

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

FILED

AUG - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE AETNA CASUALTY AND SURETY
COMPANY,

Plaintiff,

vs.

No. 96 C 280 E

ERIC J. GRAHAM d/b/a ERIC GRAHAM
CONSTRUCTION, and LORI, INC., an Oklahoma
corporation,

Defendants.

ENTERED ON DOCKET
AUG 8 8 1997
DATE

STIPULATION OF DISMISSAL WITH PREJUDICE

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

Executed the respective dates shown adjacent to each signature.

Date: 7-30-97



Jo Anne Deaton
Attorney for Plaintiff, The Aetna Casualty and Surety
Company

Date: 7/22/97


Stephen L. Andrew
Attorney for Defendant, LORI, Inc.

Date: 7/21/97


James E. Poe
Attorney for Defendant, Eric Graham d/b/a Eric
Graham Construction

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of August, 1997, a true and correct copy of the above and foregoing was mailed with proper postage thereon prepaid to Stephen L. Andrew, 125 W. Third, Tulsa, OK 74103, and James E. Poe, 111 W. 5th, Suite 740, Tulsa, OK 74103-4267.



JAD/bjo
1231-3

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

FILED

AUG 7 1997

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

JAMECA BOTTOMS,
Plaintiff,

v.

JIMMIE R. BRYANT,
CHARLES M. SNAP,
Defendants.

Case No. 95-CV-1217-H

ENTERED ON DOCKET

DATE AUG 08 1997

JUDGMENT

This matter came before the Court for a trial by jury on July 28, 29, and 30, 1997. The jury entered its verdict finding Defendants not liable on July 30, 1997.

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

IT IS SO ORDERED.

This 7th day of August, 1997.


Sven Erik Holmes
United States District Judge

56

572
8/4/97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

WILLIAM AARON DILLON, JR.
aka William A. Dillon, Jr.;
LINDA K. DILLON;
COUNTY TREASURER, Washington County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Washington County, Oklahoma,

Defendants.

FILED

AUG 7 1997

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

ENTERED ON DOCKET

DATE AUG 08 1997

CIVIL ACTION NO. 96-CV-496-H ✓

DEFICIENCY JUDGMENT

This matter comes on for consideration this 7th day of August, 1997,
upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of
Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell,
Assistant United States Attorney, and Defendants, William Aaron Dillon, Jr. aka William A.
Dillon, Jr. and Linda K. Dillon, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies
of Plaintiff's Motion and Declaration were mailed by first-class mail to William Aaron Dillon,
Jr. aka William A. Dillon, Jr. and Linda K. Dillon, 412 Meadowbrook Lane, Bartlesville,
Oklahoma 74003, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on
September 27, 1996, in favor of the Plaintiff United States of America, and against the

Defendants, William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon, with interest and costs to date of sale is \$38,985.02.

The Court further finds that the appraised value of the real property at the time of sale was \$20,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered September 27, 1996, for the sum of \$17,300.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 31st day of July, 1997.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon, as follows:

Principal Balance Plus Pre-Judgment	\$36,536.42
Interest, Administrative & Penalty Charges	
Interest From Date of Judgment to Sale	1,305.20
Appraisal by Agency	550.00
Abstracting	105.00
Ad Valorem Taxes	86.55
Publication Fees of Notice of Sale	176.85
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$38,985.02
Less Credit of Appraised Value	<u>20,000.00</u>
DEFICIENCY	\$18,985.02

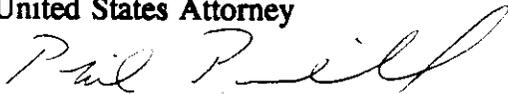
plus interest on said deficiency judgment at the legal rate of 5.56 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, William Aaron Dillon, Jr. aka William A. Dillon, Jr. and Linda K. Dillon, a deficiency judgment in the amount of \$18,985.02, plus interest at the legal rate of 5.56 percent per annum on said deficiency judgment from date of judgment until paid.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Deficiency Judgment
Case No. 96-CV-496-H (Dillon)

PP:cm

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

FILED

AUG 7 1997

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



BS&B SAFETY SYSTEMS, INC.,)
)
Plaintiff,)
)
v.)
)
CONTINENTAL DISC CORPORATION,)
)
Defendant.)

Judge Sven Erik Holmes

Civil No. 94-CV-1027-H ✓

ENTERED ON DOCKET

DATE AUG 08 1997

ORDER

1. The parties' Stipulation of Voluntary Dismissal with Prejudice shall be, and hereby is, confirmed; and this civil action is dismissed with prejudice.

2. The injunction Order entered in this civil action on November 7, 1996, shall be, and hereby is, explicitly vacated.

3. The parties shall bear their own costs and attorney's fees in this civil action.

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



Sven Erik Holmes
United States District Judge

408

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

AUG 7 1997

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

JOHN ZOELLNER,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

No. 97-CV-512-H

ENTERED ON DOCKET
DATE AUG 08 1997

ORDER

In this habeas action, Petitioner, a state inmate, alleges that his due process rights were violated in a prison disciplinary proceeding which resulted in the loss of 100 days earned credits and facility restriction for 20 days. Petitioner further states that "as a result of the misconduct," he was demoted to Level One status and, consequently, has lost an additional 150 days earned credits for a total loss of 250 days. (#4 at pg. 2). Petitioner was unsuccessful at all stages of his administrative appeal of the disciplinary decision.

Petitioner paid the filing fee and filed this habeas action on May 8, 1997, in the United States District Court for the Western District of Oklahoma. The case was subsequently transferred to the United States District Court for the Eastern District of Oklahoma. By Order May 23, 1997, Judge Frank Seay transferred this action to the Northern District of Oklahoma, where the Court granted Petitioner leave to file an opening brief. Simultaneously, and after review of the petition for writ, the

6

Court issued a questionnaire¹ to Petitioner, designed to address specifically the alleged denial or violation of due process in the prison disciplinary proceeding and exhaustion of state remedies. Petitioner has now filed both his opening brief and answers to the Court's questions. (#4, #5). For the reasons discussed below, the Court finds that Petitioner's application for writ of habeas corpus should be dismissed without prejudice at this time.

BACKGROUND

Petitioner is presently a state prisoner incarcerated at the Jess Dunn Correctional Center, (JDCC), Taft, Muskogee County, Oklahoma. The state court which imposed the sentence resulting in Petitioner's current custody was the District Court of Tulsa County, which is located within the territorial jurisdiction of the Northern District of Oklahoma. While Petitioner contends that his rights to due process and equal protection were violated in an Oklahoma City Community Corrections Center disciplinary proceeding, this Court, as the place of conviction, has concurrent jurisdiction to entertain the application for writ of habeas corpus. 28 U.S.C. § 2241(d).

Petitioner was issued an offense report for an alleged Department of Corrections' violation, Class A offense for Individual Disruptive Behavior. The alleged violation occurred October 27, 1996, when "positive results of drug test [were] received from the laboratories." (#4, Ex. C, Disciplinary Hearing Action). The test results allegedly indicated cocaine and/or methamphetamine use. Petitioner received notice of the offense report on November 13, 1996; and the disciplinary hearing

¹Pursuant to Rule 4, the judge is authorized to "take such other action as the judge deems appropriate," affording flexibility in a case where either dismissal or an order to answer may be inappropriate. *See Rule 4, Rules Governing Section 2254 Cases. See also Eason v. Thaler*, 14 F.3d 8 (5th Cir. 1994); *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) (use of questionnaire to "bring into focus the factual and legal bases of prisoners' claims").

was held November 18, 1996 (#4, Ex. B). Petitioner pled not guilty, requested an assigned staff representative, and advised the hearing officer of his desire to call witnesses. (#4, Ex. B). The investigator disqualified the witnesses "because the testimony is not material to the offense. All witnesses can only testify to inmate Zoellner character." (#4, Ex. B, Investigators Report, dated 11-14-96). Petitioner contends that under Wolff v. McDonnell, 94 S.Ct. 2963 (1974), his due process rights were violated because he was denied the right to call the requested witnesses. Petitioner also contends that since he was denied the testimony of the requested witnesses, he was not allowed to "bring to light the procedural errors of the chain of custody and violation of urine collection procedures." (#4, Ex. F, Offender's Misconduct Appeal Form).

At the November 18, 1996 disciplinary hearing, Superintendent Norvell concluded the Petitioner was guilty of the charge of Individual Disruptive Behavior, based on the positive test results received from Pharm Chem Lab. (#4, Ex. C). Plaintiff exhausted his administrative remedies by appealing the disciplinary hearing decision to Superintendent Norvell and Officer Ramsey, both of whom affirmed the findings. (#4, Exs. F and G). As a result of the misconduct, Plaintiff lost 100 days earned credits; was reclassified at Level One, a higher security level; and received a 20 day facility restriction. (#4, Ex. C). Due to the reclassification, Petitioner alleges he has lost an additional 150 days earned credits.

ANALYSIS

Section 2254(b)(1) requires a petitioner to exhaust state remedies before seeking habeas relief unless it would be futile to do so. The United States 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, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 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).

Furthermore, the Oklahoma Court of Criminal Appeals has held that "an inmate has the writ of mandamus to force prison officials to insure due process within the Department of Corrections' disciplinary system and to force prison officials to provide for procedural due process . . . before revoking credits after they have been previously earned." Canady v. Reynolds, 880 P.2d 391, 397 (Okla. Crim. App. 1994).

In this case, Plaintiff has provided copies of monthly reports, reflecting time served, credits earned, and days remaining before release. (#4, Ex. D). As of June 30, 1997, Petitioner had 159 days remaining. (Id.) And even though Petitioner contends Canady does not apply in this case, there is no indication that he "has been denied relief in the state courts." In Canady, the Oklahoma Court of Criminal Appeals stated:

Suffice it to say that before Waldon, this Court had held the only remedy available by extraordinary writ was that of habeas corpus, which a prisoner could use if he were entitled to earned credits, and which would entitle him to immediate release.

However, in Waldon, this Court held an inmate could use the writ of mandamus to force prison officials to provide him with minimum procedural due process to challenge the revocation of credits after they have previously been earned, *regardless of whether he would be entitled to immediate release if the credits were restored.* (emphasis added)

Canady, 880 P.2d 391, 396 (Okla. Crim. App. 1994) (quoting Waldon v. Evans, 861 P.2d 311

(Okla. Crim. App. 1993). The state appeals court went on to explain that an inmate "has a complaint *at such time as he or she is entitled to immediate release*; and this Court has held the writ of habeas corpus is appropriate in that instance. (citations omitted) (emphasis added) Thus, the inmate does have a state remedy at the appropriate time, i.e., when he is eligible for release." *Id.*, 880 P.2d at 399. Plaintiff has an available state court remedy, a petition for writ of mandamus and/or habeas corpus. *Id.* Petitioner herein should petition the state district court having proper jurisdiction for a writ of habeas corpus to request immediate release and/or an evidentiary hearing to determine whether Petitioner's due process rights were violated at his disciplinary hearing and, if so, whether Petitioner would be entitled to immediate release should his earned credits be restored. The Court finds, therefore, that the Petitioner's application for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.

IT IS SO ORDERED.

This 7TH day of August, 1997.



Sven Erik Holmes
United States District Judge

RECORDED ON BOOKET
8-8-97

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

WAL-MART STORES, INC.)
ASSOCIATES' HEALTH AND)
WELFARE PLAN,)
)
Plaintiff,)
)
vs.)
)
BOB G. DAVIS, EUGENIA M. DAVIS,)
and EARL W. WOLFE,)
)
Defendants.)

No. 96-C-671-K

F I L E D

AUG 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

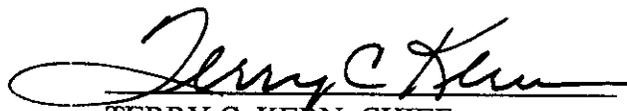
JUDGMENT

This matter came before the Court for consideration of the parties' Cross-Motions 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 August 7, 1997, the Court finds summary judgment is appropriate in favor of Plaintiff, Wal-Mart Stores, Inc. Associates' Health and Welfare Plan and against Bob G. Davis and Eugenia M. Davis as to Count I of the Complaint. Additionally, the Court finds summary judgment is appropriate in favor of Defendant Earl W. Wolfe and against Plaintiff, Wal-Mart Stores, Inc. Associates' Health and Welfare Plan as to Counts II and III of the Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Plaintiff, Wal-Mart Stores, Inc. Associates' Health and Welfare Plan as to Count I of the Complaint. Plaintiff is entitled to recover a sum of \$112,947.61 plus post judgment interest at a rate

of%5.56. IT IS LIKEWISE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant Earl W. Wolfe as to Counts II and III of the Complaint.

ORDERED this 7 day of August, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
8-8-97

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

WAL-MART STORES, INC.)
ASSOCIATES' HEALTH AND)
WELFARE PLAN,)
)
Plaintiff,)
)
vs.)
)
BOB G. DAVIS, EUGENIA M. DAVIS,)
and EARL W. WOLFE,)
)
Defendants.)

No. 96-C-671-K /

F I L E D

AUG 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are the cross-motions of the parties for summary judgment (docket #s 18 and 21).

Statement of Facts

Wal-Mart Stores, Inc. Associates' Health & Welfare Plan ("the Plan") is a self-funded employee welfare benefit plan as defined under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, ("ERISA"). As an employee of Sam's Club, Defendant Bob Davis was a participant in the Plan, and his wife, Defendant Eugenia Davis, was a beneficiary receiving medical and health coverage.

On June 9, 1993, Defendants Bob Davis and Eugenia Davis were injured in an automobile accident involving a third party. As a result of these injuries, the Davis Defendants submitted claims for medical expenses to the Plan. On July 27, 1993, Defendant Bob Davis executed a reimbursement agreement between himself and Eugenia Davis and the Plan. The reimbursement agreement states

that

In consideration of the sum of benefits paid, or to be paid, by the [Plan] by reason of injuries or damages sustained by [Bob and Eugenia Davis] as a result of an occurrence on or about 6-9-1993, at or near the City of Berryhill, OK, the [Plan] and the [Davis Defendants] agree as follows:

1. The [Plan] has the right to either reduce otherwise payable by the [Plan] or to recover benefits previously paid by the [Plan] to the extent to any of the following:

a. Any judgment, settlement, or other payments made, or to be made by person(s) considered responsible for the condition giving rise to the medical expense or by their insurers.

b. Any auto or recreational vehicle insurance payments or benefits including, but not limited to, uninsured motorist coverage.

c. Business and homeowners medical liability insurance coverage or payments.

2. That the [Plan], its successors and assigns are authorized to collect, compromise, or sue in [the Davis'] name(s) for the amount of benefits paid or to be paid by it.

3. That [Bob and Eugenia Davis] warrant[s] that no settlement has yet been made with any person, firm or corporation for injuries and damages sustained as a result of the occurrence.

On November 5, 1993, the Davis Defendants received \$70,000.00 from State Farm Insurance Company in settlement of their claims against third parties arising out of the June 9, 1993 automobile accident. That same day, they also received \$105,000.00 from Farmers' Group Insurance under the Uninsured/Underinsured Motorist provisions of two automobile policies they owned.

On November 17, 1993, the Plan made payments on their medical bills to the Davis Defendants in the amount of \$112,947.61. Subsequently, the Plan filed suit against the Davis Defendants seeking reimbursement of the amounts paid to them pursuant to the reimbursement

agreement and the terms of the welfare benefit plan.¹ Additionally, the Plan asserts that, with full

¹ Section 5.4 of the Plan states that

By filing a claim for payment of benefits under the Plan or by receiving benefits for which payment is made by the Plan, a Participant, Dependent or Beneficiary thereby assigns, transfers, and subrogates to the Plan all rights, claims and interest to the extent of the amount of benefits paid or owned by the Plan on the claim which the Participant, Dependent or Beneficiary has against any third party who may be liable for the amount of such benefits, and thereby authorizes the Plan and/or Company to sue, compromise or settle with any such third party in the Participant's, Dependent's or Beneficiary's name or otherwise.

If a Participant, Dependent or Beneficiary makes a claim for benefits for which a third party may be responsible, the Plan may either (1) pay all benefits covered under the Plan and obtain reimbursement for such benefits upon settlement with or judgment against the responsible third party, or (2) delay payment and require the third party to pay such benefits upon such settlement or judgment. As a condition of receipt of benefits paid by the Plan, the Participant, Dependent or Beneficiary must cooperate with the Plan and the Company for the purpose of exercising such rights, claims or interest to recover the amount paid. In addition, a Participant, Dependent or Beneficiary must execute a subrogation/reimbursement acknowledgment prior to the payment of any benefits; provided, however, that payment by the Plan of any benefits prior to, or without, obtaining a signed subrogation/reimbursement acknowledgment shall not operate as a waiver of this subrogation/reimbursement right.

Should a Participant, Dependent or Beneficiary make or file a claim, demand, lawsuit or other proceeding against a third party who may be liable for the amount of benefits covered or paid by the Plan, the Participant, Dependent or Beneficiary shall, as part of such claim, demand, lawsuit or other proceeding, and on behalf of the Plan, also seek payment or reimbursement for the amount of such benefits covered or paid by the Plan. A Participant, Dependent or Beneficiary must notify the Plan Administrator prior to making or filing any such claim, demand, lawsuit or other proceeding. The Plan Administrator or the Company may, at that time or at any time, (1) instruct the Participant, Dependent or Beneficiary not to seek, or to discontinue seeking, payment or reimbursement on behalf of the Plan, and (2) pursue such payment or reimbursement independently in the same or in a separate lawsuit or other proceeding or may abandon such payment or reimbursement altogether, in its sole discretion. Any

knowledge of the Plan's right of reimbursement, Defendant Wolfe, in his capacity as the Davis' attorney, advised them to refuse the Plan's demands for reimbursement, and took a fee from the settlement proceeds which should have been used to reimburse the Plan. The Plan has sued Defendant Wolfe for breach of implied contract and unjust enrichment.

The Defendants assert that both the welfare benefit plan and the reimbursement agreement are unenforceable, and that they are entitled to judgment as a matter of law because (1) Oklahoma law precludes reimbursement or subrogation until the claimant is made whole for the injuries suffered; (2) recovery from uninsured motorist insurance is specifically preempted from subrogation under Oklahoma law; (3) the Davis Defendants have not been made whole from their injuries; and (4) there is no basis for recovery from Defendant Wolfe.

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.*

compromise or settlement entered into by a Participant, Dependent or Beneficiary purporting to reduce or limit the amount of the payment designated as reimbursement for medical or any other expenses covered under the plan to an amount which is less than the benefits paid or covered by the Plan shall not be effective unless the Plan Administrator or the Company consents in writing.

ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion

1. The ERISA Issue

Both parties appear to agree that if the provisions of the Plan are unambiguous, those provisions govern the rights of the parties. Defendants, however, contend that the reimbursement provisions are ambiguous, and that the plan documents do not give the plan administrator the authority to interpret ambiguous provisions of the documents. Thus, Defendants ultimately argue that federal common law should apply, and that Oklahoma law should be adopted as federal common law in this case.

Plaintiff counters that the plan documents are not ambiguous and should be enforced as written.

ERISA preempts all state laws which "relate to" benefit plans. State laws restricting the right of subrogation have consistently been found to "relate to" benefit plans. *See, FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403, 112 L.Ed.2d 356 (1990) (holding that a Pennsylvania law precluding subrogation was preempted by ERISA); *Equity Fire & Cas. Co. v. Youngblood*, 927 P.2d 572, 575 (Okla. 1996) ("state subrogation rules are generally preempted by ERISA"). This is clearly the case with regard to the Oklahoma common law of subrogation, as well as the Oklahoma statutes which the Davis Defendants assert prohibits subrogation of medical payments under uninsured motorist

insurance. *See, Okla. Stat. tit. 36 §§ 3636, 6092.*² These laws, although they relate to the business of insurance, and therefore might be saved from preemption by the ERISA “savings clause”,³ cannot be utilized to restrict the benefit plan at issue in this case as it is a self-insured plan which may not be “deemed” an insurance company for the purposes of the ERISA savings clause.⁴ Thus, because state law is preempted, the plan itself must be construed and applied according to its terms. *Youngblood*, 927 P.2d at 575 (“an ERISA plan's rights to subrogation and reimbursement are governed by the terms of the plan when those terms are unambiguous”).

The plan administrator has determined that the Plan requires that the Davis Defendants reimburse the Plan from amounts received from the third party tort-feasor, as well as from the Davis' uninsured motorist insurance. The Davis Defendants argue that where the plan does not contain a priority of payment provision, a subrogation/reimbursement provision may not be enforced against a recipient of benefits who has not been fully compensated by payments from third parties. The Davis Defendants cite *Equity Fire & Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996), in support of this contention. In *Youngblood*, the Oklahoma Supreme Court held that a contractual subrogation or reimbursement provision, which contains no priority of payment provision, is not enforceable under Oklahoma law where the recipient of the benefits sought to be recovered has not been fully

² *Aetna Cas. & Surety Co. v. State Bd. for Prop. & Cas. Rates*, 637 P.2d 1251 (Okla. 1981) holds that §6092 prohibits provisions in automobile liability policies allowing subrogation of medical payments.

³ *See*, ERISA, 29 U.S.C. § 1144(b)(2)(A), which states that “[e]xcept as provided in [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . .”.

⁴ ERISA, 29 U.S.C. § 1144(b)(2)(B), states that no self-funded benefit plan “shall be deemed to be an insurance company or other insurer . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . .”.

compensated by payments from third parties. *Id.* at 574. In reaching this decision, the Court relied heavily on a three-part test developed in cases outside of Oklahoma. *See, Youngblood*, 927 P.2d at 576 and cases cited therein. The cases cited by the Oklahoma Supreme Court held that if a plan is silent about the priority of payment, does not expressly give its managers the right to resolve ambiguities, and the facts do not clearly show that the beneficiary's settlement included reimbursement for medical expenses, the plan would not be allowed to recover, despite ERISA.

The Court finds that *Youngblood* is distinguishable. Despite its alleged reliance on the cases cited, the *Youngblood* court fails to mention whether or not the plan at issue there contained a provision allowing the plan administrator to resolve ambiguities. Instead, the court cited the language of the self-funded ERISA plan at issue in *Sanders v. Scheideler & NEPCO EMBA*, 816 F. Supp. 1338, 1343 (W.D. Wis. 1993). In the *Sanders* case, the authority of the plan administrators was limited to allowing the plan administrator to "pass upon all claims by a member against the Association". *See, Youngblood*, 927 P.2d at 576. Correctly, this was deemed insufficient to grant plan administrators the authority to make binding interpretations of ambiguous provisions within the plan. *Sanders*, 816 F. Supp. at 1343. However, in this case, the terms of the plan give the plan administrator "complete discretion to interpret the provisions of the Plan, make findings of fact, correct errors, and supply omissions." *Defendants Exhibit 2 § 4.2(b)*. The plan administrator is bound only to use good faith in making decisions, and the decisions of the administrator are to be "final, conclusive and binding" unless found by a court to be arbitrary and capricious. *Id.* It appears beyond question that the benefit plan grants sufficient discretion to the plan administrator to resolve ambiguities in the plan language, and to bind beneficiaries to that interpretation. *Compare, Donaho v. FMC Corp.*, 74 F.3d 894 (8th Cir. 1996) (holding language giving decision maker power to

“construe and interpret” the plan sufficient to confer discretion); *Kennedy v. Georgia-Pacific Corp.*, 31 F.3d 606 (8th Cir. 1994) (holding the language “shall be solely responsible for the administration and interpretation” sufficient to confer discretion); *Malagrida v. Holland*, 19 F.3d 1429 (4th Cir. 1994) (same as to language giving to decision maker “full and final determinations as to all issues concerning eligibility for benefits”); *Humboldt v. Intermedics, Inc.*, 11 F.3d 1333 (5th Cir. 1994) (same as to language giving decision maker “sole discretion”). Because the plan grants discretion to the plan administrator to interpret the provisions of the plan, the *Youngblood* case and the cases cited in support are inapplicable, and the Court must review the plan administrator's decision according to an abuse of discretion standard. *See generally, Firestone v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989) (holding that a denial of benefits challenged under §1132(a)(1)(B) should be reviewed under an abuse of discretion standard where the benefit plan gives discretion to an administrator).

The only question remaining as to the ERISA issue is whether or not the plan administrator abused its discretion in determining that the Plan was entitled to reimbursement from the settlement and payments of uninsured motorist coverage from the Davis Defendants, despite their allegation that they had not been fully compensated for their injuries. The Court finds that the plan administrator's interpretations were reasonable, and not an abuse of discretion, in light of the explicit language of Section 5.4 of the Plan, p. D-14, and D-15 of the Summary Plan Description (*Plaintiff's Exhibit 5*), and the explicit terms of the Reimbursement Agreement (*Plaintiff's Exhibit 6*).

For this reason, the Court finds that, as a matter of law, pursuant to the explicit provisions of the Plan and the Reimbursement Agreement, the Plaintiff, Wal-Mart Stores, Inc. Associates' Health and Welfare Plan, is entitled to reimbursement of \$112,947 paid to the Davis Defendants.

2. The Claims Against Defendant Wolfe

In its motion for summary judgment, the Plaintiff contends that Defendant Wolfe had a quasi-contractual duty to ensure that the Davis Defendants honored the Plan's right to reimbursement and subrogation, and that he breached that duty when he advised the Davis Defendants not to pay the Plan. Additionally, the Plaintiff alleges that Defendant Wolfe was unjustly enriched when he retained \$10,000 of the settlement proceeds in exchange for his negotiation of the settlement agreement. In support of these claims, Plaintiff cites several cases utilizing section 1132(a)(3) of ERISA to recover payments improperly made to third parties from benefits plans. *See e.g., Blue Cross & Blue Shield v. Weitz*, 913 F.2d 1544 (11th Cir. 1990) (allowing a cause of action under Section 1132(a)(3) to a plan to recover payments improperly made to a physician); *Whitworth Bros. Storage Co. v. Central States Pension Fund*, 794 F.2d 221 (6th Cir.) *cert. denied*, 479 U.S. 1007, 107 S. Ct. 645, 93 L.Ed.2d 701 (1986) (recognizing a federal common law cause of action for unjust enrichment where an employer mistakenly made payments to an ERISA employee welfare plan). Additionally, the Plaintiff cites two Oklahoma cases in support of its claim: *Berry v. Barbour*, 279 P.2d 335 (Okla. 1954) (recognizing a cause of action for an implied contract where a contractor sued a property owner to recover costs incurred in making unauthorized repairs to the defendant's property during emergency circumstances); and *Shebester v. Triple Crown Insurers*, 826 P.2d 603 (Okla. 1992) (finding an implied in law obligation of an insurer to pay insurance proceeds to the rightful claimant).

Defendant Wolfe seeks summary judgment on this claim, and advances that Plaintiff's claim is merely a new tort theory for improper advice, which the Plaintiff has no standing to bring. Additionally, Defendant Wolfe contends that he had no notice of the Plaintiff's subrogation interests until after the settlement had been executed. Defendant Wolfe further asserts that the theory of unjust

enrichment is inapplicable to this case because he did not receive erroneous payments, but rather was compensated by the Davis Defendants for his representation. The Plaintiff did not file a response to the Defendants' cross-motion as to this issue.

Because the Court cannot find legal support for imposing a contractual duty upon Defendant Wolfe for the benefit of the Plaintiff, the Court declines to create a new cause of action. The cases cited by Plaintiff are clearly distinguishable from the facts presented in this case. Here, the Plan did not make any payments whatsoever to Defendant Wolfe, nor has Wolfe unjustly received compensation for the services that he provided to the Davis Defendants. The fact that Wolfe was mistaken in his interpretation of the subrogation rights of the Plaintiff does not create standing for the Plaintiff to sue for erroneous advice, whether clothed in the language of tort or implied contract. The Plaintiff's sole remedy lies against the Davis Defendants.

For this reason, judgment is granted as a matter of law to the Defendants as to the Plaintiff's claim for implied contract and unjust enrichment.

Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is GRANTED as to the Plaintiff's entitlement to reimbursement from the Davis Defendants. Plaintiff's Motion for Summary Judgment is DENIED as to Plaintiff's claims against Defendant Wolfe. Additionally, Defendants' Cross-Motion for Summary Judgment is DENIED as to the ERISA claim against the Davis Defendants, and GRANTED as to the claims against Defendant Wolfe.

ORDERED this 7 day of August, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

FILED ON DOCKET
8-8-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SCOTT P. KIRTLEY, Trustee,)
)
 Appellant,)
)
 vs.)
)
 JEFF GEORGE and GINA GEORGE,)
)
 Debtors, Appellees.)

97-CV-40-K(J) ✓

F I L E D

AUG 07 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On May 27, 1997, Magistrate Sam Joyner filed a Report and Recommendation, recommending that the Court find that the federal Earned Income Credit provided by 26 U.S.C. § 32 is not exempted from the property of a Chapter 7 bankruptcy estate under 31 Okla. Stat. § 1(A)(19). [Doc. No. 4]. Appellees have objected to the magistrate's recommended disposition of this appeal.

Pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b), the Court has conducted a *de novo* review of the record and the law. The Court agrees with the magistrate that the federal Earned Income Credit is not exempt under 31 Okla. Stat. § 1(A)(19). The Court hereby adopts the magistrate's May 27, 1997 Report and Recommendation. The July 29, 1996 Judgment of the bankruptcy court is REVERSED and this case is REMANDED to the bankruptcy court for further proceedings.

IT IS SO ORDERED THIS 7 DAY OF AUGUST, 1997.

Terry C. Kern
TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

7

FILED ON DOCKET
DATE 8-7-97

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

PAUL SPURLING, individually, NEDRA
SPURLING, individually, and NEDRA
SPURLING as mother and next-friend
on behalf of Robert B. Sams,

Plaintiffs,

vs.

ALBERTSON'S EMPLOYEES HEALTH AND
WELFARE PLAN,

Defendant.

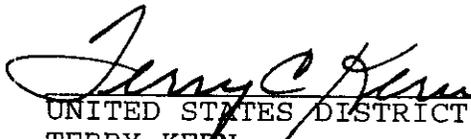
FILED

AUG 07 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
No. 97-CV 523 K (W)

ORDER FOR DISMISSAL WITH PREJUDICE

This matter comes on for consideration this 7 day of August, 1997 upon the Application for Dismissal with Prejudice filed by the Plaintiffs in this case and the Court, being fully advised in the premises, finds that the above entitled cause of action should be and is hereby Dismissed with Prejudice.


UNITED STATES DISTRICT JUDGE
TERRY KERN

8-7-97
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FILED ON 8-7-97

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

AUG 07 1997

RUBY GRACE WISE,

Plaintiff,

§
§
§
§
§
§
§
§
§
§

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

VS.

CIVIL ACTION NO. 96C923K ✓

THE PAUL REVERE LIFE
INSURANCE COMPANY

Defendants.

AGREED ORDER OF DISMISSAL

The parties have announced that all matters in dispute between them have been fully and finally resolved. It is therefore,

ORDERED, ADJUDGED AND DECREED that all causes of action brought by Plaintiff in the above-entitled and numbered cause be and the same are hereby DISMISSED WITH PREJUDICE to the right of the Plaintiff to refile same or any part thereof. All costs of Court are taxed against the party incurring same.

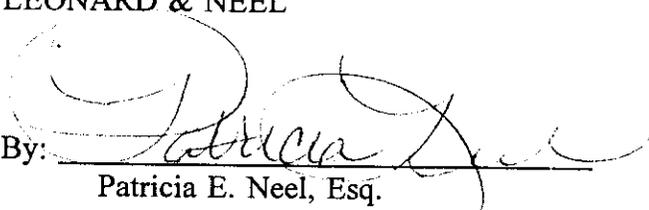
SIGNED this 7 day of August, 1997.

Terry C Kern
HONORABLE TERRY C. KERN

18

APPROVED AS TO FORM AND SUBSTANCE:

LEONARD & NEEL

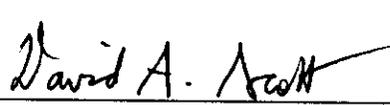
By: 

Patricia E. Neel, Esq.
OBA # 6601

1921 South Boston Avenue
Tulsa, Oklahoma 74119-5221
PH: (918) 583-8700
FX: (918) 582-3838

ATTORNEY FOR PLAINTIFF RUBY GRACE WISE

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

By: 

David A. Scott
Texas Bar No. 17894515
Carol W. Gustavson
Texas Bar No. 00790805

(Admitted for Limited Practice)

2311 Cedar Springs Road, Suite 400
Dallas, Texas 75201-7812
PH: (214) 220-0025
FX: (214) 220-0076

ATTORNEYS FOR DEFENDANT
THE PAUL REVERE LIFE INSURANCE COMPANY

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

F I L E D

ROBERT E. WILCOX, Utah Insurance)
Commissioner, as Liquidator of Southern)
American Insurance Company,)
)
Plaintiff,)

AUG - 6 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 96-C-226-B ✓

TRADE WINDS MOTOR HOTEL)
EAST, INC.,)
)
Defendant.)

FILED ON DOCKET

AUG 07 1997

ORDER

Pursuant to this Court's Order and Judgment of August 1, 1997, granting summary judgment in favor of Defendant Trade Winds Motor Hotel East, Inc., and against Plaintiff Robert Wilcox, the Court hereby dismisses the previously-severed Third-Party Defendant Oklahoma Property and Casualty Insurance Guaranty Association.

IT IS SO ORDERED this 6th day of August, 1997.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

AUG 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENERGY DYNAMICS, INC.,)
a Kansas Corp.,)

Plaintiff,)

vs.)

MIDWEST GAS STORAGE, INC.,)
an Indiana Corp., d/b/a: MIDWEST)
GAS SERVICES, INC., MIDWEST)
GAS SERVICES, CO.,)

MIDWEST GAS SERVICES CO.,)
an Illinois Corp., d/b/a: MIDWEST)
GAS SERVICES, INC., MIDWEST)
GAS SERVICES, CO.,)

DANIEL L. O'MALLEY, and)
GREGORY J. FRIEDRICH,)

Defendants.)

No. 96-C-706-C

EOD 8/6/97

ORDER

Currently pending before the Court is defendants' objection to the Magistrate's report and recommendation recommending that the settlement agreement be enforced. The Court has thoroughly reviewed the Magistrate's report and recommendation, and the Court has fully considered all points and issues raised in defendants' objection. Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the Court has conducted a de novo review of the record, and the Court finds that a valid and enforceable settlement agreement was entered into between the parties. The Court further concludes that defendants' present objection should be and hereby is overruled.

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Accordingly, the Court hereby adopts and affirms the Magistrate's report and recommendation in its entirety, and the Court directs that the settlement agreement be enforced.

IT IS SO ORDERED this 5th day of August, 1997.



H. DALE COOK
United States District Judge

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

ENERGY DYNAMICS, INC., a Kansas Corporation,

Plaintiff,

v.

MIDWEST GAS STORAGE, INC.,
an Indiana Corporation, d/b/a:
MIDWEST GAS SERVICES, INC.,
MIDWEST GAS SERVICES, CO.,

MIDWEST GAS SERVICES COMPANY,
an Illinois Corporation, d/b/a:
MIDWEST GAS SERVICES, INC.
MIDWEST GAS SERVICES, CO.,

DANIEL J. O'MALLEY, and
GREGORY J. FRIEDRICH,

Defendants.

F I L E D

AUG 05 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 96-C-706-C /

EOD 8/6/97

JUDGMENT ENFORCING SETTLEMENT AGREEMENT

As all parties agreed to the essential material terms of the Settlement Agreement entered into at a settlement conference conducted by Magistrate Judge Frank H. McCarthy on May 28, 1997, and it is sufficiently specific as to be capable of implementation, judgment is entered consistent with the Settlement Agreement.

The terms of the Settlement Agreement are as follows:

a) Plaintiff is to receive a separate judgment against MidWest Gas Storage, Inc., and MidWest Energy Holding Corp. in the amount of \$391,491.13, plus accrued interest through October 11, 1996 in the amount of \$12,402.74 plus interest accruing thereafter in the amount of \$64.36 per day, which is the same

40

amount as was previously entered against MidWest Gas Services Company (see Docket #6).

b) All parties are to bear their own attorneys fees and costs.

c) To secure the judgment, plaintiff is to receive ownership of gas in the ground owned by MidWest Gas Storage, Inc., valued as of February 1, 1996, in the amount of the judgment.

d) Plaintiff is to receive from Defendant MidWest Gas Storage, Inc., a UCC-1 covering all its personal property, such as office equipment and equipment needed to operate the gas storage business, but excluding any gas in the ground. Since MidWest Gas Storage, Inc., has been represented by defendants to be the only entity with personal property, the UCC-1 only applies to it.

e) Daniel L. O'Malley is to pay \$25,000 to plaintiff upon closing, which is to occur within a reasonable time.

f) Daniel L. O'Malley, and entities controlled by him, promise to use settlement or judgment proceeds obtained in MidWest Gas Storage, Inc. v. Panhandle Eastern Corp. and Panhandle Eastern Pipeline Co., Case No. A-152,977, in the District Court of Jefferson County, Texas, the Fifty Eighth Judicial District (the "Panhandle Eastern Litigation") to pay off the judgment in favor of plaintiff. This promise to pay should be reduced to a separate writing signed by Daniel L. O'Malley on behalf of himself and MidWest Gas Storage, Inc., and delivered to plaintiff and not filed or recorded. Any payment made pursuant to the promise to pay and the \$25,000 to be paid by O'Malley at closing will be credited against the judgment and

will also constitute payment for a proportional amount of the gas assigned to plaintiff by virtue of paragraph 4(c), which shall then revert to the defendant corporation which owned and assigned the gas to plaintiff in the proportion paid for. The purpose of this provision is to prevent double recovery by the plaintiff.

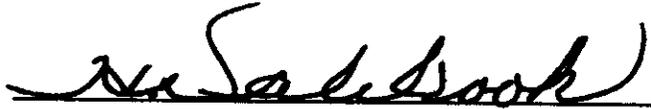
g) Plaintiff agrees not to execute on the judgment until June 1, 1998 and agrees not to execute on the judgment until five years thereafter, so long as monthly payments are made on the principle and interest accrued to that date, plus interest on the accrued amount, which shall be calculated from June 1, 1998 based on the Chase Manhattan prime interest rate in effect that date, amortized over the five year period.

h) Defendant agrees to periodically advise plaintiff as to the status of the Panhandle Eastern Litigation. This only requires advice of key developments in the case, including the close of discovery, dispositive motion filings, pretrial and trial dates, trial verdict, the filing of an appeal, appeal disposition, disposition upon remand, and settlement.

i) Friedrich and O'Malley will be dismissed with prejudice from this lawsuit and released from all claims brought or which could have been brought in it, once the \$25,000 is paid at closing and other obligations are honored, including the conveyance of ownership of gas, delivery of the UCC-1, and delivery of the promise to pay any applicable Panhandle Eastern Litigation proceeds.

All parties to this case are to honor and perform the terms of the Settlement Agreement in good faith.

Dated this 5th day of August, 1997.



H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

FILED

ENERGY DYNAMICS, INC., a Kansas Corporation,
Plaintiff,
v.
MIDWEST GAS STORAGE, INC., an Indiana Corporation, d/b/a:
MIDWEST GAS SERVICES, INC.,
MIDWEST GAS SERVICES, CO.,
MIDWEST GAS SERVICES COMPANY, an Illinois Corporation, d/b/a:
MIDWEST GAS SERVICES, INC.
MIDWEST GAS SERVICES, CO.,
DANIEL J. O'MALLEY, and
GREGORY J. FRIEDRICH,
Defendants.

AUG 05 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 96-C-706-C

EOD 8/6/97

JUDGMENT AGAINST DEFENDANT MIDWEST GAS STORAGE, INC.
AND MIDWEST ENERGY HOLDING CORP.

Based upon the Settlement Agreement entered into on May 28, 1997, Plaintiff, Energy Dynamics, Inc., is admitted to be entitled to judgment in its favor and against Defendants, Midwest Gas Storage, Inc., and MidWest Energy Holding Corp. in the amount of \$391,491.13, plus accrued interest through October 11, 1996, in the amount of \$12,402.74, together with interest accruing thereafter in the amount of \$64.36 per day.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is entered for the Plaintiff, Energy Dynamics, Inc., and against Defendants, Midwest Gas Storage, Inc., and MidWest Energy Holding Corp. in the amount of \$391,491.13, plus

41

accrued interest thereon through October 11, 1996, in the amount of \$12,402.74,
together with interest accruing thereafter in the amount of \$64.36 per day.

IT IS SO ORDERED.

Dated this 5th day of August, 1997.



H. DALE COOK
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

8-6-97

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

F I L E D

AUG 05 1997

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

MARKIE K. GARNER, in person and for
all persons similarly situated,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

Case No.96-CV-91-K

REPORT AND RECOMMENDATION

A status conference was held on June 19, 1997 before the undersigned United States Magistrate Judge in which the following matters were taken under advisement: PLAINTIFFS' MOTION FOR CLASS ACTION CERTIFICATION [Dkt. 73], PLAINTIFF/INTERVENORS' MOTION TO INTERVENE [Dkt. 71-2], and the parties' oral request that the case be stayed until January 1, 1998. PLAINTIFFS' MOTION TO FILE A SECOND AMENDED COMPLAINT [Dkt. 71-1] was granted.

Intervenors assert that their interests are not represented in this action until class certification is granted. [Dkt. 71, p.2]. Defendants do not object to class certification. [Dkt. 78, p. 1]. Based on the representations contained within Plaintiffs' brief concerning class certification, the Court concludes that the requirements of Fed.R.Civ.P. 23 have been met and RECOMMENDS that the motion for class certification pursuant to Fed.R.Civ.P. 23(b)(2) [Dkt. 73] be GRANTED. Class counsel is instructed to confer with defense counsel and to submit a proposed order

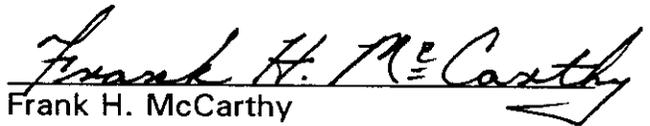
defining and certifying the class, naming appropriate class representatives, and providing notice to class members.

In light of the Court's conclusion that class certification should be granted, PLAINTIFF/INTERVENORS' MOTION TO INTERVENE [Dkt. 71-2] should be DENIED.

The parties joint oral request that the case be stayed until January 1, 1998 to enable Mayes County to hold a bond election for funding jail improvements should be granted. The Court finds that entering the requested stay would facilitate the parties' efforts to resolve this dispute without judicial intervention. The undersigned United States Magistrate Judge RECOMMENDS that the case be STAYED until January 1, 1998.

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 5th day of August, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 5th Day of August, 1997

L. Schulte

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 8-6-97

THE ESTATE OF JOHNNY RAY)
ROBBINS, by and through its personal)
representative Lisa M. Canady,)

Plaintiff,)

v.)

Case No. 97CV348 K (W)

NOTAMI HOSPITALS OF OKLAHOMA,)
INC., an Oklahoma corporation d/b/a)
Columbia Tulsa Regional Medical)
Center; DR. CHRISTINE GENTRY,)
an individual; DR. ROBERT ARCHER,)
an individual; DR. JOHN DOE, an)
individual; EMERGENCY MEDICAL)
SERVICES AUTHORITY, an Oklahoma)
public trust; and THE UNITED STATES)
OF AMERICA, ex rel. DEPARTMENT)
OF VETERANS' AFFAIRS,)

Defendants.)

F I L E D
AUG - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL OF THE UNITED STATES OF AMERICA, ex rel.
DEPARTMENT OF VETERANS' AFFAIRS**

It is hereby stipulated and agreed by and between the undersigned attorneys for plaintiffs and the undersigned attorneys for defendants, that the above-entitled action is discontinued and the complaint dismissed without prejudice as to the defendant United States of America, ex rel. Department of Veterans' Affairs.

It is further stipulated and agreed by and between the undersigned that the dismissal as to the defendant United States of America, ex rel. Department of Veterans' Affairs shall not be made a ground of objection by the other defendants to the admissibility of any decree entered

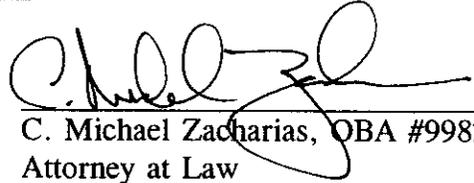
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in this case, provided, however, that the right to make all other proper objections to the admissibility of any such decrees is hereby reserved to each and all of the other defendants.

Dated this 18th day of July, 1997.



C. Michael Zacharias, OBA #9982
Attorney at Law
2642 East 21st Street, Suite 251
Tulsa, OK 74114
(918) 712-1818
Attorney for Plaintiff



Attorney for Defendant United States
of America, ex rel. Department of
Veterans' Affairs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of Aug. 1997, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon fully prepaid, to the following:

Don Hopkins
4606 South Garnett, Suite 310
Tulsa, Oklahoma 74146
Attorney for Defendant Gentry

Steven E. Holden
Terry S. O'Donnell
808 Oneok Plaza
100 West Fifth
Tulsa, Oklahoma 74103
Attorneys for Defendant Archer

Curtis Fisher
1861 East 15th
Tulsa, Oklahoma 74104
Defendant for Defendant EMSA

Stephen J. Rodolf
Karen L. Callahan
2700 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103
Attorneys for Defendant TRMC

Stephen Lewis, U.S. Attorney
Phil Pinnell, Asst. U.S. Attorney
333 W. 4th Street, Suite 3460
Tulsa, OK 74103-3809


C. Michael Zacharias

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACQUELINE A. EVANS,
SS# 486-70-0041

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,

Defendant.

No. 96-C-179-E ✓

FILED ON DOCKET

DATE AUG 06 1997

JUDGMENT

In accord with the Order filed this date, the Court hereby enters judgment in favor of the Plaintiff, Jacqueline A. Evans, and against the Defendant, John J. Callahan, Acting Commissioner of the Social Security Administration. The Decision of the Commissioner is reversed, and this matter is remanded for further development of the record. Costs and attorney fees may be awarded upon proper application.

Dated this 4th day of August 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

AUG 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACQUELINE A. EVANS,
SS# 486-70-0041

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,

Defendant.

No. 96-C-179-E

ENTERED ON DOCKET
DATE AUG 06 1997

ORDER

Plaintiff, Jacqueline A. Evans, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts error because the ALJ failed to fully and fairly develop the record, and because the ALJ's finding regarding her ability to perform her past relevant work is not supported by substantial evidence. For the reasons discussed below, the Court **reverses** the Commissioner's decision **remands** for further development of the record.

I. PLAINTIFF'S BACKGROUND

Evans was born December 26, 1956, and completed the 12th grade. Her relevant work experience is as an assembler of box sections, child care worker and hotel housekeeper. She alleges an inability to work since February 28, 1992, due to

^{1/} Plaintiff filed an application for a period of disability, disability insurance benefits, and supplemental security insurance benefits on March 18, 1994. [R. at 48]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Glen E. Michael (hereafter, "ALJ") was held January 25, 1995. [R. at 13]. By order dated April 6, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 21]. Plaintiff appealed the ALJ's decision to the Appeals Council. On February 1, 1996 the Appeals Council denied Plaintiff's request for review. [R. at 4].

12

back problems, headaches, stomach problems, and arthritis in the leg and knee. Although Evans did not allege disability due to depression, the record reflects that Evans suffers from emotional problems. Evans was in a car wreck on February 28, 1992, and suffered a whiplash type injury to her back. It was at that time that Evans alleges she became unable to work. Subsequently, in June, 1993, Evans sought treatment for chest pain, shortness of breath, and pain in the left arm, and was diagnosed with mitral valve prolapse. In April 1994, Evans was prescribed Zoloft for depression.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{2/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

^{2/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{3/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff has a severe impairment, that she is not credible as to her complaints of severe pain, and that she has the RFC to return to her work as a hotel housekeeping supervisor.

IV. REVIEW

^{3/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

Evans' first assignment of error is that the ALJ failed to fully and fairly develop the record as to her mental impairment. In this regard, the record reflects that Evans was prescribed Zoloft for depression in 1994, and that she testified regarding memory loss. Nonetheless, the ALJ failed to question Evans concerning her mental impairment and its effect on her daily activities, and failed to obtain a consultative psychiatric evaluation. In discounting her mental impairment the ALJ stated:

Although her treating physicians have indicated that there may be an underlying psychological component to her multiple physical complaints, no referral has ever been suggested to a psychiatrist or mental health specialist. The Administrative Law Judge is persuaded that the claimant's emotional problems are situational in nature and represent no more than a slight abnormality, having such a minimal affect on the claimant that they would not be expected to interfere with her ability to work, irrespective of age, education, or work experience and, therefore, would not represent a severe impairment. [R. at 15].

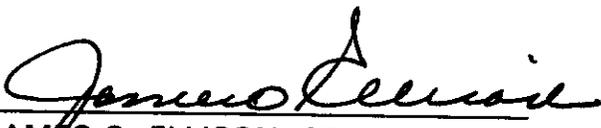
The Court is convinced that this conclusion was reached without adequate development of a factual record.

Even when a claimant is represented by counsel, an 'ALJ has a basic obligation in every social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised.' While the claimant retains the burden of showing that he is disabled at step four, the ALJ has a duty of 'inquiry and factual development.' The ALJ must obtain adequate 'factual information about those work demands which have a bearing on the medically established limitations.' Further when the claimant's impairment is a mental one, 'care must be taken to obtain a precise description of the particular job duties which are likely to produce tension and anxiety, e.g., speed, precision, complexity of tasks, independent judgments, working with other people, etc., in order to determine if the claimant's mental impairment is compatible with the performance of such work.' [Citations omitted].

Washington, 37 F. 3d at 1442. In this case the ALJ failed to develop a factual record on the extent of the claimant's mental impairment, and the effect that impairment may have on her ability to perform her former occupations. The error becomes more problematic in light of the fact that the plaintiff was pro se at the administrative level.

Accordingly, the Commissioner's decision is **REVERSED**, and this matter is **REMANDED** for further development of the record.

Dated this 47th day of August 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

AUG - 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VIRGINIA ANN GIBSON,)
)
 Plaintiff(s),)
)
 vs.)
)
 CLEAR CHANNEL RADIO, INC., et al,)
)
 Defendant(s).)

Case No. 96-C-192-B

ENTERED ON DOCKET
AUG 06 1997
DATE _____

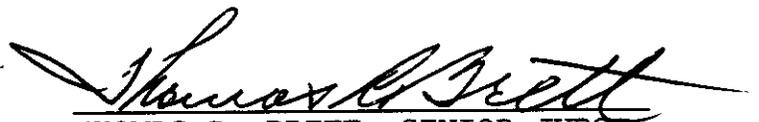
**ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT**

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 5th day of August, 1997.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

54

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

F I L E D

AUG - 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NORMA K. STOCKTON

Plaintiff,

vs.

BRYAN MANAGEMENT CORPORATION,

Defendant.

Civil Action No. 96-C-394-E

FILED ON DOCKET

DATE AUG 06 1997

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

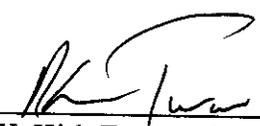
Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Norma K. Stockton, and the Defendant, Bryan Management Corporation, jointly stipulate and agree that this action, should be and is hereby dismissed with prejudice.

Each party has agreed to bear its own attorneys fees and costs.

Dated this ____ day of August, 1997.



Eric B. Bolusky, OBA #935
Wright Bryant Beech & Edwards, P.L.L.C.
406 South Boulder
400 Beacon Building
Tulsa, Oklahoma 74103
Attorneys for Norma Stockton



W. Kirk Turner, OBA #13791
Newton, O'Connor, Turner & Auer P.C.
2700 NationsBank Building
15 West Sixth Street
Tulsa, Oklahoma 74103
Attorneys for Bryan Management, Corp.

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

ENTERED ON DOCKET

DATE AUG 06 1997

ROBERT MICHAEL GAFFNEY,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA DEPARTMENT)
 OF CORRECTIONS;)
 CORRECTIONAL MEDICAL SYSTEMS,)
 a tradename for Correctional)
 Medical Services, Inc., a)
 Missouri corporation;)
 STATE OF TEXAS DEPARTMENT OF)
 CRIMINAL JUSTICE; and)
 WAYNE SCOTT, in his official)
 capacity as Executive Director)
 of the State of Texas)
 Department of Criminal Justice,)
)
 Defendants.)

Case No: 96 CV 1110 B

FILED
AUG - 4 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED NOTICE OF DISMISSAL

COMES NOW Plaintiff, Robert Michael Gaffney, and hereby dismisses, without prejudice, Defendant Wayne Scott in his official capacity and individually, from the above-styled and captioned matter because Plaintiff has learned that said Defendant should not be charged in this matter.

Respectfully submitted,

D.C. PHILLIPS & ASSOCIATES, P.C.

David C. Phillips, III
David C. Phillips, III
OBA #13551
115 W. 3rd St., Ste. 525
Tulsa, OK 74103
(918) 584-5062

B

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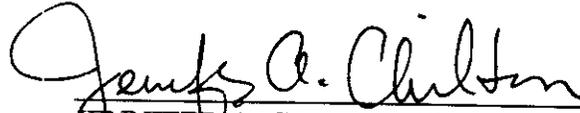
CERTIFICATE OF MAILING

This is to certify that this 4th day of August 1997, a true and correct copy of the above Notice was placed in the U.S. mail, first class postage prepaid, to:

Jennifer A. Childress
Asst. Attorney General
State of Texas
P.O. Box 12548, Capitol Station
Austin, TX 78711
Attorneys for Defendant Wayne Scott

David C. Phillips, III

APPROVED BY:



JENNIFER A. CHILDRESS

Assistant Attorney General

State Bar No. 00789220

P. O. Box 12548, Capitol Station

Austin, Texas 78711

(512) 463-2080

Fax No. (512) 495-9139

ATTORNEY FOR DEFENDANT

WAYNE SCOTT

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

WAUSAU SERVICE CORPORATION,

Plaintiff,

v.

ALTA EARLENE BLUM, guardian and
attorney-in-fact for CHARLOTTE ANN
MIGNOT, CHARLOTTE ANN MIGNOT,
Guardian Ad Litem for AMANDA L. CHURA and
LEAH M. CHURA, minor children,

Defendants,

and

MICHAEL GARY CHURA as Court Appointed
Guardian Ad Litem for AMANDA L. CHURA
and LEAH M. CHURA and as their father and
friend,

Defendant.

Case No. 96-C-843-H

F I L E D

AUG - 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE AUG 06 1997

ORDER

This matter comes before the Court pursuant to the entry of an order in this case on August 5, 1997. Such order is hereby amended to require that notice to the Court under that order, if any, shall be made prior to the acceptance of any monies from the Court Clerk, rather than seven (7) days from the file date of the August 5, 1997 order. If no such notice is given, the Court Clerk is hereby directed to make payment in accordance with the Order/Journal Entry of August 1, 1997.

IT IS SO ORDERED.

This 5TH day of August, 1997.


Sven Erik Holmes
United States District Judge

RECEIVED

AUG - 1 1997

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT OF OKLAHOMA *Phil Lombardi, Clerk*
U.S. DISTRICT COURT

WAUSAU SERVICE CORPORATION,)
NATIONWIDE MUTUAL INSURANCE)
COMPANY, NATIONWIDE LIFE)
INSURANCE COMPANY, NATIONWIDE)
INSURANCE ENTERPRISE RETIREMENT)
PLAN, and NATIONWIDE INSURANCE)
ENTERPRISE SAVINGS PLAN,)

Plaintiffs,)

v.)

ALTA EARLENE BLUM, guardian and)
attorney-in-fact for CHARLOTTE)
ANN MIGNOT, CHARLOTTE ANN MIGNOT,)
Guardian Ad Litem for)
AMANDA L. CHURA and LEAH M.)
CHURA, minor children,)

Defendants,)

and)

MICHAEL GARY CHURA as Court Appointed)
Guardian Ad Litem for AMANDA L. CHURA)
and LEAH M. CHURA and as their father)
and next friend,)

Additional Defendant.)

FILED

AUG - 1 1997

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

Case No. 96-CV-843H ✓

ENTERED ON DOCKET

~~AUG 05 1997~~

ORDER/JOURNAL ENTRY

NOW on this 1st day of August, 1997, this matter comes on for hearing and final disposition before the undersigned United States District Judge pursuant to the stipulations and agreements of the parties herein. The Court, having reviewed the stipulations among the parties hereto, including those set forth below, as well as those set forth in the "Stipulations and Settlement Agreement" entered into by the Defendants, together with the Motion To Approve

22

Settlement Agreement And Stipulated Order Involving Interests of Minors, Together With Application to Approve Depository Bank, submitted herewith by Court appointed Guardian Ad Litem, Michael Gary Chura, urging, inter alia, approval of the settlement agreements set forth herein, and, being fully advised in the premises, finds as follows:

1. That Wausau Service Corporation and its co-stakeholders Nationwide Mutual Insurance Company, Nationwide Life Insurance Company, Nationwide Insurance Enterprise Retirement Plan, and Nationwide Insurance Enterprise Savings Plan have paid into the registry of this Court the sum of \$411,859.99 on May 21, 1997, consisting of Group Life and Group Accident coverage on the life of Larry Mignot (\$405,000.00) plus incentive and final bonuses earned by Larry Mignot prior to his death (\$3,881.00) together with the amount in Larry Mignot's 401K Savings Plan account (\$2,978.99).

2. That Wausau Service Corporation and its co-stakeholders Nationwide Mutual Insurance Company, Nationwide Life Insurance Company, Nationwide Insurance Enterprise Retirement Plan, and Nationwide Insurance Enterprise Savings Plan, consistent with the "Stipulations and Settlement Agreement" by and between Defendant Charlotte Ann Mignot and minor Defendants Amanda L. Chura and Leah M. Chura, as approved by Guardian Ad Litem Michael Gary Chura, hold for Charlotte Ann Mignot the Pension Plan Death Benefits due as a result of the death of Larry Mignot in the original sum of \$34,683.96 and they should be ordered and directed to pay the net amount due from said sum which is \$27,747.17, after deducting withholding taxes and penalties required by law, directly to Charlotte Ann Mignot and should be discharged from further liability therefor.

3. That Defendants Amanda L. Chura and Leah M. Chura (minor children) and Defendant Charlotte Ann Mignot, have stipulated and agreed to accept the compromise sum of

\$19,324.98 in full satisfaction of their claims for interest herein against Plaintiffs Wausau Service Corporation, Nationwide Mutual Insurance Company, Nationwide Life Insurance Company, Nationwide Insurance Enterprise Retirement Plan, and Nationwide Insurance Enterprise Savings Plan in exchange for the waiver of any and all claims for attorneys fees by said Plaintiffs from the funds deposited with the registry of this Court.

4. That said settlement of the interest claims in the amount of \$19,324.98 should be approved as it relates to the minor children, Amanda L. Chura and Leah M. Chura, as fair and reasonable, especially in view of the waiver of any and all claims as to attorneys fees from the funds deposited herein by said Plaintiffs. The Court finds that the execution of such agreement will promote the best interests of the minor children, and that such agreement should be executed on behalf of such minors and should be binding upon them.

5. That herewith Wausau Service Corporation, Nationwide Mutual Insurance Company, Nationwide Life Insurance Company, Nationwide Insurance Enterprise Retirement Plan, and Nationwide Insurance Enterprise Savings Plan should be ordered and directed to make a final payment into the treasury registry account of this Court in the sum of \$19,324.98 to satisfy the settlement above referenced.

6. That upon payment of said \$19,324.98 into the treasury registry account of this Court, Wausau Service Corporation, Nationwide Mutual Insurance Company, Nationwide life Insurance Company, Nationwide Insurance Enterprise Retirement Plan, and Nationwide Insurance Enterprise Savings Plan should and shall be released by the Defendants and fully discharged by the Court of and from any and all further liability herein arising from or relating to the death and/or employment of Larry Mignot as to Charlotte Mignot and the minor children Amanda L.

Chura and Leah M. Chura.

7. That a settlement agreement has been entered into by and between Defendants Amanda L. Chura and Leah M. Chura (minor children) and Defendant Charlotte Ann Mignot as set forth in the "Stipulations and Settlement Agreement" filed herein and approved by Michael Gary Chura as Court appointed Guardian Ad Litem for Amanda L. Chura and Leah M. Chura and as their father and next friend, whereby minor Defendant Amanda L. Chura is awarded the gross sum of \$155,289.64 plus one-third of accrued interest herein from the Court's interest bearing account (less one-third of the appropriate registry fee) to be paid from the proceeds of the Group Life and Group Accident Insurance fund deposited herein with the Court Clerk, said gross award being subject to reduction by attorneys fees and Oklahoma estate and inheritance taxes, and whereby Defendant Leah M. Chura is awarded the gross sum of \$155,289.65 plus one-third of the accrued interest herein from the Court's interest bearing account, (less one-third of the appropriate registry fee) also to be paid from the Group Life and Group Accident Insurance fund deposited herein with the Court Clerk, said gross award also being subject to reduction by attorneys fees and Oklahoma estate and inheritance taxes. Under said Settlement Agreement Defendant Charlotte Ann Mignot is awarded the gross sum of \$120,605.68 plus one-third of the accrued interest herein from the Court's registry account (less one-third of the appropriate registry fee) said gross sum being subject to attorneys fees and reduction by \$2,978.99 which is owed by Charlotte Ann Mignot to Plaintiff Wausau Service Corporation to reimburse said Plaintiff for monies previously paid to her in error. Also, pursuant to said Settlement Agreement, Charlotte Ann Mignot and her attorney Allen Smallwood are to receive death benefits from Wausau Service Corporation and the other Plaintiffs herein in the agreed sum of \$34,683.96 (the original

agreed sum as between the Defendants), less any withholding taxes or penalties required by law, leaving the net sum of \$27,747.17 payable to Charlotte Ann Mignot by Plaintiff Wausau Service Corporation. The Court has reviewed the terms of said Settlement Agreement as specifically set forth herein and as more generally stated in the "Stipulations and Settlement Agreement" filed herein, and after full consideration thereof finds that the execution of said agreement on behalf of the minor children will promote the best interests of the said minor children, and that said agreement should be executed on behalf of said minor children and should be binding upon them.

8. That consistent with the above referenced Settlement Agreement between the Defendants and this Court's approval thereof, the Court further finds:

(a) That from the \$155,289.64 amount awarded Amanda L. Chura, \$1,500.00 should be paid to the Oklahoma Tax Commission to satisfy Oklahoma estate and inheritance taxes;

(b) That from said \$155,289.64 amount awarded Amanda L. Chura \$51,763.21 should be paid to attorneys Loyal J. Roach and Melanie J. Branham for attorneys fees and expenses herein in representing Amanda L. Chura and assuring her recovery in this case;

(c) That from the \$155,289.64 amount awarded Amanda L. Chura the balance of \$102,026.43 plus one-third of the accrued interest (less one-third of the registry fee) should be deposited in an interest bearing account with NationsBank as custodian in trust for Amanda L. Chura (POD Leah M. Chura) pursuant to Title 12, Section 83 of the Oklahoma Statutes, until she reaches 18 years of age;

(d) That from the \$155,289.65 amount awarded Leah M. Chura, \$1,500.00 should be paid to the Oklahoma Tax Commission to satisfy Oklahoma estate and inheritance taxes;

(e) That from said \$155,289.65 amount awarded Leah M. Chura \$51,763.21 should

be paid to attorneys Loyal J. Roach and Melanie J. Branham for attorneys fees and expenses herein in representing Leah M. Chura and assuring her recovery in this case;

(f) That from the \$155,289.65 amount awarded Leah M. Chura the balance of \$102,026.44 plus one-third of the accrued interest (less one-third of the registry fee) should be deposited in an interest bearing account with NationsBank as custodian in trust for Leah M. Chura (POD Amanda L. Chura) pursuant to Title 12, Section 83 of the Oklahoma Statutes, until she reaches 18 years of age;

(g) That Plaintiff Wausau Service Corporation should be paid \$2,978.99 from Charlotte Ann Mignot's share of the settlement herein, representing reimbursement for funds paid earlier to her in error by said Plaintiff;

(h) That Defendant Charlotte Ann Mignot and her attorney Allen Smallwood should receive \$117,626.69 in two separate disbursements; the first disbursement should be made upon approval of this Order by the Court Clerk from the funds initially deposited with this Court in the sum of \$98,301.71 plus one-third of the interest accrued (less one-third of the registry fee); the final amount owing Charlotte Ann Mignot and her attorney Allen Smallwood should be paid from the interest settlement ordered deposited upon approval of this Order in the sum of \$19,324.98 and should be disbursed by the Court Clerk as soon as practicable following the deposit of said funds; the original \$34,683.96 amount ordered paid into Court on June 27, 1997, should, instead, be paid directly to Charlotte Ann Mignot, after deducting withholding taxes and penalties, leaving \$27,747.17 as the net amount to be paid to her, and the Plaintiffs herein should be fully discharged from further liability herein as to said Pension/death benefits.

(i) That all the parties hereto urge that the final disposition of all these matters be

expedited and that any penalty for early withdrawal of the interest bearing funds herein is anticipated and approved and, therefore, disbursements should be made by the Court Clerk notwithstanding any applicable penalty regarding interest for withdrawal prior to August 22, 1997.

9. That NationsBank, Tulsa, Oklahoma, pursuant to the Application of the Guardian Ad Litem herein, should be approved by the Court as the depository bank for the funds disbursed herein by the Court for the minor children.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the interest settlement in the amount of \$19,324.98 is hereby approved as it relates to the minor children Amanda L. Chura and Leah M. Chura as fair and reasonable, especially in view of the waiver of any and all claims as to attorneys fees by Plaintiffs from the funds deposited herein and the Guardian Ad Litem's approval of said settlement is hereby ratified by the Court and the settlement is declared binding upon the minors herein with the same effect as if said minor Defendants were under no disability and executed the settlement agreements herein themselves.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the settlement agreement entered into herein by Defendant Charlotte Ann Mignot and minor Defendants Amanda L. Chura and Leah M. Chura, and the terms thereof, are hereby approved as fair and reasonable in all respects including the settlement as reflected herein and in the "Stipulations and Settlement Agreement" on file in this matter and the Guardian Ad Litem's approval thereof is hereby ratified by the Court and the said Settlement Agreements set forth herein shall be binding upon the Defendant minor children with the same effect as if said minor Defendants were under no disability and executed said agreements themselves.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED by the Court that Wausau Service Corporation, Nationwide Mutual Insurance Company, Nationwide Life Insurance Company, Nationwide Insurance Enterprise Retirement Plan, and Nationwide Insurance Enterprise Savings Plan is hereby ordered and directed to make a final payment into the treasury registry account of this Court in the sum of \$19,324.98 to satisfy the settlement above referenced.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED by the Court that upon payment of \$19,324.98 into the treasury registry account of this Court, Wausau Service Corporation, Nationwide Mutual Insurance Company, Nationwide Life Insurance Company, Nationwide Insurance Enterprise Retirement Plan, and Nationwide Insurance Enterprise Savings Plan are fully and completely discharged of and from any and all further liability herein arising from or relating to the death and/or employment of Larry Mignot as to Charlotte Ann Mignot and the minor children Amanda L. Chura and Leah M. Chura.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED by the Court that upon payment of the sum of \$27,747.17 directly to Charlotte Ann Mignot, Wausau Service Corporation and the other Plaintiffs herein are hereby fully and completely discharged from further liability herein with regard to pension plan and death benefit obligations arising from or relating to the death of Larry Mignot and the Order herein of June 27, 1997, is hereby set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that NationsBank, Tulsa, Oklahoma is hereby approved as the depository bank for the funds disbursed herein for the minor children, Amanda L. Chura and Leah M. Chura.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the

Clerk of this Court, notwithstanding the loss of some interest due to penalties for early withdrawal of funds, make the following payments and disbursements in the following amounts to the following named individuals or entities upon being presented with a copy of this Order:

1. That the Clerk of this Court disburse the principal sum on deposit herein in the amount of \$411,859.99 together with accrued interest less the appropriate registry fee as follows:

(a) The sum of \$2,978.99 payable to Wausau Service Corporation;

(b) The sum of \$98,301.71 plus one-third of the accrued interest less one-third of the appropriate registry fee payable to Charlotte Ann Mignot and Allen Smallwood, her attorney;

(c) The sum of \$102,026.43 plus one-third of the accrued interest less one-third of the appropriate registry fee payable to NationsBank as custodian in trust for Amanda L. Chura, a minor, (POD to Leah M. Chura) until she reaches 18 years of age;

(d) The sum of \$102,026.44 plus one-third of the accrued interest less one-third of the appropriate registry fee payable to NationsBank as custodian in trust for Leah M. Chura, a minor, (POD to Amanda L. Chura) until she reaches 18 years of age;

(e) The sum of \$3,000.00 payable to the Oklahoma Tax Commission and reflecting that minors Amanda L. Chura and Leah M. Chura are the source for said funds;

(f) The sum of \$103,526.42 payable to attorneys Loyal J. Roach and Melanie J. Branham;

2. The \$19,324.98 paid into the treasury registry of the Court contemporaneous with execution of this Order should be paid out and disbursed as soon as practicable after receipt by the Court Clerk to Charlotte Ann Mignot and her attorney Allen Smallwood.

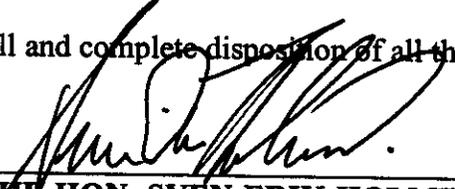
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that counsel

presenting this Order should serve a copy thereof on the Court Clerk or Chief Deputy Court Clerk personally. Absent such service, the Clerk is hereby relieved of any personal liability relative to compliance with this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the attorneys for the minor children, Amanda L. Chura and Leah M. Chura, shall have the responsibility for delivering a certified copy of this Order to NationsBank (Tulsa) at the time the deposits are made in interest bearing accounts and said attorneys are directed to obtain an executed Receipt identical to Exhibit "A" annexed hereto and to file same with the Court Clerk within 10 days of the date hereof with copies to all parties. The funds for each child may not be withdrawn without an order from this Court before each child attains the age of 18 years. Upon a proper showing of identification at the time each minor child herein attains the age of 18 years, the depository bank (NationsBank) may disburse the deposited funds plus interest accrued to each minor child attaining the age of 18.

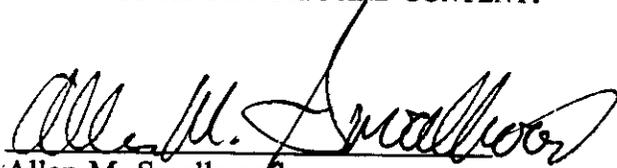
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Court recognizes that the releases attached hereto as Exhibits "B" and "C" have been given and further recognizes as a matter of law the effectiveness of such releases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this is a final Order in this case and represents a full and complete disposition of all the issues herein.

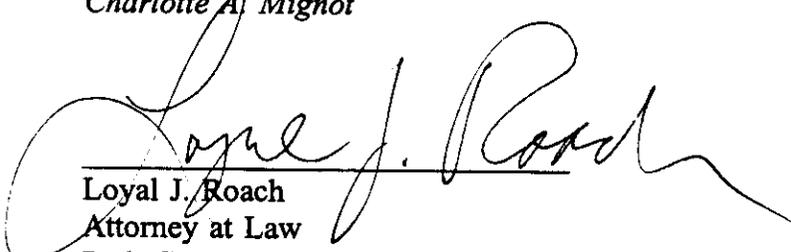


THE HON. SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:



Allen M. Smallwood
Attorney at Law
1310 South Denver Ave.
Tulsa, Oklahoma 74119
*Attorney for Defendnat
Charlotte A. Mignot*



Loyal J. Roach
Attorney at Law
Park Centre - Suite 660
525 South Main
Tulsa, Oklahoma 74103
together with
Melanie J. Branham
Attorney at Law
100 East Park, Suite 5
Park Cherry Building
Olathe, Kansas 66061
*Attorneys for Defendants
Amanda L. Chura and Leah M. Chura*

APPROVED:



Michael Gary Chura
*Court Appointed Guardian
Ad Litem for Amanda L. Chura and
Leah M. Chura, father and next friend*

APPROVED AS TO FORM ONLY:



Anne M. Radolinski
Emily E. Duke
Frederikson & Byron, P.A.
1100 International Centre
Minneapolis, Minnesota 55402
together with
Michael J. Gibbens
Kenneth J. Levit
Crowe & Dunlevy
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103
*Attorneys for Wausau Service
Corporation, Nationwide Mutual
Insurance Company, Nationwide
Life Insurance Company,
Nationwide Insurance Enterprise
Retirement Plan, and
Nationwide Insurance Enterprise
Savings Plan*

EXHIBIT "A"

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

WAUSAU SERVICE CORPORATION,)
NATIONWIDE MUTUAL INSURANCE)
COMPANY, NATIONWIDE LIFE)
INSURANCE COMPANY, NATIONWIDE)
INSURANCE ENTERPRISE RETIREMENT)
PLAN, and NATIONWIDE INSURANCE)
ENTERPRISE SAVINGS PLAN,)

Plaintiffs,)

v.)

Case No. 96-CV-843H

ALTA EARLENE BLUM, guardian and)
attorney-in-fact for CHARLOTTE)
ANN MIGNOT, CHARLOTTE ANN MIGNOT,)
Guardian Ad Litem for)
AMANDA L. CHURA and LEAH M.)
CHURA, minor children,)

Defendants,)

and)

GARY MICHAEL CHURA as Court Appointed)
Guardian Ad Litem for AMANDA L. CHURA)
and LEAH M. CHURA and as their father)
and next friend,)

Additional Defendant.)

RECEIPT

The undersigned officer and representative of NationsBank, Tulsa, Oklahoma, hereby certifies and confirms that on the ____ day of _____, 1997, NationsBank received monies and opened accounts for minors Amanda L. Chura and Leah M. Chura as follows:

1. \$ _____ received and deposited in interest bearing account (s)

_____ with NationsBank as custodian in trust for Amanda L. Chura
(POD Leah M. Chura) until she reaches 18 years of age.

2. \$ _____ received and deposited in interest bearing account (s)
_____ with NationsBank as custodian in trust for Leah M. Chura
(POD Amanda L. Chura) until she reaches 18 years of age.

The undersigned also acknowledges receipt on behalf of NationsBank (Tulsa) of a copy of the final Order of the Court in the above case dated _____, 1997, prohibiting withdrawal of the above funds until further order of the Court or until each minor reaches the age of 18 years.

NationsBank (Tulsa)

By: _____

Title: _____

Copies of above sent to all counsel of record on ____ day of _____, 1997.

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

WAUSAU SERVICE CORPORATION,)
NATIONWIDE MUTUAL INSURANCE)
COMPANY, NATIONWIDE LIFE INSURANCE)
COMPANY, NATIONWIDE INSURANCE)
ENTERPRISE RETIREMENT PLAN, and)
NATIONWIDE INSURANCE ENTERPRISE)
SAVINGS PLAN,)

Plaintiffs,)

v.)

Case No. 96-CV-843H)

ALTA EARLENE BLUM, guardian and)
attorney-in-fact for CHARLOTTE)
ANN MIGNOT, CHARLOTTE ANN MIGNOT,)
Guardian Ad Litem for AMANDA L. CHURA,)
and LEAH M. CHURA, minor children,)

Defendants.)

and)

MICHAEL GARY CHURA as Court Appointed)
Guardian Ad Litem for AMANDA L. CHURA)
and LEAH M. CHURA, and as their father and)
next friend,)

Additional Defendant.)

RELEASE

In conjunction with the Order of the Court of August 1, 1997 in the above-captioned matter, the undersigned, Michael Gary Chura, as Court appointed Guardian Ad Litem for Amanda L. Chura and Leah M. Chura and on their behalf, hereby fully releases and discharges the Wausau Service Corporation, Nationwide Mutual Insurance Company, Nationwide Life Insurance, and their

EXHIBIT "B"

affiliates, subsidiaries, officers, directors, successors and assigns, the Nationwide Insurance Enterprise Retirement Plan and its trustees, and the Nationwide Insurance Enterprise Savings Plan and its trustees, from any and all further liability for claims, demands, causes of action or damages of any kind whatsoever, whether known or unknown, suspected or unsuspected, resulting from or in any way related to any of the sums deposited with the Court, or arising from or relating to the benefits and wages which are the subject of this action due to the beneficiaries, heirs, assigns, or any Estate of Larry Mignot as a result of the death and/or employment of Larry Mignot.

Michael Gary Chura
*Court Appointed Guardian Ad Litem for
Amanda L. Chura and Leah M. Chura , father
and next friend*

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

Subscribed and sworn to before me, this ____ day of August, 1997.

Notary Public

My Commission Expires:

[S E A L]

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

WAUSAU SERVICE CORPORATION,)
NATIONWIDE MUTUAL INSURANCE)
COMPANY, NATIONWIDE LIFE INSURANCE)
COMPANY, NATIONWIDE INSURANCE)
ENTERPRISE RETIREMENT PLAN, and)
NATIONWIDE INSURANCE ENTERPRISE)
SAVINGS PLAN,)

Plaintiffs,)

v.)

Case No. 96-CV-843H)

ALTA EARLENE BLUM, guardian and)
attorney-in-fact for CHARLOTTE)
ANN MIGNOT, CHARLOTTE ANN MIGNOT,)
Guardian Ad Litem for AMANDA L. CHURA,)
and LEAH M. CHURA, minor children,)

Defendants.)

and)

GARY MICHAEL CHURA as Court Appointed)
Guardian Ad Litem for AMANDA L. CHURA)
and LEAH M. CHURA, and as their father and)
next friend,)

Additional Defendant.)

RELEASE

In conjunction with the Order of the Court of August 1, 1997 in the above-captioned matter, the undersigned, Charlotte Ann Mignot, hereby fully releases and discharges the Wausau Service Corporation, Nationwide Mutual Insurance Company, Nationwide Life Insurance, and their affiliates, subsidiaries, officers, directors, successors and assigns, the Nationwide Insurance

EXHIBIT " 1 "

Enterprise Retirement Plan and its trustees, and the Nationwide Insurance Enterprise Savings Plan and its trustees, from any and all further liability for claims, demands, causes of action or damages of any kind whatsoever, whether known or unknown, suspected or unsuspected, resulting from or in any way related to any of the sums deposited with the Court, or arising from or relating to the benefits and wages which are the subject of this action due to the beneficiaries, heirs, assigns, or any Estate of Larry Mignot as a result of the death and/or employment of Larry Mignot.

Charlotte Ann Mignot

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

Subscribed and sworn to before me, this _____ day of August, 1997.

Notary Public

My Commission Expires:

[S E A L]

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

BS&B SAFETY SYSTEMS, INC.,)
)
Plaintiff,)
)
v.)
)
CONTINENTAL DISC CORPORATION,)
)
Defendant.)

FILED

AUG - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil No. 94-CV-1027-H

Judge Sven Erik Holmes

ENTERED ON DOCKET
DATE AUG 0 5 1997

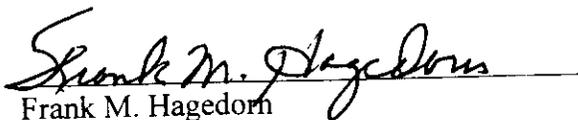
STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE

No final judgment having been entered in this civil action, pursuant to Fed. R. Civ. P. 41(a)(1) the parties stipulate to the voluntary dismissal of this civil action with prejudice upon the mutually agreed conditions (1) that the injunction Order entered herein on November 7, 1996, be explicitly vacated and (2) that the parties bear their own costs and attorney's fees.

This stipulation is part of the settlement of all matters heretofore in dispute between the parties not only in this civil action but also in the interlocutory appeal taken to the United States Court of Appeals for the Federal Circuit from the injunction Order entered herein on November 7, 1996 (as well as other litigation pending in the United States District Court for the Southern District of Texas). In order to facilitate the consummation of their settlement and the dismissal of the aforementioned interlocutory appeal, the parties respectfully urge this Court to promptly

407

enter the accompanying proposed Order confirming this stipulation by implementing the
aforementioned mutually agreed conditions of the dismissal.



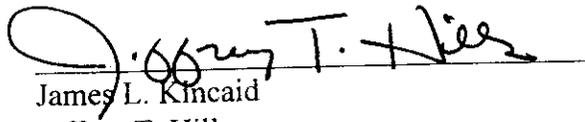
Frank M. Hagedorn
Robert P. Fitz-Patrick
HALL, ESTILL, HARDWICK, GABLE
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, OK 74103-3708
Tel: (918) 594-0400
Fax: (918) 594-0505

Richard L. Stroup
Christopher P. Isaac
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.
1300 I Street, N.W., Suite 700
Washington, DC 20005
Tel: (202) 408-4000
Fax: (202) 408-4400

Phillip P. Sudan, Jr.
RYAN & SUDAN, L.L.P.
Two Houston Center
909 Fannin, Suite 3900
Houston, TX 77010-1010
Tel: (713) 652-0501
Fax: (713) 652-0503

James E. Sharp
SHARP & LANKFORD
1785 Massachusetts Avenue, N.W.
Washington, DC 20036-2117
Tel: (202) 745-1700
Fax: (202) 745-2505

Attorneys for Plaintiff
BS&B SAFETY SYSTEMS, INC.



James L. Kincaid
Jeffrey T. Hills
CROWE & DUNLEVY
500 Kennedy Building
321 South Boston Avenue
Tulsa, OK 74103
Tel: (918) 592-9800
Fax: (918) 592-9801

Jack C. Goldstein
Richard L. Stanley
ARNOLD, WHITE & DURKEE
750 Bering Drive
Houston, TX 77057-2198
Tel: (713) 787-1400
Fax: (713) 789-2679

Don A. Wetzel
WETZEL, HENRI & DRUCKER, L.L.P.
The Millside Building
2170 Buckthorne Place, Suite 300
The Woodlands, TX 77380
Tel: (281) 363-5050
Fax: (281) 363-0077

Attorneys for Defendant
CONTINENTAL DISC CORPORATION

COA

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

F I L E D

AUG - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil No. 94-CV-1027-H

Judge Sven Erik Holmes

BS&B SAFETY SYSTEMS, INC.,)

Plaintiff,)

v.)

CONTINENTAL DISC CORPORATION,)

Defendant.)

ENTERED ON DOCKET
DATE AUG 05 1997

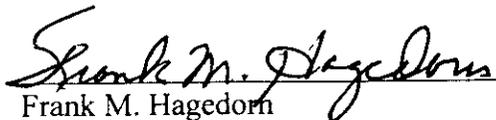
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This stipulation is part of the settlement of all matters heretofore in dispute between the parties not only in this civil action but also in the interlocutory appeal taken to the United States Court of Appeals for the Federal Circuit from the injunction Order entered herein on November 7, 1996 (as well as other litigation pending in the United States District Court for the Southern District of Texas). In order to facilitate the consummation of their settlement and the dismissal of the aforementioned interlocutory appeal, the parties respectfully urge this Court to promptly

407

enter the accompanying proposed Order confirming this stipulation by implementing the
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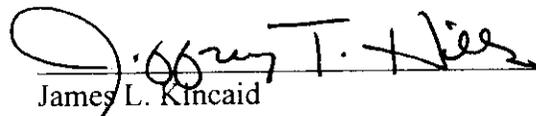
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SHARP & LANKFORD
1785 Massachusetts Avenue, N.W.
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Attorneys for Plaintiff
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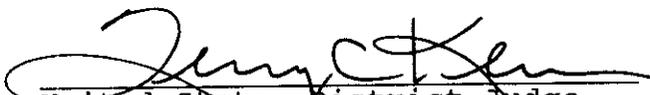
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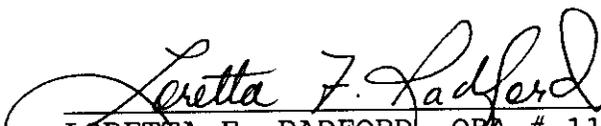
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Fax: (281) 363-0077

Attorneys for Defendant
CONTINENTAL DISC CORPORATION

interest thereafter at the current legal rate of 5.56 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDITH M. PAULI,
SS# 444-36-6841

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,

Defendant.

No. 96-C-58-E

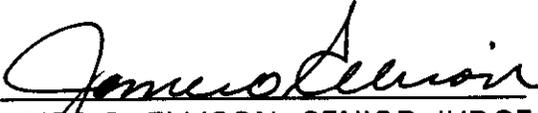
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DATE AUG 04 1997

J U D G M E N T

In accord with the Order filed this date, the Court hereby enters judgment in favor of the Plaintiff, Edith M. Pauli, and against the Defendant, John J. Callahan, Acting Commissioner of the Social Security Administration. The Decision of the Commissioner is reversed, and this matter is remanded for an immediate award of benefits. Costs and attorney fees may be awarded upon proper application.

Dated this 1st day of August 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

AUG 1 1997 *mw*

EDITH M. PAULI,
SS# 444-36-6841

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-58-E

FILED ON DOCKET

DATE AUG 04 1997

ORDER

Plaintiff, Edith M. Pauli, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts error because (1) the ALJ ignored the treating physician's opinion, (2) improperly evaluated Pauli's mental impairment, and (3) failed to follow the Order on remand regarding the psychiatric review technique form. For the reasons discussed below, the Court **reverses** the Commissioner's decision, and remands for an award of benefits.

I. PLAINTIFF'S BACKGROUND

^{1/} Plaintiff filed an application for disability and supplemental security insurance benefits in May, 1990. [R. at 10]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge John M. Slater (hereafter, "ALJ") was held March 25, 1991. [R. at 10]. By order dated April 26, 1991, the ALJ determined that Plaintiff was not disabled. [R. at 18]. Plaintiff appealed the ALJ's decision to the Appeals Council. On January 8, 1992 the Appeals Council denied Plaintiff's request for review. [R. at 5]. On May 11, 1993, however, this case was remanded by the District Court. [R. at 434]. On remand, following a hearing held on September 30, 1993, the same ALJ again found that plaintiff was not disabled. [R. at 377]. On November 24, 1995, the Appeals Council again denied Plaintiff's request for review. [R. At 367].

Edith Pauli was born June 21, 1938, and has some college hours, and attended trade schools for drafting, nurses' aide, and computers. Her relevant work experience includes work as a medical records clerk, bookkeeper and draftsman. Pauli alleges an inability to work since November, 1988, due to severe mental impairment and a disabling back injury. Pauli was diagnosed with a ruptured disk on November 15, 1988, and eventually underwent surgery on June 27, 1989. She was given a work release by her surgeon on October 11, 1989. She claims to continue to have pain and some numbness due to the surgery. In addition, Pauli claims to suffer from a mental impairment, characterized by forgetfulness, nervousness, appetite disturbance, crying spells, an inability to meet work quotas, fatigue, poor self esteem, sleep disturbance, poor concentration, and an inability to work around people.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{2/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

^{2/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{3/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff, although impaired, has a RFC for performing sedentary and light work, and is therefore capable of performing her past relevant work as a medical records clerk, bookkeeper and draftsman. In making this finding, the ALJ concluded that Pauli was not credible regarding her complaints of pain or her mental impairment.

^{3/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

IV. REVIEW

This case was initially remanded for hearing wherein a trained psychologist would testify after the district judge found that the ALJ abused his discretion by improperly discounting the conclusions of two mental health professionals and substituting his own judgment. While the Court notes that, on remand, the ALJ did hold a supplemental hearing where a psychiatrist and a vocational expert testified, a review of the ALJ's second opinion reveals that the ALJ again rejected the treating physician's opinion on the very same grounds that were found to be error in the first decision. Plaintiff argues that, on remand, the Commissioner did not follow the order of this Court and ignored the treating physician's opinions that the plaintiff could not sustain work activity. The Court agrees.

In its Order dated May 11, 1993, the Court noted the September 17, 1990 opinion of Dr. Joe Tyler:

Ms. Pauli appears capable of understanding, carrying out and remembering simple instructions. She is able to respond appropriately to supervision and interact appropriately with co-workers. She is, however, unable at this time to handle the customary pressures associated with work. Any attempt to work either on a full-time or part-time basis would be expected to result in a deterioration of Ms. Pauli's current level of functioning and an exacerbation of her symptoms of depression. [R. at 433].

The Court, at that time also noted that the ALJ discounted the opinion of Dr. Tyler and found that it was error to do so.

Furthermore, he [Tyler] specifically noted that the claimant was working in a county building on a part time basis and he raised no objection to this either. Given the fact that claimant's treating physician never imposed these limitations upon the claimant throughout her treatment

history and instead allowed her to continue her job search, the undersigned finds this assessment to be of decreased material value. [R. at 434].

On remand, the same ALJ again failed to give appropriate weight to the treating physician's opinion, for the very same reasons that had been found to be error. In discussing Dr. Tyler's opinion in the decision on remand, the ALJ stated:

Although restrictions were placed upon work pressures, the undersigned notes that the physician entering these limitations was well aware that the claimant continued to seek employment subsequent to her alleged onset date and in no way ever discouraged the claimant in her job search. Furthermore, the undersigned noted that many of the above-stated negative findings upon mental status examination are attributable to this same physician. Consequently, the undersigned finds the claimant's treating physician's functional assessment to be contrary to his progress notes, thus reducing the probative value of this assessment. [R. at 381].

The Court finds, once again that the ALJ's attempts to discredit the opinion of the treating physician are invalid. The alleged contradiction between the treating physician's progress notes and functional assessment simply does not exist. See Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1985).

The Court finds that the ALJ again erred in rejecting the treating physician rule and in failing to fully evaluate the facts and the medical record on plaintiff's mental impairment. The case is Reversed and Remanded to the Commissioner for an immediate award of benefits.

Dated this 15th day of August 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKY G. WHITE,
SS# 444-56-3213

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,

Defendant.

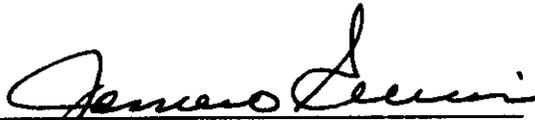
No. 95-C-1246-E ✓

ENTERED ON DOCKET
DATE AUG 04 1997

JUDGMENT

In accord with the Order filed July 31, 1997, the Court hereby enters judgment in favor of the Defendant, John J. Callahan, Acting Commissioner of the Social Security Administration, and against the Plaintiff, Ricky White. Plaintiff shall take nothing of his claim. Costs and attorney fees may be awarded upon proper application.

Dated this 1st day of August 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

10

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

F I L E D

AUG - 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT E. WILCOX, Utah Insurance)
Commissioner, as Liquidator of Southern)
American Insurance Company,)

Plaintiff,)

vs.)

TRADE WINDS MOTOR HOTEL EAST,)
INC.,)

Defendant.)

Case No. 96-C-226-B /

ENTERED ON DOCKET

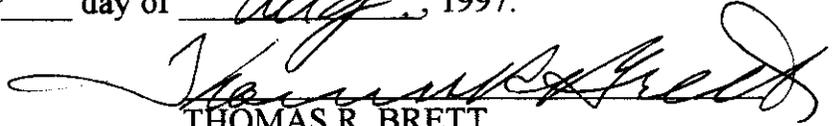
AUG 04 1997

J U D G M E N T

In keeping with the Order sustaining the motion for summary judgment of the Defendant, Trade Winds Motor Hotel East, Inc., and overruling the motion for summary judgment of the Plaintiff, Robert E. Wilcox, Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company, judgment in hereby entered in favor of Defendant, Trade Winds Motor Hotel East, Inc., and against the Plaintiff, Robert E. Wilcox, Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company; the Plaintiff to recover nothing against said Defendant. Costs of this action are awarded in favor of Trade Winds Motor Hotel East, Inc., and against Robert E. Wilcox, Utah Insurance Commissioner, as Liquidator of Southern American Insurance Company, upon timely application pursuant to Local Rule 54.1. Each party is to pay their own respective attorneys' fees.

50

IT IS SO ORDERED this 1st day of Aug., 1997.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

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

F I L E D
AUG - 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT E. WILCOX, Utah Insurance)
Commissioner, as Liquidator of Southern)
American Insurance Company,)

Plaintiff,)

vs.)

Case No. 96-C-226-B

TRADE WINDS MOTOR HOTEL)
EAST, INC.,)

Defendant.)

ENTERED ON DOCKET
DATE AUG 04 1997

ORDER

The Court has for decision the parties' respective motions for summary judgment pursuant to Fed.R.Civ.P. 56. After careful consideration of the record and the applicable legal authorities, the Court is of the opinion Plaintiff, Robert E. Wilcox' ("Wilcox") Motion for Summary Judgment (Docket #32) should be DENIED and Defendant, Trade Winds Motor Hotel East, Inc.'s ("Trade Winds") Motion for Summary Judgment (Docket #22) should be GRANTED.

UNDISPUTED FACTS

1. Southern American Insurance Company ("Southern American") is an insurance company domiciled in the state of Utah. (See Complaint, page 2, paragraph 2).
2. Southern American sold a commercial umbrella liability insurance policy, # SU 019090, to Trade Winds in September 1984, which at relevant times herein was in force. (See Trade Winds' Brief in Support of Motion for Summary Judgment, Ex. B).

44

3. Under the terms of the commercial umbrella liability policy the insurer, Southern American, became liable up to the limits of the \$5 million coverage if Trade Winds primary insurance coverage in the amount of \$500,000.00 with American Casualty Company of Reading, Pennsylvania, was exhausted. (See Wilcox' Brief in Support of Motion for Summary Judgment, Ex. A, and Defendant's Ex. A to Response Brief filed July 15, 1997).

4. On July 5, 1985, Mario Pinal, a minor invitee, drowned in one of Trade Winds' swimming pools. Pinal's parents sued Trade Winds in Tulsa County District Court Case No. CJ-85-6438, in a wrongful death action resulting in a jury verdict against Trade Winds for actual damages, including prejudgment interest, of \$745,245.12, and punitive damages of \$316,000.00. (See Trade Winds' Brief in Support of Motion for Summary Judgment, Ex. D and E).

5. Trade Winds appealed the Pinal judgment and on April 30, 1991, the Oklahoma Court of Appeals affirmed the Pinal judgment which became final. (See Trade Winds' Brief in Support of Motion for Summary Judgment, Ex. E).

6. On August 4, 1989, Trade Winds sued its primary insurer, American Casualty Company of Reading, Pennsylvania, for bad faith in Tulsa County District Court Case No. CJ-89-4226, for failure to settle the Pinal claim for \$350,000.00, as it had an opportunity to do prior to the jury verdict. (See Wilcox' Brief in Support of Motion for Summary Judgment, Ex. B).

7. After Trade Winds' suit against American Casualty Company was removed to the United States District Court for the Northern District of Oklahoma, Southern American

intervened in the matter as a party plaintiff. (See Wilcox' Brief in Support of Motion for Summary Judgment, Ex. C and D).

8. Trade Winds and Southern American settled their lawsuit against American Casualty Company. As a result of the settlement, on May 16, 1991, Southern American made payment in the amount of \$173,000.00, as its contribution to the settlement as excess carrier. The total settlement amount, including post-judgment interest, was \$1,319,000.00, the balance thereof paid by contributions from American Casualty Company and the insured, Trade Winds. (See Wilcox' Brief in Support of Motion for Summary Judgment, Ex. E, F, G and H, and Defendant's Brief in Support of Motion for Summary Judgment, Ex. F).

9. Trade Winds did not actually receive any of the \$173,000.00, but it was paid by Southern American for and on behalf of the insured, Trade Winds, in settlement of the Pinal wrongful death final judgment.

10. The principal business of Southern American Insurance Company, as an excess carrier, is to in good faith pay covered claims on behalf of its insured that exceed the insured's primary coverage.

11. On March 26, 1992, upon petition filed March 25, 1992, by the Utah Insurance Commissioner, Southern American was ordered liquidated by the Third Utah Judicial District Court in and for Salt Lake County, Case No. 920901617. (See Wilcox' Brief in Support of Motion for Summary Judgment, Ex. J and K).

12. At the time of the payment of the \$173,000.00, by Southern American on behalf of its insured, Trade Winds, ten (10) months prior to Southern American's petition in

liquidation, Trade Winds had no knowledge, or reasonable cause to believe, that Southern American was or was about to become insolvent, nor was the Trade Winds a Utah Code Ann. §31A-27-321 (1)(b)(iv) type of creditor.

13. The Plaintiff, liquidator, commenced this action against Trade Winds on March 22, 1996.

THE STANDARD OF FED.R.CIV.P. 56 MOTION FOR SUMMARY JUDGMENT

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

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

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

summary judgment must be denied. *See Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

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

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

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

ANALYSIS AND LEGAL CONCLUSIONS

Wilcox, as Southern American liquidator, seeks to recover from Trade Winds the \$173,000.00 payment made by Southern American on behalf of its insured, Trade Winds, as a preferential transfer outside the ordinary course of business made within one (1) year of Southern American’s Liquidation Petition. The dispositive issues raised by this matter are whether the May 16, 1991, \$173,000.00 payment from Southern American on behalf of Trade Winds is a voidable preference under the Utah Insurance Code and did Plaintiff timely commence this action.

Pertinent provisions of the Utah Insurance Code dealing with insurer’s liquidation are:

§31A-27-321

Voidable preferences and liens.

(1)(a) As used in this chapter, "preference" means a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or allowed by the insurer within one year before the filing of a successful petition for rehabilitation or liquidation under this chapter, the effect of which transfer may enable the creditor to obtain a greater percentage of his debt than another creditor of the same class would receive. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, transfers otherwise qualifying are considered to be preferences if they are made or allowed within one year before the filing of the successful petition for rehabilitation or within two years before the filing of the successful petition for liquidation, whichever time is shorter.

(b) Any preference may be avoided by the rehabilitator or liquidator, if:

- (i) the insurer was insolvent at the time of the transfer;
- (ii) the transfer was made within four months before the filing of the petition;
- (iii) the creditor receiving it or to be benefited by it or his agent acting with reference to the transfer had, at the time when the transfer was made, reasonable cause to believe that the insurer was or was about to become insolvent; or
- (iv) the creditor receiving it was an officer, an employee, an attorney, or other person who was in fact in a position of comparable influence in the insurer to an officer, or any shareholder holding directly or indirectly more than 5% of any class of equity security issued by the insurer, or any other person with whom the insurer did not deal at arm's length.

* * *

(d)(4) The receiver may not avoid a transfer of property under this section for or because of:

* * *

(b) the payment, within 45 days after a debt is incurred, of a debt incurred in the ordinary course of the business of the insurer and according to normal business terms;

§31A-1-301

(21) "Creditor" means a person, including an insured, having any claim, whether matured, unmatured, liquidated, unliquidated, secured, unsecured, absolute, fixed or contingent.

Defendant asserts that §31A-27-321(1)(b)(i), (ii), and (iii) are to be read in the conjunctive, i.e., unless all three are satisfied a preference is not voidable by the liquidator. Such a construction, when read in conjunction with §31A-27-321(1)(a), ignores the one year provision in the definition of a preference. The Court concludes the Utah legislature intended §31A-27-321(1)(b)(i), (ii), and (iii) to be read in the disjunctive.

However, the Court concludes §31A-27-321(d)(4)(b) under the undisputed facts prevents the liquidator (receiver) from avoiding the transfer of the \$173,000.00 herein.

The subject transfer was made by Southern American ten (10) months before the Southern American liquidation petition was filed. The payment of the \$173,000.00 was made within forty-five (45) days of the Pinal judgment becoming final, and at the time, Trade Winds had no knowledge of or reasonable cause to believe Southern American was insolvent.

The sole purpose and business of an excess liability carrier is the investigation, negotiation, settlement, and/or litigation of covered claims against its insured in exchange for the premium duly paid. The insurance policy (Wilcox' Exhibit A to Brief in Support of Motion for Summary Judgment) makes clear that litigation defense and payment is integral to the ordinary business of a liability carrier, either primary or excess. The Southern American insurance policy under paragraph 1, Coverage, states:

To pay on behalf of the insured for ultimate net loss in excess of the retained limit hereinafter stated which the insured may sustain by reason of liability imposed upon the insured by law or assumed by the named insured under contract: * * *

The very nature of the liability insurance contract contemplates and covers the defense of lawsuits and the ultimate payment of judgments.

Wilcox in his reply brief argues that litigation such as herein between the primary carrier, the insured, and the excess carrier, takes the matter out of the ordinary course of business of the insurer. Wilcox' argument states:

If SAIC had simply paid Trade Winds' claim based on the wrongful death judgment, that payment would have been in the ordinary course of business. SAIC does not pay the claim, however. Instead it embarked a complex two-year course of litigation with Trade Winds and ACC. The payment at issue was made pursuant to settlement of this litigation. While SAIC's underlying antecedent liability to Trade Winds may have been incurred in the ordinary course of business: a claim under an excess loss policy, the payment was outside the ordinary course of business because it was made in connection with the settlement of the litigation.

(Wilcox' Reply and Surreponse Brief, pages 9-10). Wilcox' cited cases are inapposite because they do not involve liability insurance carriers whose ordinary course of business is to litigate disputed claims.

The gist of Wilcox' argument is, in effect, that had Southern American simply paid the approximately \$800,000.00 [$\$500,000.00$ (primary) + $\$800,000.00$ (excess) = $\$1.3$ million], it would have clearly been in the ordinary course of business, but by contesting and litigating the primary carrier's failure to settle within the policy limits, when it had an opportunity to do so, and by further contesting, negotiating and litigating the punitive damage

coverage issue, Southern American took the matter out of the ordinary course of business as an insurer. In essence, Wilcox argues that by litigating these hotly contested bad faith and punitive damage issues, common disputes in the insurance industry, and saving the Southern American estate over \$600,000.00 in the process, it was no longer in the ordinary course of business as an insurer. Litigation of bad faith claims and disputes over punitive damage coverage is commonplace and ordinary in the liability insurance industry.¹

The subject of “preference” and “ordinary course of business” is a matter frequently involved in bankruptcy cases. 11 U.S.C. §547. Generally, an analysis of what constitutes “ordinary course of business” in the context of a bankruptcy proceeding involves looking to what is “ordinary in relation to the standards prevailing in the relevant industry.” *In re Transue & Williams Stamping Co.*, 1995 WL 646834, *3 (Bankr.N.D.Ohio) (citing *Logan v. Basic Distribution Corporation (In re Fred Hawes Organization, Inc.)*, 957 F.2d 239, 244 (6th Cir. 1992)).

Was the payment “according to normal business terms?” Each litigated liability claim

¹The affidavit of Allen I. Widiss (Trade Winds' Ex. A to Trade Winds' Response in Opposition to Wilcox' Motion for Summary Judgment) is not considered as probative herein wherein it expresses an opinion on the ultimate issue of law concerning “a debt incurred in the ordinary course of business of the insurer and according to normal business terms” because such opinion invades the province of the court. Further, neither will the Court attach any probative value to the similarly expressed opinions in the affidavits of Max Levine and Richard E. Foss (Wilcox' Ex. A and B, respectively, to Wilcox' Reply and Surreponse Brief) because such opinions pertain to the ultimate issue of law and invade the province of the court. Although Trade Winds' objections to the belated filing of the affidavits of Levine and Foss are well taken, such are moot in view of the Court's ruling herein. Trade Winds' request for an award of attorney's fees and costs for bringing of the objection is hereby overruled.

is ordinarily unique and different from others in terms of the personal injury or property damage experienced and asserted. "Normal business terms" in concluding a litigated personal injury dispute, or dispute between a primary and excess carrier, are what the parties in an arm's length good faith negotiation agree. The evidence before the Court supports that the \$173,000.00 transfer herein was pursuant to an arm's length good faith negotiation in the ordinary course of business of the insurer, Southern American.

Additionally, the Court concludes the applicable Oklahoma three-year statute of limitations period of Okla. Stat. tit. 12, §95(2), an action upon a liability created by statute, applies. Wilcox' Complaint and its interrogatory answers Nos. 5, 6 and 7 (Ex. H to Trade Winds' Brief in Support of Motion for Summary Judgment) state that the action is based upon Utah Code Ann. §31A-27-321. The subject \$173,000.00 payment herein was made on May 16, 1991, and this action was commenced on March 22, 1996. The liquidation petition was filed on March 25, 1992, three years and eleven months before the commencement of this action.

The parties agree in their briefs the applicable statute of limitations is governed by the law of the forum, Oklahoma. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988). The substantive law governing the issues herein is that of the state of Utah. *See Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 1469 (1945); *see also Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 1234 (1949).

Wilcox argues the applicable statute of limitations under Oklahoma law is five years

under Okla.Stat. tit. 12, §95(1), because this action involves a suit on a written contract. The payment of the \$173,000.00, was made by Southern American under its written contract of insurance with its insured, Trade Winds. However, Wilcox' action as liquidator to recover the sum as a voidable preference proceeds under Utah Code Ann. §31A-27-321.

Utah Code Ann. §78-12-33 states the following regarding limitations applying to actions brought for and on behalf of the state or other governmental entity:

The limitations in this article apply to actions brought in the name of or for the benefit of the state or other governmental entity, the same as to actions by private parties, ... (exception made as to asbestos cases)

Regarding actions brought by the liquidator, Utah Code Ann. §31A-27-317(3) states:

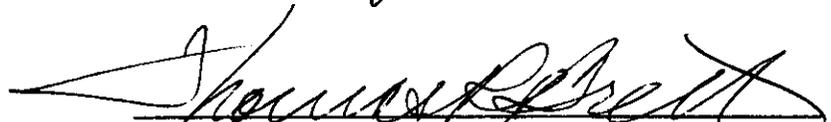
(3) The liquidator may within two years subsequent to an order for liquidation or within any further time as applicable law permits, institute an action or proceeding on behalf of the estate of the insurer upon any cause of action against which the period of limitations fixed by applicable law had not expired at the time of the filing of the petition.

Plaintiff attempts to urge that the liquidator acts on behalf of the State of Utah and, therefore, has immunity from the operation of periods of limitation. The above-quoted sections of the Utah Code indicate to the contrary, i.e., the liquidator is not generally immune from periods of limitations as a representative of the State of Utah.

At the outside, the liquidator had three years from the date of the filing of the liquidation petition, March 25, 1992, to commence this action, which would be by March 25, 1995. The action was not commenced until March 22, 1996, thus the applicable three-year period of limitations had expired.

For the reasons expressed herein, the Defendant Trade Winds' Motion for Summary Judgment is hereby GRANTED (Docket #22), and the Motion for Summary Judgment of the Plaintiff, Wilcox, is hereby DENIED (Docket #32). A separate Judgment in favor of Trade Winds and against Wilcox as expressed herein will be entered contemporaneous with the filing of this Order.

IT IS SO ORDERED this 1st day of August, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SAC

ON DOCKET
8-4-97

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

CAROLE RICHMOND,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF REGENTS FOR THE)
 UNIVERSITY OF OKLAHOMA,)
 THE UNIVERSITY OF)
 OKLAHOMA d/b/a UNIVERSITY)
 OF OKLAHOMA HEALTH)
 SCIENCES CENTER,)
)
 Defendant.)

NO. 96-C-340K

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

DISMISSAL OF CLAIMS

Plaintiff Carole A. Richmond hereby dismisses with prejudice the following claims against Defendant Board of Regents for the University of Oklahoma, University of Oklahoma d/b/a University of Oklahoma Health Services Center:

- 1) Claims under the Equal Employment Opportunity Act 42 U.S.C. Sec. 200 et. seq. ("Title VII") and applicable parts of the Civil Rights Act of 1991 based on race discrimination and sex discrimination.
- 2) Claim under the Americans with Disabilities Act based on disability discrimination.

CL

Plaintiff retains its claim of retaliation under the Equal Employment Opportunity Act, 42 U.S.C. Sec. 200 et. seq. and related damages claimed or sought under the Equal Employment Opportunity Act, 42 U.S.C. Sec. 200 et. seq. and the Civil Rights Act of 1991.

Respectfully submitted,


PATTERSON BOND, OBA #942
420 Beacon Building
406 South Boulder Avenue
Tulsa, Oklahoma 741-3-3825
(918) 583-0303
Facsimile (918) 582-6101

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Application was mailed, first class postage prepaid, this 1st day of August, 1997, to the following named persons, to-wit:

Fred Gipson
Lisa Millington
University of Oklahoma
Office of Legal Counsel
660 Parrington Oval, Suite 213
Norman, Oklahoma 73019


PATTERSON BOND

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

PROVIDENT LIFE AND ACCIDENT)
INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
JOHN E. BUNT,)
)
Defendant.)

Case No. 97CV 548BU(J)

F I L E D

AUG - 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE AUG 04 1997

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Provident Life and Accident Insurance Company, and hereby
dismisses the above captioned cause with prejudice.

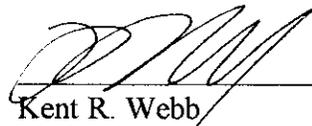
Provident Life and Accident
Insurance Company,



Kent R. Webb, OBA #16466
WHITE & ASSOCIATES
111 West Fifth Street, Suite 510
Tulsa, Oklahoma 74103-4259
(918) 582-7888
Attorney for Plaintiff

Certificate of Mailing

I, Kent R. Webb, do hereby certify that on this 1st day of August, 1997, I mailed a true and
correct copy of the foregoing document, postage prepaid, to: John Bunt, 701 E. 11th St., Claremore,
Oklahoma 74017, and Michael L. Gatrost, 1711 Westport Rd., Kansas City, Missouri 64111.


Kent R. Webb

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

CHARLENE HALL and LOWELL HALL, as
husband and wife,

Plaintiffs,

vs.

JONATHAN LEE WILLIAMS, an individual,
J.C. PENNEY COMPANY, INC., a foreign
corporation, and THE HERTZ CORPORATION,
a foreign corporation,

Defendants.

FILED

AUG - 1 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96 CV 837 W

RECEIVED CLERK'S OFFICE
AUG 04 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties to this action, the Court having previously heard statement of counsel and testimony of witnesses sworn and having approved the settlement agreement, and pursuant to the terms of said settlement agreement, do herein stipulate that the settlement has been satisfied and that this matter should be dismissed with prejudice to its refiling.

WHEREFORE, the parties pray that this Honorable Court enter its Order dismissing this matter with prejudice as to refiling.

Charlene Hall
CHARLENE HALL, Plaintiff

Lowell Hall
LOWELL HALL, Plaintiff

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

By: Ann E. Allison
Ann E. Allison, #13234
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant herein, hereby certifies that a true and correct copy of the above and foregoing **Stipulation of Dismissal with Prejudice** was served upon Plaintiff herein by depositing the same in the United States mail, postage prepaid, and properly addressed to Plaintiff's counsel of record, as follows:

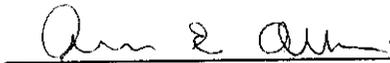
Paul D. Brunton
610 South Main, Suite 312
Tulsa, Oklahoma 74119-1258
ATTORNEY FOR PLAINTIFFS

and

C. Jack Maner
C. JACK MANER, P.C.
201 West 5th Street, Suite 550
Tulsa, Oklahoma 74103
ATTORNEY FOR PLAINTIFFS

on this 1st day of August, 1997; with the original being filed with:

Phil Lombardi
Clerk of the U.S. District Court
for the Northern District
411 U.S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103



ANN E. ALLISON

g:\lit\neb\42\29

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

JUL 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKY G. WHITE,)
SS# 444-56-3213)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting Commissioner)
of Social Security Administration,)
)
Defendant.)

No. 95-C-1246-E ✓

ORDER

FILED ON DOCKET
DATE **AUG 01 1997**

Plaintiff, Ricky G. White, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts error because the ALJ improperly discounted his recurrent hand tremor and limitation on bending and stooping in concluding that he could return to his former work as a computer operator on August 1, 1989. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

^{1/} Plaintiff filed an application for disability and supplemental security insurance benefits on November 13, 1989. [R. at 16]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge James D. Jordon (hereafter, "ALJ") was held November 19, 1991. [R. At 16]. By order dated January 7, 1992, the ALJ determined that Plaintiff was entitled to a closed period of disability from July 31, 1987 to August 1, 1989. [R. at 16]. Plaintiff appealed the ALJ's decision to the Appeals Council. On March 15, 1994 the Appeals Council remanded, following remand from the United States District Court for the Northern District of Oklahoma, for consideration of the issue of "medical improvement" to support cessation of benefits. [R. at 343]. A supplemental hearing was held on June 16, 1994 before ALJ Stephen C. Calvarese. [R. at 343]. By Order Dated June 27, 1995, the ALJ determined again that plaintiff's disability ceased on August 1, 1989. [R. At 343]. Plaintiff again appealed to the Appeals Council, and, on November 13, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 329].

9

I. PLAINTIFF'S BACKGROUND

Ricky White sought disability insurance benefits due to back problems which resulted in 2 surgeries. White was born July 18, 1955, and has a high school education with some college. His past work is as a computer operator, which is light, semiskilled work. White began to have back problems in 1986, and, in September of that year underwent surgery to the lumbar spine in which certain plates and screws were intalled in his back. The screws broke, and he underwent a second surgery on August 3, 1987 wherein the hardware was replaced. His physician, Dr. Mayoza, testified that, by August 1, 1989, White had no interference with his ability to sit, stand, walk, or climb steps, and that he had reached "maximum medical improvement." The sole issue here is whether White was disabled after August 1, 1989.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims. See 20 C.F.R. § 404.1520. Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R.

Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Disability under the Social Security Act is defined as the

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

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{2/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

^{2/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was disabled from July 31, 1987 to July 31, 1989, but that his disability ceased on July 31, 1989 because of medical improvement. The ALJ concluded that, as of July 31, 1989, plaintiff could return to his past work as a computer operator.

IV. REVIEW

Here the sole issue is whether White was disabled from August 1, 1989 to September 1, 1990 ^{3/}, or stated, differently, whether the ALJ erred in determining that, as of, August 1, 1989, White was capable of performing his past relevant work. In a "step four" case, as this is, the ALJ has a duty of determining the individual's residual functional capacity, the physical and mental demands of his prior job, and the ability of the individual to return to that job. Henrie v. U.S. Dept. Of Health and Human Services, 13 F.3d 359, 361 (10th Cir. 1993). White argues that he could not

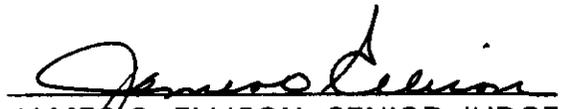
^{3/} It is undisputed that plaintiff resumed work as a telemarketer on September 1, 1990.

return to his former occupation because of hand tremors and his limitation on bending and stooping. The ALJ, however, found that White retained the residual functional capacity to perform work activities at the light to medium exertional level, could lift or carry up to 30 pounds, walk 1 hour, sit 4 hours, and stand 2 hours without interruption, with occasional bending, squatting, crawling and climbing. The ALJ further noted that the second surgery resulted in a solid fusion, and that White's physician indicated there should be no problem with sitting, standing, walking, climbing stairs, or picking up and lifting weights.

With respect his claims of pain and hand tremors, the ALJ found that White had suffered hand tremors since the 1960's and had been able to work despite them. The ALJ also found White not to be credible on his claims of pain. He noted that White's activities were very similar to those before his surgery, that White took only over-the-counter- pain relief products, and that he no longer seeks medical attention for his back. Taking all these factors into account, the Court finds that the ALJ did not err in determining that White had a medical improvement, was no longer disabled, and could return to his previous work as early as August 1, 1989.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 3/57 day of July 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

JUL 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

F.A.I.T.H. (Families Against Injustice to
Humanity); B.J. STOUFFER II, et al.,)

Plaintiff,)

vs.)

No. 97-C-654-B

OKLAHOMA AGENCIES;)
STIFEL, NICOLAUS and COMPANY,)
INC. of ST. LOUIS, MISSOURI, et al.,)

Defendants.)

FILED ON DOCKET
AUG 7 1997

ORDER

Before the Court is a Complaint for Declaratory and Injunctive Relief brought by plaintiff B.J. Stouffer II ("Stouffer") individually and as purported representative of a class of death row inmates incarcerated at Oklahoma State Penitentiary in the "H Unit."¹ Stouffer alleges subject matter jurisdiction pursuant to 28 U.S.C. §1343 for his civil rights claim under 42 U.S.C. §1983, and pursuant to 18 U.S.C. §§1964 for his civil RICO claim under 18 U.S.C. §1962. The gravamen of Stouffer's forty-five (45) page complaint is a §1983 claim of constitutional deprivation of his and fellow male death row inmates' rights; to wit, the adoption of policies and practices which deprive the inmates in H-Unit of legal counsel and medical examinations in violation of the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and the laws of Oklahoma. Defendants include officials formerly and presently employed by the Oklahoma State Penitentiary and Oklahoma Department of Corrections; Attorney General Drew

¹Stouffer has moved for leave to proceed *in forma pauperis*. (Docket No. 2). Because the Court finds that venue lies in the Eastern District of Oklahoma, the Court does not address this motion.

Edmondson; Governor Frank Keating; Oklahoma state agencies, including the Department of Human Services, Office of State Finance, Office of Public Affairs, and Oklahoma Indigent Defense System; Eastern State Hospital; Stifel, Nicolaus and Company, Inc.; individual attorneys; and state court judges. Stouffer seeks injunctive and declaratory relief, which includes, *inter alia*, restraining defendants from

confiscations, reprisals, withholding physical access to law library, creative accounting procedures, threats on double celling, movement of assets without specific approval, withholding effective legal counsel after court appointment, charging for postage, photocopies, and medical prescriptions, (which are to be at state expense for indigents) delayed mailings of legal mailings, rejections of legitimate requests for photocopies of legal pleadings, exhibits, letters, requests etc; ignoring the rights of use of telephone for legal calls with all personnel associated with preparation for proceedings challenging the sentences of death of Plaintiffs and the member of their class and for all civil cases relating to Plaintiffs.

Stouffer also seeks a writ pursuant to 28 U.S.C. §1651 prohibiting execution of any of Plaintiffs' class and tolling of deadlines during the pendency of this action.

Although Stouffer attempts to allege subject matter jurisdiction in his complaint, he asserts no basis for venue in this Court. As this action is one involving the policies, procedures, operations and management of the H-Unit at the Oklahoma State Penitentiary in McAlester, Oklahoma, the Court finds that venue properly lies in the Eastern District, and not the Northern District of Oklahoma. *See 28 U.S.C. §1391(b)*. Accordingly, the Court transfers this case to the Eastern District of Oklahoma.

ORDERED this 28th day of July, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

GARY B. HOBBS,)
)
Plaintiff,)
)
vs.)
)
TONY M. GRAHAM, GORDON B.)
CECIL, CATHERINE DEPEW HART,)
SCOTT WOODWARD, DAVID JANSEN,)
ROBERT PRUDEN, and UNITED)
STATES OF AMERICA,)
)
Defendants.)

ENTERED ON DOCKET
DATE 8-1-97

No. 97-CV-568-H ✓

FILED
JUL 31 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, a federal prisoner incarcerated in Alabama, has paid the filing fee to commence this Bivens action against the United States of America as well as the former U.S. Attorney for the Northern District of Oklahoma, several Assistant U.S. Attorneys, and Special Agents for the Internal Revenue Service and the Federal Bureau of Investigation, all in their individual and official capacities.

As a preliminary matter, the Court notes that an identical Bivens-type action was filed in forma pauperis by Plaintiff on June 17, 1996, in Case no. 96-CV-545-H, against these same Defendants. That action was dismissed on July 29, 1996, under the screening provisions of The Prison Litigation Reform Act of 1996, 28 U.S.C. § 1915A, as frivolous.

In this pro se complaint, Plaintiff sues Defendants for taking his personal and real estate property between June 21, 1990, and October 24, 1990, without Due Process of Law and without the payment of just compensation. He seeks damages in the amount of \$2,607,500.

2

ANALYSIS

Since Plaintiff is proceeding pro se, the Court must liberally construe his pleading. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). While pro se complaints are held to less stringent pleading requirements, it is not the proper function of the court to assume the role of advocate. The broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. Id. A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. Id. at 1109.

Nevertheless, pursuant to Fed. R. Civ. P. 12(b)(6), the Court shall, on its own motion, dismiss Plaintiff's complaint. While dismissals under Rule 12(b)(6) typically follow a motion to dismiss, a court may dismiss sua sponte where it is patently obvious that the plaintiff(s) cannot prevail on the facts alleged, and allowing an opportunity to amend would be futile. Hall, 935 F.2d at 1109-10. The Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff's claims against the individual Defendants are barred by the two-year statute of limitations. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed"). "[A] Bivens action, like an action brought pursuant to 42 U.S.C. § 1983, is subject to the statute of limitations of the general personal injury statute in the state where the action arose." Industrial Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994). The applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988).

Plaintiff's action arose in 1990 when Defendants allegedly took possession of his personal and real estate property. Therefore, Plaintiff's action would be time-barred if brought after October, 1992. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (the State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners). As Plaintiff filed this case on June 13, 1997, it is clearly time-barred, absent an applicable exception or tolling provision as provided by Oklahoma law. Id., at 539 (stating that limitations periods in § 1983 suits are determined by the appropriate state statute of limitations and the coordinate tolling rules) .

In his complaint, Plaintiff attempts to overcome the bar imposed by the statute of limitations by arguing that (1) pursuant to 12 Okla. Stat. §§ 93, 95(3) and 95(5), the applicable time period is five (5) years; (2) the limitations period did not begin to run until June, 1995 when he first gained access to critical documents allegedly withheld from Plaintiff by Defendants; and (3) Oklahoma's "savings statute," 12 Okla. Stat. § 100, applies to these facts and serves to effect a timely filing of the instant case.

The Court finds none of Plaintiff's arguments convincing. As discussed supra, the Court finds that Plaintiff's claims accrued in 1990 when Defendants allegedly took possession of Plaintiff's real and personal property. At that time, Plaintiff had the means of discovering the bases of Defendant's actions. See Gearhart Industries, Inc. V. Grayfox Operating Co., 829 P.2d 1005 (Okla. Ct. App. 1992). As a result, the applicable limitations period began to run in 1990, not in 1995 when Plaintiff states he first acquired "bank records and other financial records" allegedly withheld from Plaintiff by Defendants. Therefore, a lawsuit filed on June 13, 1997, is untimely whether the applicable time period is two (2) years or five (5) years.

Similarly, Plaintiff's reliance on 12 Okla. Stat. § 100 is misplaced. That statute provides that

a new action may be commenced within one (1) year after a *timely filed* case fails for any reason other than a decision on the merits. Plaintiff's previous lawsuit filed against these same defendants, 96-CV-545-H, was dismissed as time-barred. In other words, the Court found that it was not *timely filed*. Therefore, Plaintiff cannot benefit from the one (1) year refiling period allowed by 12 Okla. Stat. § 100 and his instant claims against the individual Defendants are time-barred. See Grider v. USX Corp., 847 P.2d 779, 786 (Okla. 1993).

Plaintiff's claims against the United States also lack an arguable basis in law because the United States is immune from suit under the doctrine of sovereign immunity. See generally United States v. Testan, 424 U.S. 392 (1975). "Sovereign immunity generally bars suits against the United States or its agencies, whether brought by a private party or by a state." Kelley v. United States ex rel. Department of Justice, 69 F.3d 1503, 1507 (10th Cir. 1995), cert. denied, 116 S.Ct. 1966 (1996). Because Plaintiff seeks money damages and does not seek "to enjoin the enforcement of an unconstitutional statute," id., a federal court lacks jurisdiction to entertain such a claim. See Neitzke v. Williams, 490 U.S. 319, 327 (1989).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's action is DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6).

IT IS SO ORDERED.

This 31st day of July, 1997.



Sven Erik Holmes
United States District Judge

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

FILED
JUL 31 1997

STEPHEN CRAIG BURNETT,)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT,)
)
 Respondent.)

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

No. 96-CV-334-H

ENTERED ON DOCKET

DATE 8-1-97

ORDER

Petitioner Burnett filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss, arguing that the petition contains unexhausted grounds for relief and should be dismissed. This Court agrees.

The Court notes that in his petition for writ of habeas corpus, Petitioner fails to identify specifically each ground providing a basis for habeas relief. Instead, he provides a three page description of the events surrounding his conviction, focusing on the conduct of his counsel, two court-appointed public defenders. He states that "[m]y counsel was ineffective in that they encouraged me to plead guilty to something that was not even a crime and 'coached' me in how to present this to the Judge at the plea bargain proceeding on April 26, 1994" and that he "would like to incorporate all of my legal arguments made prior to this time in this petition." (Petition, Doc. 1, page 5-C). The Court concludes that Petitioner intends to include a claim of ineffective assistance of counsel in this habeas action. See Haines v. Kerner, 404 U.S. 519 (1972).

A petitioner may seek federal habeas review only if he has exhausted all available state court remedies, and, in the course of those proceedings, fairly presented his constitutional claims to the

state's courts. 28 U.S.C. § 2254(b); Momient-El v. DeTella, No. 96-2050, 1997 WL 364531, at *2 (7th Cir. July 1, 1997). 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). The exhaustion requirement is based on the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950). The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982). Finally, it is well-established that a federal district court must dismiss a habeas corpus petition containing both exhausted and unexhausted grounds for relief. Rose v. Lundy, 455 U.S. 509 (1982).

In his brief in support of the motion to dismiss, Respondent alleges that Petitioner now submits, for the first time, a Sixth Amendment claim of ineffective assistance of counsel. According to Respondent, Petitioner asserts that his attorneys "coached" him and encouraged him to plead guilty, and misled him with respect to the punishment he would receive if he plead guilty to the charge. Also, Respondent argues that Petitioner appears to assert, again for the first time, that his guilty plea was not knowing and voluntary since he was under the influence of anti-depressant medication. According to Respondent, neither of these claims has been presented to the Oklahoma appellate court.

In his objection, Petitioner argues that although he did not use the precise expression

"ineffective assistance of counsel" when presenting his claims to the Oklahoma courts, he nonetheless raised the issue in all of his pleadings. Petitioner does not address whether he has presented to the Oklahoma appellate court his claim concerning the influence of anti-depressant medication on the voluntariness of his plea.

To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the highest state court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). In determining whether an issue has been fairly presented to a state court, the Seventh Circuit Court of Appeals looks to whether the petitioner's argument: "(1) rel[ied] on pertinent federal cases; (2) rel[ied] on state cases applying constitutional analysis to a similar factual situation; (3) assert[ed] the claim in terms so particular as to call to mind a specific constitutional right; or (4) allege[d] a pattern of facts that is well within the mainstream of constitutional litigation." Momient-El v. DeTella, No. 96-2050, 1997 WL 364531, at *3 (7th Cir. July 1, 1997) (quoting Verdin v. O'Leary, 972 F.2d 1467, 1473-74 (7th Cir. 1992)).

In the instant case, Petitioner entered a plea of guilty to the charge levied against him and was sentenced accordingly by the trial court judge. Petitioner did not withdraw his plea and did not file a direct appeal. He did, however, seek post-conviction relief. In both his application for post-conviction relief filed in the state district court and his brief in support of his petition in error filed in the Oklahoma Court of Criminal Appeals, Petitioner alleges that his counsel failed to provide information that would have affected his decision to plead guilty to the charge. However, nowhere in his pleadings did Petitioner allege that the acts and omissions of his counsel rose to the level of a constitutional violation. Nor does it appear that Petitioner ever claimed that he was under the influence of medications which influenced the voluntariness of his plea. Furthermore, neither the state district court nor the Oklahoma Court of Criminal Appeals addressed either of these issues in their

opinions denying post-conviction relief.

After reviewing the record in this case and applying the factors advocated by the Seventh Circuit to these facts, the Court finds that in referencing his counsel in the claims presented to the Oklahoma courts, Petitioner did not rely on pertinent federal cases to argue ineffective assistance of counsel, did not rely on state cases applying constitutional analysis to a similar factual situation, failed to assert the claim in terms so particular as to call to mind a specific constitutional right, and failed to allege a pattern of facts that is well within the mainstream of constitutional litigation. As a result, Petitioner did not "fairly present" his claim of ineffective assistance of counsel to the Oklahoma Court of Criminal Appeals in his post-conviction petition. Similarly, Petitioner has not presented to the Oklahoma appellate court his claim concerning the impact of medications on the voluntariness of his plea. The Court concludes, therefore, that the petition contains unexhausted claims and should be dismissed for failure to exhaust available state remedies.

Petitioner has also filed two motions to substitute parties (Docket #s 6 and 8) requesting that the Warden of the correctional facility where he is presently incarcerated be substituted as the named respondent. The Court finds that today's order renders those motions moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss (Docket #4) is **GRANTED**. This action is **dismissed without prejudice** for failure to exhaust state remedies.
2. Petitioner's motions to substitute parties (Docket #s 6 and 8) are **denied as moot**.

IT IS SO ORDERED.

This 31st day of July, 1997.



Sven Erik Holmes
United States District Judge

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

HERMAN EUGENE MACK,)
)
Plaintiff,)
)
vs.)
)
DAVE HILL, et al.,)
)
Defendants.)

ENTERED ON DOCKET

DATE 8-1-97

No. 97-CV-276-H

F I L E D

JUL 31 1997

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

ORDER

Plaintiff, a prisoner appearing pro se, filed a civil rights complaint on behalf of the "indigent class" imprisoned at Tulsa County Jail. On April 16, 1997, Plaintiff was granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, as amended by The Prison Litigation Reform Act of 1996, Pub.L.No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996). On June 11, 1997, the Court declined to certify the class and allowed Plaintiff fifteen (15) days, or until June 26, 1997, to submit an amended complaint. Plaintiff was ordered to identify each Defendant, to identify specifically any injury he himself had sustained as a result of the alleged violations of his constitutional rights, to identify specifically the conduct of each Defendant which he alleged to be violative of his constitutional rights, and to set out each of his claims with more specificity (Docket #9). That Order stated that this case would be dismissed as frivolous or for failure to state a claim should Plaintiff fail to amend his complaint.

A review of the file indicates that Plaintiff has not submitted an amended complaint or otherwise demonstrated good cause for his failure to comply with the June 11, 1997 Order. Because Plaintiff has not amended his complaint, the Court finds that this case should be dismissed, pursuant to 28 U.S.C. § 1915A(b), for failure to state a claim upon which relief may be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. This case is **dismissed for failure to state a claim upon which relief may be granted.**
2. The Clerk is directed to **flag** this as a dismissal under 28 U.S.C. § 1915A(b).
3. Plaintiff's motion to support evidence for an order of injunction relief (Docket #6) is **denied as moot.**

IT IS SO ORDERED.

This 31st day of July, 1997.



Sven Erik Holmes
United States District Judge

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

FILED

JUL 31 1997

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

INDUSTRIAL POWER/BUSINESS)
SERVICES/VELMA ROSE, GAY, SPECIAL)
TRUSTEE)

Plaintiff,)

v.)

UNITED STATES OF AMERICA,)
INTERNAL REVENUE SERVICE,)
REVENUE OFFICER HOMER WALKER,)
BOATMEN'S FIRST NATIONAL BANK,)
and ARKANSAS VALLEY STATE BANK)

Defendants.)

Case No. 97-CIV-483H

ENTERED ON DOCKET

DATE 8-1-97

ORDER DISMISSING DEFENDANT BOATMEN'S FIRST NATIONAL BANK

On the 31st day of July, 1997, there came for consideration the Motion to Dismiss filed by Defendant Boatmen's First National Bank of Oklahoma ("Boatmen's"). The Court being advised of the facts and having reviewed the pleadings in this case, finds as follows:

1. On or about June 11, 1997 Plaintiffs filed their Complaint herein naming Boatmen's as a defendant. The Plaintiffs' Complaint involves a Notice of Levy issued by the Internal Revenue Service for unpaid taxes which was served upon Defendant Boatmen's and Defendant Arkansas Valley State Bank.

2. The Notice of Levy served on Boatmen's directed it to turn over property and rights to property which it had or was obligated to pay to Business Services, Nominee of Bill Loghry, AKA Billie Joe Loghry.

3. In connection with the filing of the Complaint, Plaintiffs requested a Temporary Restraining Order ("TRO"). The TRO sought to prevent Boatmen's from turning over any property

18

to the IRS pending a determination of Plaintiffs' claims.

4. On June 12, 1997, a hearing was held on the TRO application. The result of that hearing was an agreement between the parties that Boatmen's be ordered to turn over property in its possession which was subject to the Notice of Levy to the Court to be held pending the determination of Plaintiff's claim. It was further agreed and the Court ordered that upon payment of the funds into the Court Boatmen's shall be dismissed from the case.

5. Boatmen's has tendered the funds in dispute to the Court Clerk for deposit into the Court Registry in accordance with the Court's June 12, 1997 Order and it therefore should be dismissed.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Defendant Boatmen's First National Bank of Oklahoma is dismissed from this action and is discharged from any further liability or claim Plaintiff may have relating to the Notice of Levy filed by the IRS.



The Honorable Sven Erik Holmes
United States District Court Judge
for the Northern District of Oklahoma

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

JIMMY R. KUDER,

Plaintiff,

vs.

KAREN STEED,
MIKE MANDERS,
AND BRENDA LAUCHNER,
in their individual
and official capacities,

Defendants.

Case No. 97 CV 388 H (W)

ENTERED ON DOCKET

DATE 8-31-97

FILED
JUL 31 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DISMISSAL WITHOUT PREJUDICE

The Court has considered the Motion for Dismissal Without Prejudice and Without Objection by Defendant filed by the Plaintiff, Jimmy R. Kuder, and finds that the dismissal should be allowed and the relief requested therein granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be and is hereby dismissed without prejudice against the Defendants, Karen Steed, Mike Manders and Brenda Lauchner, in their individual and official capacities.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court, that each party shall be responsible for their own costs and attorney fees incurred as a result of the above captioned cause.


UNITED STATES MAGISTRATE JUDGE

8-1-97

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

BARBARA SKAGGS, as guardian)
of the person and the estate of ROY)
SKAGGS, an incapacitated person,)
)
Plaintiff,)
)
v.)
)
OTIS ELEVATOR COMPANY, a New)
Jersey corporation,)
)
Defendant.)

JUL 31 1997

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

Case No. 96CV-605H

JUDGMENT IN A CIVIL CASE

On 14th day of July, 1997, the above-captioned cause came on for jury trial before the undersigned Judge of the United States District Court for the Northern District of Oklahoma, the Honorable Sven E. Holmes.

The Plaintiff, Barbara Skaggs, appeared in person by and through her attorney of record, Anthony M. Laizure; and the Defendant, Otis Elevator Company, appeared through its representative, Tom Herman, and by and through its attorneys of record, Robert E. Manchester and Shannon K. Emmons.

Thereupon, both parties announced ready for trial; a jury was empaneled; *voir dire* was conducted; peremptory challenges were executed; and a jury of eight persons was sworn. Trial was commenced and, after sworn testimony was adduced in open court and exhibits were introduced, the proceedings were adjourned for that day.

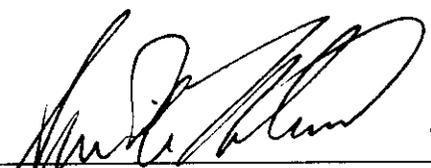
On July 15, 1997, the proceedings were reconvened; further testimony was adduced in open

court, and exhibits were introduced.

On July 16, 1997, the proceedings were reconvened; further testimony was adduced in open court; exhibits were introduced and Plaintiff rested. Defendant moved for Judgment as a Matter of Law, which was denied by the Court. Thereupon, Defendant elicited sworn testimony; exhibits were introduced, and the proceedings were adjourned for that day.

On July 17, 1997, the proceedings were reconvened; further testimony was adduced in open court; exhibits were introduced; Defendant rested; and Defendant renewed its Motion for Judgment as a Matter of Law, which the Court denied. After instructions were given and closing arguments made, the jury retired to deliberate. After deliberation the jury returned a verdict in favor of Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered upon the jury verdict, and that Plaintiff, Barbara Skaggs, guardian of the person and the estate of Roy Skaggs, an incapacitated person, take nothing by reason of her Complaint as amended and that judgment be entered in favor of Defendant, Otis Elevator Company, on the claims asserted in the Complaint as amended.



The Honorable Sven E. Holmes
United States District Judge for the
Northern District of Oklahoma

DATE 8-1-97

FILED

JUL 31 1997

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

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

IMOGENE H. HARRIS,
Plaintiff,

v.

CITY OF TULSA, OKLAHOMA, a municipal
corporation; TULSA TRANSIT AUTHORITY,
a charter agency of the City of Tulsa; and TULSA
AIRPORTS IMPROVEMENT TRUST, a public
trust,
Defendants.

Case No. 96-CV-230-H

ADMINISTRATIVE CLOSING ORDER

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

If, by 45 days from today, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 31st day of July, 1997.


Sven Erik Holmes
United States District Judge

DATE 8-1-97

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

JUL 31 1997

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

RONALD BALL,)
)
 Plaintiff,)
)
 v.)
)
 PNS, INC., d/b/a MACFRUGAL'S BARGAINS)
 CLOSE-OUTS,)
)
 Defendant.)

Case No. 97-CV-574-H ✓

ADMINISTRATIVE CLOSING ORDER

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

If, by 30 days from today, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 31ST day of JULY, 1997.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
8-1-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 31 1997

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

UNITED STATES OF AMERICA,

Plaintiff

v.

CAROL BURGER,

Defendant.

Civil Action No. 97CV 246H

DEFAULT JUDGMENT

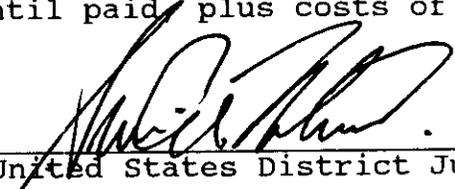
This matter comes on for consideration this 31st day of July, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Carol Burger, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Carol Burger, was served with Summons and Complaint on May 9, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Carol Burger, for the principal amount of \$1,360.21, plus accrued interest of \$11.18, plus interest thereafter at the rate of 5 percent per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover

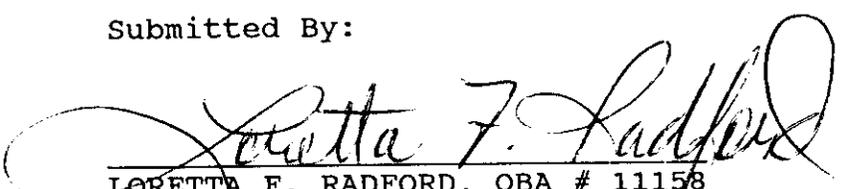
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the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of ~~556~~ percent per annum until paid, plus costs of this action.



United States District Judge

Submitted By:



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

8-1-97
FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUL 3 1 1997 M

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

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 THOMAS E. MEADOWS,)
)
 Defendant.)

Civil Action No. 97CV420 H) ✓

DEFAULT JUDGMENT

This matter comes on for consideration this 31st day of July, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Thomas E. Meadows, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Thomas E. Meadows, acknowledged receipt of Summons and Complaint on June 17, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

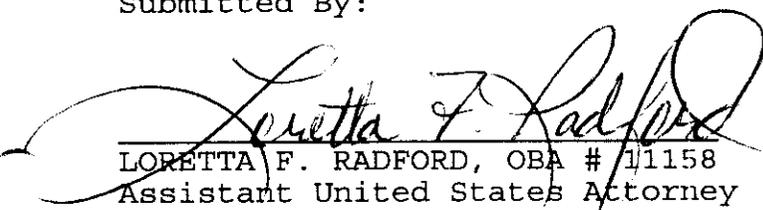
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Thomas E. Meadows, for the principal amount of \$2,077.10, plus accrued interest of \$88.16, plus administrative charges in the amount of \$27.66, plus interest thereafter at the rate of 4 percent per annum

until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.56 percent per annum until paid, plus costs of this action.



United States District Judge

Submitted By:



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

LEF/jmo

ENTERED ON DOCKET
8-1-97
FILED

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

JUL 31 1997

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

THRIFTY RENT-A-CAR SYSTEM, INC.
an Oklahoma corporation,

Plaintiff,

v.

ACME AUTO LEASING ASSOCIATES OF
HARTFORD COUNTY, INC., a Connecticut
corporation, ROUTE SEVEN CORPORATION,
INC., a Connecticut corporation, CLEMENT
BRANCALE, an individual, and JOHN CULLEN,
an individual,

Defendants.

Case No. 96-CV-270-H ✓

ADMINISTRATIVE CLOSING ORDER

This matter comes before the Court on the parties' joint motion for an administrative closing order (Docket # 42).

In their joint motion, the parties state that they have made "substantial progress toward settlement of the case and expect all issues to be resolved in a timely manner." The parties further state that "final resolution of the litigation depends upon results of environmental testing that may require several additional weeks to complete." Thus the parties request that the Court administratively close this case pending settlement.

Accordingly, the Clerk is ordered to administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by 60 days from today, the Parties have not reopened this case for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 31st day of July, 1997.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH R. ABEL,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of the Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE AUG 01 1997

No. 95-CV-352-J ✓

F I L E D

JUL 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

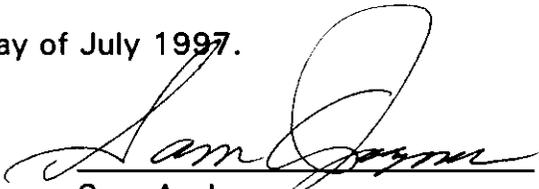
ORDER

This case was previously remanded to Defendant under sentence six of 42 U.S.C. § 405(g) for reconstruction of the claim file. At the same time, this case was administratively closed, pursuant to N.D. LR 41.0.

The claim file was apparently not able to be reconstructed. So, the Appeals Council vacated the Administrative Law Judge's January 4, 1995 decision, which formed the basis for this appeal, and remanded the case for another hearing before an administrative law judge. Plaintiff's new hearing was held and the Administrative Law Judge entered a partially favorable decision, which neither party has appealed.

Plaintiff has now filed a motion to reopen this case so that a judgment in his favor can be entered. Plaintiff's motion is **DENIED**. Plaintiff is not a prevailing party in this litigation and he is not entitled to judgment in his favor. This appeal is hereby dismissed as moot.

IT IS SO ORDERED this 29 day of July 1997.


Sam A. Joyner
United States Magistrate Judge

8-1-97

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

FESTUS OLUMIRADESA,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, Sheriff,)
)
 Defendant.)

No. 97-CV-290-K ✓

F I L E D

JUL 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On April 17, 1997, the Court granted Plaintiff's first motion for leave to proceed in forma pauperis and ordered Plaintiff, pursuant to 28 U.S.C. § 1915(b)(1), to submit an initial partial payment of \$17.00 by May 19, 1997. On May 29, 1997, Plaintiff filed a motion for extension of time (Docket #5) to make the \$17.00 initial partial payment. Because Plaintiff, a federal prisoner, had been in transit, the Court granted Plaintiff an additional thirty (30) days, or until July 4, 1997, within which to submit the required payment or to show cause in writing for his inability to comply with the Court's Order. On June 23, 1997, Plaintiff submitted a second application to proceed in forma pauperis (Docket #7).

After reviewing the financial statement supporting Plaintiff's second motion for leave to proceed in forma pauperis, including the Certified Trust Fund Account Statement, signed by an authorized officer of the prison,¹ along with the information provided by Plaintiff in his first motion for leave to proceed in forma pauperis, the Court finds that the second motion should be granted. However, for the reasons discussed herein, the Court finds that Plaintiff's complaint

¹According to the account statement, Plaintiff has had an average monthly balance and average monthly deposits of \$20.25 for the previous six month period.

8

should be dismissed, pursuant to 28 U.S.C. § 1915A, for failure to state a claim upon which relief can be granted.

The Prison Litigation Reform Act of 1996, added a new section, 28 U.S.C. § 1915A, to the in forma pauperis statute, entitled "Screening." That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint ... is frivolous, malicious, or fails to state a claim upon which relief may be granted." Id. For the reasons discussed below, the Court finds that Plaintiff's complaint must be dismissed pursuant to 28 U.S.C. § 1915A for failure to state a claim.

In his complaint, Plaintiff names Stanley Glanz, Tulsa County Sheriff, as defendant. Plaintiff alleges that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment while incarcerated at the Tulsa County Jail. The Court finds that Plaintiff has failed to state a claim against Defendant Glanz in either his individual or his official capacity. As to any claim against Sheriff Glanz in his individual capacity, Plaintiff has failed to allege an affirmative link sufficient to establish liability as to Sheriff Glanz. It is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the constitutional deprivation. Meade v. Grubbs, 841 F.2d 1512, 1527. That link can take the form of personal participation, an exercise of control or discretion, or a failure to supervise. Id. Plaintiff must show that the defendant expressly or otherwise authorized, supervised, or participated in the conduct which caused the deprivation. Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. Id.

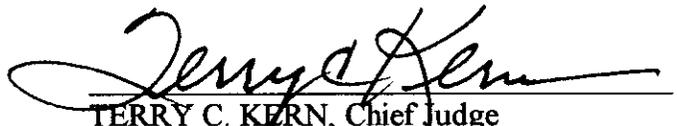
Plaintiff has also failed to state a claim against Sheriff Glanz in his official capacity as Sheriff of Tulsa County. In order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. Respondeat superior does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also Jenkins v. Wood, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)). Plaintiff's claims fail to establish either of these elements.

The Court concludes, therefore, that Plaintiff has failed to state a claim against Defendant Glanz, in either his individual or official capacity, and that this action must be dismissed pursuant to 28 U.S.C. § 1915A.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's second motion for leave to proceed in forma pauperis (Docket # 7) is **granted**.
2. Plaintiff's complaint is **dismissed**, pursuant to 28 U.S.C. § 1915A, for failure to state a claim upon which relief can be granted.
3. The Clerk is directed to flag this as a dismissal pursuant to 28 U.S.C. § 1915A.

SO ORDERED THIS 31 day of July, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

RECEIVED ON DOCKET
DATE 8-1-97

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

MARCUS ELWAYNE PARTEE, and)
QUANG VINH DIEU HOANG,)

Plaintiffs,)

vs.)

STATE OF OKLAHOMA,)
COUNTY OF TULSA,)

et al.,)

Defendants.)

No. 97-CV-407-K (M)

FILED

JUL 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiffs, inmates of Tulsa County Jail appearing *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. §§ 1983, 1985(2) and 1986 (Docket #1) and an incomplete motion for leave to proceed *in forma pauperis* (Docket #2).¹ In the text of their complaint, Plaintiffs identify three (3) defendants: Tulsa County Public Defenders Office, Tulsa County District Court and Tulsa County Sheriff's Office.²

On June 3, 1997, this Court entered an Order directing each Plaintiff, in the best interest of justice, to dismiss this action voluntarily then to refile his own individual action alleging those claims specific to him. The Order provided that each Plaintiff was to file a motion to dismiss this

¹It appears that the limited information provided in the motion for leave to proceed *in forma pauperis* pertains to Plaintiff Partee. No financial information is provided by Plaintiff Hoang. In addition, Plaintiffs have failed to attach the required certified copy of the trust fund account statement (or institutional equivalent), *see* 28 U.S.C. § 1915(a)(2), to complete the "statement of institutional accounts," and to obtain the signature of an authorized prison official.

²The Court notes that in the caption of the complaint, Plaintiffs identify defendants as "State of Oklahoma, County of Tulsa, et al."

5

action without prejudice on or before June 18, 1997 and advised Plaintiffs that failure to comply with the Order could result in the case being dismissed without prejudice by the Court.

Plaintiffs did not file motions to dismiss as directed by the Court. However, they did file a "Response to Order of Court and Brief in Support" (Docket #4). In their response, Plaintiffs object to the Court's Order stating that the "specific intent in construction of complaint was not to bring cause, state nor describe to the court an isolated non-prejudicial (sic) act, thus, to separate action alleging independent constitutional violations would nullify the widespread and prejudicial acts described in this instant case." Over Plaintiffs' objection, the Court nonetheless finds that Plaintiffs cannot prosecute this action jointly. Therefore, this action should be dismissed without prejudice for failure to comply with the Court's Order of June 3, 1997.

Even if Plaintiffs were allowed to proceed with the instant action as co-plaintiffs, the Court finds that the complaint is deficient and would be subject to dismissal pursuant to 28 U.S.C. § 1915A, the new "Screening" provision added to the in forma pauperis statute by The Prison Litigation Reform Act of 1996. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint ... is frivolous, malicious, or fails to state a claim upon which relief may be granted." Id.

In the instant action, Plaintiffs have named Tulsa County Public Defenders Office, Tulsa County District Court and Tulsa County Sheriff's Office as defendants. Plaintiffs complain that the actions of these Defendants have resulted in denial of their right to access the courts. The Court finds that Plaintiffs' complaint would be subject to dismissal pursuant to 28 U.S.C. § 1915A for failure to state a claim since none of the Defendants is a proper "person" within the

meaning of the Civil Rights Act. See 42 U.S.C. §§ 1983, 1985(3). Numerous courts have held that such entities are not proper defendants in a section 1983 action. Martinez v. Winner, 771 F.2d 424, 444 (10th Cir. 1985); Johnson v. City of Erie, 834 F.Supp. 873, 878 (W.D. Pa. 1993); PBA Local No. 38 v. Woodbridge Police Dept., 832 F.Supp. 808, 826 (D.N.J. 1993).

In addition, the Court notes that Plaintiffs' claims seem to allege ineffectiveness of counsel and bias of the trial court and may be more appropriately addressed in a habeas corpus action.³ In determining whether a civil rights damage claim should be treated as one controlled by the habeas corpus statutes, the court must focus on the nature of the claim rather than the form of relief requested. Hanson v. Heckel, 791 F.2d 93, 95 (7th Cir. 1986). Plaintiffs' allegations of imprisonment based upon bias of the trial court and ineffective assistance of counsel challenge the fact of their confinement. Where a state prisoner challenges the fact or duration of his confinement, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 93 S.Ct. 1827, 1836-37, 1841 (1973). However, a federal habeas petitioner must exhaust available state remedies before bringing a federal habeas action. Rose v. Lundy, 102 S.Ct. 1198, 1202 (1982). The exhaustion requirement in federal habeas actions "is rooted in considerations of federal-state comity." Preiser, 93 S.Ct. at 1837. "The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." Id., 93 S.Ct. at 1837-38. Because Plaintiffs' claims are inextricably linked to the constitutionality of their confinement, they fall within the core of habeas

³It appears from the pleadings that both Plaintiffs are awaiting trial and should be classified, therefore, as pre-trial detainees.

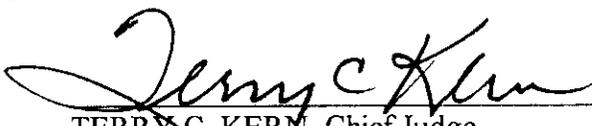
corpus. See Crump v. Lane, 807 F.2d 1394, 1401 (7th Cir. 1986). Therefore, exhaustion of state remedies would be required before presenting these claims to this Court. The Court finds that Plaintiffs' complaint, if treated as a habeas corpus petition, would be subject to dismissal for failure to exhaust state remedies.

For all of the reasons discussed supra, the Court finds that Plaintiffs' complaint should be dismissed without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiffs' complaint is **dismissed without prejudice**; and
- (2) Plaintiffs' motion for leave to proceed in forma pauperis is denied as **moot**.

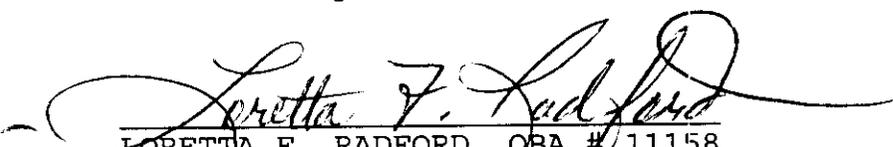
SO ORDERED THIS 31 day of July, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.50 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/jmo

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

ABRAHAM CALAMEASE and)
STEPHEN HILL, individually and)
on behalf of all others similarly situated,)
))
Plaintiffs,)
))
vs.)
))
CASH AMERICA, INC. OF)
OKLAHOMA, a corporation, and)
CASH AMERICA INTERNATIONAL,)
INC., a corporation,)
))
Defendants.)

F I L E D

JUL 31 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-295-K ✓

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 July, 1997.

Terry C. Kern
TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-333-K

ORVILLE NICHOLS, an Individual)
and Citizen of Oklahoma,)

Plaintiff,)

vs.)

JOHN COBB and DANNY VAUGHN,)
Individuals and Citizens of)
California,)

Defendants.)

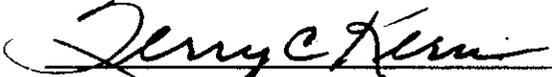
JUDGMENT

A Clerk's Entry of Default was entered as to Defendant Danny Vaughn on February 13, 1997. Jury trial as to Defendant John Cobb was held on July 30 and July 31, 1997. After presentation of the Plaintiff's case, the Court granted Defendant John Cobb's motion for a directed verdict. Subsequently, the Court submitted the issue of damages to be entered against Defendant Vaughn to the jury, and on July 31, 1997, the jury returned a verdict granting \$100,000 in compensatory damages, and \$200,000 in punitive damages.

Pursuant to the jury verdict and the prior proceedings of the Court, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant John Cobb and against the Plaintiff, Orville Nichols. It is likewise ORDERED, ADJUDGED AND DECREED that default judgment should be awarded for Plaintiff, Orville Nichols and against Defendant, Danny Vaughn, with damages awarded as follows: \$100,000 in compensatory damages, and \$200,000 in punitive damages. Additionally, the Plaintiff is entitled to post-judgment interest at

a rate of %5.56.

ORDERED this 31 day of July, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 8-1-97

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

F I L E D

TONY LAMAR VANN,

Petitioner,

vs.

HOWARD RAY,

Respondent.

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JUL 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-871-K

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate Judge filed June 24, 1997, in which the Magistrate Judge recommended that Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket #1) should be denied and respondent's motion to dismiss for failure to be in state custody (Docket #12) should be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

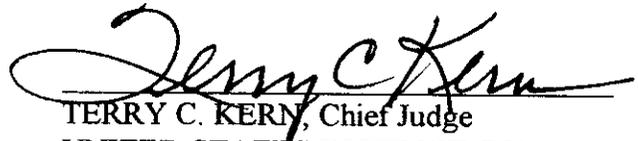
ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (Docket #16) is **adopted and affirmed.**
2. Petitioner's petition for a writ of habeas corpus (Docket #1) is **denied.**

17

3. Respondent's motion to dismiss for failure to be in state custody (Docket #12) is **granted.**
4. Petitioner's motion for removal of case from state courts and jury trial demanded (Docket #2), Petitioner's motion to be released on personal recognizance and jury trial demanded (Docket #5), Petitioner's motion to dismiss (Docket #9), Petitioner's motion for discovery (Docket #11), Petitioner's objection to respondent's motion to dismiss and alternative demand for trial of the merits (Docket #14), and Petitioner's application to stay the proceedings (Docket #15) are moot.

SO ORDERED THIS 31 day of July, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT