

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KERRY SCOTT,)
)
Plaintiff,)
)
vs.)
)
DOLORES RAMSEY, Designee for)
the Director, Dept. of Corr.;)
RON CHAMPION, Warden DCCC;)
Lt. JIM RODEN, Disciplinary Hearing)
Officer DCCC; LT. LORENE KRAMER)
Disciplinary Investigator DCCC; and)
SGT. MARK BEARS, Correctional)
Officer DCCC,)
)
Defendants.)

No. 97-CV-872-BU (M) /

ENTERED ON DOCKET

DATE 11-10-97

ORDER

Having been granted leave to proceed *in forma pauperis*, Plaintiff brings this *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. While incarcerated at the Dick Conner Correctional Center ("DCCC") in Hominy, Oklahoma, Plaintiff was charged with and convicted of violating a prison rule. Plaintiff was sentenced to 30 days disciplinary segregation and assessed a \$25.00 fine. Plaintiff's appeal to the warden was denied, and the decision of the disciplinary hearing officer was affirmed by the Designee for the Director of the Oklahoma Department of Corrections (ODOC). Plaintiff alleges that various disciplinary hearing procedures, including failure to afford him an impartial disciplinary hearing tribunal, deprived him of a liberty interest without due process, implicating a violation of the Fourteenth Amendment to the United States Constitution. Plaintiff seeks actual and punitive damages from each Defendant as well as expungement of the misconduct

conviction, reclassification to Class Level 4 along with "application of credits allotted under this level." (#1).¹

Background

Plaintiff alleges he was charged with the offense of "presence in an unauthorized area," a Class A offense, on June 29, 1997. According to Plaintiff, the offense report alleged Plaintiff was observed coming out the gate of Unit K & M, which is off limits for Plaintiff as he lives in Unit A & C. Plaintiff admits he received a copy of the offense report.

However, Plaintiff alleges the investigator failed to investigate adequately the circumstances or to submit a detailed and objective report "pertinent to the charge" as defined by the ODOC procedures. As a result, Plaintiff alleges the misconduct charge and the decision of the disciplinary hearing officer were based on insufficient evidence.

Finally, Plaintiff alleges the disciplinary chairperson "was not impartial because he chose to believe the reporting officer's story rather than mine without providing any justifying reason. The mere statement that the reporting officer had nothing to gain by lying on the inmate does not make his story more believable." Plaintiff concludes the disciplinary chairperson "chose to believe the reporting officer's story rather than mine only because the reporting officer was a correctional officer like him." (#1).

¹References are to docket numbers assigned to documents as filed in the court record.

Analysis

To establish a claim under 42 U.S.C. § 1983, Plaintiff must demonstrate that his constitutional rights were violated by a person or persons acting under color of state law. A claim as in this matter will lie under § 1983 for violation of due process guarantees only where the alleged violations infringed a cognizable liberty interest. Allison v. Kyle, 66 F.3d 71, 74 (5th Cir. 1995).

A. Disciplinary Segregation, Reclassification and Opportunity to Earn Credits

In Sandin v. Conner, 115 S.Ct. 2293 (1995), the Supreme Court redefined how a court should determine the existence of a protected liberty interest in cases arising from prison proceedings. In Sandin, plaintiff Conner was charged with a violation of prison regulations. Conner's request to call certain witnesses to testify at his disciplinary hearing was denied, he was found guilty of misconduct and was sentenced principally to 30 days disciplinary segregation. The plaintiff filed suit under § 1983 alleging violation of his due process rights at the disciplinary hearing. Initially the District Court granted summary judgment to the defendants, but the Ninth Circuit Court of Appeals reversed judgment. Reinstating the judgment for the defendants, the Supreme Court held that a protected liberty interest "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ... nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 115 S.Ct. at 2300. Finding Conner's punitive segregation from the general prison population did not inevitably affect the duration of his sentence or "work a major disruption in his environment," the Court held that Conner's confinement for 30 days in a segregated housing unit infringed no liberty interest protected by the Due Process Clause. Id., at 2302.

Applying the Sandin principles to this case, Plaintiff must demonstrate that the imposition of disciplinary segregation and the denial of an opportunity to earn good time credits because of reclassification in some way implicate a liberty interest protected by the Fourteenth Amendment to the United States Constitution.

Plaintiff's *Complaint* contains no allegations which would support a finding by the Court that the disciplinary segregation to which he was subjected was "atypical" or imposed a "significant hardship ... in relation to the ordinary incidents of prison life." In short, Plaintiff's *Complaint* fails to demonstrate that the disciplinary segregation sentence which he received as punishment implicates his liberty. Having failed to demonstrate that the disciplinary segregation violates a constitutional right, Plaintiff's *Complaint* does not state a claim under 42 U.S.C. § 1983 with regard to the disciplinary segregation.

Plaintiff points out that by being reclassified due to the misconduct charge, he was denied the opportunity to earn good time credits. See 57 Okla. Stat. § 138(D)(1)(a) (defining inmates subject to disciplinary action as Class 1 inmates) and § 138(D)(2) (assigning 0 credits per month to Class 1 inmates). Unlike the revocation of previously-earned good time credits, the denial of an opportunity to earn good time credits does not implicate an inmate's liberty. An inmate does not have a constitutional right to be classified so as to earn good time credits. See Brown v. Champion, 1995 WL 433221, at *1 (10th Cir. July 24, 1995); Janke v. Price, No. 96-1493, 1997 WL 537962, at *2 (10th Cir. Sept. 2, 1997); Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995) (all holding that the loss of the opportunity to earn good time credits does not implicate any constitutionally protected interest). Consequently, the fact that Plaintiff's disciplinary conviction resulting in his reclassification, thus denying him an opportunity to earn good time credits, is too remote a

consequence in and of itself to invoke the procedural protections of the Due Process Clause.

Even assuming Plaintiff's allegations are true and liberally construing his pleading pursuant to Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the claim pled under § 1983 that Plaintiff was placed in 30 days disciplinary segregation and fined \$25.00 without due process of law fails to state facts sufficient to demonstrate that a constitutional right is at stake.

B. Heck v. Humphrey and Edwards v. Balisok

To the extent any of Plaintiff's claims are sufficiently pled to state a constitutional right, even those claims are subject to dismissal under Heck v. Humpnrey, 512 U.S. 477, 481-83 (1994), and Edwards v. Balisok, 117 S.Ct. 1584, 1588 (1997).

In Heck, the Supreme court held that when a state prisoner seeks damages in a § 1983 suit, the "district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction and sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Janke v. Price, No. 96-1493, unpublished opinion, 1997 WL 537962 (10th Cir. September 2, 1997).

In Edwards, the Supreme Court refined the Heck limitation on the scope of § 1983 actions. Specifically, the prisoner, Balisok, alleged the "deceit and bias of the hearing officer himself" which resulted in violation of his due process rights in the disciplinary hearing. The Court analogized Balisok's allegations to those of a criminal defendant tried by a partial judge: if the allegations were established, the defendant would be 'entitled to have his conviction set aside no matter how strong the evidence against him.' Janke, 1997 WL 537962, *3. Thus, the Edwards Court held that "the prisoner's claim, 'based on allegations of deceit and bias on the part of the decision-maker that

necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983,' but is properly addressed as a petition for habeas corpus relief. Id. (quoting Edwards v. Balisok, 117 S.Ct. at 1588-89; Heck, 512 U.S. at 481) (stating that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks ... speedier release") (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)); Smith v. Maschner, 899 F.2d 940, 951 (10th Cir. 1990).

The United States Supreme Court has sent a clear message: "[A]n inmate cannot seek money damages for alleged deprivations arising out of a prison disciplinary hearing by commencing an action under § 1983 unless the results of that hearing already have been invalidated." Burnell v. Coughlin, 97-CV-6038L, 1997 WL 548736, at *5 (W.D.N.Y. Sept. 3, 1997).

Throughout his pleading, Plaintiff emphatically asserts that Defendants reliance on the investigating officer's report and statement specifically indicates their deceit and bias. Plaintiff alleges the investigating officer "did not make any inquiry or submit a detailed and objective report" and "did not determine or inquire where the reporting officer was located when he witnessed the alleged offense." He contends the evidence "unequivocally revealed that the reporting officer could not have seen the K & M unit gate from where he was located, and consequently, he could not have seen or observed plaintiff exiting that gate.' Plaintiff also asserts that the disciplinary officer was not impartial and failed to give adequate reasons to support the decisions he reached. Resolution of this § 1983 case would, therefore, "necessarily imply the invalidity of the punishment imposed" at the disciplinary hearing.

Conclusively, in situations such as the one presented by Plaintiff in this matter, the § 1983 complaint fails to state a cause of action because the § 1983 claim does not accrue until the plaintiff

has somehow invalidated the conviction, sentence or fact of imprisonment. Heck, 114 S.Ct. 2373-74. Plaintiff has not demonstrated that the punishment imposed has previously been invalidated through an appropriate *mandamus* or *habeas corpus* state action. Id.; Balisok, 117 S.Ct. 15 1587-88 (1997); Janke, 1997 WL 537962, at *4-5.

C. The Prison Litigation Reform Act

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section (codified at 28 U.S.C. § 1915A) to the in forma pauperis statute entitled "Screening." That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

Even liberally construing the *Complaint* in this case, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes Plaintiff's allegations do not raise constitutional claims and, thus, fail to state a claim on which relief can be granted.

Conclusion

After liberally construing Plaintiff's allegations, the Court finds that Plaintiff's § 1983 *Complaint* fails to state a claim upon which relief can be granted for the reasons that (1) disciplinary segregation and loss of classification along with denial of an opportunity to earn good time credits do not implicate a liberty interest protected by the Fourteenth Amendment Due Process Clause, and (2) even if Plaintiff's § 1983 claims were sufficient to demonstrate that a constitutional right was at stake, such claims are subject to dismissal under Heck v. Humphrey, 512 U.S. 477 (1994), as a judgment in favor of Plaintiff "would necessarily imply the invalidity of the punishment imposed."

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's § 1983 *Complaint* is **dismissed without prejudice.**

SO ORDERED THIS 10th day of November, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT COURT

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

NOV 7 1997

DEL DEE LANG,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE and the STATE)
OF OKLAHOMA,)
)
Respondents.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-003-C

ENTERED ON DOCKET
NOV 10 1997
DATE _____

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge filed on September 9, 1997 (doc. #43), in this habeas corpus action pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that the petition for habeas corpus be dismissed as procedurally barred since Petitioner has failed to establish cause and prejudice for his failure to file a direct appeal.

On September 19, 1997, Petitioner filed his objection to the Report. Specifically, Petitioner objects to five (5) of the Magistrate's findings and conclusions: (1) that Petitioner failed to establish cause and prejudice to overcome the procedural default, (2) that Petitioner's testimony was not fully credible, (3) that "nothing" in the record corroborates Petitioner's testimony concerning his intent to withdraw his guilty plea within the requisite ten (10) day period or that he attempted to contact his attorneys, (4) that Petitioner's explanation concerning his decision to enter a guilty plea was not credible, and (5) that Petitioner's testimony concerning his efforts to contact counsel within the ten day period cannot be accepted as true since Respondent cannot produce corroborating evidence, in

CLM 11-7

the form of mail and telephone logs, which had been destroyed.

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which Petitioner has objected. Based on careful review of the facts of this case as well as the applicable law, the Court finds that the Report should be adopted and affirmed.

BACKGROUND

On May 1, 1986, Petitioner pled guilty to Murder in the First Degree in Rogers County District Court and was sentenced to life in prison. Petitioner did not file a direct appeal.

On September 3, 1986, Petitioner filed a motion for transcript at public expense. In that motion, Petitioner indicated that one of the grounds for relief he intended to allege was "inandiquate (sic) lawyer."

Five (5) years later, on September 11, 1991, Petitioner filed an Application for Post-Conviction Relief. Although Petitioner alleged, *inter alia*, that the trial court failed to make sufficient inquiry before accepting his guilty plea, Petitioner did not allege that he had been denied effective counsel.

On August 17, 1992, Petitioner requested leave to amend his application to indicate that he desired to withdraw his guilty plea. In addition, Petitioner claimed that he had been abandoned by his counsel on appeal and had therefore been denied effective assistance of counsel. Petitioner's application was denied on March 4, 1993. The Oklahoma Court of Criminal Appeals affirmed the district court's denial of the application. That Court concluded that Petitioner had failed to provide a sufficient reason for his failure to file a direct appeal. The Oklahoma Court of Criminal Appeals

specifically noted that "failure to perfect a direct appeal waives all errors unless a defendant can establish that he was denied an appeal through no fault of his own." (#1, Ex. 3).

Petitioner filed the instant petition for writ of habeas corpus on January 3, 1996. He raised ten (10) grounds for relief, including that he had been denied effective assistance of counsel when his counsel abandoned him on appeal. Respondent filed a motion to dismiss the petition, arguing that Petitioner's claims were procedurally barred due to his failure to file a direct appeal. On September 30, 1996, this Court denied the motion to dismiss, finding that issues of fact existed as to whether Petitioner sufficiently inquired about his appeal rights. The issues were referred to the Magistrate Judge for an evidentiary hearing and a Report and Recommendation.

On March 18, 1997, an evidentiary hearing was held to afford Petitioner the opportunity to establish cause and prejudice for his failure to file a direct appeal. Petitioner was present at the hearing, represented by counsel, and testified in his own behalf. Also, the attorneys who represented Petitioner during the criminal proceedings in district court, Jack E. Gordon, Jr., and Richard Mosier, were present and testified. After the evidentiary hearing, Petitioner deposed Honey Marcum, a jailer at Rogers County Jail during the 10 day period following Petitioner's sentencing.

DISCUSSION

A. Failure to demonstrate cause and prejudice

In its Order of September 30, 1996 (doc. #22), this Court found that unless Petitioner could demonstrate cause and prejudice for his failure to file a direct appeal or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered, his claims would be barred by the procedural default doctrine. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995). Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised on direct appeal. Moore v. State, 809 P.2d 63, 64 (Okla. Crim. App.), cert. denied, 502 U.S. 913 (1991) (the doctrine of res judicata bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal).

The "cause" prong of the standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for "prejudice," a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

At the evidentiary hearing conducted by the Magistrate Judge, Petitioner completely failed to show that some objective factor external to the defense impeded his efforts to comply with state procedural rules. Petitioner testified that his counsel failed to preserve his right to appeal his guilty plea and failed to come to the county jail even after he contacted the attorney's office by phone and sent letters. However, an attorney has no absolute duty in every case to advise a defendant of his appeal rights or to preserve defendant's appeal rights following a guilty plea conviction. Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d

525, 527 (9th Cir. 1985); Carey v. Leverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992); Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock v. New Mexico, 880 F.2d 1184, 1188; see also Shaw v. Cody, 46 F.3d 452, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when 'counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman v. Reynolds, 971 F.2d 500, 506 (quoting Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985)).

Petitioner's trial counsel, Jack E. Gordon, Jr., testified at the evidentiary hearing that Petitioner never indicated a desire to withdraw his guilty plea or to otherwise proceed with an appeal. (EH trans., p. 58). He also testified that since Petitioner had confessed, on videotape, to murdering his grandmother, he had recommended that Petitioner plead guilty to receive a life sentence. (EH trans., p. 67-68).

Petitioner presented no evidence to support his assertions that attorney Gordon had recommended that he plead guilty then file an appeal because Petitioner would have a better chance to "beat the case on appeal." (EH trans., p.16). Gordon denied ever having suggested that course

of action to Petitioner or any other client. (EH trans., p. 63). Nor did Petitioner present evidence to corroborate his assertions that he attempted to telephone and write to his counsel during the 10-day period concerning his desire to withdraw his guilty plea. As noted above, counsel's duty to inform his client of his limited right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506. Therefore, counsel had no duty to advise Petitioner of his right to appeal the guilty plea absent any evidence demonstrating that counsel knew or had reason to know that Petitioner believed a claim of error on constitutional grounds existed, which could have resulted in setting aside the plea, or that Petitioner had inquired about an appeal right. Laycock, 880 F.2d at 1188.

Petitioner correctly argues that abandonment by counsel at the appeals stage is a *per se* violation of the Sixth Amendment. United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993); Castellanos v. United States, 26 F.3d 717 (7th Cir. 1984). However, as emphasized in the Castellanos decision, "[r]equest' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue." Id., at 719; see also United States v. Youngblood, 14 F.3d 38, 40 (10th Cir. 1994) (finding effective assistance where defendant received the proper explanations from his lawyer, and "the transcript of the hearing makes it clear that [the defendant] never affirmatively indicated any desire to appeal to his counsel or to the district judge"). The only evidence Petitioner is able to point to as corroborating his allegation that his counsel knew he desired to perfect a direct appeal is the following exchange which occurred at the May 1, 1986 plea hearing:

THE COURT: You have the right to be held in the County Jail up to ten days to determine if you want to file a motion to vacate the judgment and sentence of the Court or file your notice of intent to appeal. Do you wish to be held in the County Jail for ten days?

MR. GORDON: Why don't we go ahead and do that, Del?

THE DEFENDANT: (Nods head)

(#44, pp. 1-2, 4). However, at the March 18, 1997 evidentiary hearing, Petitioner's trial counsel Gordon explained that he recommended Petitioner remain at the Rogers County Jail, not because of any knowledge of Petitioner's desire to withdraw his guilty plea or to file a notice of intent to appeal, but because the conditions were "a heck of a lot better in Rogers County Jail than [they were] in the penitentiary." (EH trans., p. 72). Also, Gordon testified that he knew Petitioner had family in the area and Petitioner could visit with them before being transferred to Department of Corrections custody. (EH trans., p. 72). After reviewing this testimony, the Court concludes that Petitioner's reliance on the quoted exchange is insufficient to support his allegation that counsel knew he desired to withdraw his guilty plea.

Petitioner also objects to the Report on the basis that he was precluded from presenting corroborating evidence, i.e., jail phone and mail logs, attorney records, because all pertinent records had been destroyed. Petitioner's claim that he failed to perfect a direct appeal due to ineffective assistance of counsel was first raised more than 6 years after his sentencing. It appears that the records were destroyed pursuant to the policies of the jail and the attorney due to the passage of time rather than any attempt to destroy evidence. Petitioner cannot wait 6 years to bring his claims and then complain of the fact that records allegedly supporting his claim have been destroyed.

The Court finds that Petitioner has failed to present evidence, other than his own conclusory testimony, that he informed his counsel of his desire to withdraw his guilty plea. In the absence of corroborating evidence, the Court concludes that Petitioner received effective assistance of counsel and has failed to demonstrate cause for his failure to file a direct appeal.

B. Credibility Findings

Although Petitioner objects to the Magistrate's findings that his testimony was not fully credible, the Court finds that, after careful review of the transcripts, the evidence supports the factual findings of the Magistrate Judge.

CONCLUSION

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which Petitioner has objected and has concluded that the Report should be adopted and affirmed and the petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) The Report and Recommendation of the Magistrate Judge (doc. #43) is **adopted and affirmed**;
- (2) The petition for writ of habeas corpus is **dismissed with prejudice**. Petitioner's claims are procedurally barred and this Court is precluded from addressing the claims on the merits.

SO ORDERED THIS 6 day of November, 1997.



H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV - 5 1997

SHEILA A. DENTON, an individual,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,)

v.)

Case No. 97-C-55-B

STEVEN M. DODSON, an individual,)

SONTHEIM ASSET MANAGEMENT,)

INC., an Oklahoma corporation,)

HEILBRONN DEVELOPMENT, L.L.C.,)

an Oklahoma limited liability company,)

and CAPITAL ALLIANCE, INC.,)

an Oklahoma corporation,)

Defendants.)

ENTERED ON DOCKET

DATE NOV 10 1997

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Dodson maintained a fiduciary capacity with Denton during the time of acts alleged in the Petition.

2. The fiduciary capacity existed prior to the breaches of fiduciary duty alleged in the Petition.

3. The fiduciary capacity existed separate and apart from the breaches of fiduciary duty alleged in the Petition.

4. The fiduciary capacity was deliberately created by Denton and Dodson.

5. During his fiduciary capacity, Dodson accepted funds from Denton in the amount of \$445,567.83.

6. The acceptance of funds from Denton by Dodson created an express trust.

7. The \$445,567.83 constituted the *res* of Dodson's fiduciary capacity.

Cham 11-7

8. While acting in his fiduciary capacity, Dodson engaged in defalcation as to the funds entrusted to him by Denton.

9. Denton was damaged as a result of Dodson's defalcation.

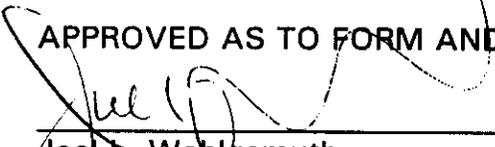
10. Dodson's defalcation constitutes a breach of fiduciary duty.

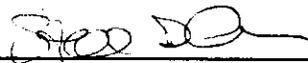
11. The amount of damages suffered by Denton as a result of the breach of fiduciary duty is \$336,831.

Dated this 4th day of Nov., 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

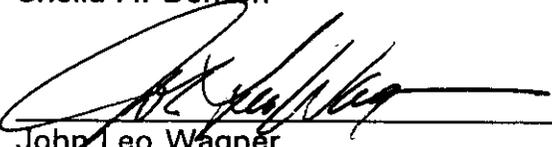
APPROVED AS TO FORM AND SUBSTANCE:


Joel E. Wohlgenuth
Attorney for Steven M. Dodson


Steven M. Dodson


Terry M. Thomas
Attorney for Sheila A. Denton


Sheila A. Denton


John Leo Wagner
United States Magistrate Judge
and Settlement Judge

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

FMI-USA, INC.,
a Delaware Corporation,

Plaintiff,

vs.

INTERMODAL TRANSPORT CO.;
LAND STAR SYSTEMS, INC., and
IT CLOSURE CORP.,

Defendant.

NOV 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-0210-C

ENTERED ON DOCKET

DATE NOV 10 1997

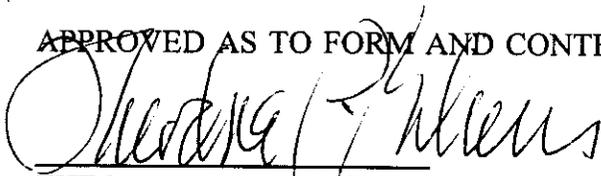
ORDER OF DISMISSAL

NOW on this 6th day of ~~October~~ ^{Nov.}, 1997, upon the Joint Written Stipulation of Plaintiff and Defendant the Court finds the Stipulation should be granted and the cause dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court the above entitled action be and the same shall be dismissed with prejudice to filing.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTEXT



THEODORE P. GIBSON
TIPS & GIBSON
525 S. Main, Suite 1111
Tulsa, OK 74103-4512



STUART D. CAMPBELL
GABLE, GOTWALS, MOCHE,
SCHWABE, KIHLE & GABERINO
100 W. 5th Street, 1000 Oneok Plaza
Tulsa, OK 74103-4219

Clm 11-7

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

FILED

JAMES R. FRANCIS

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 96-CV-1030-M

NOV 07 1997 *SAC*
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 11/10/97

ORDER

The Commissioner's MOTION TO STRIKE PLAINTIFF'S OPENING BRIEF [Dkt. 9], filed October 8, 1997, is before the Court. The Commissioner seeks to strike Plaintiff's 14 page brief for non-compliance with the Court's scheduling order which limits the length of the brief to 5 pages, exclusive of the signature block and certificate of service. Plaintiff has not filed a response to the Commissioner's motion. Instead, Plaintiff filed another brief. Plaintiff's second brief is 10 pages long, is printed in a different and smaller typeface, and contains several footnotes and lengthy quotations which are in even smaller print.

The local rules for this district address both the failure to respond to a motion and the appropriate size of type to be used on materials filed with the court. "Failure to timely respond [to a motion] will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested." N.D.LR 7.1 C. Rule 10.1A specifies that the text of documents presented for filing shall be "in a font or typeface that contains no more than 12 characters per inch[.]" N.D.LR 10.1A.

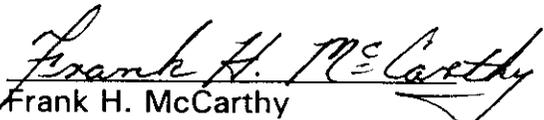
In restricting the number of pages for Plaintiff's brief, the Court does not intend to unfairly limit Plaintiff's ability to present his case. However, because the Court reviews a volume of Social Security disability appeals it is familiar with the relevant Social Security regulations and the pertinent case law. Therefore, extensive quotation of authority is not generally necessary, or helpful. Further, the Court is required to, and does, "meticulously examine the record to determine whether the evidence in support of the [Commissioner's] decision is substantial." *Washington v. Shalala*, 37 f.3d 1437, 1439 (10th Cir. 1994) [quotation and citation omitted]. Therefore, extensive quotation from the record is not necessary. With the necessity of including the foregoing components removed, 5 pages is generally adequate to present Plaintiff's case. However, the Court has been liberal in granting permission to file longer briefs, when requested. Since Plaintiff neither requested to file a longer brief nor responded to Defendant's motion to strike, the Court exercises its discretion in accordance with N.D.LR 7.1B, and GRANTS Defendant's MOTION TO STRIKE PLAINTIFF'S BRIEF [Dkt. 9]. Plaintiff's brief [Dkt. 8] filed August 25, 1997, shall remain in the Court file, but will not be considered by the Court.

Plaintiff's second brief [Dkt. 10], filed October 20, 1997, is also STRICKEN as it fails to comply with either the page limitation in the Court's February 24, 1997, scheduling order, or the typeface requirements of N.D.LR 10.1 A. That brief shall also remain in the Court file, but will not be considered by the Court.

Plaintiff has until November 17, 1997, within which to request permission to file a brief exceeding 5 pages including specific reasons why the usual 5 pages are

inadequate, or until December 5, 1997 within which to file a brief in compliance with the Court's order of February 24, 1997 and all local rules. Defendant's response brief is due 60 days after Plaintiff's corrected brief is filed.

SO ORDERED this 7th day of


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

NOV 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES COLLEY,)
)
Petitioner,)
)
vs.)
)
RAY LITTLE, and)
)
ATTORNEY GENERAL of)
)
OKLAHOMA,)
)
Respondents.)

No. 97-CV-307-BU ✓

ENTERED ON DOCKET
DATE NOV 3 7 1997

ORDER

On February 20, 1997, Petitioner filed his petition for writ of habeas corpus and paid the filing fee to commence this action in the United States District Court for the Western District of Oklahoma. On April 2, 1997, the action was transferred, over Petitioner's objection, to the Northern District of Oklahoma.

This Court entered its Order requiring Respondent to show cause why the writ should not issue on April 17, 1997. That Order provided that "Petitioner may file a reply brief within thirty (30) days after the filing of Respondent's response." On May 7, 1997, Respondent filed his response urging that the request for habeas corpus relief should be denied. Petitioner failed to file a reply brief.

However, pursuant to the terms of an Order filed July 24, 1997, the Court gave Petitioner another opportunity to reply to Respondent's arguments. That Order allowed Petitioner until August 24, 1997, to submit a reply brief. Petitioner was advised that "[f]ailure to respond may result in the automatic dismissal of this action."

The July 24, 1997 Order was mailed to Petitioner at the Williams S. Key Correctional Center in Fort Supply, Oklahoma, his last known address. However, the mailing was returned to the Court, marked "Return to Sender" and "Not at SWC or ECWC or WSKCC." Because Petitioner has failed to notify the Court of his change of address, this action cannot proceed and the Court concludes that it should be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that the instant action is **dismissed without prejudice** for failure to prosecute.

SO ORDERED THIS 6th day of November, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID HOLDEN, an individual,)
HOLLIMAN, LANGHOLZ, RUNNELS,)
& DORWART, an Oklahoma)
corporation,)

Plaintiffs,)

vs.)

No. 94-C-1021-BU

EMERALD SERVICES CORPORATION,)
a Delaware corporation; and)
LOEHR H. SPIVEY, a/k/a LARRY)
SPIVEY, an individual,)

Defendants.)

ENTERED ON DOCKET

DATE NOV 3 7 1997

ORDER

On August 11, 1997, United States Magistrate Judge Sam A. Joyner entered a Report & Recommendation, wherein he recommended that this Court find Plaintiffs are a prevailing party for the purpose of an award of attorney fees under 12 O.S. § 936 on the promissory note, but that Plaintiffs are not a prevailing party under Fed. R. Civ. P. 54(d). Magistrate Judge Joyner additionally recommended that this Court deny an award of attorney fees to Defendants under 71 O.S. § 408(i).

This matter now comes before this Court upon the timely objections of Defendants to the Report & Recommendation of Magistrate Judge Joyner. The Court has conducted a de novo review of Defendants' objections. See, Insurance Company of North America v. Bath, 1992 WL 113746 (10th Cir. 1992) (copy attached) (motion for attorney's fees should be considered a dispositive motion triggering the procedure and standard of review found at 28 U.S.C. § 636(b)(1)). Having done so, the Court agrees with the findings,

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analysis and reasoning of Magistrate Judge Joyner. The Court therefore adopts Magistrate Judge Joyner's Report & Recommendation in its entirety.

Accordingly, Defendants' Objection to Magistrate Judge Joyner's Report and Recommendation of Attorneys Fees and Costs (Docket Entry #247) is **OVERRULED**. Magistrate Judge Joyner's Report & Recommendation (Docket Entry #246) is **AFFIRMED**. Plaintiffs are the prevailing party for the purpose of an award of attorneys fees under 12 O.S. § 936 on the promissory note, but Plaintiffs are not the prevailing party under Fed. R. Civ. P. 54(d). Defendants are not entitled to an award of attorneys fees under 71 O.S. § 408(i).

ENTERED THIS 6th day of November, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(Cite as: 968 F.2d 20, 1992 WL 113746 (10th Cir.(Wyo.)))

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

**INSURANCE COMPANY OF NORTH
AMERICA, Appellee,**

v.

**Timothy P. BATH and Margaret A. Bath,
Appellants.**

No. 90-8083.

United States Court of Appeals, Tenth Circuit.

May 27, 1992.

D.Wyo., No. 90-8083.

D.Wyo.

DISMISSED.

Before HOLLOWAY and McWILLIAMS, Circuit
Judges, and CAUTHRON, District Judge. [FN*]

ORDER AND JUDGMENT [FN]**

ROBIN J. CAUTHRON, District Judge.

**1 The issue addressed in this appeal is whether appellants Timothy P. Bath and Margaret A. Bath have waived their right to challenge an award of attorney's fees and costs to appellee Insurance Company of North America ("INA"). The trial court adopted the findings and recommendations of the magistrate judge in an order that noted appellants had neither objected to nor appealed from the magistrate judge's findings and recommendations.

The underlying action was resolved in favor of INA

in an order entered December 6, 1989, where the trial court granted INA's motion for summary judgment on its indemnity claim and awarded INA \$20,979.88. The Baths did not appeal this ruling. In a motion filed January 10, 1990, INA requested attorneys fees in the amount of \$22,723.42 and \$2,089.95 in costs. This motion was referred to a magistrate judge, who conducted a hearing on March 13, 1990, and forwarded findings and recommendations to the district judge on April 17, 1990. Although there is no dispute that all counsel received copies of the findings and recommendation, neither the magistrate judge nor the Clerk of Court (in the District of Wyoming, these offices are held by the same individual) notified the parties of their right or duty to object to the magistrate judge's findings and recommendations, and no appeal or objection was filed.

The magistrate judge's findings and recommendations were adopted by the trial court in an order noting the Baths' failure to object. This order was entered July 12, 1991 and was followed six days later by the Baths' motion for a de novo determination. In an order entered September 12, 1990, the trial court again noted that during the three-month period before the magistrate judge's findings and recommendations were adopted the Baths had failed to object, despite the fact they were represented by counsel charged with notice and knowledge of the federal and local rules.

INA has moved to dismiss the Baths' appeal and asserts the Baths' failure to object to the magistrate judge's findings and recommendations constitutes a waiver of their right to appeal. In Niehaus v. Kansas Bar Association, 793 F.2d 1159 (10th Cir.1986), we held that an appellate court will not entertain appeals of a magistrate judge's findings unless appellant has first raised his objections before the district court. Niehaus would clearly require dismissal of this appeal. See also Thomas v. Arn, 474 U.S. 140, 156 (1985) ("court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate judge's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired."). The Baths argue they were relieved of the necessity of appeal to the District Court by the local rules.

(Cite as: 968 F.2d 20, 1992 WL 113746, **1 (10th Cir.(Wyo.)))

A court may prescribe rules for the conduct of its business. 28 U.S.C. § 2071 and Fed.R.Civ.P. 83. Under Local Wyoming Court Rules, an objection to a magistrate judge's recommendation on a dispositive matter (or an appeal of a non-dispositive matter) requires action within ten (10) days. Local Court Rule 611. The same time requirement is defined in 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(a). It appears to be the Baths' argument that no appeal was required because the attorney fee motion was neither dispositive nor non-dispositive and thus did not fall within the time requirements for appeal defined in Local Rule 611.

****2** A motion for attorney's fees, even if post-judgment, should be considered a dispositive motion triggering the procedure and standard of review found at 28 U.S.C. § 636(b)(1). See *Colorado Bldg. & Const. Trades Council v. B.B. Andersen Const. Co., Inc.*, 879 F.2d 809, 811 (10th Cir.1989); see also *Weatherby v. Sec. of Health and Human Services*, 654 F.Supp. 96 (E.D.Mich.1987) (post-judgment attorney fee order entered by magistrate set aside as outside scope of § 636(b)(1)(A)); cf. *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458 (10th Cir.1988) (award of attorney fees as discovery sanction is non-dispositive). Thus the Baths were required to file their objections to the findings and recommendation of the magistrate judge within 10 days, not only under Local Rule 611(b), but also Fed.R.Civ.P. 72(a) and § 636(b)(1). We have searched the record and find no justification to hold that the Baths first presented an appeal or objection to the trial court. In an attempt to distinguish *Niehaus*, the Baths state they raised "their objections before the District Court in both correspondence and by motion for de novo consideration." Brief of Appellants, filed May 10, 1991, at p. 48. However, this statement appears to be in conflict with statements made in other pleadings. See Appellants' Traverse to Plaintiff-Appellee's Motion to Dismiss, filed September 7, 1990 (¶ 7: "defendants-appellants respectfully contend here, as in the District Court, that Local Court Rule 611(a) did not require an appeal to be taken from the Magistrate's Findings and Recommendations;" ¶ 9: "the defendants-appellants did not believe an appeal or the formal submission of written objections to the Magistrate's Findings and Recommendations was necessary"). The trial court held that the Bath's de novo motion was both untimely and failed to "identify the portions of the

Magistrate's proposed findings and recommendations to which objection is made" (Order, September 12, 1990, pp. 3-4, Doc. 116). While there were communications with the trial court, these cannot be construed as rising to the level of an objection to, or appeal of, the magistrate judge's findings and recommendations. See May 30, 1990, letter from Bath's counsel to Hon. Alan B. Johnson, Att. E to Appellants' Brief filed May 10, 1991 (letter makes reference to attorney fees but does not state an intention to object or appeal); July 10, 1990, letter from INA's counsel to Hon. Alan B. Johnson, Att. A to Appellants' Brief filed May 10, 1991 (noting Baths did not object to the findings and recommendations and requesting entry of order adopting same). These communications demonstrate that the Baths had notice of the magistrate judge's findings and recommendations, but did not file objections or an appeal.

The Baths next assert their appeal was not required because no notice of the necessity of appeal was given them as required by Local Rule 611(b). We find this notice provision applies only to unrepresented parties. In *Moore v. United States*, 950 F.2d 656 (10th Cir.1991), we joined other circuits in requiring the magistrate judge's order to advise a pro se litigant of the time in which any objection must be filed, as well as the effect of the failure to do so. Wyoming's Local Court Rule 611(b) is no more than a reiteration of the holding in *Moore*. It does not relieve represented parties of the duty to appeal the magistrate judge's recommendation. To find otherwise would put the Local Rule in contravention of the statute and Federal Rules, which is prohibited. 28 U.S.C. § 2071(a). There is no dispute that § 636(b)(1), Fed.R.Civ.P. 72(a) and Local Court Rule 611 are clear in requiring objections or an appeal of a magistrate judge's pronouncement within ten days.

****3** We find nothing in the Local Rules which relieved the Baths of the necessity of appeal of the magistrate judge's findings and recommendation. *Niehaus* clearly applies to require dismissal of the appeal.

Accordingly, INA's Motion to Dismiss is granted, and the appeal is dismissed.

FN* Honorable Robin J. Cauthron, United States District Judge for the Western District of

Oklahoma, sitting by designation.

FN** This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3

END OF DOCUMENT

ENTERED ON DOCKET

DATE 11-6-97

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

FILED

NOV - 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CEDRIC JORDAN, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 PHILLIPS PETROLEUM COMPANY, INC.,)
 a Delaware Corporation,)
)
 Defendant.)

Case No. 96-CV-921K

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), F.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice because the parties have settled the case.

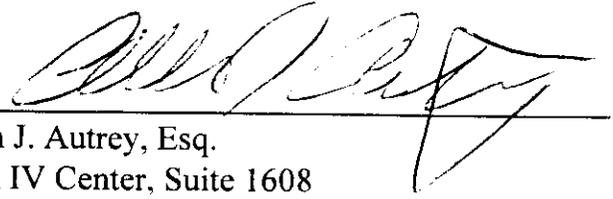
Respectfully submitted,



Kimberly Lambert Love, OBA #10879
Mary L. Lohrke, OBA #15806
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza, 100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

and

Robert J. Fries, OBA #13501
Senior Attorney
Phillips Petroleum Company
1226 Adams Building
Bartlesville, Oklahoma 74004
(918) 661-4340
Attorneys for Defendant, Phillips 66
Company, a division of Phillips
Petroleum Company



Allen J. Autrey, Esq.
Bank IV Center, Suite 1608
15 West Sixth Street
Tulsa, Oklahoma 74119

and

Wesley E. Johnson, Esq.
Nicks, Johnson & Bates
1448 South Carson Avenue
Tulsa, Oklahoma 74119

Attorneys for Plaintiff, Cedric Jordan

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

FILED

NOV - 5 1997

BARBARA DANIELS,)
)
 Plaintiff,)
)
 v.)
)
 KMART CORPORATION,)
 a Michigan corporation,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-19-B

ENTERED ON DOCKET

DATE NOV 06 1997

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff's causes of action in this case against Defendant, Kmart Corporation.

DATED this 3 day of Nov, 1997.

Barbara Daniels
Barbara Daniels, Plaintiff

Katherine T. Waller
Katherine T. Waller
403 South Cheyenne, Suite 1100
Tulsa, OK 74103
(918) 582-9339
(918) 583-1117 (Fax)
Attorney for Plaintiff, Barbara Daniels

Kristen L. Brightmire
Kristen L. Brightmire
Doerner, Saunders, Daniel & Anderson
320 South Boston, Suite 500
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(918) 582-1211
(918) 591-5360 (Fax)
Attorneys for Defendant, Kmart Corporation

31

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

FMI-USA, INC.,
a Delaware Corporation,

Plaintiff,

vs.

INTERMODAL TRANSPORT CO.;
LAND STAR SYSTEMS, INC., and
IT CLOSURE CORP.,

Defendant.

FILED

NOV - 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-0210-C

ENTERED ON DOCKET

DATE NOV 06 1997

JOINT STIPULATION OF DISMISSAL

Pursuant to the applicable provisions of Rule 41 of the Federal Rules of Civil Procedure, Plaintiff and Defendant, through counsel, jointly state a settlement has been reached in the above entitled matter and requests this Court to enter an Order dismissing this cause of action with prejudice.

Respectfully submitted,

THEODORE P. GIBSON, OBA #3353
TIPS & GIBSON
525 South Main, Suite 1111
Tulsa, OK 74103-4512
918-585-1181, Fax 585-1668
ATTORNEYS FOR PLAINTIFF

STUART D. CAMPBELL
GABLE, GOTWALS, MOCHE,
SCHWABE, KIHLE & GABERINO
100 W. 5th St., OneOk, Suite 1000
Tulsa, OK 74103-4219

015

20

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

ELIZABETH COOK,)
)
Plaintiff,)
)
v.)
)
MULTIMEDIA GAMES, INC.,)
)
Defendant.)

No. 97-C-144-H

FILED

NOV - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOV 30 1997

STIPULATION OF DISMISSAL PURSUANT TO FED. R. CIV. P. 41(a)(1)(ii)

COMES NOW the Plaintiff and by this Stipulation signed by all parties who have appeared in this action, pursuant to the Fed. R. Civ. P. 41(a)(1)(ii), dismissed this action with prejudice.

DEFENDANT:

PLAINTIFF:

MULTIMEDIA GAMES, INC.

By: [Signature]
Its: [Signature]

[Signature]
Elizabeth E. Cook

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

THE RICHARDSON LAW FIRM

By: [Signature]
Graydon Dean Luthy, Jr., OBA#5568
320 South Boston, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400
(918) 594-0505
ATTORNEYS FOR DEFENDANT
MULTIMEDIA GAMES, INC.

By: [Signature]
Keith A. Ward, OBA #9346
6846 S. Canton, Suite 200
Tulsa, Oklahoma 74136
(918) 492-7674
(918) 493-1925 Facsimile
ATTORNEYS FOR PLAINTIFF
ELIZABETH E. COOK

DATE 11-5-97

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

FILED

NOV - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HARBOR'S VIEW MARINA,)
)
Plaintiff,)
)
vs.)
)
FIBERGLASS ENGINEERING, INC.,)
d/b/a COBALT BOATS,)
)
Defendant.)

Case No. 96-CV-1148K

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

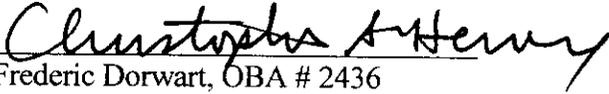
Plaintiff Harbor's View Marina and Defendant Fiberglass Engineering, Inc., d/b/a Cobalt Boats, pursuant to Rule 41(a)(ii) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, with prejudice to refileing, each party to bear its respective costs and attorney fees.

Respectfully submitted,



Phil Frazier, OBA # 3112
FRAZIER, SMITH & PHILLIPS
1424 Terrace Drive
Tulsa, OK 74104-4626
Telephone (918) 744-7200
Facsimile (918) 744-7210

Attorneys for Plaintiff



Frederic Dorwart, OBA # 2436
Christopher S. Heroux, OBA # 11859
FREDERIC DORWART, LAWYERS
Old City Hall
124 East Fourth Street
Tulsa, OK 74103-5010
Telephone (918) 599-9922
Facsimile (918) 583-8251

Attorneys for Defendant

OKI

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

ELAINE S. CLAXTON,)
)
Plaintiff,)
)
v.)
)
BILLY PARKER and TULSA GREAT)
EMPIRE BROADCASTING, INC.,)
d/b/a KVOO (AM & FM) and KICK 99,)
)
Defendants.)

ENTERED ON DOCKET

DATE 11-5-97

Case No. 97-CV-185-K

FILED

NOV - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

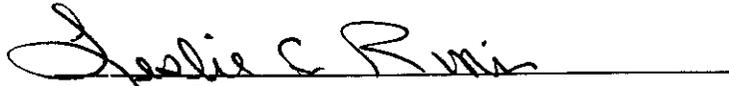
Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff's causes of action in this case against Defendants Billy Parker and Tulsa Great Empire Broadcasting, Inc., d/b/a KVOO (AM & FM) and KICK 99.

DATED this 4th day of November, 1997.

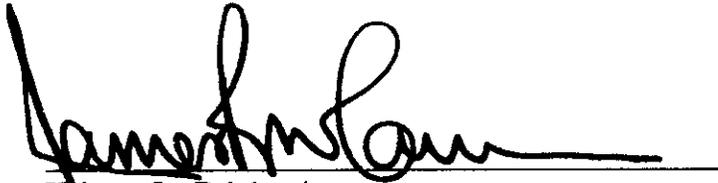


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WJ



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Attorneys for Defendant Billy Parker



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(918) 591-5360 (Fax)
Attorneys for Defendant, Tulsa Great Empire Broadcasting
Company, Inc.

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

FILED

NOV 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARTHA JO RISELING, as Surviving)
Widow Spouse and Personal Repr-)
sentative of STEPHEN M. RISELING,)
Deceased; MARTHA JO RISELING,)
Individually,)

Plaintiffs,)

vs.)

Case No. 90-C-961 E

NATIONAL CAR RENTAL SYSTEM, INC.,)
d/b/a NATIONAL CAR RENTAL, a)
Delaware corporation; JONES OLDS-)
GMC-BUICK, INC.; GENERAL MOTORS)
CORPORATION, Tradename OLDSMOBILE)
DIVISION, a Delaware corporation;)
and GERALD JONES, d/b/a NATIONAL)
CAR RENTAL,)

Defendants.)

EOD 11/4/97

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for consideration this 3/27 day of October, 1997, before the undersigned District Judge of the United States District Court for the Northern District of Oklahoma, and having considered the Joint Application of the parties for an Order of Dismissal with Prejudice, having reviewed the file, and being fully advised in the premises, finds and Orders as follows:

That the Joint Application of the Plaintiffs, Martha Jo Riseling, as Surviving Widow Spouse and Personal Representative of Stephen M. Riseling, Deceased; Martha Jo Riseling, Individually, and the Defendants, National Car Rental System, Inc., d/b/a National Car Rental, Jones Olds-GMC-Buick, Inc., and

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(Handwritten initials)

Gerald Jones d/b/a National Car Rental, for a Dismissal With Prejudice should be and is hereby granted.

BE IT THEREFORE ORDERED, ADJUDGED AND DECREED that the claims of the Plaintiffs, Martha Jo Riseling, as Surviving Widow Spouse and Personal Representative of Stephen M. Riseling, Deceased; Martha Jo Riseling, Individually, against the Defendants: National Car Rental System, Inc., d/b/a National Car Rental, Jones Olds-GMC-Buick, Inc., and Gerald Jones d/b/a National Car Rental, only, BE AND ARE HEREBY DISMISSED WITH PREJUDICE.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED that this Order of Dismissal with Prejudice does not effect the claims of the Plaintiffs, Martha Jo Riseling, as Surviving Widow Spouse and Personal Representative of Stephen M. Riseling, Deceased; Martha Jo Riseling, Individually against the Defendant General Motors Corporation, Tradename Oldsmobile Division, a Delaware corporation.



JUDGE JAMES ELLISON
United States District Judge

APPROVED:

By: 

John Baum, OBA #6120
4808 N. Classen Blvd.
Oklahoma City, OK 73118

AND

Mark Shores, OBA #10128
500 N.W. 13th Street
Oklahoma City, OK 73103

Attorneys for Plaintiffs
Martha Jo Riseling, as
Surviving Widow Spouse
and Personal Representative
of Stephen M. Riseling,
Deceased; Martha Jo
Riseling, Individually

By: Phillip McGowan
Phillip McGowan, OBA 5997
1516 South Boston, Suite 205
Tulsa, Oklahoma 74119
Attorney for National Car Rental
System, Inc. d/b/a National Car
Rental, Jones Olds-GMC-Buick,
Inc. and Gerald Jones d/b/a
National Car Rental

CERTIFICATE OF MAILING

This will certify that a true and correct copy of the
above and foregoing was mailed to:

Mary Quinn Cooper
Rhodes Hieronymus Jones Tucker and Gable
P. O. Box 21100
Tulsa, OK 74121

on this _____ day of _____, 1997, with postage prepaid
thereon.

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

SAMSON RESOURCES COMPANY)
)
 Plaintiff,)
)
 vs.)
)
 EXXON CORPORATION)
)
 Defendant.)

Case No. 96-CV-1159

FILED

NOV - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOV 3 1997

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, Samson Resources Company ("Samson") and Exxon Corporation ("Exxon"), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulate to the dismissal of Samson's claims and Exxon's counterclaims which were asserted in the referenced litigation without prejudice to the refileing of the same. Each party shall bear its own costs and attorneys' fees.

Dated this 31st day of October, 1997.

Robert N. Barnes

Robert N. Barnes, OBA #0537
Michael E. Smith, OBA #8385
Robert D. McCutcheon, OBA #5945
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(405) 843-0363 Telephone
(405) 843-0790 Telefacsimile

Attorneys for Plaintiff
SAMSON RESOURCES COMPANY

-and-

*mm
clerk
clt*



GARY W. DAVIS, OBA #2204
JOHN J. GRIFFIN, JR., OBA #3613
L. MARK WALKER, OBA #10508

-Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
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(405) 235-7700

Attorneys for Defendant
EXXON CORPORATION

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

F I L E D

NOV 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOME CORPORATION, an Oklahoma Corporation, NEODYNE DRILLING CORPORATION, an Oklahoma corporation, THOMAS F. WATSON, and an individual and director and officer of Dome Oil Corporation and Neodyne Drilling Corporation, and THOMAS C. JOHNS, an individual,

Plaintiffs,

vs.

COMPTON K. KENNARD, as an individual and officer and director of South Florida Pump Service, Inc., and GARY HERMANN, an individual,

Defendants.

and

GARY HERMANN and MARY JANE HERMANN individually and d/b/a BEAR CIL & GAS, INC.,

vs.

DOME CORPORATION, an Oklahoma corporation, NEODYNE DRILLING CORPORATION, an Oklahoma corporation, THOMAS G. WATSON, an individual and as a director and officer of Dome Oil Corporation, and THOMAS C. JCHNS, an individual, and THE CINCINNATI INSURANCE COMPANY.

Third-Party Defendants.

Case No. 96-C-97-E

ENTERED ON DOCKET
DATE NOV 04 1997

C R D E R

Now before the Court is the Motion for Summary Judgment of the defendants Compton K. Kennard and South Florida Pump Service (collectively, "Kennard") against the plaintiffs Dome Corporation

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(Dome), Neodyne Drilling Corporation (Neodyne), Thomas G. Watson (Watson) and Thomas C. Jones (Jones) (Docket #59). Also before the Court is the Motion for Summary Judgment to declare insurance coverage of the Defendant Gary Hermann (Hermann) (Docket # 52), and the Motion for Summary Judgment regarding insurance coverage of third party defendant Auto-Owners Insurance Company (Auto-Owners) (Docket #57) and the Motion for Summary Judgment of the third party defendant Cincinnati Insurance Company (Cincinnati) (Docket #55). In addition Auto-Owners has filed a Motion to Strike (Docket # 58) Hermann's Motion for Summary Judgment insofar as it deals with the potential of coverage by Auto-Owners.

This matter began as a relatively simple libel and slander claim by Dome, Neodyne, Watson, and Johns against Kennard and Hermann. Hermann was a participant in an oil and gas business venture which was organized as Dome and Neodyne. Watson and Johns were principals in the business venture. Sometime in 1995, Hermann became unhappy with the progress of the venture and enlisted the aid of Kennard in investigating the venture. That investigation resulted in a lengthy report dated September 25, 1995, which was mailed to the interest owners in the wells promoted and operated by Neodyne and Dome. Plaintiffs contend that the letter contains false statements made wilfully and without regard for their truth or falsity. Plaintiffs also assert that, after the letter went out, Hermann and Kennard made statements to the plaintiffs' investors to the effect that plaintiffs were incompetent thieves who had "bilked" their investors out of money.

In June of 1996, Hermann brought a claim against Cincinnati Insurance Company, with whom Hermann had two umbrella policies and a business owners policy, arguing that it had an obligation to defend Hermann in this case and that, in the event he was found liable to plaintiffs, Cincinnati would be responsible for the payment of any judgment. Cincinnati in turn filed a third party complaint for declaratory judgment, and also sought a determination of the responsibilities of Auto-Owners, with whom Hermann had a homeowners policy of insurance. Auto-Owners filed a cross-claim against Hermann and a counterclaim against Cincinnati, seeking a determination of coverage.

Legal Analysis

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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant

"must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Defamation Claims

In his Motion for Summary Judgment on Plaintiffs' defamation claims, Kennard argues that the statements made in his letter are opinion and thus not actionable, that all of the statements made are not actionable under the intra corporate privilege, and that the report is not actionable because it is "adjunct to legislation." With respect to his argument regarding opinion, Kennard relies on Miskovsky v. Oklahoma Pub. Co., 664 P.2d 587, 593-594 (Okla. 1982), wherein the court held that opinionative statements "are not factual, but rather judgmental. Accordingly, they cannot form the basis of a libel action, as they cannot be verified as true or false." Opinion has been defined as that which cannot be objectively determined. Metcalf v. KFOR-TV, Inc., 828 F.Supp. 1515 (W.D. Okla. 1992). Despite Kennard's own labeling of his statements as opinion, the Court does not find that statements regarding the honesty or the competence of plaintiffs "cannot be objectively determined."

Kennard also argues that summary judgment is appropriate because any statement made by him was an "intra corporate communication" which does not, as a matter of law, constitute a publication. Magnolia Petroleum Co. V. Davidson, 148 P. 2d 468 (Okla. 1944); Starr v. Pearle Vision, Inc., 54 F.3d 1548 (10th Cir. 1995). Kennard's assertion, however, that the statements were

"intra corporate communications" is without merit. The statements complained of were made by an investor (Hermann) and a person hired by that investor (Kennard) to other investors and landowners of plaintiffs' leases. Both Magnolia Petroleum and Starr are factually distinguishable from the present case in that they deal with situations where an employee brings a complaint against his employer or co-workers for alleged defamatory statements. That is not the fact situation in this case. Further, Kennard cites to no authority which would extend the "intra corporate communication" rule to investors in a corporation.

Lastly, Kennard argues that the allegedly defamatory statements are "adjunct to legislation," and thus privileged. For this assertion, Kennard relies on Okla.Stat.tit 12, §1443.1, which provides that a privileged communication is one made in "any legislative or judicial proceeding or any other proceeding authorized by law." Neither the statements in the letter, nor the subsequent oral statements were "made in any judicial proceeding," regardless of the fact that the letter refers to related litigation. By the same token, however, the reference to pending litigation could not be a defamatory statement because it is a true statement. Summary judgment on plaintiffs' claims is not appropriate.

Insurance Coverage

There are four policies at issue: Auto-Owners' Homeowners Policy, Cincinnati's Personal Umbrella Liability Policy, Cincinnati's Businessowners Policy, and Cincinnati's Commercial

Umbrella Liability Policy. Hermann argues first that the Homeowners Policy provides coverage¹, and in the event that it does not, that the Businessowners Policy provides coverage. All three, Hermann, Auto-Owners, and Cincinnati have filed motions for summary judgment on the issue of coverage. The arguments raised in the motions are essentially the same and the Court will address first the applicability of the Homeowners Policy, and then the applicability of the Businessowners Policy.

Auto-Owners, by letter of January 24, 1996, questioned whether its Homeowners Policy would provide coverage in these circumstances, citing the following exclusions:

Under Personal Liability Coverage and Medical Payments to Others Coverage we do not cover:

3. bodily injury or property damage arising out of business pursuits of an insured person in connection with a business owned or financially controlled by that person or by a partnership or joint venture of which that person is a partner or member.

* * *

Under the Personal Liability Coverage we do not cover:

¹ Hermann makes the argument regarding the Homeowners Policy in his Motion for Summary Judgment. Auto-Owners has filed a Motion to Strike the Motion for Summary Judgment (Docket # 58) on the grounds that Hermann has not, in this lawsuit asserted a claim against Auto-Owners. The Court finds this argument to be without merit. Hermann notified Auto-Owners of this lawsuit and made a claim for coverage in January, 1996. Although Hermann only made a direct claim in this lawsuit against Cincinnati, Auto-Owners filed a cross-claim against Hermann seeking a declaration of no coverage. The question of whether the Homeowners Policy provides coverage is clearly at issue in this lawsuit, and Auto-Owners provides no authority or legitimate grounds for striking the Motion for Summary Judgment of Hermann.

5. personal injury:

- a. in connection with any business, occupation, trade or profession; or
- b. with respect to any publication or utterance made knowing it to be false.

Because Hermann concedes that bodily injury and property damage are not part of plaintiffs' claims and are irrelevant to the coverage determination, the "Business Pursuits" exclusion is not at issue here. The language at issue is "personal injury in connection with any business, occupation, trade or profession." The policy defines "business" as "any full or part time trade, profession or occupation."

Because Hermann attempts to interpret the Homeowners policy with the aid of Michigan case law, and Auto-Owners attempts to interpret the policy with the aid of Oklahoma case law, the first question which must be answered is whether Oklahoma or Michigan law applies to the interpretation of the Homeowners Policy. A federal court in a diversity case applies the choice of law rules of the forum state. Moore v. Subaru of America, 891 F.2d 1445, 1448 (10th Cir. 1989). The forum state is Oklahoma, and, the general rule under Oklahoma law is that the interpretation of an insurance contract should be determined by the laws of the state in which the contract was made. Roby v. Bailey, 856 P. 2d 1013 (Okla. App. 1993). It is undisputed in this case that the policy was entered into in the state of Michigan. Thus Michigan law applies.

Hermann, relying on Van Hollenbeck v. Insurance Company of North America, 403 N.W. 2d 166 (Mich. App. 1987), argues that the

personal injury business exclusion is ambiguous and must be interpreted to apply only if the allegations relate to the insured's principal business (which, in this case is ownership of a hardware business). In Van Hollenbeck, the court found that an exclusion which provided that coverage would not apply "to any business or business property of the insured" was ambiguous. "Business" was defined in that policy to include "trade, profession, or occupation." The insured argued that the exclusion did not apply because the underlying suit was not against Van Hollenbeck's business, but against Van Hollenbeck individually. The court stated:

Although we acknowledge the reasonableness of the trial court's interpretation of the exclusion as encompassing any activity engaged in for profit, trade, or occupation, we likewise observe that the interpretation offered by plaintiffs is just as reasonable. The ambiguity in the clause should not inure to the benefit of the insurer who drafted the policy. If INA wanted to specifically exclude the business pursuits of its insured, it was perfectly capable of doing so. Consequently, construing the "business" exclusion narrowly, we are unpersuaded that it applied to negate coverage in the underlying suit.

Van Hollenbeck, 403 N.W. at 169-70.

In the present case, the exclusion is such that claims for personal injury "in connection with any business, occupation, trade, or profession" are not covered. Further the policy in this case defines business as an "full or part time trade, profession or occupation." An ambiguity does not exist with this language as it does with the language in Van Hollenbeck. The key difference is the phrase "in connection with" which is in the policy at issue in this lawsuit. Because of that phrase, it is not reasonable to

argue that just because the lawsuit is not against Hermann's business, but against him individually, the exclusion does not apply. The language does not compel the conclusion that the exclusion must be limited to the Hermann's principal occupation. In fact, the language specifically includes an occupation which is "part-time." The Homeowners Policy does not apply because of the business exclusion. Because the Homeowners Policy does not provide coverage, there is coverage pursuant to the terms of the Personal Umbrella Liability Policy.

The remaining question is whether coverage is provided under the terms of the Business Owners package Policy. That policy provides:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," "personal injury," or "advertising injury" to which the insurance applies. We will have the right and duty to defend any "suit" seeking these damages.

The policy lists as an insured both "Garmann Corporation" and "Gary Hermann." The policy provides:

C. WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

Cincinnati denied coverage, asserting that none of the allegations of the Amended Petition are connected with Hermann's duties as an officer, director or employee of Garmann Corporation or any other

business of which he is the sole owner.

Hermann argues that the policy is ambiguous, and must therefore be construed against Cincinnati because there is no definition in the policy of the word "business." He asserts that if the Homeowners Policy does not apply then the Court must have determined "that the allegations brought against Gary Hermann are brought pursuant to his capacity as the operator of an oil and gas `business,'" and he is therefore covered under the Business Owner's Policy. In making this argument, Hermann ignores the clear language of the policy. Assuming that Hermann's argument is correct that, since the word `business' is not defined, it must be assumed that his investment is a `business," this does not solve the problem of the unambiguous language "of which you are the sole owner." There is no dispute whatsoever that Hermann is not the sole owner of the oil and gas business venture known as Dome and Neodyne, but rather one of several investors. Under the clear language of the Business Owner's Policy, there is no coverage for the claims made in the Amended Petition.

The Motion for Summary Judgment of the defendants Compton K. Kennard and South Florida Pump Service (Docket #59) is DENIED. The Motion for Summary Judgment of the Defendant Gary Hermann (Docket # 52), is DENIED. The Motion for Summary of Third Party Defendant Auto-Owners Insurance Company (Docket #57) is GRANTED. The Motion for Summary Judgment of the Third Party Defendant Cincinnati Insurance Company (Docket #55) is GRANTED. The Motion to Strike (Docket # 58) is DENIED.

IT IS SO ORDERED THIS 31ST DAY OF OCTOBER, 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED
NOV 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ENTERED ON DOCKET
DATE NOV 04 1997

O R D E R

The Court, upon consideration of plaintiff's Motion filed under Authority of Fed.R.Civ.P. 60(b) to Vacate the Order Dated April 8, 1997, and the Judgment Dated May 13, 1997 (Docket #78), and upon consideration of the briefs and arguments of the parties submitted upon the issues raised enters the following Order:

It is Ordered that plaintiff's 60(b) motion is denied. Plaintiff urges that this Court's ruling was based on a mistake of law, which law was substantially clarified on June 24, 1997 by the Supreme Court of the State of Oklahoma in its opinion in Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc., No. 83,358. Plaintiff's position would have merit if the issues raised, presented, and addressed by the Supreme Court of Oklahoma were the same as the issues this Court addressed in its judgment and order. They are not the same.

The key issue before this Court was whether plaintiff's constitutional rights guaranteed by the Fourteenth Amendment were infringed by the state court in the condemnation proceedings. This

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Court stated in its Order, "Implicit in the issue before the court is the constitutionality of Okla.Stat.tit.66, §53(a), or its application in this case. . . . With the issue framed in this manner, the Court finds that Willis does not have a constitutional right to a hearing prior to PSO taking a possessory interest in his land."

The holding of the Supreme Court of Oklahoma establishes that the actions of the district court were in violation of Okla.Const., §§ 23, 24 and Okla.Stat.tit.66, §53. The decision did not involve the constitutionality of Okla.Stat.tit.66, §53. It addressed the failure of the lower courts to follow the established statutory process. Plaintiff has full relief available to him upon remand to the state district court.

In light of this finding, the Court declines to request of the Court of Appeals that this case be remanded for further proceedings based upon the holding of the Supreme Court of the State of Oklahoma. Plaintiff's motion to vacate (Docket #78) is denied.

IT IS SO ORDERED THIS 31st DAY OF OCTOBER, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIAN WALLS, <i>et al.</i> ,]
]
Plaintiffs,]
]
-vs-]
]
THE AMERICAN TOBACCO COMPANY, INC., <i>et al.</i> ,]
]
Defendants.]

Civil Case No. 97-CV-218-H /

ENTERED ON DOCKET

DATE 11/4/97

**PLAINTIFFS' NOTICE OF
VOLUNTARY DISMISSAL WITHOUT PREJUDICE OF DEFENDANT
THE TOBACCO INSTITUTE, INC.**

Plaintiffs notify the Court and the parties of the voluntary dismissal of defendant The Tobacco Institute, Inc., without prejudice, pursuant to Fed. R. Civ. P. 41.

Respectfully submitted,

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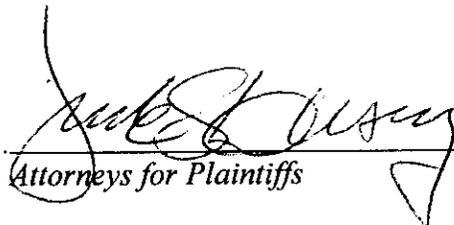
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Certificate of Service

The undersigned, one of the attorneys for the plaintiffs herein, hereby certifies that a true and correct copy of the above and foregoing document was mailed, by United States mail, postage prepaid, on this 30th day of October, 1997, to the following:

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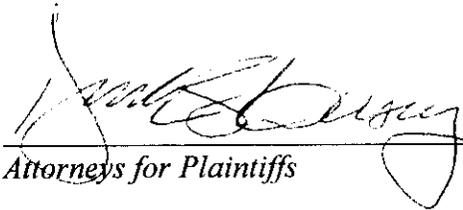
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BRIAN WALLS, *et al.*,

Plaintiffs,

-vs-

THE AMERICAN TOBACCO COMPANY,
INC., *et al.*,

Defendants.

ENTERED ON DOCKET

DATE 11 4 97

Civil Case No. 97-CV-218-H

FILED

NOV - 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**STIPULATION OF
VOLUNTARY DISMISSAL WITHOUT PREJUDICE**

Plaintiffs and defendants stipulate to the voluntary dismissal of class representative
Constance Cason, without prejudice, pursuant to Fed. R. Civ. P. 41.

Respectfully submitted,

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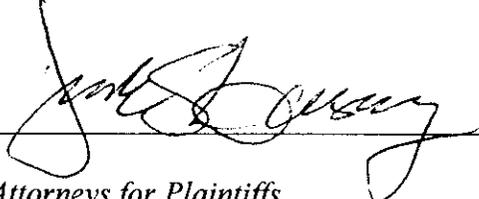
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Certificate of Service

The undersigned, one of the attorneys for the plaintiffs herein, hereby certifies that a true and correct copy of the above and foregoing document was mailed, by United States mail, postage prepaid, on this 30th day of October, 1997, to the following:

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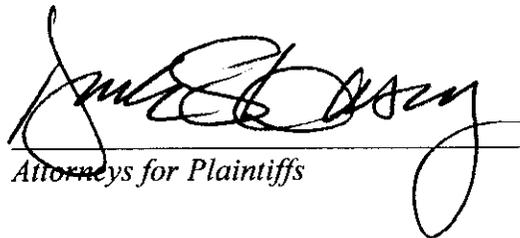
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Attorneys for Defendant The Tobacco Institute, Inc.



A handwritten signature in black ink, appearing to read "James E. Hutton", is written over a horizontal line. The signature is fluid and cursive.

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

PENNY M. TIPTON,)
)
Plaintiff,)
)
vs.)
)
TAP PHARMACEUTICALS, INC. and)
ABBOTT LABORATORIES, INC.,)
)
Defendants.)

Case No. 96-C-325-BU

F I L E D

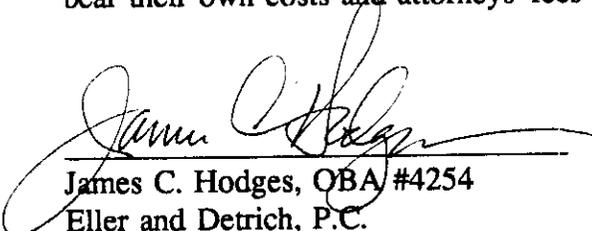
OCT 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

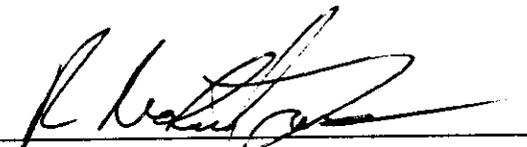
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JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff Penny M. Tipton, Defendant TAP Pharmaceuticals, Inc. and Defendant Abbott Laboratories, by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action with prejudice, each party to bear their own costs and attorneys' fees incurred herein.


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

FILED

OCT 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MAURICE SHERMAN BLISS, ET AL.,)
)
Plaintiffs,)
)
vs.)
)
CHARLES SCHUSTERMAN, ET AL.,)
)
Defendants.)

Case No. 96-CV-557-BU

ENTERED ON DOCKET
NOV 03 1997
DATE _____

JUDGMENT

This action came before the Court upon Defendants' Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Charles Schusterman, C. Philip Tholen and Jack Canon, and against Plaintiffs and that Defendants are entitled to recover of Plaintiffs their costs of this action.

ENTERED this 31st day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
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ORDER

This matter comes before the Court upon the motion of Defendants, Charles Schusterman, C. Philip Tholen and Jack Canon, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. Plaintiffs have responded to the motion, Defendants have replied and Plaintiffs have responded thereto. Based upon the parties' submissions, the Court makes its determination.

Background

From August through October, 1980, Samson Resources Company ("Samson"), obtained oil and gas leases and/or ratification of leases ("the Sherman Heir Leases") from Frances Gullick Mayo, Leona Sherman Nance, Ruthie Estelle Sherman Rowlan, Frances Gullick Hair, Mary Withie Sherman McCracken, Melton W. Gullick, Maurice Sherman Bliss and Ida May White Cannon ("the Sherman Heir Lessors").

The Trammel Trust Well was spud on November 28, 1980, soon after the Sherman Heir Leases were obtained, and was thereafter

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completed in early 1981. First sales of production began in 1981.

Samson did not pay royalties to the Sherman Heir Lessors. Plaintiffs, who are the Sherman Heir Lessors or the heirs of the Sherman Heir Lessors, were Intervenors in the trial underlying Mitchell Energy Corp. v. Samson Resources Co., 80 F.3d 976 (5th Cir. 1996). That trial resulted in the Texas jury awarding Plaintiffs judgment against Samson for \$40,000,000.00 in punitive damages and \$1,354,752.11 in actual damages.

The Fifth Circuit, in Mitchell, reversed the punitive damage award in its entirety and reduced the actual damage award to Plaintiffs to \$206,167.00 (royalties for a fifteen year period plus interest). The Fifth Circuit found that Plaintiffs' claims of fraud and conversion were not supported under Texas law.

Prior to the Fifth Circuit's decision, Plaintiffs commenced the instant action. Originally, Plaintiffs sued twenty-three persons and/or entities affiliated with Samson alleging various theories of liability. After the Mitchell opinion, Plaintiffs dismissed all theories against all defendants other than the present Defendants. Plaintiffs also added a claim of tortious interference with contract. Subsequently, upon motion of Defendants, all but two theories of liability alleged against Defendants were dismissed. The two remaining theories are tortious interference with contract and civil conspiracy. In the instant motion, Defendants seek summary judgment on those claims.

Defendant, Charles Schusterman, is the founder, controlling shareholder, and President of Samson. Defendants, C. Philip Tholen and Jack Canon, are officers of Samson. Plaintiffs allege that these Defendants made the decision for Samson not to pay royalties to Plaintiffs and thus interfered with their contracts with Samson.

Summary Judgment Standard

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). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient to defeat summary judgment. There must be evidence on which the jury could reasonably find for the plaintiffs. Id.

The inquiry for the Court is "whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 250.

Discussion

Under Texas law, a plaintiff alleging tortious interference with contract must prove the following four elements to sustain his or her claim: (1) a contract subject to interference existed; (2) the act of interference was willful and intentional; (3) the willful and intentional act proximately caused damages; and (4) actual damage or loss occurred. Juliette Fowler Homes v. Welch Assocs., 793 S.W.2d 660, 665 (Tex. 1990). A necessary element of the plaintiff's claim is a showing that the defendant took an active part in persuading a party to a contract to breach it. Davis v. HydPro, Inc., 839 S.W.2d 137, 139 (Tex. App. 1992). Also, a necessary element is that the defendant must be a third party, or a stranger, to the contract to tortiously interfere with it. Holloway v. Skinner, 898 S.W.2d 793, 795-96 (Tex. 1995). When a defendant serves the dual roles of the corporate agent and the third party who allegedly induces the corporation's breach, the plaintiff may establish a prima facie case by showing the alleged interference was performed in furtherance of the defendant's personal interests. Id. at 796. This preserves the logically necessary rule that a party cannot tortiously interfere with its own contract. Id. The plaintiff to meet his or her burden must

show that the defendant acted in a fashion contrary to the corporation's interests that the agent could only have been motivated by personal interests. Id. at 796-98.

As to Defendants, Charles Schusterman and C. Philip Tholen, the Court finds that Plaintiffs cannot establish a tortious interference claim because these Defendants were not strangers to the leases. It is undisputed that Schusterman owned a 32.625% working interest in the Sherman Heir Leases. It is also undisputed that Tholen was a general partner of Ace IV and Ace IV owned a 4.875% working interest in the Sherman Heir Leases. By definition, a working interest owner is a party to the underlying lease. See, 8 Williams & Meyers, Oil and Gas Law (Manual of Terms), at pp. 1225-26 (defining "working interest" as the "operating interest under an oil and gas lease"). Therefore, as working interest owners, Defendants were parties to the leases and cannot, as a matter of law, tortiously interfere with the leases.

In addition, the Court finds as to Defendants, Charles Schusterman, C. Philip Tholen and Jack Canon, Plaintiffs have failed to present sufficient evidence to raise a genuine issue of fact that they took an active part in Samson's nonpayment of royalties. It is undisputed that Canon did not join Samson until after the decision to not pay royalties was made. The undisputed evidence also shows that Schusterman and Tholen, while officers of Samson when the decision was made, were not involved with the day-

to-day operations of Samson's land or division order departments. The undisputed evidence shows that employees in the land and division order departments made the decision not to pay royalties to Plaintiffs.

In support of Defendants' alleged participation in the nonpayment of royalties, Plaintiffs have submitted evidence of a one-page handwritten memorandum of Schusterman copied to Tholen and two other officers allocating drilling costs and working interests between Samson's internal owners. The Court, however, finds that the memorandum does not show that Schusterman and Tholen affected the payment of royalties to Plaintiffs. The memorandum, which allocated ownership of Samson's leases, had no bearing on who would be paid royalties. Indeed, after the 1980 memorandum, the evidence shows that the land department and the division order department prepared documents that recognized all royalty interests and correctly indicated that the interests claimed by both the heirs of George Davis and the heirs of Mary Sherman would be suspended.

Plaintiffs have also submitted a 1981 letter copied to Tholen from an oil purchaser, Big Heart, enclosing a 100% division order, a 1990 one-page memorandum from Samson's division order department received by Tholen and Canon that set forth ownership in the well and a 1990 letter received by Tholen and Canon from a Mr. Fuller who claimed to be an heir of Augusta Sherman West. The Court,

however, finds that these documents do not establish that Tholen and Canon affected the payment of royalties. Neither the letter from Big Heart nor the division had anything to do with Plaintiffs. Likewise, Mr. Fuller is not a Plaintiff in this case and the evidence shows that Tholen and Canon were informed that Augusta Sherman West was not listed as a potential owner. Although Tholen and Canon by studying the bottom of the one-page memorandum from the division order department could have recognized that Plaintiffs' royalty interest was not the subject of a suspense entry, Tholen and Canon's failure to discover the error and remedy it does not give rise to a tortious interference claim. Neither silence, hostility, nor failure to response is sufficient to support a tortious interference claim against an agent. American Medical Int'l Inc. v. Guirintano, 821 S.W.2d 331, 338 (Tex. App. 1991).

In addition, the Court finds that Plaintiffs have failed to present any evidence to show that Defendants, C. Philip Tholen and Jack Canon, personally benefited from the nonpayment of royalties. It is undisputed that Philip and Canon never received any revenues from the well. Specifically, as to Tholen, the evidence shows that he never expected to receive any benefit from revenues because Ace IV's debt was so high that it never was expected to make a distribution to Tholen. Although Defendants received a salary from Samson, the receipt of a salary is insufficient to show a tortious

contractual interference. Holloway, 898 S.W.2d at 796. As Plaintiffs cannot show a personal benefit to Defendants from Samson's nonpayment of royalties, the Court finds that Plaintiffs cannot establish that Defendants committed an act of willful or intentional interference.

In conclusion, the Court finds that Defendants are entitled to summary judgment on Plaintiffs' claim of tortious interference with contract because Plaintiffs cannot establish the essential elements of their claim. As Plaintiffs cannot show that Defendants tortiously interfered with their leases, the Court also finds that Defendants are entitled to summary judgment on Plaintiffs' civil conspiracy claim.¹ Schoellkopf v. Pledger, 778 S.W.2d 897, 900 (Tex. App. 1989); Central Savings and Loan Assoc. v. Stemmons Northwest Bank, 848 S.W.2d 232, 241-42 (Tex. App. 1992).

Based upon the foregoing, Defendants' Motion for Summary Judgment (Docket Entry #46) is **GRANTED**. Judgment shall issue forthwith.

ENTERED this 31st day of October, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹ As the Court has found Plaintiffs cannot establish their claims against Defendants, the Court need not address the statute of limitations defense raised by Defendants in further support of summary judgment.

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

F I L E D

OCT 31 1997

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

GEORGIA TREVIZO

518-42-3536

Plaintiff,

vs.

KENNETH S. APFEL,¹

Commissioner,

Social Security Administration,

Defendant.

Case No. 96-CV-610-BU (M)

ENTERED ON DOCKET

NOV 03 1997

REPORT AND RECOMMENDATION

Plaintiff, Georgia Trevizo, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

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

¹ Kenneth S.. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

² Plaintiff's June 2, 1993, protectively filed application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held November 17, 1994. By decision dated February 24, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 2, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(11)

F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born April 15, 1939 and was 55 years old at the time of the hearing. She has an 8th grade education and formerly worked as a poultry processor and home care provider. She claims to be unable to work as a result of mental stress, arthritis, hypertension, memory problems, knee, neck and back pain, and headaches. The ALJ determined that Plaintiff is capable of performing her past relevant work as a home care provider. The case was thus decided at step four of the five-step evaluative sequence for determining whether Plaintiff is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) improperly rejected a treating physician's opinion; (2) improperly evaluated her credibility; and (3) improperly rejected testimony of the vocational expert. The Court finds that the ALJ's decision is supported by substantial evidence in the record and should be AFFIRMED.

TREATING PHYSICIAN OPINION

Plaintiff was treated by Norman A. Cotner, M.D. and J.D. Corpolongo, D.O. intermittently from March 1989 to January 1994. Their records reflect that she was seen for a variety of complaints including fever, coughing, nausea, headaches, and neck, arm and back pain. [R. 239-246]. The report of March 24, 1992, x-rays of Plaintiff's right shoulder and cervical spine ordered by Dr. Cotner show a "normal right shoulder" and "narrowing of C5, 6, C6, 7 disc spaces" evidence of nerve root impingement and "evidence for [sic] muscle spasm is noted." [R. 247]. On September 14, 1993, Dr. Corpolongo completed a letter which states:

Mrs. Trevizo has been under my care for chronic pain in her neck and arms.

She was treated in August for pain and stiffness in her neck and left arm. She has trouble lifting her left arm.

She has been on several different anti-inflammatory drugs but they have not helped release [sic] the pain.

Her condition is getting progressively worse. There is no way this lady could work as a chicken hanger.

She would have problems holding a job due to her osteoarthritis.

I feel that it would be appropriate for her to be assigned for disability.

[R. 236].

The ALJ rejected Dr. Corpolongo's opinion stating that there is nothing in the treatment record which would corroborate the level of restriction indicated in the letter. The statement that the several anti-inflammatory medications were of no help

is contradicted in the records which show that she was doing better and an exacerbation occurred when she ran out of medication. [R. 17].

It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984). The Court finds that ALJ appropriately set forth specific, legitimate reasons for rejecting Dr. Corpolongo's opinion.

CREDIBILITY ANALYSIS

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of her pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ addressed some of the factors set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R.

416.929(c)(3), and Social Security Ruling 88-13, including Plaintiff's objective medical findings, use of medication, side effects, and her activity level and appropriately applied the evidence to those factors. The Court finds that the ALJ evaluated Plaintiff's credibility, the record and her allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

VOCATIONAL EXPERT

At Plaintiff's November 17, 1994 hearing, she testified that she was working as a home care provider, and had since February. [R. 76]. As a home care provider she works three hours a day, preparing meals, doing dishes, cleaning floors, and giving medication, as required. [R. 75]. She has done this work off and on for a number of years, and left her previous jobs when she was no longer needed to provide care for the individuals. [R. 200]. The ALJ concluded that, despite her impairments, Plaintiff was capable of performing home care provider work. [R. 19, 20].

At the hearing Plaintiff's counsel asked the vocational expert what sort of jobs are available in the economy for a woman of Plaintiff's age--55, education--8th grade, work history--unskilled. The vocational expert answered there would be no jobs she could perform. The ALJ clarified that the vocational expert meant that if she was not able to do her past relevant work that there would be no jobs. [R. 80-81]. Plaintiff argues that the vocational expert's testimony precludes a finding that she is not disabled. This rationale was implicitly rejected by the Tenth Circuit in *Murrell v. Shalala*, 43 F.3d 1388, 1389 (10th Cir. 1994). In that case the Court discussed

proper application of 20 C.F.R. § 404.1520(a) which states that if the Commissioner "find[s] that you are disabled or not disabled at any point in the [five-step] review, we do not review your claim further." Although the Court was presented with the question of the propriety of the practice of offering alternative dispositions, it made the following parenthetical comment which is applicable in this case: "the integrity of a step-four finding is not compromised in any way by the recognition that step five, if it were reached, would dictate the same [or a different] result." *Id.* [bracket in original]. Applying the foregoing principle to this case, the Court finds that it is irrelevant whether there are any other jobs in the economy which Plaintiff could perform, the fact that she can perform her past relevant work as a home care provider precludes a finding of disability.

The ALJ's finding that Plaintiff could perform her past relevant work as a home care provider is supported by substantial evidence in the record.

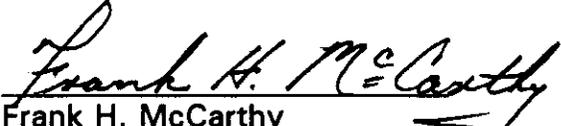
CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the Commissioner's finding that Plaintiff is not disabled as defined in the Social Security Act be AFFIRMED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and

recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 31st day of October, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE