligence

Under Oklahoma law gross negligence is defined as the lack of slight care and diligence.

Okla. Stat. tit. 25 § 6. The Oklahoma Supreme Court has expounded upon this statutory definition, stating that gross negligence requires the intentional failure to perform a manifest duty in reckless disregard of the consequences or in callous indifference to the life, liberty, or property of another. *Fox v. Oklahoma Memorial Hospital*, 774 P.2d 459, 461 (Okla. 1989). Thus, gross negligence is the same as a negligence claim, differing only as to the degree.

NMP asserts that, as experts in the field of computer software, Parametric had a duty not to recommend software which could not meet NMP's needs. NMP further contends that Parametric breached this duty by recommending the Pro/E software, and that as a result of this breach NMP incurred economic injury through the expenditure of funds to purchase and implement the Pro/E software. Parametric claims that NMP's gross negligence claim is barred by the economic loss rule, which bars negligence actions seeking purely economic damages caused by a product defect; however NMP asserts that Oklahoma has not adopted the economic loss rule, citing *Keel v. Titan Constr. Corp.*, 639 P.2d 1228 (Okla. 1982) and *Dentco Investment Co., Inc. v. Oklahoma Natural Gas Co.*, 569 P.2d 512 (Okla. App. 1977).

The economic loss rule was recognized by the Supreme Court in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 871-72, 106 S.Ct. 2295, 2302-03, 90 L.Ed.2d 865 (1986). In *East River S.S. Corp.*, the Court, sitting in admiralty, determined that a products liability claim could not be pursued absent personal injury or property damage. *Id.* The Court reasoned that warranty law sufficiently protected the purchaser of a defective product for damages sustained to the product itself. *Id.* This decision was adopted by the Oklahoma Supreme Court in *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990). See also, *Oklahoma Gas & Elec. v. McGraw-Edison Co.*, 834 P.2d 980 (Okla. 1992). In *Waggoner*, the plaintiff sought recovery of

purely economic damages caused by a defectively designed mobile home. Specifically, the Plaintiffs sought replacement costs of the home, and \$50,000 in punitive damages for “misrepresentations . . . suffering and harassment” resulting from failures of the manufacturer to remedy the defects. *Waggoner*, 808 P.2d at 651. The Court reversed a judgment for the plaintiffs on the ground that the trial court improperly instructed the jury on manufacturers' products liability. Holding that economic damages caused by a defective product were “more logically related to the UCC than to manufacturers' products liability” the court found that any recovery therefore must be based upon the contractual relationship, specifically the warranty provisions, express or implied. *Waggoner*, 808 P.2d at 653. The Court further stated that “[t]o extend manufacturers' product liability to include purely economic losses would undermine the UCC's 'comprehensive and finely tuned statutory mechanism for dealing with the rights of parties to a sales transaction with respect to economic losses.'” *Id.* (citations omitted). Parametric, although not citing the *Waggoner* case, urges the Court to apply the economic loss rule in this case, thus barring NMP's gross negligence claim. Parametric asserts that NMP's gross negligence claim is merely an attempt to recover monies expended on a product that did not meet its expectations. Parametric further contends that NMP is limited to pursuit of a breach of warranty claim, and that NMP's allegation of gross negligence is an attempt to avoid the warranty limitations set forth in the Licencing Agreement. NMP counters by stating that Oklahoma has not adopted the economic loss rule, and that a party can recover under a negligence theory for purely economic losses. NMP cites *Keel v. Titan Constr. Corp.*, 639 P.2d 1228 (Okla. 1982) and *Dentco Investment Co., Inc. v. Oklahoma Natural Gas Co.*, 569 P.2d 512 (Okla. App. 1977) in support of its contention. The Court finds that *Keel* is not applicable to this issue because it dealt with performance of a contract for services rather than a sales contract; however, *Dentco*

Investment Co., Inc. provides a more interesting and applicable analysis. In *Dentco Investment Co., Inc.*, Oklahoma Natural Gas Company (“ONG”), approached the defendant, who was planning the construction of an apartment complex, and fraudulently induced it to purchase a natural gas air conditioning system for use in the new apartments. *Dentco Investment Co., Inc.*, 569 P.2d at 514. ONG drew up the plans for the system, including designing the duct work layout and specifications as to the number, location, type and tonnage of the chiller units and coil sizes. *Id.* at 515. ONG then hired a company to supply and install the units. *Id.* The system did not work properly from the start, and major modifications failed to correct the problem. *Id.* at 516. The plaintiffs sued ONG, seeking recovery on theories of negligence, fraud and misrepresentation, breach of contract, and the Oklahoma Deceptive Trade Practices Act. The court allowed negligence claims to be pursued against ONG; however, the court specifically found that ONG “did undertake to design an air-conditioning system for plaintiffs,” and in so doing, “incurred legal responsibility for ‘injury occasioned . . . by [its] want of ordinary care or skill . . .’” *Id.* (citations omitted). The *Dentco Investment Co., Inc.* case, although more closely resembling the facts in this dispute, is clearly distinguishable. In this case, there is no evidence that Parametric contracted with NMP to design a computer system capable of meeting NMP's needs. The dispute involves a sales contract, and any system design was left specifically to NMP's discretion. Whether Oklahoma courts would apply the economic loss rule to this dispute or not, NMP cannot pursue a gross negligence claim against Parametric because there is no duty imposed on Parametric outside the scope of the Licensing Agreement and the warranties contained therein. *Compare, Walter Raczynski Prod. Design v. International Business Machines Corp.*, 1994 WL 247130, *2 (N.D.Ill. 1994) (holding that a provider of software and hardware was not an information provider and thus could not be charged with negligent misrepresentation); *Hoke, Inc. v.*

Cullinet Software, Inc., 1992 WL 102715 (D.N.J. 1992) (holding that New Jersey courts would bar tort suits for negligent misrepresentations inducing the formation of contracts between commercial parties); *Accusystems, Inc. v. Honeywell Information Systems, Inc.*, 580 F. Supp. 474 (S.D.N.Y. 1984) (rejecting negligent misrepresentation claim against seller of computer hardware and software on the ground that New York courts do not recognize a cause of action for negligent misrepresentation in the absence of some special relationship of trust or confidence between the parties). *But see, Schroeders, Inc. v. Hogan Systems, Inc.*, 522 N.Y.S.2d 404 (1987) (permitting a cause of action for negligent misrepresentation against seller of software despite lack of special relationship because “this cause of action has been held to exist as between parties to contracts”).

For the foregoing reasons, Defendant's Motion for Summary Judgment as to Plaintiff's gross negligence claim is GRANTED.

IV. Breach of Contract

NMP's remaining claim is a breach of contract claim alleging that the Pro/E software was defective, and violated the warranty clause contained in the Licensing Agreement. NMP seeks recovery of the purchase price of the Pro/E software as well as the costs incurred to implement the software including the cost of purchasing the Silicon Graphics hardware.

Parametric seeks summary judgment on the ground that NMP's breach of contract claim is time barred. Alternatively, Parametric asserts that if the breach of contract claim is not time barred, Parametric's liability is limited to the actual amount that NMP paid to Parametric.

Under the Licensing Agreement, Parametric warrants that the licensed program, at the time of installation and for 90 days afterward, will conform substantially to the applicable documentation delivered by Parametric. The Licensing Agreement further states that Parametric will provide

customer service and new releases of the licensed program during the warranty period. The customer service agreement indicates that, upon receiving written notice from the customer specifying failures or errors found in a program during the warranty period, Parametric will use its best efforts to correct significant programming errors and to repair or replace licensed products not conforming to the applicable documentation. Upon payment of an additional maintenance fee, a customer may extend this maintenance plan. The Licensing Agreement clearly and unambiguously disclaims all other warranties, express or implied, including any warranty of merchantability or fitness for a particular purpose.

NMP asserts that the licensing of software does not constitute a sale of goods, and since Oklahoma public policy prohibits contractual limitations periods for contracts falling outside the scope of Article 2 of the UCC, the Massachusetts six year limitations period applies. Alternatively, NMP states that even if the one year limitation period is applicable, the breach of warranty claim accrues upon discovery of the breach, since the Licensing Agreement warranty extends to future performance of the goods. NMP further states that genuine issues of material fact exist as to whether NMP knew or should have known of such claims prior to February 16, 1995, and cites Mass. Gen. Laws ch. 106, § 275(2), and *Cambridge Plating Co., Inc. v. NAPCO, Inc.*, 991 F.2d 21, 25 (1st Cir. 1993) in support of this contention.

Since the Court has already determined that the licensing of the Pro/E software in this case constituted a sale of goods, the first issue to be resolved is whether Massachusetts law allows parties to a contract for a sale of goods to contractually limit damages, and provide limitations periods on initiation of contractual claims. Under Massachusetts law, a contractual one year limitations period does not violate Massachusetts public policy, and is expressly permitted under the Massachusetts

UCC. Mass. Gen. Law ch. 106 § 2-725; *Hays v. Mobil Oil Corp.*, 930 F.2d 96, 100 (1st Cir. 1991). Similarly, the Massachusetts UCC allows parties to a contract for the sale of goods to limit damages as long as such limitation would not be unconscionable. Mass. Gen. Law ch. 106 § 2-719. *See also*, *PC Com, Inc. v. Proteon, Inc.*, 946 F. Supp. 1125, 1138 (S.D.N.Y. 1996) (holding that under Massachusetts law, contractual provision in computer goods sales contract limiting consequential damages was not unconscionable). Similarly, Massachusetts law permits parties to modify or limit express or implied warranties as long as the language is conspicuous, and in the case of limitations of implied warrants of merchantability, as long as the limitation clause mentions the word “merchantability”. Mass. Gen. Law ch. 106 § 2-316. The Court finds that the contractual provisions in the Licensing Agreement are valid under Massachusetts law, therefore the only remaining issue is whether the breach of contract claim accrued prior to February 16, 1995.

The parties agree that the 90-day warranty contained in the Licensing Agreement is a warranty for future performance, that the Licensing Agreement disclaims all other warranties, and that the software performed without problem for the 90 day period following installation. The parties dispute, however, when the claim for breach of warranty should accrue. According to Parametric, the cause of action accrued within the 90 day limited warranty period, and since no defects were discovered within that 90 day period, a breach of warranty claim is time barred. NMP asserts that the proper accrual test is the “discovery rule”, and that the breach of warranty cause of action accrued when NMP knew or should have known in the exercise of reasonable diligence that the Pro/E software was defective. NMP further states that a genuine issue of fact exists as to whether NMP knew or should have known about the breach prior to February 16, 1995.

The only Massachusetts case on point is the *Cambridge Plating Co., Inc.* case cited by NMP

in support of their contention that the discovery rule applies to warranties of future performance. *Cambridge Plating Co., Inc.*, 991 F.2d at 25-26 (“a cause of action for breach of a warranty of future performance is tolled until the plaintiff has adequate notice of the claim”). This is a well established rule in commercial contracts and has been reduced to writing in § 2-725 of the Uniform Commercial Code. *See*, Mass. Gen. Law ch. 106 § 2-725 (“A breach of warranty accrues when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”). Thus, if, as the parties stipulate, the warranty in the Licensing Agreement is a warranty of future performance, the *Cambridge Plating Co., Inc.* case is dispositive of the accrual issue. Although Parametric correctly points out that the warranty provision in the *Cambridge Plating Co., Inc.* contract was not time limited, but rather appeared to extend indefinitely, *Cambridge Plating Co., Inc. v. NAPCO, Inc.*, 876 F. Supp. 326, 331 (D. Mass. 1995), this does not change the Massachusetts rule of law that warranties of future performance accrue when the breach is or should have been discovered. Parametric contends that the warranty of future performance only covered future performance within 90 days from the time of installation. NMP asserts that the warranty extended each time the maintenance plan was renewed. The Court finds, however, that warranties of future performance must be explicit. Warranties that appear to promise future performance may be nothing more than promises to repair defects occurring within a specific time frame.

Consider the case in which the manufacturer promises to repair any defect in a car's drivetrain that occurs within two years or 24,000 miles, whichever occurs first. . . . Many courts would interpret this as a warranty that explicitly extends to future performance and would therefore grant four years from the time of the occurrence of the defect. On the other hand, one might read the agreement to mean simply that the seller will repair any defect that comes to light within that period irrespective of its

cause, by that seller's liability ends at the earlier 24,000 miles and does not extend for four years beyond that time. The seller (and buyer if the truth be known) may construe such agreement not as a warranty at all but as an agreement to repair unrelated to any defect in the goods . . .

James J. White & Robert S. Summers, *Uniform Commercial Code* § 11-9 at 479 (3d ed. 1988). This passage perfectly illustrates the conflicting interpretation presented in this case. The warranty in the present case states that the Pro/E program will conform substantially to the applicable documentation supplied to the customer; however, the Licensing Agreement further states that Parametric's obligations under the warranty are limited to using its best efforts to correct all significant programming errors, and to repair or replace all products not performing substantially in accordance with the applicable documentation at no expense to the customer. Although the Licensing Agreement does allow NMP to purchase a maintenance plan at the expiration of the warranty period, the maintenance plan is clearly a separate agreement to provide maintenance services for a annual fee. "The Maintenance Plan shall be renewable annually after the initial 90 day Warranty period, and Customer shall pay therefor in advance according to the then current Maintenance Fee . . ."

(*Appendix to Plaintiff's Response, Exhibit 2 ¶ 8*).

The Court finds that the 90 day warranty covers defects which appear within the 90 day period following installation. Since no defects appeared in the software prior to that date, NMP's breach of warranty claim is time barred. See, *Office Supply Co., Inc. v. Basic/Four Corp.*, 538 F. Supp. 776 (E.D. Wis. 1982) (upholding 90-day warranty limitation and granting summary judgment on breach of contract claim where defects in computer system arose outside of warranty period); *Dreier Co., Inc. v. Unitronix Corp.*, 527 A.2d 875 (N.J. Super. 1986) (holding that warranty claim accrued at tender where 180 day warranty on computer not a warranty for future performance as it involved a remedy only); *Liecar Liquors, Ltd. v. CRS Business Computers, Inc.*, 205 A.D. 868, 613

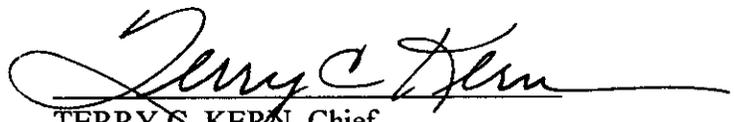
N.Y.S.2d 298 (3d Dept. 1994) (time limited warranty on computer not a warranty for future performance as it involved a remedy only).

For the foregoing reasons, Parametric's Motion for Summary Judgment is GRANTED as to NMP's breach of contract claim.

Conclusion

The Court has determined that Defendant Parametric is entitled to summary judgment as to all claims in this matter. As to NMP's fraud and misrepresentation claim, NMP has failed to provide evidence that any misrepresentations were made to NMP by Parametric. NMP's gross negligence claim fails because Parametric owed no duty to NMP, and thus could not have breached such duty. NMP's breach of contract claim is time barred pursuant to the warranty and limitations provisions contained in the Licensing Agreement. For the foregoing reasons, Parametric's Motion for Summary Judgment (docket # 9) is GRANTED.

ORDERED this 31 day of March, 1997.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE 4-1-97

DONNA PADDOCK, dba CARDS BY DONNA,)
)
Plaintiff,)
)
v.)
)
STEVEN STEWART AND ASSOCIATES, INC.,)
)
a Texas corporation, ALL AMERICAN)
SERVICE CORP., INC., a Texas corporation,)
DAVID RHODES, an individual, and KEN)
RAMS, an individual,)
)
Defendants.)

No. 95-c-1254-K ✓

F I L E D

MAR 31 1997/10

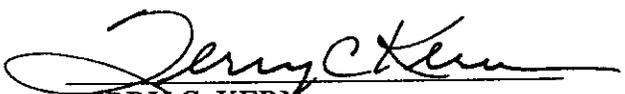
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have agreed to a settlement and dismissal with prejudice of all claims, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 31 day of March, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
4-1-97

EMPLOYERS INSURANCE OF)
WAUSAU, a Mutual Company,)
)
Plaintiff,)
)
vs.)
)
FREEMAN COMMERCIAL)
CONCRETE, INC., an Oklahoma)
Corporation,)
)
Defendant.)

Case No. 96-C-336-K

FILED

MAR 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FILED

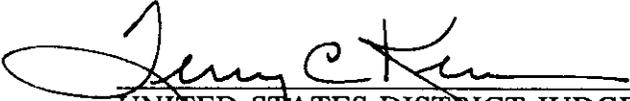
MAR 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Judgment in the amount of \$152,100 is hereby granted against Defendant Freeman Commercial Concrete, Inc. and in favor of Plaintiff, Employers Insurance of Wausau. Plaintiff is entitled to recover its costs and attorneys' fees incurred in this action.

SO ORDERED this 31 day of March, 1997.


UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 4-1-97

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

F I L E D

WILLIE LEONARD GRANT,)
)
 Plaintiff,)
)
 v.)
)
 JOHN MIDDLETON,)
)
 Defendant.)

MAR 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-306-K

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Petitioner's Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) and the Amended Response to Petition for Writ of Habeas Corpus (Docket #9). Petitioner was convicted in Tulsa County District Court, Case No. CF-91-4222 of possession of cocaine with intent to distribute after former conviction of a felony, and sentenced to twenty years imprisonment. The conviction was affirmed on appeal to the Oklahoma Court of Criminal Appeals.

Petitioner now seeks federal habeas relief on the alleged grounds that: (1) the trial court did not have jurisdiction to enhance his sentence because the applicable portion of the information was not verified under oath as mandated by statute, (2) the trial court erred in admitting a police officer's opinion that the drugs were possessed with intent to distribute, (3) admission of impeachment evidence indicating the defendant's prior conviction for assault and battery was improper, (4) the prosecutor committed reversible error by abusing the defendant's right to remain silent in the presence of the jury, (5) prosecutorial argument outside the bounds of the law

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prejudiced the fairness of trial, and (6) the defendant's conviction is unsustainable as a matter of law because it is not supported by sufficient evidence.

The testimony at trial was that, on the evening of October 8, 1991, several Tulsa police officers set up a surveillance of an apartment building in Tulsa County (Trial Transcript from March 3, 1992 ("TR") 164). Officer Steve Middleton was 50 to 70 yards north of the building, watching it with unobstructed vision with ten by fifty power binoculars (TR 166, 168, 170). He observed the defendant sitting on an electrical power unit on the north side of the building, wearing dark pants and a dark sweatshirt with "Mistoclean" printed on it in bright, gold letters (TR 171). He watched the defendant walk to a dumpster northeast of the back door, right under a light pole, reach with his hand into a slot on the side of the dumpster, pause momentarily, and then pull his hand back (TR 172). As the defendant walked away from the dumpster, the officer saw him put his hand inside his crotch area, but could not see exactly what he was doing (TR 172).

The defendant returned to the electrical power unit, and then went to the doorway of the building and reached into his right pocket, pulled out what looked like money, and began to count it (TR 172-173). He put it back into his pocket, and went outside and sat down on the electrical unit again (TR 173). In a few minutes, he saw a car approaching through an alley on the east side of the building and ran inside the apartment building (TR 173). After the car passed, the defendant came back outside and sat back down on the power unit (TR 174). Two men approached him on foot from the east, a car pulled up and a fourth man got out, and the four had a

conversation and went into the apartment building (TR 174). After a few minutes, the first two men who had come on foot exited the building (TR 175). Then the defendant came out, looked around, and walked over to a concrete parking barrier adjacent to the power unit with a "balled-up something" in his right hand (TR 175). He placed it underneath a gap in the parking barrier (TR 175). Then he walked away (TR 175).

During this time Officer Middleton maintained constant radio contact with Officer Tim Reece (TR 190-191). Officer Middleton directed Officer Reece to the parking barrier and told him to reach in the gap under it where he had watched the defendant put the "wadded-up" object (TR 176). Officer Reece reached in the gap under the parking barrier and found a brown paper bag, inside of which was a plastic baggie containing six bindles of cocaine (TR 192-193). There were no other objects or debris around or underneath the parking barrier (TR 193).

Officer Moore performed a field test or "chemical spot test" on a portion of one of the bindles of cocaine and confirmed that the substance in the baggie was cocaine (TR 197-200, 212). Later, Paul Schroeder, a forensic chemist with the Tulsa Police Department, performed analyses on each bindle in the plastic baggie using a gas chromatograph/mass spectrometer and confirmed that each bindle was cocaine (TR 212-214).

The defendant testified at trial that he was sitting outside his girlfriend's apartment on the night of his arrest (Trial Transcript from March 4, 1992 ("TR II") 10). He said that while he was there, a resident of the apartment asked him to go to the

store to get some cigarettes (TR II 11). He said that he went to the store, bought the cigarettes for the resident, and then bought some brandy for himself (TR II 11). He said that when he returned, he sat outside the apartment building on an electrical unit and drank the bottle of brandy, which was in a brown paper sack (TR II 12).

The defendant stated that some people came by and asked him where a resident lived (TR II 12). After escorting the people to the second floor to show them the approximate unit, he went back outside and sat on the electrical unit (TR II 12). When he finished the brandy, he threw the empty bottle in the nearby dumpster (TR II 13). He sat down again, got sleepy, walked around to the side of the building, and sat on a car and fell asleep (TR II 13-14). The next thing he knew, two police officers apprehended him (TR II 14). He testified that he had no drugs in his possession, was not selling drugs, and did not place any drugs under a traffic barrier (TR II 15).

There is no merit to petitioner's first claim that the court did not have jurisdiction to enhance his sentence because the applicable portion of the information was not verified under oath, as mandated by statute. Under Oklahoma Stat. tit. 22, § 303(A), all informations must "be verified by the oath of the prosecuting attorney, complainant, or some other person." Petitioner's claim is clearly a matter of state law. In conducting habeas review, a federal habeas corpus court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States, and errors of state law are not cognizable. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994), cert. denied, ____ U.S. ____, 115 S.Ct. 2278, 132 L.Ed.2d 282 (1995). In Camillo v.

Armontrout, 938 F.2d 879, 880 n.3 (8th Cir. 1991), the court recognized that whether or not a state enhancement is complied with is a matter not normally reviewable by a federal court on habeas.¹

There is no merit to petitioner's second claim, which challenges the trial court's determination that a police officer's testimony that petitioner possessed the drugs with intent to distribute was admissible. Evidentiary and procedural rulings made by state courts may not be questioned in a habeas case, unless the petitioner can demonstrate that the contested statements were so prejudicial in the context of the proceedings as a whole that he was deprived of the fundamental fairness essential to the concept of due process. Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir.), cert. denied, 490 U.S. 1112 (1989) (citing Brinlee v. Crisp, 608 F.2d 839, 850 (10th

¹Even if the court reviewed this issue, it must conclude that this is not a claim that would entitle petitioner to relief. He contends that the second page of the information was not verified, which invalidated it for enhancement purposes. There is no claim that the information did not give notice to him of the charges against him and the fact that he was being tried as an habitual offender, as required by the due process clause of the Fourteenth Amendment. Paterno v. Lyons, 334 U.S. 314, 320 (1948).

The failure to verify the second page of the information does not effect the defendant's notice that he is being tried as an habitual offender. Under the Oklahoma statute, there is no requirement that the second page of the information be verified. A prior conviction is not itself a charge for a crime, but is only to be considered when determining punishment. The legislature's reasoning in requiring verification is that the power of government to initiate criminal charges is so serious that it demands verification as a precautionary measure. Buis v. State, 792 P.2d 427, 429-431 (Okla. Crim. App. 1990). The second page does not introduce or initiate additional charges, so no verification is needed as a precaution. The verification requirement only provides that the information itself, not individual pages of the information, must be verified.

Cir. 1979), cert. denied, 444 U.S. 1047 (1980). The Supreme Court has stated that “[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.” Smith v. Phillips, 455 U.S. 209, 221 (1982).

In this case, the state qualified Officer Steve Middleton and Officer Glen Moore as expert witnesses after they testified to extensive law enforcement training and experience in drug and narcotics investigations (TR 179-180, 201-203). Based on his training, experience, and specialized knowledge, Officer Middleton testified that the absence of drug paraphernalia and the way the cocaine was packaged indicated that it was for sale (TR 183-184). On the same basis, Officer Moore testified that the quantity of the cocaine, the way it was packaged, and the absence of drug paraphernalia and the presence of cash in the possession of the defendant indicated that the cocaine was for sale (TR 202-203).

The trial judge’s decision regarding the admissibility of the officers’ testimony based on their training, experience, and knowledge was proper opinion testimony under Oklahoma law. McCoy v. State, 699 P.2d 663, 665-666 (Okla. Crim. App. 1985). In addition, the Tenth Circuit has recognized the specialized knowledge that a narcotics agent has which is not within the knowledge of the average person. United States v. Harris, 903 F.2d 770, 776 (10th Cir. 1990). The admission of the statements did not result in error of a constitutional dimension or deprive petitioner of a fair trial.

There is no merit to defendant's claim that the trial court erred in admitting evidence of the defendant's prior conviction for assault and battery with intent to kill, which was committed in connection with the crime of robbery. The Oklahoma court has found that the relevance of crimes of violence to a defendant's honesty or credibility is minimal, but the crime of robbery involves theft and is, therefore, relevant to his honesty and credibility. Cline v. State, 782 P.2d 399, 400 (Okla. Crim. App. 1989).

In addition, the prior conviction for assault and battery with intent to kill and the crime of possession of cocaine for which the defendant was tried are dissimilar. A special problem exists when a prior conviction is the same or similar to the crime for which a defendant is on trial. Robinson v. State, 743 P.2d 1088, 1091 (Okla. Crim. App. 1987). In that situation, pressure exists on the jurors to presume that "if the defendant did it once, he could do it again." Id. Hence, there is a presumption of prejudice whenever a former conviction is the same or similar to the crime for which a defendant is tried. Turner v. State, 803 P.2d 1152, 1156 (Okla. Crim. App. 1990), cert. denied, 501 U.S. 1233 (1991). Here there was no pressure on the jurors to presume that "the defendant did it once, so he could do it again," and any prejudice as a result of admitting evidence of the prior conviction was minimal.

The defendant's credibility was central at trial. He provided the only testimony or evidence in his case-in-chief. His version of the facts is at odds with the testimony of the police officers. That made his credibility central to the jury in returning a verdict. The importance of his testimony and the centrality of his credibility at trial

favor admission of the defendant's prior conviction. Id. at 1156.

The petitioner contends that the fact that the prior conviction of assault and battery was over eight years old at the time that the state introduced it at trial makes it remote and unlikely to be relevant to the defendant's credibility. However, Okla. Stat. tit. 12, § 2609(B) provides that prior convictions less than ten years old are not stale and can be admitted.

The trial court has wide latitude to determine whether evidence of prior convictions is probative on the defendant's credibility. This court will not disturb the trial court's finding except for abuse of discretion. Id. at 1156. The trial court did not abuse its discretion in finding that the probative value of the prior conviction outweighed the danger of unfair prejudice.

There is no merit to petitioner's claim that the prosecutor committed reversible error when he commented on petitioner's right to remain silent when he examined the petitioner. The prosecutor asked petitioner if he had told anyone else about the events of the night in question and petitioner said he had not (TR II 26-27). Then the prosecutor asked what he had told the police officers when he was arrested and he stated that he told them that he was out there drinking and that the cocaine did not belong to him (TR II 28-29). His counsel objected, and the objections were sustained (TR II 25-29).

The Supreme Court concluded in Doyle v. Ohio, 426 U.S. 610, 618-619 (1976), that a defendant may not be questioned about his silence at the time of arrest after receiving Miranda warnings for impeachment purposes. However, in Fletcher

v. Weir, 455 U.S. 603, 607 (1982), the Court held that the state does not violate a defendant's due process rights by questioning him about postarrest silence in the absence of a Miranda warning. The Court noted that its decision was consistent with its earlier decision in Doyle. 455 U.S. at 606.

The record does not show that the petitioner ever received Miranda warnings. He volunteered to talk at the scene and denied that the cocaine belonged to him. He did not invoke his right to remain silent. In Anderson v. Charles, 447 U.S. 404, 408 (1980), the Supreme Court stated that a defendant who voluntarily speaks after receiving Miranda warnings may be cross-examined at a later trial about his prior inconsistent statements. The fact that there is no indication that a Miranda warning ever came into play and the petitioner voluntarily talked to the police shows that petitioner's claim has no merit.

There is no merit to petitioner's claim that prosecutorial arguments introducing facts not in evidence prejudiced his right to a fair trial. The court in Fero, 39 F.3d at 1473, stated that, in determining whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, a court must determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process, citing Donnelly v. DeChristoforo, 416 U.S. 637, 642, 645 (1974). The prosecutor's comments must be examined in proper perspective based on the entire trial. United States v. Young, 470 U.S. 1 (1985). To obtain habeas relief based on a prosecutor's closing argument, it is not enough that the petitioner show that the prosecutor's

remarks were undesirable or even universally condemned; the relevant question still is whether the comment so infected the trial with unfairness that due process was denied. Darden v. Wainwright, 477 U.S. 168, 181 (1986); Hogan v. State, 877 P.2d 1157, 1163 (Okla. Crim. App. 1994), cert. denied, ____ U.S. ____, 115 S.Ct. 1154, 130 L.Ed.2d 1111 (1995).

Petitioner claims the prosecutor erred by suggesting that the jurors consider whether the evidence showed that the defendant acted like "a common drug dealer" and that the events on the night in question could have been a drug deal (TR II 42-43). The prosecutor's comments were based on the previous testimony at trial and did not so infect it with unfairness as to make the resulting conviction a denial of due process. The jury determined whether it believed the defendant's or the state's interpretation of the facts.

Petitioner also claims that his trial was tainted when the prosecutor vouched for the credibility of the police officer's statements, comparing their "experience" and "honors" with that of "a two-time convicted felon." (TR II 54-55). The trial judge admonished the jury to disregard the comments (TR II 54). The Oklahoma court has found that when a comment is objected to and the objection is sustained, any error is cured. Woodruff v. State, 846 P.2d 1124, 1140 (Okla. Crim. App.), cert. denied, 510 U.S. 934 (1993). Considering the comments made and the fact that the jury was admonished to disregard them, the petitioner was not deprived of a fundamentally fair trial.

Petitioner also claims that he received an unfair trial because the prosecutor

mentioned that there were no witnesses to corroborate petitioner's story (TR II 55-56). In Oklahoma, a comment on the failure to call corroborating witnesses is a legitimate subject of comment during closing argument. Jackson v. State, 763 P.2d 388, 389 (Okla. Crim. App. 1988).

Petitioner complains that the prosecutor suggested that he was a threat to society (TR II 56-57). However, the defense objected, and the objection was sustained (TR II 57), so the error was cured. Petitioner argues that the prosecutor "embraced the jury by speaking in terms of 'we,'" but there is no case law finding that such a practice results in an unfair trial.

There is also no merit to petitioner's final argument that his conviction is not supported by substantial evidence. The Supreme Court set forth the standard for reviewing the sufficiency of the evidence in Jackson v. Virginia, 443 U.S. 307, 319 (1979), which is 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.

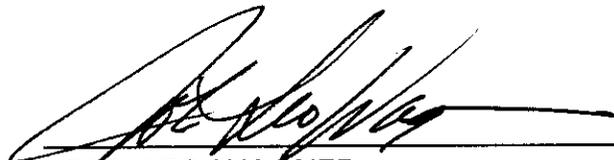
The evidence presented at trial was that Officer Middleton saw the defendant with a "balled-up" object in his hand (TR 175). The officer watched the defendant hide the object in the gap under a parking barrier (TR 175). Through constant radio contact, he directed Officer Reece to the parking barrier under which he saw the defendant hide the "balled-up" object (TR 176). Officer Reece found a brown paper bag in the gap under the parking barrier (TR 192). Under the barrier there was no other objects or debris (TR 193). Inside the bag was a substance which tested

positive for cocaine (TR 200). The defendant had no pipe or smoking device (TR 184, 187). Based upon this evidence, a reasonable trier of fact reviewing the evidence in the light most favorable to the prosecution could have found that the defendant possessed the cocaine with intent to distribute it. There was sufficient evidence to convict the petitioner of the crime charged.

Petitioner is not entitled to habeas corpus relief, and his petition for writ of habeas corpus should be denied.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 28th day of March, 1997.

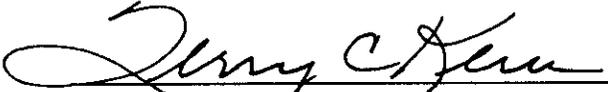


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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ACCORDINGLY, IT IS ORDERED that this case be transferred to the United States District Court for the Western District of Oklahoma.

SO ORDERED THIS 31 day of March, 1997.


TERRY C. KEEN, Chief Judge
UNITED STATE DISTRICT COURT

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

FILED

MAR 31 1997



Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ONE PARCEL OF REAL PROPERTY KNOWN)
 AS:)
)
 E/2 NW/4 SE/4 AND W/2 NE/4 SE/4)
 (40.0 ACRES))
)
 and)
)
 ONE PARCEL OF REAL PROPERTY KNOWN)
 AS:)
)
 E/2 W/2 NW/4 SE/4 (10.0 ACRES))
)
)
 ALL IN SECTION 29, TOWNSHIP 18 NORTH,)
 RANGE 10 EAST, CREEK COUNTY,)
 OKLAHOMA, AND ALL BUILDINGS,)
 APPURTENANCES, AND IMPROVEMENTS)
 THEREON,)
)
 Defendants.)

Case No. 92-C-037-E ✓

ENTERED ON DOCKET

DATE APR 31 1997

ORDER

Now before the Court is the Motion For Constructive Trust of Proceeds from Sale or Forfeited Property Pending Appeal and Alternative Application for Additional Time to Post Supersedeas Bond (Docket #61) of the Claimant Melvin Gann.

The Court entered a Judgment of Forfeiture in this matter on December 31, 1996. Gann sought to stay the Judgment pending appeal, and the Court granted Gann's request contingent upon

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the posting of a bond in the amount of \$30,000. Gann asked the Court to reconsider its order, arguing that \$30,000 was an unreasonable amount for the bond requirement, and the Court denied that request. Gann now seeks additional time to post the supersedeas bond so that he can seek a stay from the Court of Appeals. The Court of Appeals has denied his request for Stay, therefore Gann's motion for additional time is denied as moot. In addition, Gann's request for a constructive trust is not reasonable under these facts.

The Motion For Constructive Trust of Proceeds from Sale or Forfeited Property Pending Appeal and Alternative Application for Additional Time to Post Supersedeas Bond (Docket #61) of the Claimant Melvin Gann is denied.

IT IS SO ORDERED THIS 31st ^{March} DAY OF ~~APRIL~~, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

CARL C. SMITH,
SSN: 440-56-4825,

PLAINTIFF,

vs.

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

DEFENDANT.

MAR 31 1997 SA

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

CASE No. 96-CV-262-M ✓

ENTERED ON DOCKET

DATE 4/1/97

ORDER

Plaintiff, Carl C. Smith, 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

¹ Plaintiff's July 12, 1993 application for disability benefits was denied September 30, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held November 29, 1994. By decision dated January 18, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 21, 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.

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 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, born on October 30, 1951, claims to be unable to work as a result of pain in the lower back and legs. The ALJ determined that, although Plaintiff is unable to perform his past relevant work as heavy equipment operator, dump-truck driver, tractor operator and janitor, he is functionally capable of performing a narrow range of light work with limitations on lifting no more than 20 pounds occasionally, only occasional bending and stooping, and alternating sitting and standing. [R. 18]. 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) improperly analyzed the medical evidence; (2) failed to give the treating physician's opinion sufficient consideration and weight; and (3) erred in finding Mr. Smith not disabled after

November, 1993. The record of the proceedings has been meticulously reviewed by the Court.

BACKGROUND AND HISTORY

Plaintiff was injured while working for the City of Tulsa on July 12, 1990. He was seen at Springer Clinic where first Dr. Meeks, then Dr. L.R. Mansur diagnosed possible "diskogenic" problems and referred Plaintiff to Randall L. Hendricks, M.D., an Orthopedic Surgeon. [R. 167-178, 236-237]. Dr. Hendricks diagnosed left-sided herniated disc at L5-S1 which was confirmed by CT Scan. [R. 228-229, 235]. On August 9, 1990, Dr. Hendricks performed an L4-5 diskectomy with which he "was quite pleased." [R. 175-183]. After six weeks, Plaintiff was placed on rehabilitative exercises including walking and using dumbbells. [R. 219]. On October 31, 1990, Plaintiff was released by Dr. Hendricks to return to work on light duty with no lifting over 40 lbs. [R. 217]. Plaintiff returned to Dr. Hendricks for follow up on December 17, 1990. At that time, Dr. Hendricks reported to Plaintiff's first examining physician, Dr. Meeks, that Plaintiff was "doing well. I reviewed with him the 40 pound weight lifting restriction I recommended for his job with the city; and suggested that that be enforced for one year following his return to work. The patient has an excellent result, Brian. He is quite pleased and this was very gratifying." [R. 216].

On March 4, 1991, Dr. Hendricks advised Plaintiff's employer, by way of a handwritten note, that Plaintiff was unable to ride or drive tractors for "at least 6 months" and suggested that Plaintiff "be retrained for another job." [R. 215]. Dr. Hendricks's records contain a note that Plaintiff called his office on October 15, 1991

with complaints of muscle spasm in his back. [R. 213]. Dr. Hendricks's records indicate that Plaintiff was seen for those complaints on October 21, 1991. The doctor noted that Plaintiff had been back to work since 11-1-90 and that he "was retired" since September, 1991 because there were "no jobs he was qualified for." [R. 213].

On that same date, Dr. Hendricks dictated the following note for the chart:

Carl is in our office quite unexpectedly. I've taken care of this patient with a previous diskectomy. He in fact did well and returned to work for the city. Unfortunately something happened at the city where he said that they simply told him that they didn't have any job for his qualifications and they terminated him, or at least they put him on disability of some kind. This is very unfortunate to the patient as one can understand and he is very concerned about this. He brought in a work release type form today that he wanted me to fill out with respect to restrictions and I did so for him. I think it is very unfortunate what's happened to the patient. Apparently he does have an attorney and he is working on this, now trying to turn into a work comp injury after about a year and a half to two years.

I'll be happy to see the patient back again in the future as necessary, but I really think he's doing pretty well. [R. 214].

The record shows that Plaintiff filed for Disability Insurance Benefits with the Social Security Administration on May 22, 1992. [R. 66-70].

Angelo Dalessandro, M.D., an examiner for the State of Oklahoma Disability Determination Unit, examined Plaintiff on June 26, 1992. [R. 185-189]. Dr. Dalessandro's assessment was:

This 41-year-old white male in slight distress with low back pain. Gait appeared normal in terms of speed, stability and safety. There were no joint deformities, redness, swelling or tenderness except in the lumbodorsal area. He has good grip strength and dexterity of both hands. However, with

his low back pain and limitation of movement, any work related activities are compromised at this time.

Plaintiff's first claim for Social Security Benefits filed on May 22, 1992 was denied. [R. 71-79]. No further action was taken by Plaintiff on that claim.

On July 12, 1993, Plaintiff again filed applications for disability insurance benefits and supplemental security income benefits with the Social Security Administration. [R. 84-91].

Plaintiff was examined the second time by Dr. Dalessandro on September 9, 1993. [R. 191-196]. Dr. Dalessandro's assessment was:

This 41-year-old male walks with a slight limp but gait is normal to speed, stability and safety. Dexterity of fine and gross manipulation is present. Grip strength is right 10 kg, left 20 kg. There is restriction of flexion and extension of the lumbosacral joint. The patient appears to be depressed and could be somatizing.² Medical care would probably reduce his symptomatology.

Plaintiff's claims for Social Security benefits were denied on September 30, 1993. Plaintiff requested reconsideration and then a hearing. [R. 101, 121].

In November, 1993, Plaintiff was involved in an automobile accident which he claims caused neck and low back injury and pain. [R. 46, Plf's Brief at p. 2 and 4].

The record contains handwritten treatment notes from Westview Medical Clinic where Plaintiff was treated by Lawrence Reed, M.D. after the automobile accident. Dr. Reed's November 15, 1993 note indicated that Plaintiff had been injured on

² *Dorland's Illustrated Medical Dictionary*, (28th Ed. 1994) p. 1545: Somatization: in psychiatry, the conversion of mental experiences or states into bodily symptoms.

November 5, 1993 and that he was experiencing the same symptoms he'd had prior to surgery which the surgery "had resolved." Dr. Reed prescribed Vicodin, Ansaid and Flexeril and sent Plaintiff for X-rays. [R. 207-208]. The X-ray report by John T. Forsythe, M.D. on November 16, 1993, noted a normal left shoulder, old trauma to C5-6 with anterior and posterior osteophyte formation, anterior calcification in the anterior spinous ligament, some narrowing of the L6-S1 interspace and evidence of sacralization of L6 on the left with pseudoarthrosis. The X-rays revealed no fractures. [R. 205-206].

On November 24, 1993, Plaintiff was again seen by Dr. Hendricks who noted that he had previously treated Plaintiff for the 1990 on-the-job injury and that he had sent Plaintiff back to work after his recovery. [R. 212]. Dr. Hendricks reported that Plaintiff had not worked because "apparently they said they did not have a job available for him." Plaintiff told Dr. Hendricks that he had been injured in a motor vehicle accident on November 5, 1993. He was complaining of neck, left arm, low back and left leg pain. He reported that he was being treated by Dr. Lawrence Reed and was undergoing physical therapy, some portions of which "made him worse." Dr. Hendricks's examination revealed restricted range of motion, some numbness that follows S1 and, to a lesser extent, L5 distribution and somewhat restricted cervical motion. Nonetheless, Dr. Hendricks recommended continued conservative management under Dr. Reed's care and said he would follow up in a month if Plaintiff did not improve. Dr. Reed was copied on the typewritten office note. *Id.*

Plaintiff returned to Dr. Reed on November 30, 1993 and on December 14, 1993. [R. 201, 204]. Both times, Plaintiff was continued on medication and physical therapy. On December 9, 1993, Plaintiff underwent an EMG study and a Nerve Conduction Study which were negative. [R. 202-203]. On December 17, 1993, an MRI was performed at St. Francis Hospital. [R. 200]. Dr. Steven Leonard, the radiologist, stated in the MRI report that the sagittal images suggest recurrent disk herniation. Dr. Reed saw Plaintiff again on December 27, 1996 and, because of the MRI report, sent him back to Dr. Hendricks. [R. 199].

On January 10, 1994, Dr. Hendricks examined Plaintiff and noted that his complaints were "about the same as before." His dictated note to the chart on January 10 stated that he would get the studies conducted on behalf of Dr. Reed and personally review them. [R. 211]. On January 12, 1994, Dr. Hendricks wrote Plaintiff the following letter:

I wanted to right [sic] you this note and let you know that I have looked at your studies previously performed. As you remember, Dr. Kache, M.D., performed an EMG and nerve conduction study on you in December of last year. This study did not show any significant ongoing radiculopathy of your left leg at that time. You have also had an MRI performed December 17, 1993. This is a very interesting study in that it shows my previous operative procedure at L4-5 on the left. It appears as if you have a bulging disk at that level and there is probably some scar tissue as well. More than likely, a combination of these two problems are causing your pain. Hopefully, this could be managed in non-surgical fashion, perhaps proceeding with a lumbar epidural steroid injection, more back exercises and tincture of time. Should this not improve, it may be necessary to contemplate an operative procedure.

Please contact our office and we can arrange for you to begin back exercises as well as a lumbar epidural steroid injection. [R. 210, 248].

There is no record of Plaintiff's response to this letter and no indication that he returned for treatment as recommended by Dr. Hendricks.

The next and final treatment note made by Dr. Hendricks in Plaintiff's chart is the record of a telephone conversation with Plaintiff's wife on April 22, 1994, who called requesting pain medication, which Dr. Hendricks refused. [R. 250].

Apparently at the request of Plaintiff's attorney, Dr. Hendricks wrote a letter to Greg A. Farrar, Attorney, on April 25, 1994, outlining his examinations of Plaintiff after the automobile accident of November 5, 1993. [R. 249-250]. Dr. Hendricks stated in the letter:

An MRI of the lumbar spine was undertaken, showing what appeared to be a recurrent L5-6 disk herniation on the left side where he was symptomatic. At L6-S1 (the patient appears to have six lumbar type vertebra) the radiologist mentioned a bulging of the disk. I looked quite carefully and did not appreciate a bulging disk at L6-S1.

He stated he had recommended conservative management to the Plaintiff and had mentioned that, if there was no improvement, "surgery could be necessary." Dr. Hendricks wrote that he had not seen Plaintiff since his visit of February 2, 1994 and had refused to prescribe pain medication at the request of Plaintiff's wife as it had been over two months since he had last seen the patient.

On April 26, 1994, Michael D. Farrar, D.O. wrote a letter to Greg A. Farrar, an attorney, regarding his examinations of Plaintiff on September 27, 1990, February 15, 1991 and April 26, 1994. [R. 243-245]. Dr. Farrar's history repeated Plaintiff's complaints of increased pain after his motor vehicle accident and his claim of inability to work due to pain. The physical examination revealed full ranges of motion to the shoulders, elbows, wrists and fingers with good gross and fine finger manipulative abilities. His lower extremities revealed full ranges of motion to the hips, knees, ankles and feet. There continued to be evidence of L5 and S1 sensory neuropathies bilaterally with weakness of the extensor hallucis longus. The lumbar spine revealed significant musculoligamentous spasm with range of motion loss. In his discussion of Plaintiff's condition, Dr. Farrar stated that, subsequent to his February, 1991 evaluation of Plaintiff for the adjudication of his work related claim in which the diagnostics had shown a bulging disc, the motor vehicle injury had caused marked increase in Plaintiff's pain. Dr. Farrar reported that the magnetic resonance imaging showed disc herniations at two levels. He stated that, although Plaintiff had been treated conservatively, he continued to do poorly. His opinion was that Plaintiff "is in need of treatment. Continual conservative treatment with physical therapy and work hardening may be of benefit, as would be treatment through epidural steroid injections." [R. 245].

In October 1994, Dr. Reed completed a Supplementary Claim Disability Benefits form in which various categories of impairment were set forth in classes ranging from: 1 - No limitation of functional capacity; to: 5 - Severe limitations of functional

capacity. [R. 247]. He checked Plaintiff's physical impairment as: "Class 5 - Severe limitations of functional capacity; incapable of minimal (sedentary) activity (75-100%)." In the mental/nervous impairment category, Dr. Reed checked: "Class 3 - Patient is able to engage in only limited stress situations and engage in only limited interpersonal relations (moderate) limitations." For Extent of Disability, Dr. Reed marked "yes" to: "Is patient now totally disabled - From Patient's Regular Occupation", and, "From Any Occupation." Dr. Reed marked "no" to the two questions: "Is patient a suitable candidate for further rehabilitation services"; and, "Can present job be modified to allow for handling with impairment?" *Id.*

On October 25, 1994, Dr. Reed signed an application for a permanent Handicapped Parking Privilege Certificate, checking: "F. Is severely limited in his or her ability to walk due to an arthritic, neurological or orthopedic condition." His diagnosis was stated as: "Disk herniations centrally and to the left of midline at L5-6 and L6-S1; transitional 6th lumbar vertebral body."

At the hearing on November 29, 1994, Plaintiff submitted a list of medications including Vicodin, Cyclobenzaprene and Alprazolam. [R. 251]. He testified that he had last seen Dr. Reed in October, 1994 and had received prescriptions at that time. [R. 45].

PLAINTIFF'S ALLEGATIONS OF ERROR

Plaintiff states that he has had two traumatic back injuries, one in 1990 and one in 1993. He asserts that "[a]ssuming arguendo, that evidence establishes that [he] improved sufficiently following his 1990 surgery to return to work, the medical

evidence is uncontroverted that [he] was unable to work following the November 1993 injury." [Plaintiff's Brief, p. 4]. Plaintiff complains the ALJ erred by discounting his credibility and lumping all of the pre and post November 1993 medical records together in his analysis in reaching his conclusion that Plaintiff is not disabled. *Id.* Plaintiff contends that the proper analysis of his medical condition should have been undertaken in two parts, asserting that, had this been done, the ALJ would have been compelled to find Plaintiff disabled based upon the medical evidence after the November 1993 injury alone.

THE ALJ'S DECISION

The ALJ found Plaintiff impaired by "severe status post partial hemilaminectomy at L4-5 and L5-6, foraminotomy of L-5 nerve root, and partial diskectomy of L5-S1, with residual pain and numbness radiating into the left leg." The ALJ determined that Plaintiff is unable to perform his past relevant work but that he has the residual functional capacity (RFC) to perform the physical exertional and nonexertional requirements of light work except for limitations on lifting over 20 pounds occasionally or 10 pounds frequently (exertional), occasional bending and stooping, and alternating sitting and standing (nonexertional). [R. 20].

In reaching this conclusion, the ALJ evaluated the medical records of Randall Hendricks, M.D., and Lawrence Reed, M.D., who he identified as Plaintiff's treating physicians. The ALJ discussed the X-rays obtained in November, 1993 and the EMG and Nerve Conduction Study conducted in December, 1993, and noted that they were done "after the car accident on November 5, 1993." [R. 13]. He reported that Dr.

Hendricks had treated Plaintiff for the 1990 injury but he also addressed Dr. Hendricks's statement that he was unable to appreciate a bulging disk at L6-S1 after his review of the December 1993 MRI. [R. 14]. The ALJ also discussed the report of Dr. Farrar, who had examined Plaintiff both before and after the November 1993 accident. [R. 14]. Dr. Farrar, like Dr. Hendricks, had recommended conservative treatment after the automobile accident, considering "possible diskectomy" only after the conservative treatment was accomplished and unsuccessful. [R. 249]. While the ALJ's recitation of the content of the records may appear "lumped together" because they are sometimes paraphrased out of chronological order, it is clear that the ALJ reviewed the records as they pertained to each injury appropriately.

The ALJ discussed at length the forms that Dr. Reed filled out for Plaintiff on October 18, 1994. [R. 14]. He recognized that Dr. Reed was one of Plaintiff's treating physicians after the November 5, 1993 car accident but noted that he had treated Plaintiff for a shorter period of time than had Dr. Hendricks, who had treated Plaintiff for the 1990 injury and had examined Plaintiff after the 1993 accident. The ALJ found Dr. Reed's "checklist" to be both brief and cursory, consisting only of stated restrictions, without indicating the findings upon which such restrictions are based. He found the forms to be contradicted by the negative EMG, Nerve conduction study and Dr. Hendricks's interpretation of the MRI. The ALJ also determined that much of Dr. Reed's report was based upon the history given to him by Plaintiff, not upon clinical and laboratory diagnostic techniques.

DISCUSSION

It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984).

Plaintiff contends that Dr. Reed's diagnosis and opinion that Plaintiff is unable to work "are uncontroverted." He states that the medical records provide objective support for his allegations of debilitating pain in the months following his 1993 injury.

Plaintiff states that the "MRI results show recurrent herniated discs at two levels." [Plf's Brief, p. 4]. However, the radiologist's impression, as noted by the ALJ, was "suspect recurrent disk herniations." [R. 200]. Furthermore, as discussed above, Dr. Hendricks reported to Plaintiff's attorney that he had "looked quite carefully and did not appreciate a bulging disk at L6-S1." [R. 249].

Plaintiff states: "[e]ven Dr. Hendricks opined that, based upon the information he was given, Mr. Smith appeared to be doing poorly following his accident, and would probably need surgery." [Plf's Brief, p. 5]. What Dr. Hendricks said was that it

appeared from the phone call received from Plaintiff's wife that he was not doing well. [R. 249-250]. He did not state that he believed Plaintiff was doing poorly based upon physical examination. In fact, in his letter to the attorney, he pointed out that he had not seen Plaintiff in over two months and so, he had declined to prescribe pain medication. *Id.*

Both Dr. Hendricks and Dr. Farrar stated that surgery "could be necessary" if conservative treatment did not provide Plaintiff relief. [R. 245, 249]. Although Dr. Hendricks did state in his letter to Plaintiff that it "appears as if" he had a bulging disk, and, although he did use the phrase "will probably require a diskectomy" in his letter to the attorney, it is clear from review of all his records that Dr. Hendricks believed conservative management to be the course of treatment for Plaintiff's complaints.

As recognized by the ALJ, Dr. Hendricks treated Plaintiff for the July 1990 injury, released him to return to work with some restrictions and a recommendation for retraining to another job, examined him after the November 1993 accident and recommended "consideration" of diskectomy only after conservative treatment failed to alleviate Plaintiff's complaints of pain. After Dr. Reed received the MRI radiologist's report that he "suspected" recurrent disk herniation, [R. 200], he referred Plaintiff back to Dr. Hendricks for treatment. [R. 199]. This indicates that he deferred to Dr. Hendricks's assessment of Plaintiff's condition. When evidence in the record is inconsistent, including medical opinions, the ALJ must weigh all of the evidence and resolve the conflict. *Goatcher v. United States Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (holding that ALJ should determine whether

inconsistent medical reports outweigh treating physician's report and should consider factors identified in regulations; 20 C.F.R. § 416.927 (c)(2) and (d)(2)-(6) (setting forth the factors to be considered). The Court finds that there is substantial evidence in the record to support the finding of the ALJ that Dr. Hendricks's opinion was entitled to as much weight as Dr. Reed's opinion and even to accord it more weight based upon his treatment of Plaintiff for both injuries and for a longer period of time.

Plaintiff did not return to Dr. Hendricks for treatment. And, it appears from the record, Plaintiff went completely without treatment after the last time he saw Dr. Hendricks on February 2, 1994. [R. 249]. There is no evidence in the record that Plaintiff was physically examined for completion of the forms by Dr. Reed on October 18 and 25, 1994. Nor is there any indication that he received treatment from Dr. Reed between December 27, 1993, when Dr. Reed referred him to Dr. Hendricks, and October 1994, when the forms were filled out and signed. The record supports the ALJ's rejection of Dr. Reed's "checklists" as not supported by specific findings.³ *Castellano*, p. 1029.

Although the ALJ did not reach his determination based upon Plaintiff's failure to undertake prescribed treatment, his assessment of Plaintiff's credibility was based, in part, upon Plaintiff's mischaracterization of Dr. Hendricks's proposed treatment plan and his stated reasons for discontinuing treatment. He stated twice at the hearing before the ALJ that he discontinued treatment because "[t]hat was it for Reed. I was

³ The 10th Circuit reached the same conclusion under similar circumstances in a recent unpublished opinion: *Walker v. Chater*, 1997 WL 100882 (10th Cir. (Okla.)).

getting ready to have my back surgery again", [R. 40], and, "because Hendricks was getting ready to do my second back surgery." [R. 42]. There is no evidence that Dr. Hendricks's last assessment of Plaintiff's ability to work was changed by his examination of Plaintiff after the 1993 automobile accident. Dr. Hendricks did not comment upon Plaintiff's ability or nonability to work in his treatment notes and correspondence after the 1993 accident. It appears that Dr. Hendricks believed Plaintiff had "retired" from work or had been terminated due to lack of work. [R. 213, 214, 249]. However, as the record shows, and the ALJ pointedly noted, a report of contact with Plaintiff's former supervisor for the City of Tulsa revealed that there had been "no problem with the quality" of his light duty work which contradicts Plaintiff's contention that he was not able to perform his light duty assignments. [R. 17,132, 134]. Moreover, Plaintiff's testimony regarding his daily activities, as noted by the ALJ, are not consistent with the reported inability to engage in even minimal and sedentary activity as checked on the list by Dr. Reed. [R. 35, 254].

Plaintiff's treating physician had released him to return to work following the 1990 surgery and recovery. Plaintiff did, in fact, return to work and was able to do the light duty work assigned by his employer. The record supports the ALJ's assessment of Plaintiff's lack of credibility and his conclusion that Plaintiff's condition had not worsened such as to make him unable to work. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361,

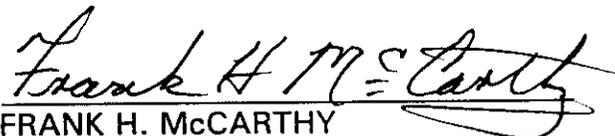
363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990).

CONCLUSION

The ALJ's opinion indicates that he considered all of the medical reports in the record in making his determination that Plaintiff retains the capacity to do light work. The final responsibility for determining the ultimate issue of disability is reserved to the [Commissioner]. *Castellano*, p. 1029; 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2).

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

SO ORDERED this 31ST day of March, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

LINDA L. McPHERSON,

Plaintiff,

vs.

THE CITY OF TULSA, OKLAHOMA,

Defendant.

FILED

MAR 31 1997 *SAC*

Case No. 96-C-741-M

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

ENTERED ON DOCKET

DATE

4/1/97

JUDGMENT IN A CIVIL CASE

This action came on for trial before the Court and a jury, Honorable Frank H. McCarthy, United States Magistrate Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED, AND ADJUDGED:

That the plaintiff take nothing, that the action be dismissed on the merits and that the defendant, The City of Tulsa, Oklahoma, recover its costs of action.

DATED this 31ST day of MARCH, 1997.

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