

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

CHADWICK SMITH, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DIANE BARKER HARROLD, )  
in her individual capacity, District Attorney )  
of Cherokee County; )  
JOE BYRD, )  
in his individual capacity, Principal Chief )  
of the Cherokee Nation; )  
NORMAN FISHER, )  
in his individual and official capacity, Chief of )  
Tahlequah Police Department, Tahlequah, Oklahoma )  
DELENA GOSS, )  
in her individual and official capacity, Sheriff )  
of Cherokee County, State of Oklahoma; )  
ADA DEER, )  
in her individual and official capacity as )  
Undersecretary of the Department of Interior for )  
Indian Affairs, )  
JIM FIELDS, )  
in his individual and official capacity, as Muskogee )  
Area Director of the Bureau of Indian Affairs; )  
PERRY PROCTOR, )  
in his individual and official capacity, Criminal )  
Investigator for the Bureau of Indian Affairs, )  
Department of Interior; )  
RICK SMITH, )  
in his individual and official capacity, )  
Cherokee County Deputy Sheriff; )  
BOARD OF COUNTY COMMISSIONERS, )  
Cherokee County. )  
)  
Defendants. )

No. 97CV765-B (W) ✓

**FILED**  
DEC 9 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE DEC 10 1997

ORDER

Before the Court for decision is Defendants' motion to dismiss for lack of venue

37

(Docket Nos. 19, 20 and 22).

Plaintiff, Chadwick Smith ("Smith"), alleges violations of his rights under the First, Fifth and Fourteenth Amendments of the Constitution of the United States of America, Sections 1983, 1985, 1986 and 1988 of Title 42 of the United States Code, the Treaties of 1835 and 1866 between the Cherokee Nation and the United States of America and Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971), and seeks a preliminary injunction, declaratory judgment, and money damages against the Defendants, save one. All Defendants except Ada Deer ("Deer") (Plaintiff sues Deer only in her official capacity - see Plaintiff's objection filed 11-26-97, p. 4) reside in the Eastern District of Oklahoma. Plaintiff resides in the Northern District of Oklahoma.

Plaintiff alleges that on June 20, 1997, at the Cherokee Nation Courthouse in Tahlequah, Oklahoma, he was unlawfully arrested and restricted in his rights to speak and assemble by all the Defendants.<sup>1</sup> Plaintiff alleges Defendants Diane Barker Harrold ("Harrold") and Joe Byrd ("Byrd") carried out an unlawful extrajudicial arrest and wrongful prosecution as well as an assault and battery upon his person on that date.

The events arose from the current political strife between the Executive and Judicial Branches of the Cherokee Nation Government. The Executive Branch, with aid of local law enforcement, had seized and taken over the Cherokee Nation Courthouse in Tahlequah,

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<sup>1</sup>On November 6, 1997, the Court entered an order dismissing the state claims against the federal employee defendants in their individual capacity. Said claims proceed against the United States insofar as said defendants were acting in their official capacity.

Oklahoma; and Plaintiff, whose sympathies were with the Judicial Branch, was arrested as he attempted to enter the Cherokee Nation Courthouse in violation of the Executive Branch order.

The Defendant Harrold is the District Attorney of Cherokee County, Oklahoma. The Defendant Byrd is the Principal Chief of the Cherokee Nation. The Defendant Norman Fisher is the Chief of Police of the City of Tahlequah, Oklahoma. The Defendant Delena Goss is the Sheriff of Cherokee County, Oklahoma, and the Defendant Rick Smith is a Deputy Sheriff of Cherokee County, Oklahoma. The Defendant Deer is Undersecretary of the Department of Interior for Indian Affairs (“Bureau of Indian Affairs”). The Defendant Jim Fields is the Muskogee, Oklahoma Area Director of the Bureau of Indian Affairs, and Defendant Perry Proctor is a Criminal Investigator employed by the Bureau of Indian Affairs of the United States. The Defendant Cherokee County, Oklahoma Board of County Commissioners is a party under Oklahoma law wherein the Cherokee County Sheriff’s office is sued.

Plaintiff seeks a preliminary injunction, declaratory judgment, and money damages in excess of \$10,000.00, from all of the Defendants, with the exception of Deer, against whom there is no money damage claim.

Plaintiff claims venue in the Northern District of Oklahoma is proper under 28 U.S.C. § 1391(e) because he resides in the Northern District of Oklahoma and some of the Defendants are United States Government employees sued in their official capacity.

28 U.S.C. § 1391(e) states:

“A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.”

\* \* \*

The case of Stafford v. Briggs, et al., 444 U.S. 527 at 544 (1980), states the proper venue statute where government employees are also sued for damages in their individual capacity, as herein, is 28 U.S.C. § 1391(b). 28 U.S.C. § 1391(b) states:

“A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.”

Thus, Plaintiff's place of residence is not a factor in determining venue under § 1391(b). § 1391(b)(2) which states venue in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, \* \* \*” applies in this case.

Further, the language of § 1391(e):

“\* \* \* Additional persons may be joined as parties to any such action

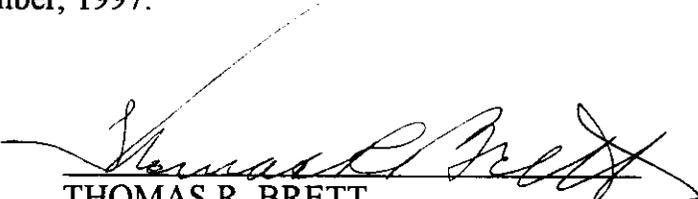
in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.”

supports that § 1391(b) is the appropriate venue statute by virtue of the nonfederal employee Defendants being joined as additional Defendants herein.

The Court concludes the Northern District of Oklahoma is not a proper venue but the Eastern District of Oklahoma is the proper venue for this case to proceed. The Court hereby transfers the action under 28 U.S.C. §1406(a) to the United States District Court for the Eastern District of Oklahoma.<sup>2</sup>

The numerous pending motions remain for decision by the judge presiding in the Eastern District of Oklahoma.

DATED this 9<sup>th</sup> day of December, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup>Even if venue were properly established in the Northern District of Oklahoma, it is probable the Court would transfer the case under a theory of *forum non conveniens*, 28 U.S.C. §1404(a), to the United States District Court for the Eastern District of Oklahoma. This is because a majority of the parties, the nonparty witnesses, and relevant documentary evidence reside in the Eastern District of Oklahoma, and the complained of events giving rise to the claim occurred in the Eastern District of Oklahoma.

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

LINDA TURNBULL-LEWIS, BARBARA )  
STARR-SCOTT, JESSUP BRYANT, )  
KATHY CARTER-WHITE, BARBARA )  
MARTENS, DIANE BLALOCK, GINA )  
WAITES; and )

BONNIE ROMERO, as parent of EDWIN )  
LEWIS ROMERO, a juvenile; and )

PAT RAGSDALE, LISA TIGER, DANNY )  
TEEHEE, PAUL THOMAS, SHARON )  
WRIGHT, BRYAN BLAIR, MICKEY )  
SPEARS, STEVEN GARNER, LEONARD )  
McMILLIAN, MIKE DAWES, JIM )  
REDCORN, STACY EUBANKS, FRANKIE )  
DREADFULWATER, FELICIA OLAYA, )  
RICHARD MANKILLER, and ORVEL )  
BALDRIDGE; )

Plaintiffs, )

vs. )

DIANE BARKER-HARROLD, in her )  
individual capacity, District Attorney of )  
Cherokee County; )  
NORMAN FISHER, in his individual and )  
official capacity, City of Tahlequah Police )  
Department; )  
CHARLES HARTSHORNE, in his individual )  
and official capacity, Sheriff of Adair County, )  
State of Oklahoma; )  
DELENA GOSS, in her individual and official )  
capacity, Sheriff of Cherokee County, State of )  
Oklahoma; )  
JOHNNY PHILPOT, in his individual and )  
official capacity, Sheriff of Sequoyah County, )  
State of Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )

**FILED**  
DEC 9 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97CV764-B (W) /

ENTERED ON DOCKET  
DATE DEC 10 1997

Adair County; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Cherokee County; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Sequoyah County; )  
 BOB RICKS, in his individual and official )  
 capacity, Director of the Department of Public )  
 Safety, Oklahoma Highway Patrol; )  
 ADA DEER, Undersecretary for Indian Affairs, )  
 Department of Interior; )  
 JIM FIELDS, Muskogee Area Director of the )  
 Bureau of Indian Affairs; )  
 PERRY PROCTOR, in his individual and )  
 official capacity, Criminal Investigator for )  
 the Bureau of Indian Affairs, Department of )  
 Interior, )  
 )  
 )  
 Defendants. )

ORDER

The Court has for decision the Defendants' motions to dismiss for lack of venue in the Northern District of Oklahoma (Docket Nos. 28 and 34).

The twenty-five Plaintiffs herein bring this action for vindication of their civil rights under the First, Fifth and Fourteenth Amendments of the Constitution of the United States of America, Sections 1983, 1985, 1986 and 1988 of Title 42 of the United States Code, the Treaties of 1835 and 1866 between the Cherokee Nation and the United States of America, and Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), seeking a preliminary injunction, declaratory judgment, as well as compensatory and punitive damages.

The action arises from the current political strife between the Executive and Judicial Branches of the Cherokee Nation governance. Plaintiffs allege the Defendants conspired to

deny them their rights of due process, freedom of speech and assembly at the Cherokee Nation Courthouse, Tahlequah, Oklahoma, in Cherokee County, Oklahoma, pursuant to an order of and orchestrated by the Chief of the Cherokee Tribe, Defendant Joe Byrd. Plaintiffs allege certain Plaintiffs' rights were violated as aforesaid on June 20, August 5, and August 13, 1997, and they also experienced assault and battery on their person by the Defendants.

Of the twenty-five Plaintiffs, five reside in the Northern District of Oklahoma, and the balance reside in the Eastern District of Oklahoma.<sup>1</sup> The Plaintiffs are citizens of the United States and the Cherokee Nation.

The Defendant Diane Barker-Harold is the District Attorney of Adair, Cherokee and Sequoyah Counties, Oklahoma. The Defendant Norman Fisher is Chief of Police of the City of Tahlequah, Oklahoma. The Defendant Charles Hartshorne is the Sheriff of Adair County, Oklahoma. The Defendant Delena Goss is the Sheriff of Cherokee County, Oklahoma. The Defendant Johnny Philpot is the Sheriff of Sequoyah County, Oklahoma. The Defendants Adair, Cherokee and Sequoyah County Boards of Commissioners are a party under Oklahoma law where their respective County Sheriffs are sued. The Defendant Bob Ricks is Director of the Oklahoma Department of Public Safety and resides in the Western District of Oklahoma. The Defendant Ada Deer is the Undersecretary of the Department of Interior

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<sup>1</sup>Of the five (Starr-Scott, McMillian, Thomas, Teehee, and Redcorn) who reside in the Northern District of Oklahoma, Plaintiffs' counsel states he intends to dismiss the action of two (McMillian and Redcorn) such Plaintiffs. See exhibit attached to motion of Defendant Diane Barker-Harold, et al., filed 11-19-97.

in charge of the Bureau of Indian Affairs and resides in the state of Maryland. Defendant Jim Fields is the Muskogee Area Director of the Bureau of Indian Affairs, Department of Interior. The Defendant Perry Proctor is a Criminal Investigator, employed by the Bureau of Indian Affairs, Department of Interior. All Defendants reside in the Eastern District of Oklahoma excepting the Defendants Ricks and Deer.

Plaintiffs state the Defendants fall in three classes: (a) those acting in concert on June 20, 1997, which include Barker-Harrod, Goss, Fisher, Deer, Fields and Proctor; (b) those acting in concert on August 5, 1997, which include Fisher, Barker-Harrod, Deer, Fields and Proctor; and (c) those acting in concert on August 13, 1997, which includes all of the Defendants.<sup>2</sup>

Plaintiffs claim venue in the Northern District of Oklahoma is proper under 28 U.S.C. § 1391(e) because three of the Plaintiffs reside in the Northern District of Oklahoma and some of the Defendants are United States Government employees sued in their official capacity.

28 U.S.C. § 1391(e) states:

“A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2)

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<sup>2</sup>On November 6, 1997, the Court entered an order dismissing the state claims against the federal employee defendants in their individual capacity. Said claims proceed against the United States insofar as said defendants were acting in their official capacity.

a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.”

\* \* \*

The case of Stafford v. Briggs, et al., 444 U.S. 527 at 544 (1980), states the proper venue statute where government employees are also sued for damages in their individual capacity, as herein, is 28 U.S.C. § 1391(b). 28 U.S.C. § 1391(b) states:

“A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.”

Thus, Plaintiff's place of residence is not a factor in determining venue under § 1391(b). § 1391(b)(2) which states venue in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, \* \* \*” applies in this case.

Further, the language of § 1391(e):

“\* \* \* Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.”

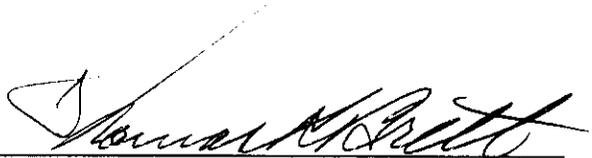
supports that § 1391(b) is the appropriate venue statute by virtue of the nonfederal employee

Defendants being joined as additional Defendants herein.

The Court concludes the Northern District of Oklahoma is not a proper venue but the Eastern District of Oklahoma is the proper venue for this case to proceed. The Court hereby transfers the action under 28 U.S.C. §1406(a) to the United States District Court for the Eastern District of Oklahoma.<sup>3</sup>

The numerous pending motions remain for decision by the judge presiding in the Eastern District of Oklahoma.

DATED this 7<sup>th</sup> day of December, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

<sup>3</sup>Even if venue were properly established in the Northern District of Oklahoma, it is probable the Court would transfer the case under a theory of *forum non conveniens*, 28 U.S.C. §1404(a), to the United States District Court for the Eastern District of Oklahoma. This is because a majority of the parties, the nonparty witnesses, and relevant documentary evidence reside in the Eastern District of Oklahoma, and the complained of events giving rise to the claim occurred in the Eastern District of Oklahoma.

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

**F I L E D**

DEC 5 1997 *plw*

DOME CORPORATION, et al., )

PLAINTIFFS, )

VS. )

COMPTON K. KENNARD, et al., )

DEFENDANTS. )

and )

GARRY HERMANN AND MARY JANE )

HERMANN, INDIVIDUALS AND )

d/b/a BEAR OIL AND GAS, )

VS. )

DOME CORPORATION, ET.AL. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-CIV-97-E

ENTERED ON DOCKET

DATE ~~DEC 10 1997~~

ORDER FOR DISMISSAL

NOW, on this 5<sup>th</sup> day of December, 1997  
upon proper Motion of the parties, the above and styled case id  
dismissed as follows:

1. All claims in the Petition and Amended Petition and all  
other pleadings of the Plaintiffs are hereby dismissed with  
prejudice against all Defendants and the Counter-Plaintiffs.

2. All claims of the Defendants and Counter-Plaintiffs in  
their respective Answers, Counter-Claim and Amended Counter-Claim  
and all other pleadings are dismissed with prejudice against the  
Plaintiffs and Counter-Defendants.

3. The Defendants, Gary Hermann, Mary Jane Hermann, and Bear  
Oil and Gas are ordered to pay to the Plaintiffs \$7500 on or  
before November 19, 1997.

4. Further, the Defendant Bear Oil and Gas is ordered to  
execute within ten (10) days of November 19, 1997, an appropriate  
release to that certain Security Agreement dated March 17, 1994,

*jj*

for \$41,000.00, thereby releasing all right, title and interest in that certain 1962 Franks Explorer Workover Rig, S/N GA3AB4H7322, which is attached as Exhibit A to the parties Joint Motion to Dismiss, filed herein.

DONE THIS 5<sup>th</sup> DAY OF December, 1997.

  
\_\_\_\_\_  
James O. Ellison,  
United States District Judge

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

FILED

DEC 5 1997 *mu*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DOMES CORPORATION, AN OKLAHOMA )  
CORPORATION, NEODYNE DRILLING )  
CORPORATION, AN OKLAHOMA CORP- )  
ORATION, THOMAS G. WATSON, AS AN )  
INDIVIDUAL, AND AS A DIRECTOR AND )  
OFFICER OF DOME OIL CORPORATION AND )  
NEODYNE DRILLING CORPORATION, AND )  
THOMAS C. JOHNS, AN INDIVIDUAL, )

Plaintiffs, )

vs. )

Case No. 96 CV-0097 E )  
(Tulsa County Case )  
CJ-95-05504) /

COMPTON K. KENNARD, AS AN )  
INDIVIDUAL AND AN OFFICER AND )  
DIRECTOR OF SOUTH FLORIDA PUMP )  
SERVICE, INC., A FLORIDA CORP. AND )  
GARY HERMANN, AN INDIVIDUAL, )

Defendants, )

and )

ENTERED ON DOCKET

DATE DEC 10 1997

GARY HERMANN and MARY JANE HERMANN, )  
INDIVIDUALLY AND BEAR OIL & GAS, )  
INC., )

Cross-Plaintiffs, )

vs. )

DOMES CORPORATION, AN OKLAHOMA )  
CORPORATION, NEODYNE DRILLING )  
CORPORATION, AN OKLAHOMA CORP- )  
ORATION, THOMAS G. WATSON, AS AN )  
INDIVIDUAL, AND AS A DIRECTOR AND )  
OFFICER OF DOME OIL CORPORATION AND )  
NEODYNE DRILLING CORPORATION, AND )  
THOMAS C. JOHNS, AN INDIVIDUAL, AND )  
THE CINCINNATI INSURANCE COMPANY, )

Cross-Defendants. )

87

ORDER GRANTING APPLICATION FOR DISMISSAL WITH PREJUDICE

COMES on before me this 5<sup>TH</sup> day of December, 1997, the Agreed Application for Dismissal With Prejudice of all parties hereto, with the exception of the Defendant insurance companies, The Cincinnati Insurance Company and Auto-Owners Insurance Company, the Court hereby dismisses this matter and all issues related thereto with prejudice to refiling.

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

DATE 12-10-97

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

**FILED**

DEC 09 1997 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RICHARD S. GAZALSKI, II,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNIVERSITY OF TULSA,	)
	)
Defendant.	)

Case No. 97-cv-547-H ✓

**ORDER**

This matter comes before the Court on Defendant University of Tulsa's motion to dismiss (Docket #3) the complaint of Richard S. Gazalski, II, (Docket # 1) on the grounds that Plaintiff has failed to have summons issued and served upon Defendant within 120 days after the filing of the complaint as required under Fed. R. Civ. P. 4(m).

Plaintiff filed his complaint on June 6, 1997.<sup>1</sup> Plaintiff did not have a summons issued by the Clerk of the Court. Service of process should have been obtained by October 6, 1997 in order to comply with Rule 4(m), which provides in pertinent part:

**Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate.

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<sup>1</sup> Plaintiff, without leave of the Court, filed an amended complaint on July 7, 1997 (Docket # 2). The only difference between his original complaint and his amended complaint is that the latter deletes the former's statement that "statutory and common law attorney's lien [are] claimed." Even assuming that Plaintiff has 120 days from the date the amended complaint was filed, service should have been effected by November 4, 1997.

H

Fed. R. Civ. P. 4(m). On October 6, 1997, Plaintiff's process server served Defendant only with a copy of the complaint. No summons accompanied the complaint as required under Fed. R. Civ.

P. 4(c)(1), which provides:

A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.

Fed. R. Civ. P. 4(c)(1). No return of service/summons has been filed in this case. Defendant has not waived service under Fed. R. Civ. P. 4(d).

Under Fed. R. Civ. P. 4(m), the Court must give a a mandatory extension of time to any plaintiff who demonstrates good cause for failure to effect timely service. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). If a plaintiff fails to show good cause, the Court "must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service."<sup>2</sup>

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<sup>2</sup> Espinoza, 52 F.3d at 841. The legislative history of Rule 4(m) does not define "good cause." Cox v. Sandia Corp., 941 F.2d 1124, 1125 (10th Cir. 1991). The "good cause" provision "should be read narrowly to protect only those plaintiffs who have been meticulous in their efforts to comply with the Rule." Despain v. Salt Lake Area Metro Gang Unit, 13 F.3d 1436, 1438 (10th Cir. 1994). The Tenth Circuit has enunciated several instances in which good cause was not present. For example, a defendant's actual notice of the suit is not good cause. Despain, 13 F.3d at 1439. Moreover, the absence of prejudice to defendants, by itself, is not good cause for failure to serve. Id. Inadvertence or negligence alone do not constitute good cause, while mistake of counsel or ignorance of the rules also do not suffice. Kirkland v. Kirkland, 86 F.3d 172, 176 (10th Cir. 1996). Even the running of the statute of limitations does not demonstrate good cause and make dismissal inappropriate. Despain, 13 F.3d at 1349. See also Putnam v. Morris, 833 F.2d 903, 905 (10th Cir. 1987) (holding that since it is "counsel's responsibility to monitor the activity of the process server and to take reasonable steps to assure that a defendant is timely served," reliance on a process server who fails to perform is not good cause). As one commentator has stated, "[t]he lesson to the federal plaintiff's lawyer is not to take any chances. Treat the 120 days with the respect reserved for a time bomb." Cox, 941 F.2d at 1126.

Plaintiff has not responded to Defendant's motion to dismiss, and has made no attempt to demonstrate good cause for failure to effect timely service upon Defendant. Neither has Plaintiff attempted to demonstrate that a "permissive extension of time may be warranted." Espinoza, 52 F.3d at 841. Under these circumstances, the Court finds that Defendant's motion to dismiss should be granted and Plaintiff's complaint, and amended complaint, should be dismissed without prejudice for failure to comply with Fed. R. Civ. P. 4(m).

IT IS SO ORDERED

This 9<sup>TH</sup> day of December, 1997.



Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET  
DATE 12-10-97

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

COUNTRY MUTUAL INSURANCE )  
COMPANY, an Illinois corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RICKEY NORRIS, his attorneys )  
STEWART M. MOSS and JOHN R. )  
EVANS, JR., SPRINGER CLINIC )  
INC., and OKLAHOMA STATE AND )  
EDUCATION EMPLOYEES GROUP )  
INSURANCE BOARD )  
 )  
Defendants. )

Case No. 97-CV-758-H ✓

**FILED**  
DEC 09 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

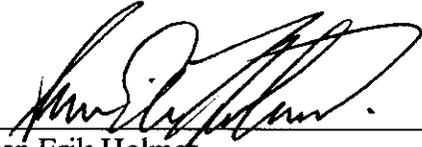
**ORDER**

This matter comes before the Court on a motion to dismiss (Docket # 3) by Defendant Oklahoma State and Education Employees Group Insurance Board.

Plaintiff instituted this interpleader action with respect to funds payable on an insurance policy. Defendant requests that it be dismissed from this action because it has no interest in the subject matter of the action. For good cause shown, Defendant's motion to be dismissed from this action is hereby granted.

IT IS SO ORDERED.

This 9<sup>TH</sup> day of December, 1997.

  
Sven Erik Holmes  
United States District Judge

9



ENTERED ON DOCKET

DATE 12-10-97

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

RONALD D. BALL,  
Plaintiff,

VS.

PNS STORES, INC. d/b/a  
MACFRUGAL'S BARGAINS  
• CLOSE-OUTS,  
Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. 97-CV-574H(M)

**FILED**  
DEC 09 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

AGREED ORDER OF DISMISSAL

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

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

SIGNED this 9<sup>TH</sup> day of DECEMBER, 1997.

  
HONORABLE SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

9

APPROVED AS TO FORM AND SUBSTANCE:

By: Ralph Simon  
Ralph Simon, Esq.  
Oklahoma Bar No. 8254

KICKAPOO TRIBE GAMING COMMISSION  
Route 1, Highway K20, Box 157A  
Horton, Kansas 66439  
PH: (913) 486-3180

ATTORNEY FOR PLAINTIFF RONALD D. BALL

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

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

(Admitted for Limited Practice)

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

ATTORNEYS FOR DEFENDANT PNS STORES, INC. D/B/A MACFRUGAL'S BARGAINS  
• CLOSE-OUTS

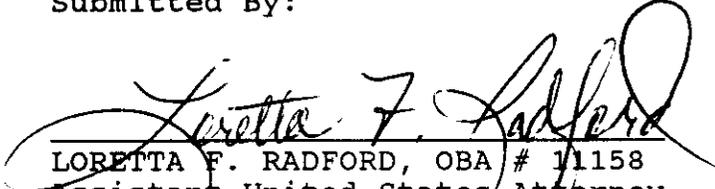
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\$100.00, plus interest thereafter at the rates of 3%, 5% and 9% per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.47 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

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

LFR/llf

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

**F I L E D**

DEC 09 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LPR ENTERPRISES, INC., a Texas Corporation,  
  
Plaintiff,  
  
vs.  
  
RON LYON,  
  
Defendant.

No. 96-CV-983-K ✓

ENTERED ON DOCKET

DATE 12-10-97

ORDER

Before the Court is Defendant Lyon's objection to Magistrate Judge Wagner's Report and Recommendation recommending that default judgment in the above captioned case be granted to Plaintiff LPR Enterprises, Inc. (LPR). Defendant Lyon has objected in a timely manner.

Because LPR's motion for default judgment is dispositive, the Court must review objections to findings *de novo* upon the record. *Fed. R. Civ. P. 72(b)*. See also *Gee v. Estes*, 829 F.2d 1005, 1008 (10th Cir. 1989) (holding that 28 U.S.C. § 636 governing the jurisdiction, powers, and temporary assignments of Magistrate Judges requires *de novo* review of the magistrate's findings where timely objections have been filed).

Lyon presents three "reasons" for "setting aside" Magistrate Judge Wagner's default judgment recommendation. First, Lyon claims that his former attorney, Ralph Simon, "abandoned him without notice and moved out of state." *Def. Obj. to Default J.* Second, Lyon claims that he did not and does not have knowledge of court

29

proceedings because Mr. Simon continues to receive "all legal documents." *Id.* Third, Lyon claims he cannot adequately defend himself due to a head injury and is currently seeking new counsel. *Id.*

The Court finds that Defendant Lyon's first two reasons for setting aside default judgment were properly addressed by the Magistrate. Lyon does not dispute Magistrate Wagner's findings nor does he allege that Magistrate Wagner failed to correctly weigh the evidence or disregarded any evidence in reaching his findings. This Court entered an order July 31, 1997 directing Defendant how to proceed upon his attorney's request to withdraw. Defendant failed to take action.

As to the subject of the third objection, Magistrate Wagner found that Lyon failed to show incompetence and thus default judgment was permissible under Federal Rule of Civil Procedure 55(b)(2) (prohibiting default judgment against an incompetent person). Lyon has indicated to the Court that he believes Magistrate Wagner has incorrectly decided the competency issue.

The Court has conducted a *de novo* review of the competency issue. The Court notes that the accident that caused Lyon's alleged incompetency occurred in December 1996, nine months before Magistrate Wagner filed his Report and Recommendation. During this time neither Lyon nor his counsel indicated in any way that Lyon was incompetent, despite several opportunities to so inform the Court. At no time during this period was a guardian, committee, conservator, or other representative appointed for Lyon and the Court is not aware of any such appointments having been attempted.

The issue should have been raised prior to the eve of default judgment being entered, and in any event lacks sufficient evidentiary support.

The Court has also reviewed the documents Defendant has submitted with the Response to Plaintiff's Motion for Default Judgment, including: the emergency services record from the day of the accident that led to the alleged incapacity; a letter from Lyon's physician dated February 24, 1997 stating that at the time of the letter Lyon was on medication that could alter judgment; a letter from Lyon's nursing care provider dated March 10, 1997 outlining the care Lyon was receiving and an invoice from the nursing care provider; an invoice for rehabilitative services received by Lyon. *See Def.'s Resp. To Pl.'s Mot. For Default J..* The Court finds that these documents are not sufficient to show that the Defendant is incompetent and that default judgment is not prohibited under Federal Rule of Civil Procedure 55(b)(2). The most significant document, an unsworn letter from Lyon's physician, only tends to show what Lyon's condition was at the time of the letter in February 1997, approximately seven months before Magistrate Wagner issued his Report and Recommendation. The letter does not address Lyon's condition at the time of the motion for default judgment. The Court does not believe that the documents submitted with the Defendant's Response to the Motion for Default Judgment are sufficient evidence of incompetency to prohibit the entry of default judgment.

If the Defendant has additional evidence, the Court would

entertain a Motion to Set Aside Default pursuant to Federal Rule of Civil Procedure 55(c).

It is the order of the Court that the Report and Recommendation of the Magistrate Judge (#23) is hereby AFFIRMED and Defendant's objection (#26) is OVERRULED. The motion of the Plaintiff for default judgment (#19) is hereby GRANTED.

The Court sets a hearing to determine the amount of damages for January 12, 1998 at 9:30. Fed. R. Civ. Pro. 55(b)(2).

ORDERED this 8 day of December, 1997.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET  
DATE 12-10-97

SHERMAN LEE JONES, )  
Petitioner, )  
vs. )  
STEVEN KAISER, Warden, )  
Respondent )

No. 97-CV-558-K (M) ✓

**F I L E D**

DEC 09 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Petitioner, a state prisoner appearing *pro se*, has paid the filing fee to commence this federal habeas action pursuant to 28 U.S.C. § 2254.

**BACKGROUND**

Petitioner was convicted by a jury in Tulsa County District Court on January 15, 1988, of Unauthorized Use of a Motor Vehicle after former conviction of two or more felonies and sentenced to fifty years imprisonment. He is currently in custody of the Oklahoma Department of Corrections at McAlester, Oklahoma.

Petitioner filed a direct appeal and his conviction was affirmed by the Oklahoma Court of Criminal Appeals on January 13, 1991. Petitioner then filed an application for post conviction relief, which was denied by the trial court. On February 7, 1997, Petitioner appealed the denial to the Oklahoma Court of Criminal Appeals. On March 19, 1997, that Court affirmed the denial of his application for post-conviction relief.

In this federal habeas action, the Court must liberally construe Petitioner's petition in light of his *pro se* status. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them

liberally). The Court finds that Petitioner asserts only one claim for habeas relief: that he was denied a fair trial when the trial court submitted an erroneous jury instruction containing prejudicial "presumed not guilty" language, as held in Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995).

### *ANALYSIS*

As a preliminary matter, the Court finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

Next, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Although Petitioner has not attached copies of his petition-in-error, nor the appeals court's opinion affirming his conviction, Petitioner admits he did not raise the improper jury instruction issue on direct appeal.<sup>1</sup> However, Petitioner did raise this issue in his post-conviction relief application filed in the district court, which was denied and subsequently appealed to and affirmed by the Court of Criminal Appeals, copies of which are provided with the petition. After a careful review of the record, the Court concludes Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b). See Coleman v. Thompson, 501 U.S. 722, 732 (1991).

In its Order Denying Application for Post Conviction Relief, dated January 9, 1997, the trial

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<sup>1</sup>Petitioner responded to question 16(a)(4), (5) in the petition for writ of habeas corpus as follows:

#### Direct Appeal

- (4) If you appealed from the judgment of conviction, did you raise this issue? Yes  No
- (5) If you did not raise this issue in your direct appeal, briefly explain why: "OK Ct. of Crim. Appeals had not issued decision on which ruled jury instruction was unconstitution [sic]; see Flores v. State, 896 P.2d 558, (Okla.Cr. 1995)."

court stated:

Before this Court is Petitioner's Application for Post-Conviction Relief. He alleges therein that the jury instruction given by this Court was incorrect. He alleges the law in this area has changed. He cites the Court of Criminal Appeals decision in *Flores v. State*, F-93-977 (Okl. Cr. Jan. 24, 1995), in support of his argument that in giving the instruction that a defendant is presumed not guilty verses being presumed innocent denied him of a fair trial. In addition, Petitioner alleges that his attorney was ineffective for failing to raise this issue on the direct appeal of Petitioner's case.

After a thorough discussion of the matter, the trial court issued its denial of Petitioner's requested post-conviction relief finding that the ruling in *Flores* by the Oklahoma Court of Criminal Appeals was not to be applied retroactively. The trial court also stated that the jury-type error rested entirely on state statutes and any error which may have occurred was not of a constitutional magnitude but rather a violation of state statute, and that Petitioner failed to assert "sufficient reason" for his failure to bring this jury instruction claim on direct appeal. See *Moore v. State*, 889 P.2d 1253 (Okla. Crim. App. 1995). On March 19, 1997, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of Petitioner's post-conviction application finding that Petitioner had waived the issue since it had not been raised on direct appeal (citing 22 O.S. 1991, § 1086; *Webb v. State*, 835 P.2d 115, 116 (Okla. Crim. App. 1992)).

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 724 (1991); see also *Maes v. Thomas*, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); *Gilbert v. Scott*, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of

procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claim is barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

Because of his procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause 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).

Petitioner attempts to show cause by alleging that his claim did not exist at the time of his

direct appeal since Flores had not yet been decided. See note 1, *supra*. Petitioner's argument that Flores represents a new law or a change in the law and that, therefore, his claim was properly raised for the first time in his first application for post-conviction relief is without merit. In denying Petitioner's application for post-conviction relief, the trial court judge stated that "this court finds that any error which occurred was not of a constitutional magnitude, but rather the violation of [an Oklahoma] statute." This Court agrees and finds that the Flores decision does not announce a new constitutional rule but rather finds a violation of a state statute which violation resulted in a deprivation of established constitutional rights. Furthermore, even if Flores could be construed as announcing a new constitutional rule of criminal procedure, that rule would not be applicable to those cases which became final before the new rule was announced. Teague v. Lane, 489 U.S. 288, 310 (1989). The Oklahoma Court of Criminal Appeals decided Flores v. State in 1995, more than three years after Petitioner's conviction became final. Nothing in the Flores decision indicates that it is to be applied retroactively. Since Petitioner's conviction became final prior to the ruling in Flores, that decision has no retroactive application to Petitioner.

In addition, in its opinion denying Petitioner's application for post-conviction relief, the trial court addressed Petitioner's argument that his trial counsel and appellate counsel were ineffective for failing to object to the "non-standard" jury instruction regarding the presumption of innocence at trial and on appeal.<sup>2</sup> Although Petitioner does not specifically allege this ground in the instant habeas petition, the Court will nonetheless address this argument as a potential basis for "cause" for Petitioner's failure to raise the issue on direct appeal. The Court finds this argument unpersuasive.

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<sup>2</sup>In the petition for writ of habeas corpus, Petitioner responded to questions 16(a)(1) and (2) as follows:

- (1) GROUND ONE: Jury instruction were nonstandard regarding presumption of innocence.
- (2) Supporting facts: Judge Hopper issued a nonstandard instruction to the jury on presumption of innocence.

Although the issue of the erroneous jury instruction could have been raised during trial or on appeal but was not, this failure alone does not constitute ineffective assistance of counsel. In Webb v. State, 835 P.2d 115 (Okla. Crim. App. 1992), the Oklahoma Court of Criminal Appeals held that "[t]he mere fact that counsel fails to recognize the factual or legal basis for a claim, or fails to raise the claim despite recognizing it, is not sufficient to preclude enforcement of a procedural default" (citing Murray v. Carrier, 477 U.S. 478 (1986)). Moreover, the Tenth Circuit has consistently held that "counsel's assistance is not ineffective simply because counsel fails to base its decisions on laws that might be passed in the future." United States v. Gonzales-Lerma, 71 F.3d 1537, 1542 (10th Cir. 1995). Consequently, Petitioner did not receive ineffective assistance simply because his trial counsel failed to object to the "presumed not guilty" instruction, or because his appellate counsel failed to raise this issue on direct appeal and Petitioner cannot argue that these events were the "cause" for his procedural default of the issue. Therefore, the Court concludes that Petitioner cannot satisfy the "cause" standard necessary to overcome the procedural bar. Having determined Petitioner cannot establish cause, the Court need not address the prejudice inquiry. Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995).

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime of which he was convicted. Therefore, Petitioner cannot overcome the procedural bar under the fundamental miscarriage of justice exception.

Pursuant to Rule 4, *Rules Governing § 2254 Cases*, the petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits

annexed to it that the petitioner is not entitled to relief, the Court "shall make an order for its summary dismissal and cause the petitioner to be notified." See Rule 4, Rules Governing § 2254 Cases in the United States District Courts.

*CONCLUSION*

The Court concludes that it plainly appears from the face of the petition that Petitioner's claim is procedurally barred. Therefore, the petition for a writ for habeas corpus should be summarily dismissed.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED this 9 day of December, 1997.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

BIZJET INTERNATIONAL SALES & )  
SUPPORT, INC., an Oklahoma )  
corporation, )

Plaintiff )

vs. )

ALLIEDSIGNAL INC., a Delaware )  
corporation; )

and )

CFC AVIATION SERVICES, L.P., a )  
Delaware limited partnership, d/b/a )  
GARRETT AVIATION SERVICES, )

and )

UNC-CFC ACQUISITION CO., INC. )  
d/b/a GARRETT AVIATION )  
SERVICES, a Delaware corporation, )

Defendants. )

Case No.: 96CV 811K /

**F I L E D**

DEC 09 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER DISMISSING CASE WITH PREJUDICE**

Pursuant to the Stipulation of the all the parties and good cause appearing therefore,

IT IS ORDERED:

Dismissing this case with prejudice, each party to bear its own costs and attorneys fees.

DATED this 9 day of December 1997.



TERRY C. KERN  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT

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

BEVERLY CONTRERAS, Individually, )  
and as mother and next friend of )  
CHRISTINA MARIE BLEVINS, )  
NICOLE REYNE BLEVINS, )  
JAMES EDWARD BLEVINS, and )  
as PERSONAL REPRESENTATIVE )  
OF THE ESTATE OF JAMES BLEVINS, )

Plaintiffs, )

v. )

PAN AMERICAN LIFE )  
INSURANCE COMPANY, PALIC )  
UNIVERSAL BENEFIT TRUST, )  
and MARION DESOBRY, )

Defendants. )

**FILED**  
DEC 05 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-74-H

ENTERED ON DOCKET  
DATE 12-9-97

**ORDER**

This matter comes before the Court on a partial motion to dismiss and to strike the jury trial (Docket # 5) by Defendant Pan American Life Insurance Company ("Pan American").

Pan American requests that the Court dismiss Plaintiffs' state law claims in their second through seventh causes of action because the claims are preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., as well as strike Plaintiffs' demand for a jury trial because ERISA does not grant a jury trial.

This suit arises from the death of James Blevins, a truck driver for Ellsworth Motor Freight Lines, Inc. ("Ellsworth"). Mr. Blevins was covered by a plan insured by Pan American, made available to Mr. Blevins through his employer. Mr. Blevins died while driving a truck for Ellsworth. Plaintiffs made a claim for benefits under the Pan American policy, but were denied

payment due to a dispute over Mr. Blevins' actual cause of death. Ultimately, Pan American paid the death benefits to Plaintiffs, but only after the present suit was filed alleging seven different causes of action.

Plaintiffs' first cause of action is for damages pursuant to ERISA. Plaintiffs' other causes of action include state law claims for fraud, unfair claim settlement practices, interference with protected interests, breach of fiduciary duty, intentional infliction of emotional distress, and breach of an implied duty of good faith.<sup>1</sup> Defendant moved to dismiss the state law claims based upon ERISA's preemption provisions.

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes of this analysis, the Court accepts as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

## I

There are three ERISA provisions that govern the statute's preemptive effect:

Except as provided in subsection (b) of this section [the savings clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . . 29 U.S.C. § 1144(a) (pre-emption clause).

Except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities. 29 U.S.C. § 1144(b)(2)(A) (savings clause).

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<sup>1</sup> The Court notes that in their petition, Plaintiffs began each state law claim with the phrase "[i]f the Life Insurance Plan is not subject to [ERISA] . . . ." Thus, Plaintiffs clearly recognized the potential viability of ERISA preemption to their state law causes of action.

Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company . . . or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. 29 U.S.C. § 1144(b)(2)(B) (deemer clause).

ERISA, sec. 514, 29 U.S.C. § 1144.

The United States Supreme Court has described the application of the above provisions as follows: “If a state law ‘relate[s] to . . . employee benefit plan[s]’ it is pre-empted. § 514(a). The savings clause excepts from the pre-emption clause laws that ‘regulat[e] insurance.’ § 514(b)(2)(A). The deemer clause makes clear that a state law that ‘purport[s] to regulate insurance’ cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B).” Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987). Moreover, ERISA’s preemption clause has an “expansive sweep,” and should be given its “broad common-sense meaning.” Id. at 47.

#### A

The initial inquiry for the Court is whether the group occupational accident plan in the instant case is an “employee welfare benefit plan” covered under ERISA. The statute defines an “employee welfare benefit plan” as “any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance . . . medical, surgical, or hospital care or benefits . . .” 29 U.S.C. § 1002(1).

There are two components to this statutory definition: (1) the “plan, fund, or program” requirement; and (2) the “established or maintained” requirement. The Tenth Circuit has stated there is a “plan, fund, or program” under ERISA “if ‘from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of

financing, and the procedures for receiving benefits.” Peckham v. Gem State Mutual of Utah, 964 F.2d 1043, 1047 (10th Cir. 1992) (quoting Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982)). Such a “plan, fund, or program” is “established or maintained” by examining the degree of employer participation in the plan to ensure that the plan is part of the employment relationship. Specifically, the Court should determine “whether the purchase of the insurance policy constituted an expressed intention by the employer to provide benefits on a regular and long term basis.” Id. at 1049 (quoting Wickman v. Northwest Nat’l Ins. Co., 908 F.2d 1077, 1083 (1st Cir. 1990).

The Court finds that the plan in the instant case meets the requirements to be classified as an “employee welfare benefit plan.” First, Pan American’s plan specifically states the schedule of benefits, the beneficiaries, and the claim procedures necessary to obtain benefits. Second, the employer, Ellsworth, obtained an accident benefit plan and a group life insurance plan for Mr. Blevins as a part of his long-term employment relationship with the company. Thus, Plaintiffs’ plan satisfies both the “plan, fund, or program” and the “established or maintained” requirements to be classified as an “employee welfare benefit plan” for purposes of ERISA.

#### B

The Court next addresses whether Plaintiffs’ state law causes of action “relate to” Pan American’s employee benefit plan. The Supreme Court has stated that:

A law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Under this broad common-sense meaning, a state law may relate to a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also not precluded simply because a state law is consistent with ERISA’s substantive requirements.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 122, 138-39 (1990) (citations and quotation marks omitted). Moreover, the Supreme Court has held that ERISA's civil enforcement provisions must be the exclusive avenue for actions asserting improper processing of claims for benefits. Pilot Life, 481 U.S. at 52. Laws that provide only an alternative cause of action to collect benefits under an ERISA plan or interfere with the calculation of benefits are preempted, while traditional exercises of state power or regulatory authority are not preempted. Monarch Cement Co. v. Lone Star Indus., Inc., 982 F.2d 1448, 1452 (10th Cir. 1992).

The Court finds that the claims in Plaintiff's second through seventh causes of action "relate to" the employee benefit plan in the instant case. Plaintiffs' claims for fraud, unfair claim settlement practices, interference with protected interests, breach of fiduciary duty, intentional infliction of emotional distress, and breach of an implied duty of good faith clearly have a "connection with or reference to" the employee benefit plan. The factual basis for each of these state law claims centers around Pan American's allegedly improper processing of Plaintiffs' claim for benefits or are merely alternative methods to collect benefits under the plan. The Court is not persuaded by Plaintiffs' attempts to distinguish their claims from the numerous cases preempting the same or similar types of state claims. As a result, Plaintiffs' state law claims "relate to" and therefore are preempted by ERISA. See also Pilot Life, 481 U.S. at 47 (holding that claims for tortious breach of contract, breach of fiduciary duty, and fraud in the inducement were preempted); Cannon v. Group Health Serv. of Oklahoma, 77 F.3d 1270, 1273-74 (10th Cir. 1996) (holding that a breach of fiduciary duty claim was preempted by ERISA); Peckham, 964 F.2d at 1049 (stating that state law claims for breach of duty of good faith, emotional distress, and punitive damages were preempted); Settles v. Golden Rule Ins. Co., 927 F.2d 505, 509 (10th Cir.

1991) (stating that claims for improper administration of benefit plans are preempted).

## II

Pan American also requests that the Court strike Plaintiffs' request for a jury trial, alleging that Plaintiffs are not entitled to a jury trial under ERISA in an action for benefits. ERISA does not specify whether such cases are to be tried to a jury, and the Supreme Court and Tenth Circuit have not decided this issue. The Tenth Circuit noted, however, that eight circuits have held there is no right to a jury trial for ERISA actions arising under section 502 or section 510. Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 829 (10th Cir. 1995).

In the Northern District of Oklahoma, one court has held that ERISA does not grant a jury trial in an action for monetary damages against the insurer of an employee benefit plan because in Lafoy v. HMO Colorado, 988 F.2d 97, 99 (10th Cir. 1993), the Tenth Circuit confirmed that ERISA rights and remedies are equitable in nature. Clark v. Occidental Petroleum Corp., No. 94-C-30-E, at 3-4 (N.D. Okla. May 4, 1994).

The Court agrees with the authority of the majority of circuit courts and the previous authority in the Northern District denying a jury trial in ERISA actions. Since ERISA is a legislatively created equitable cause of action, Plaintiffs do not have a constitutional or statutory right to have their case tried before a jury. Thus, Pan American's motion to strike the jury trial is hereby granted.

III

For the reasons set forth above, Pan American's partial motion to dismiss counts two through seven of Plaintiffs' petition and Pan American's motion to strike the jury trial (Docket # 5) are hereby granted.

IT IS SO ORDERED.

This 4<sup>TH</sup> day of December, 1997.



---

Sven Erik Holmes  
United States District Judge

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

**FILED**

DEC 08 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOANA SHARP, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE WILLIAM'S COMPANIES, )  
 INC., a Delaware Corporation, )  
 )  
 Defendant. )

Case No. 96-CV-28-H ✓

ENTERED ON DOCKET

DATE 12-9-97

**JUDGMENT**

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on December 4, 1997.

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

IT IS SO ORDERED.

This 5<sup>th</sup> day of December, 1997.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

54

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

**FILED**  
DEC 05 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOANA SHARP, )  
)  
Plaintiff, )  
)  
v. )  
)  
THE WILLIAM'S COMPANIES, )  
INC., a Delaware Corporation, )  
)  
Defendant. )

Case No. 96-CV-28-H ✓

ENTERED ON DOCKET

ORDER

DATE 12-9-97

This matter comes before the Court on a motion for summary judgment (Docket # 37) by Defendant The William's Companies, Inc. ("TWC"). A hearing was held in this matter on December 2, 1997.

Plaintiff Joana Sharp, a Caucasian, was an employee of Defendant. Plaintiff's supervisor was Mary Walrond, an African-American, and Ms. Walrond's direct supervisor was John Fischer, a Caucasian. Mr. Fischer had ultimate responsibility for employment decisions made by Ms. Walrond, including the decision with respect to Ms. Sharp that is the subject of the instant case.

TWC terminated Plaintiff on November 8, 1993. Plaintiff alleges that her supervisor, Ms. Walrond, discriminated against Plaintiff based upon her race. Specifically, Ms. Sharp asserts that she and Ms. Walrond had many disagreements as a result of Ms. Sharp being a Caucasian, including Ms. Walrond's statement that she thought Ms. Sharp had a problem working for a black woman. Plaintiff also alleges that Ms. Walrond showed favoritism and preference to African-American employees.

In contrast, Defendant asserts that its workplace does not discriminate against white employees, noting that approximately 86% of its employees are Caucasian. Defendant has moved

53

for summary judgment, claiming that Plaintiff was not discharged based upon her race, but instead was terminated due to poor work performance and insubordination.

I

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

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

477 U.S. at 322.

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

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find

for the plaintiff.

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

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

## II

Plaintiff claims she was discharged based upon her race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII prohibits an employer from discharging or otherwise discriminating against an employee because of his or her race. 42 U.S.C. § 2000e, *et seq.* In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established a three-part analysis for Title VII disparate treatment claims. First, the plaintiff must establish a prima facie case of discrimination. Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to state a legitimate nondiscriminatory reason for the workplace decision. Third, if the defendant carries this burden, the plaintiff must show that the defendant's reason was merely a pretext for discrimination. Id. at 802. However, the plaintiff

always bears the ultimate burden of proving discriminatory intent by the defendant. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

To establish a prima facie case of racial discrimination, Plaintiff must prove (1) that she is a member of a protected class, (2) that she applied for and was qualified for an available position, (3) that she was discharged, and (4) that the position remained open or was filled by another person. McDonnell Douglas, 411 U.S. at 802. Plaintiff's establishment of a prima facie case creates a presumption of unlawful discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

In the instant case, Plaintiff, a Caucasian, claims reverse race discrimination. Since Plaintiff is not a member of a historically disadvantaged group, the requirements of the prima facie case are somewhat modified. A plaintiff claiming reverse discrimination:

does not necessarily deserve the presumption of discrimination afforded to a member of an ostensibly disfavored minority class. Thus, [Plaintiff] must identify background circumstances that would justify applying to a majority plaintiff the same presumption of discrimination afforded to a minority plaintiff who establishes a prima facie case by showing that the defendant is one of those unusual employers who discriminate against the majority.

Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1534 (10th Cir. 1995) (citations omitted). The Court of Appeals for the District of Columbia has held that the "background circumstances" that a majority plaintiff must establish fall into two general categories: "(1) evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites; and (2) evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993) (citations omitted). See also Reynolds, 69 F.3d at 1535 (holding that the plaintiff had

established the negative background circumstances for a prima facie case of reverse discrimination where the plaintiff was the only white employee in a department composed entirely of Hispanics).

If Plaintiff is unable to demonstrate background circumstances, she may alternatively establish her prima facie case of reverse race discrimination by presenting "direct evidence of discrimination, or indirect evidence sufficient to support a reasonable probability that but for the plaintiff's status, the challenged employment decision would have favored the plaintiff." Notari v. Denver Water Dep't, 971 F.2d 585, 590 (10th Cir. 1992); see Bridget E. McKeever, Tenth Circuit Provides Alternative for Majority Plaintiffs to State a Prima Facie Case under Title VII: Notari v. Denver Water Department, 34 B.C. L. Rev. 440, 448 (1993) (stating that "[t]he court's decision in Notari occupies a middle ground between the Parker "background circumstances" requirement and the application of an unmodified McDonnell Douglas formulation in reverse discrimination cases under Title VII").

Accordingly, under the McDonnell Douglas analysis, if Plaintiff establishes a prima facie case either by demonstrating the requisite background circumstances, Reynolds, 69 F.3d at 1534, or by establishing direct or indirect evidence of discrimination, Notari, 971 F.2d at 590, Defendant then has the burden of producing evidence that it discharged her "for a legitimate, nondiscriminatory reason." Id. at 254. Defendant's burden is solely one of production: Defendant "is not required to persuade [the Court] that it actually was motivated by the asserted reason." Equal Employment Opportunity Comm'n v. Ackerman, Hood & McQueen, Inc., 758 F. Supp. 1440, 1452 (W.D. Okla. 1991), aff'd, 956 F.2d 944 (10th Cir. 1992).

Ultimately, to prevail on her claim in the instant case, Plaintiff must demonstrate "that the proffered reason was not the true reason for the employment decision," Burdine, 450 U.S. at 256,

and that her race was. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). At all times, Plaintiff retains the "ultimate burden of persuading the [trier of fact] that [she] has been the victim of intentional discrimination." Burdine, 450 U.S. at 256. However, if Plaintiff establishes a prima facie case and presents evidence that Defendant's nondiscriminatory reason was pretextual, Plaintiff has presented enough evidence to survive a motion for summary judgment. Randle v. City of Aurora, 69 F.3d 441, 452-53 (10th Cir. 1995).

### III

Using this legal framework, the Court finds that Plaintiff has not established a prima facie case under Reynolds by demonstrating the necessary "background circumstances" to show that Defendant is one of the unusual employers who discriminate against the majority. Unlike the employer in Reynolds, the employer in the instant case is not statistically dominated by employees of a minority racial group. Rather, the number of African-Americans employed by Defendant is only approximately 10% of Defendant's total workforce. Unlike Reynolds, the mere fact that Plaintiff and her African-American supervisor had difficulty in their personal and professional relationship is not sufficient to create a presumption of discrimination for this majority Plaintiff.

The Court also finds that Plaintiff has not established a prima facie case under Notari's alternative formulation. The alleged statements by Ms. Walrond concerning race do not constitute evidence of discrimination against Ms. Sharp. See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994) (holding that absent a nexus between discriminatory statements and a challenged decision, "stray" and isolated statements are insufficient to establish a discriminatory animus). Indeed, the record reflects that Ms. Walrond was not ultimately

responsible for the employment decision adverse to Ms. Sharp.<sup>1</sup> Moreover, neither Ms. Sharp's feelings and opinions that Ms. Walrond exhibited favoritism toward African-American employees,<sup>2</sup> nor Plaintiff's comparison to various African-American employees whom Ms. Walrond allegedly favored,<sup>3</sup> constitute direct or indirect evidence "sufficient to support a reasonable probability" that Plaintiff's discharge was due to her race. Thus, under either formulation, Plaintiff has failed to establish a prima facie case of racial discrimination.

The Court's conclusion in this case is supported by reference to a hypothetical situation. The purpose of Title VII is to ensure that employers utilize a single standard in dealing with all employees, regardless of race. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976). Thus, if Plaintiff in the instant case were African-American and her supervisor were Caucasian, the question is fairly presented whether a claim of racial discrimination would exist. The answer most certainly is "no." Plaintiff has presented to the Court no background circumstances or evidence of discrimination to support her claim, other than the fact that her

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<sup>1</sup> Plaintiff conceded at the hearing in this matter that John Fischer, Ms. Walrond's supervisor, was at least a co-decisionmaker with respect to Ms. Sharp's termination. It is settled law that any alleged discriminatory animus by one supervisor does not provide direct evidence of discrimination by others in the chain of command. See Ramsey v. City & County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990).

<sup>2</sup> Mere opinion and belief that discrimination occurred is not sufficient to overcome a motion for summary judgment. See Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990); Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) ("To survive summary judgment, 'nonmovant's affidavits must be based on personal knowledge and set forth facts that would be admissible into evidence; conclusory and self-serving affidavits are not sufficient.'").

<sup>3</sup> In order to validly compare similarly-situated employees for proof of disparate treatment, the employees must have dealt with the same supervisor, been subject to the same standards, and have engaged in the same conduct. Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992). Accordingly, TWC's treatment of various employees in different jobs with different responsibilities is inapposite.

supervisor is a different race and that the two did not get along. If an African-American employee were to present this same claim about a Caucasian supervisor with the same evidence, including the fact that the ultimate decisionmaker, as well as 86% of the employer's workforce, was the same race as the claimant, the outcome would most certainly be summary judgment in favor of the employer. The same result must obtain under the facts present here. To do otherwise would undermine the goals of impartiality and fairness that Title VII was meant to promote.

For the reasons set forth above, Defendant's motion for summary judgment (Docket # 37) is hereby granted.

IT IS SO ORDERED.

This 4<sup>TH</sup> day of December, 1997.

  
Sven Erik Holmes  
United States District Judge



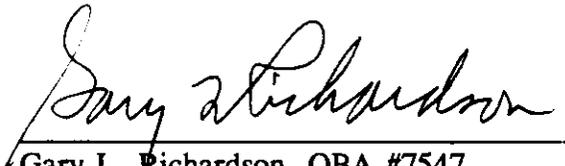
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court herein shall be taxed against the party incurring same.

SIGNED this 5<sup>TH</sup> day of DECEMBER 1997.

  
\_\_\_\_\_  
JUDGE PRESIDING

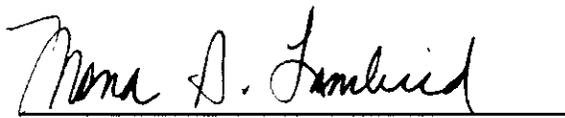
APPROVED AS TO FORM AND CONTENT:

**THE RICHARDSON LAW FIRM**

  
\_\_\_\_\_  
Gary L. Richardson, OBA #7547  
6846 So. Canton, Suite 200  
Tulsa, Oklahoma 74136  
(918) 492-7674

**COUNSEL FOR PLAINTIFFS**

**ANDREWS DAVIS LEGG BIXLER MILSTEN & PRICE**

  
\_\_\_\_\_  
Mona S. Lambird, OBA #5184  
Michelle Johnson, OBA #14757  
500 West Main  
Oklahoma City, Oklahoma 73102  
(405) 272-9241

**McKOOL SMITH, P.C.**

Mike McKool, Jr.  
Texas State Bar No. 13732100  
Eric W. Buether  
Texas State Bar No. 03316880  
Michael V. Marconi  
Texas State Bar No. 00784524  
300 Crescent Court, Suite 1500  
Dallas, Texas 75201  
(214) 978-4000

**COUNSEL FOR DEFENDANTS**

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

**FILED**

DEC 8 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PAT BLAICH, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STATE OF OKLAHOMA, ex rel., )  
 OKLAHOMA EMPLOYMENT SECURITY )  
 COMMISSION, )  
 )  
 Defendant. )

Case No. 96-CV-1065-BU

ENTERED ON DOCKET

DATE DEC 09 1997

**JUDGMENT**

This action came before the Court upon Defendant Oklahoma Employment Security Commission's 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 Defendant, State of Oklahoma, ex rel., Oklahoma Employment Security Commission and against Plaintiff, Pat Blaich.

Dated at Tulsa, Oklahoma, this 5<sup>th</sup> day of December, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

DEC 8 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PAT BLAICH, )  
)  
Plaintiff, )  
)  
vs. )  
)  
THE STATE OF OKLAHOMA, ex rel., )  
OKLAHOMA EMPLOYMENT SECURITY )  
COMMISSION, )  
)  
Defendant. )

Case No. 96-CV-1065-BU

ENTERED ON DOCKET  
DATE DEC 8 1997

**ORDER**

This matter comes before the Court upon Defendant Oklanoma Employment Security Commission's Motion for Summary Judgment. Plaintiff, Pat Blaich, has responded in opposition to the motion. Based upon the parties' submissions and the applicable law, the Court finds that Defendant's motion should be granted.<sup>1</sup>

Plaintiff's left arm was amputated above the elbow in June of 1991. Plaintiff does not have a prosthesis. On September 16, 1994, Plaintiff went to Defendant's local office in Miami, Oklahoma to apply for a job with Dana Corporation. Dana Corporation is located in Vinita, Oklahoma. Plaintiff had been informed that she had to register with the Miami local office because it handled all referrals for Dana Corporation. Plaintiff interviewed with Paul Marquez, an employee of Defendant. The parties disagree as to the exact conversation between Plaintiff and Mr. Marquez. Plaintiff testified in her deposition that she wanted to apply for a

<sup>1</sup> On November 7, 1997, this Court entered a minute order granting Defendant's motion and advising the parties that a written order setting forth the reasons for its decision would follow. This Order constitutes the Court's written order.

production job with Dana Corporation; that she told Mr. Marquez that there were several jobs she could do, i.e. inspect quality; that Mr. Marquez informed her that Dana Corporation did not have any jobs like that available; that she told Mr. Marquez that she would like to fill out an application for production work and that Mr. Marquez refused to allow her to fill out an application. There is no dispute between the parties, however, that Mr. Marquez advised Plaintiff that Dana Corporation only had assembly positions available.

Plaintiff brought this action under the American With Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., alleging that Defendant discriminated against her by denying her an opportunity to apply for employment on account of her disability. Plaintiff also claims that Defendant made unlawful pre-employment medical inquiries of her which resulted in the denial of an opportunity to apply for employment. Defendant denies that it discriminated against Plaintiff in any manner. Nevertheless, it argues that Plaintiff is not a qualified individual with a disability as defined by the ADA because Plaintiff does not consider herself to be disabled and even if she is disabled, she could not perform the essential functions of the available employment position with or without reasonable accommodation.

Under Rule 56(c), Fed. R. Civ. P., summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material

fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. See, Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The moving party, however, need not negate the elements of the non-movant's case Id.

Once a proper motion has been made, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. Celotex, 477 U.S. at 322-23. The controverted evidence must be viewed in the light most favorable to the non-movant, and all reasonable doubts must be resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). Summary judgment is mandated if the non-movant fails to make a showing sufficient to establish the existence of an element essential to her case on which she bears the burden of proof at trial. Celotex, 477 U.S. at 322, 106 S.Ct. at 2552.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees,

employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

To establish a prima facie case under the ADA, Plaintiff must demonstrate that: (1) she is a disabled person with the meaning of the ADA; (2) she is qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation; and (3) the defendant discriminated against her in the employment decision (the job application procedure and/or hiring process) because of the alleged disability. Siemon v. AT&T Corp., 117 F.3d 1173, 1175 (10<sup>th</sup> Cir. 1997); White v. York International Corporation, 45 F.3d 357, 360-361 (10<sup>th</sup> Cir. 1995).

The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA. Dutcher v. Ingalls Shipping, 53 F.3d 723, 726 (5<sup>th</sup> Cir. 1995). The statute requires an impairment that "substantially limits one or more of the major life activities." Id. The ADA defines neither "substantially limits" nor "major life activities" but the EEOC's regulations under the ADA, which adopt the same definition of major

life activities as used in the Rehabilitation Act regulations, 34 C.F.R. § 104, provide guidance. See, Bolton v. Scrivner, Inc., 36 F.3d 939 (10<sup>th</sup> Cir. 1994), cert. denied, 115 S.Ct. 1104 (1995). Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Id. at 942; MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1444 (10<sup>th</sup> Cir. 1996) (adopting regulation's definition of "major life activities"); Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1173 (10<sup>th</sup> Cir. 1996) (including sitting, standing, lifting and reaching from 29 C.F.R. § 1630, App. § 1630.2(i)). The factors that are to be considered in determining whether an impairment substantially limits a major life activity include:

- (1) the nature and severity of the impairment;
- (2) the duration of the impairment; and
- (3) the long term impact of the impairment.

"Substantially limited" is defined as:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. § 1630.2(j)(i), (ii).

To meet the first requirement of a prima facie case--

establishing that she is disabled under the ADA--Plaintiff must show that she has an impairment which is severe enough to rise to the level of a disability that substantially limits one or more major activities. The Court finds that Plaintiff has failed to raise a genuine issue of fact as to this issue. The parties do not dispute and the Court recognizes that Plaintiff has a physical impairment. However, as previously stated, the ADA requires an impairment that substantially limits one or more of the major life activities. Dutcher, 53 F.3d at 726. Plaintiff testified in deposition that her amputated left arm did not substantially limit any major life activity. In response to Defendant's motion, Plaintiff states that the testimony is neither an accurate recounting, nor a fair characterization of her testimony. However, Plaintiff does not proffer any evidence to show how the testimony is inaccurate or an unfair characterization. Moreover, Plaintiff fails to present any evidence to establish that her amputated left arm substantially limits any major life activity, including working. Plaintiff specifically testified in her deposition that "I can do just about everything I want to do. All I have to do is set my mind to do it." Exhibit 1 to Plaintiff's response, p. 55, 11. 19-20. Thus, the Court concludes that Plaintiff has failed to show that she is disabled as defined by the ADA.<sup>2</sup>

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<sup>2</sup> To the extent Plaintiff's allegations may be construed as claiming that Defendant "regarded" her as disabled with respect to working, Plaintiff has failed to present sufficient evidence to raise a genuine issue of fact that Defendant regarded her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes. MacDonald, 94 F.3d at 1445.

The Court also finds that Plaintiff has failed to raise a genuine issue that she was qualified, with or without reasonable accommodation, to perform the essential functions of the assembly position, which was the only position available at Dana Corporation. The Tenth Circuit has endorsed a two-part analysis for determining whether a person is qualified under the ADA: (1) whether the individual could perform the essential functions of the job, i.e. functions that bear more than a marginal relationship to the job at issue and (2) if (but only if) the individual is not able to perform the essential functions of the job, whether any reasonable accommodation by the employer would enable her to perform those functions. White, 45 F.3d at 361-62.

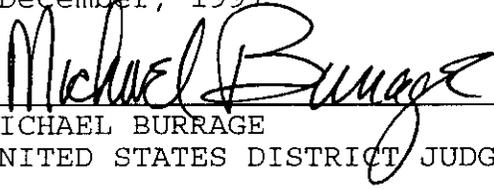
The undisputed evidence shows that an assembly worker at Dana Corporation is required to rotate among at least 10 assembly stations. It also shows that some of the assembly positions cannot be modified for a one handed worker. Plaintiff has made no allegation and has presented no evidence of possible accommodations which would enable her to perform the essential functions of an assembler at Dana Corporation. Plaintiff states in her affidavit that she believes she could perform the work required of a production worker with the type of reasonable accommodations contemplated and required by the ADA. However, the undisputed evidence shows that Plaintiff was advised that only assembly positions were available. The ADA does not require an employer to promote a disabled person as an accommodation, nor must an employer reassign the employee to an occupied position, nor must the

employer create a new position to accommodate the disabled person. White, 45 F.3d at 362. Thus, Plaintiff has failed to raise a genuine issue that she is a qualified individual with a disability.

Plaintiff claims that Defendant's alleged conduct in the interview violated the ADA's restrictions on pre-employment medical examination and inquiries. 42 U.S.C. § 12112(d)(2)(A). The Court finds that summary judgment is appropriate on this issue because Plaintiff has not shown that she is disabled within the meaning of the ADA. As such, she does not have a claim under the ADA for violation of the ADA's rules on pre-employment medical examinations and inquiries. Griffin v. Steeltek, Inc., 964 F. Supp. 317 (N.D. Okla. 1997); Armstrong v. Turner Industries, Ltd., 950 F. Supp. 162, 167-168 (M.D.La. 1996).

Based upon the foregoing, Defendant Oklahoma Security Commission's Motion for Summary Judgment (Docket Entry #8) is **GRANTED**. Judgment shall issue forthwith.

ENTERED this 5<sup>th</sup> day of December, 1997

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DORETTA TOLLETT,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

ENTERED ON 01 01 1997  
DEC 09 1997  
DATE \_\_\_\_\_

No. 96-CV-1156-J ✓

**F I L E D**

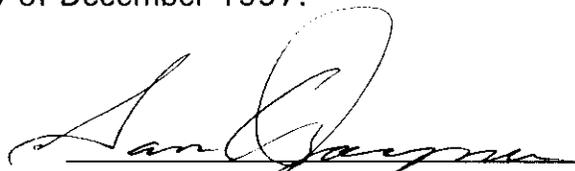
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Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 8 day of December 1997.

  
Sam A. Joyner  
United States Magistrate Judge

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<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

20

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

**F I L E D**

DEC - 8 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiff, )

v. )

GND RENT A CAR, INC., )  
an Ohio corporation, )

EDWIN SCHARTMAN, an individual, )  
and PATRICK GRAHAM, an individual, )

Defendants. )

Case No. 97-CV-634H(W)

DEC 09 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Dollar Rent A Car Systems, Inc. ("Dollar") hereby agrees to dismiss its claims in this lawsuit against Defendants GND Rent A Car, Inc. ("GND"), Edwin Schartman ("Schartman") and Patrick Graham ("Graham") with prejudice. Defendants GND, Schartman and Graham also agree to dismiss their claims in this lawsuit against Dollar with prejudice.

DATED:                     , 1997.

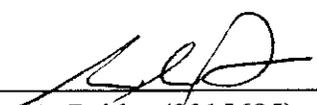
HALL, ESTILL, HARDWICK, GABLE  
GOLDEN & NELSON, P.C.

By: Sarah Jane McKinney  
Sarah Jane McKinney, OBA #17099  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74106-3708  
Tel. (918) 594-0400  
Fax (918) 594-0505

ATTORNEYS FOR PLAINTIFF  
DOLLAR RENT A CAR SYSTEMS, INC.

6

CIS



---

Robert A. Poklar (0015685)  
Thomas C. Wagner (0003301)  
CHATTMAN, GAINES & STERN  
1350 Euclid Avenue, Suite 1400  
Cleveland, Ohio 44115-1817  
(216) 781-1700

Mary Clayborne  
228 Robert S. Kerr, Suite 800  
Court Plaza Building  
Oklahoma City, Oklahoma 73102

ATTORNEYS FOR DEFENDANTS  
GND RENT A CAR, INC., EDWIN  
SCHARTMAN, AND PATRICK  
GRAHAM

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DEC - 8 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRIAN WALLS, et al.,

Plaintiffs,

-vs-

Civil Case No. 97-CV-218-H

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

Defendants.

**RECEIVED**

DEC 09 1997

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STIPULATION OF DISMISSAL

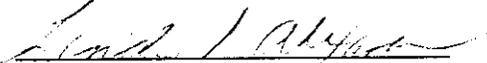
HUTTON & HUTTON

Plaintiffs hereby agree to dismiss without prejudice defendant, United States Tobacco Company, pursuant to Fed. R. Civ. P. 41, each side to bear its own costs. The parties signing below, by counsel, agree to and have no objection to dismissal without prejudice of United States Tobacco Company from the above-captioned case.

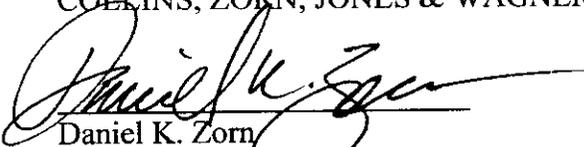
HUTTON & HUTTON

  
Andrew W. Hutton  
Derek S. Casey  
Attorneys for Plaintiffs

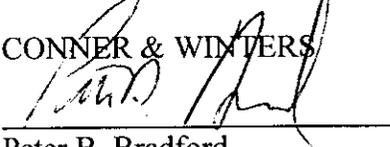
NIEMEYER, ALEXANDER, AUSTIN  
& PHILLIPS

  
John C. Niemeyer  
Linda G. Alexander  
Anne E. Zachritz  
Attorneys for Defendants R.J. Reynolds  
Tobacco Company and RJR Nabisco, Inc.

COLLINS, ZORN, JONES & WAGNER

  
Daniel K. Zorn  
Attorneys for Defendant United  
States Tobacco Company

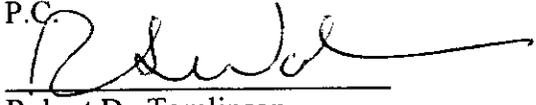
CONNER & WINTERS

  
Peter B. Bradford  
Timothy J. Bomhoff  
Attorneys for Defendants B.A.T. Industries,  
P.L.C. and Batco, Ltd.

CROWE & DUNLEVY

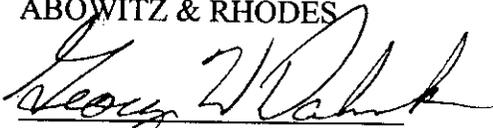
  
Richard C. Ford  
Leanne Burnett  
Attorneys for Defendants The American  
Tobacco Company, American Brands, Inc.,  
Brown & Williamson Tobacco Corporation,  
Batus, Inc., and Batus Holdings, Inc.

MCKINNEY, STRINGER & WEBSTER,  
P.C.

  
Robert D. Tomlinson  
George D. Davis  
Ronald L. Walker  
Attorneys for Defendants Philip Morris  
Incorporated and Philip Morris Companies,  
Inc.

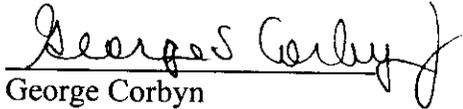
63

ABOWITZ & RHODES



George W. Dahnke  
Attorneys for Defendants Lorillard  
Tobacco Co., Lorillard, Inc., and  
Loews Corporation

CORBYN & HAMPTON



George Corby  
Joe M. Hampton  
Attorneys for Defendant The Council  
for Tobacco Research -U.S.A., Inc.

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

**FILED**

DEC - 5 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TERESA SUE FABES, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GULF INSURANCE COMPANY, a foreign )  
corporation, THE TRAVELERS )  
INSURANCE COMPANY, a foreign )  
corporation, and THE TRAVELERS )  
INDEMNITY COMPANY, a foreign )  
corporation, )  
)  
Defendants. )

Case No. 96-C-357B

ENTERED ON DOCKET

DATE DEC 08 1997

**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW Teresa Sue Fabes, Plaintiff herein, and Gulf Insurance Company, The Travelers Insurance Company, The Travelers Indemnity Company, and Travelers Group, Inc., Defendants herein, and pursuant to Rule 41 of the Federal Rules of Civil Procedure do stipulate to the dismissal of the above styled and numbered cause with prejudice to the refiling thereof.

Respectfully submitted,



Paul T. Boudreaux, Esq.  
Atkinson, Haskins, Nellis, et al.  
525 South Main, Suite 1500  
Tulsa, OK 74103-4524  
(918) 582-8877

ATTORNEYS FOR PLAINTIFF  
TERESA SUE FABES

Phil R. Richards, OBA #10457  
RICHARDS & ASSOCIATES  
9 East 4th Street, Suite 910  
Tulsa, OK 74103  
(918) 585-2394

ATTORNEY FOR DEFENDANT  
GULF INSURANCE COMPANY

and

W.D. Greenwood, Esq.  
Huckaby, Fleming, Frailey, et al.  
P. O. Box 60130  
Oklahoma City, OK 73146  
(405) 235-6648

ATTORNEYS FOR DEFENDANTS  
TRAVELERS INSURANCE COMPANY,  
TRAVELERS INDEMNITY COMPANY and  
TRAVELERS GROUP, INC.

By:   
Phil R. Richards

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

**F I L E D**

DEC - 5 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LIPE, GREEN, PASCHAL & TRUMP, P.C. )

Plaintiff, )

vs. )

Case No. 96-CIV-915-C

IMPACT SOFTWARE PRODUCTIONS, INC., )

BROOK BOEHMLER, and WILLIAM BICE, )

Defendants. )

ENTERED ON DOCKET

DEC 08 1997

DATE

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Lipe, Green, Paschal & Trump, P.C., by and through its undersigned counsel, and hereby dismisses its claims against the Defendants, with prejudice.

*Mark E. Dreyer*

Mark E. Dreyer, OBA # 14998  
CONNER & WINTERS  
3700 First Place Tower, Suite 3700  
15 East 5<sup>th</sup> Street  
Tulsa, Oklahoma 74103-4344  
(918) 586-5711

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this pleading was deposited in the United States mail, postage prepaid, on the 5 day of December, 1997, addressed as follows:

Robert Sartin  
Barrow, Gaddis, Griffith & Grimm  
610 South Main, Suite 300  
Tulsa, Oklahoma 74119-1248

*Mark E. Dreyer*

6

27

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

**F I L E D**

DEC - 5 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiffs, )

vs. )

Case No. 95-C-469-B

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

Defendants and Third Party )  
Plaintiffs, )

vs. )

ENTERED ON DOCKET

DATE DEC 08 1997

E.U. BAIN, JR., )

Third Party Defendant, )  
Plaintiff, )

vs. )

VICTOR MILLER, )

Third Party Defendant. )

ORDER

Before the Court for consideration is Plaintiffs' Supplement To Plaintiffs' Motion To Alter Or Amend Judgment Or, In The Alternative, To Reconsider, filed December 2, 1997. Therein, Plaintiffs' counsel asserts the Court erred by denying Plaintiffs' Motion To Reconsider prior to Plaintiffs' filing of a reply brief. Plaintiffs' Supplement is, in effect, a

170

motion to reconsider the denial of their Motion To Reconsider. For the reasons below, Plaintiffs' supplemental Motion is overruled.

I.

On November 11, 1997, the Court granted Defendants' Motion For Partial Summary Judgment which related to Plaintiffs' right engine failure claim. Plaintiffs moved for reconsideration. Because the Court was of the opinion Plaintiffs' initial Motion To Reconsider lacked merit, a summary denial of that Motion was entered. For clarification, the Court expands its reasoning for denying the initial Motion To Reconsider herein. The bases of Plaintiffs' initial Motion To Reconsider included Plaintiffs' belief the Court erred by failing to consider the untimely Rule 26 disclosure of Dr. Michael Hynes and the previously stricken expert opinions of Lynn Cooter relating to the right engine failure of the Cessna 421B; and Plaintiffs' belief the Court erred by failing to examine "the pleadings, depositions, answers to interrogatories, and admissions on file" to determine whether a genuine issue of material fact remained as to the cause of the right engine failure, Motion To Reconsider, p. 7.

II.

In the instant supplemental Motion, Plaintiffs correctly state a party has eleven (11) days after the filing of a response brief to reply, unless shortened by Court Order. See ND L.R. 7.1(D). However, the eleven (11) day window to file a reply is not an absolute right and may be invoked only when new matter is injected by the response. Id. Although Plaintiffs contend in the instant supplemental Motion that Defendants raised new matter by

their Response To Plaintiff's Motion To Reconsider, Plaintiffs fail to identify the new matter, or their reply thereto. Further, the Court notes Plaintiffs' initial Motion To Reconsider was filed on November 18, 1997, just thirteen (13) days prior to the December 1, 1997 trial. Defendants' Response was filed on November 24, 1997, just seven (7) days prior to the December 1, 1997 trial. Obviously, had the Court waited eleven (11) days for Plaintiffs to file any reply, such would have been at the tail end of trial and could have drastically impacted the course of trial. Thus, the Court implicitly shortened the time to reply by scheduling the case to begin trial on December 1, 1997.

The Court is of the opinion the only issue raised by Plaintiffs' initial Motion To Reconsider was whether Plaintiffs had on file timely, proper expert witness disclosure(s) relating to the right engine failure claim. This included the issue of whether Plaintiffs had timely filed a Rule 26 disclosure of Dr. Michael Hynes. At the time the Court ruled on Plaintiffs' initial Motion To Reconsider, the issues could be determined based solely on a thorough review of the record. Contrary to Plaintiffs' assertions in their initial Motion To Reconsider, the Court did undergo a thorough review of all matters "on file" prior to ruling on same. Nowhere in the record, save as an exhibit to Plaintiffs' initial Motion To Reconsider, did the Court find a Rule 26 disclosure from Dr. Hynes which related to this case. Obviously, since it was first filed on November 18, 1997, the Rule 26 disclosure of Dr. Hynes relating to this case was not "on file" prior to the Rule 26 disclosure deadline, and thus not timely. The Court found no other timely expert witness disclosures which related to the right engine failure claim. Thus, the Court properly denied Plaintiffs' initial Motion

To Reconsider.

Any argument the Court should have overruled Defendants' Motion For Partial Summary Judgment based on the stricken opinions of Lynn Cooter is meritless. Material previously stricken by the Court is not considered for purposes of a later filed motion. Thus, the Court properly denied Plaintiffs' initial Motion To Reconsider.

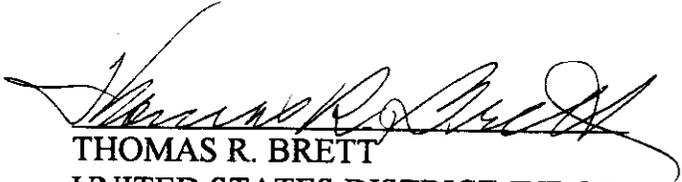
In summary, the Court properly granted Defendants' Motion For Partial Summary Judgment on the right engine claim. No expert testimony linking Defendants to the right engine failure existed in the record of this case at the time the Motion For Partial Summary Judgment was decided. None has been timely filed since. In the initial Motion To Reconsider, Plaintiffs' counsel employs the questionable tactic of filing, for the first time and some three (3) months after the deadline, a Rule 26 disclosure of Dr. Hynes; declaring the Court improperly failed to consider the late disclosure of Dr. Hynes; and arguing it was error for the Court to refuse to consider stricken material.

Plaintiffs' supplemental Motion, or second bite at the reconsideration apple, does not provide a factual basis to find the filing of a reply brief by Plaintiffs to their Motion To Reconsider was warranted prior to the Court's decision to deny same.

### III.

Plaintiffs' Supplement To Plaintiffs' Motion To Alter Or Amend Judgment Or, In The Alternative, To Reconsider, filed December 2, 1997, is overruled. Defendants' request for attorney fees in conjunction with the instant Motion is held in abeyance until attorney fee issues are addressed at the conclusion of trial.

IT IS SO ORDERED this 4 day of December, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

INSULATION MATERIALS  
CORPORATION OF AMERICA  
and JOHN REDDEN,

Plaintiffs,

vs.

PLASTICS ENGINEERING  
ASSOCIATES, INC., JAMES D.  
FOGARTY and DAVID J. FOGARTY,

Defendants.

DEC - 5 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96CV 918H

ENTERED ON DOCKET

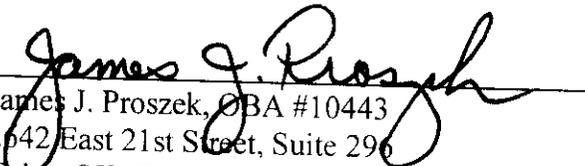
DATE 12-8-97

DISMISSAL WITH PREJUDICE

Plaintiffs Insulation Materials Corporation of America and John Redden and Defendants  
Plastics Engineering Associates, Inc., James D. Fogarty and David J. Fogarty, being all parties who  
have appeared in this action, hereby stipulate pursuant to Fed R. Civ. P. 41(a)(1)(ii) to the dismissal  
of all claims in this action with prejudice, with each party to bear its own costs.

GOURLEY & PROSZEK P.L.L.C.

By:

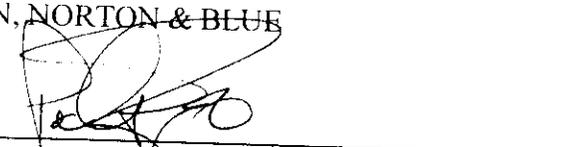


James J. Proszek, OBA #10443  
2642 East 21st Street, Suite 296  
Tulsa, OK 74114-1740  
(918) 748-7902

ATTORNEYS FOR PLAINTIFFS

ALLEN, NORTON & BLUE

By:



Peter L. Sampo  
121 Majorca, Suite 300  
Coral Gables, FL 33134  
(305) 445-7801

ATTORNEYS FOR DEFENDANTS

ENTERED ON DOCKET

DATE 12-8-97

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

BIZJET INTERNATIONAL SALES & )  
SUPPORT, INC., an Oklahoma )  
corporation, )

Plaintiff )

vs. )

ALLIEDSIGNAL INC., a Delaware )  
corporation; )

and )

CFC AVIATION SERVICES, L.P., a )  
Delaware limited partnership, d/b/a )  
GARRETT AVIATION SERVICES, )

and )

UNC-CFC ACQUISITION CO., INC. )  
d/b/a GARRETT AVIATION )  
SERVICES, a Delaware corporation, )

Defendants. )

Case No.: 96CV 811K ✓

**F I L E D**

DEC - 8 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

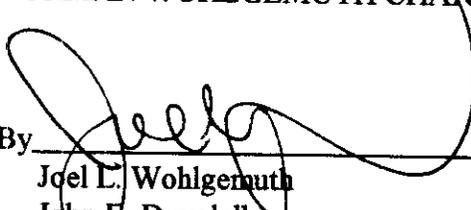
Plaintiff BizJet International Sales & Support, Inc. and all Defendants, by and through their attorneys undersigned, hereby stipulate that this action be dismissed with prejudice, each party to bear its own costs and attorneys' fees.

145

015

DATED this 8<sup>th</sup> day of December 1997.

**NORMAN WOHLGEMUTH CHANDLER & DOWDELL**

By 

Joel L. Wohlgenuth  
John E. Dowdell  
William W. O'Connor  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103  
**Attorneys for Plaintiff**

William J. Maledon  
Brett L. Dunkelman  
OSBORN MALEDON, P.A.  
2929 North Central Avenue  
Post Office Box 36379  
Phoenix, Arizona 85067-6379

and

Michael J. Gibbens  
Kenneth J. Levit  
CROWE & DUNLEVY  
500 Kennedy Building  
321 South Boston  
Tulsa, Oklahoma 74103-3313

**Attorneys for Defendant AlliedSignal Inc.**

By 

William J. Maledon

BOONE, SMITH, DAVIS, HURST & DICKMAN

By Scott R. Rowland

L.K. Smith  
Paul J. Cleary  
Scott R. Rowland  
500 Oneok Plaza  
100 West Fifth Street  
Tulsa, Oklahoma 74103

**Attorneys for Defendant UNC**

Jeffrey M. Shoet  
Paul H. Roeder  
GRAY CARY WARE & FREIDENRICH  
401 B Street, Suite 1700  
San Diego, California 92101

Donald L. Kahl  
Heather Pollock  
HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.  
320 South Boston, Suite 400  
Tulsa, Oklahoma 74103-3708

**Attorneys for Defendant CFC**

By Heather E. Pollock

ENTERED ON DOCKET

DATE ~~12-8-97~~

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

**F I L E D**

DEC - 8 1997 *10*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RANDY OLMSTEAD, AS PERSONAL )  
REPRESENTATIVE OF THE ESTATE )  
OF DAVID L. BELL, DECEASED, )

Plaintiff, )

v. )

UNITED STATES OF AMERICA, )

Defendant. )

CIVIL NO. 97-CV-34-K ✓

STIPULATION FOR DISMISSAL

It is hereby stipulated and agreed that the complaint in the above-entitled case be dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys fees or other expenses of litigation.

*William E. Farrow*

WILLIAM E. FARRIOR  
Barrow Gaddis Griffith & Grimm  
610 S. Main St., Suite 300  
Tulsa, OK 74119-1248  
Telephone No.: 918-584-1600

Attorneys for Plaintiff

*Robert D. Metcalfe, III*

ROBERT D. METCALFE, III  
Department of Justice  
Tax Division  
Ben Franklin Station  
Post Office Box 7238  
Washington, D.C. 20044  
Telephone No.: 202-307-6525

Attorney for Defendant

*mail  
c/d  
aw/mt*

*9*

RC

ENTERED ON DOCKET  
DATE 12-8-97

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

JEFFREY STRAUBEL, d/b/a STRAUBEL )  
INVESTMENTS, an individual, and H. WILLIAM )  
MOTT, M.D., an individual, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
CORPORATE AVIATION SERVICES, )  
INC., an Oklahoma corporation; )  
 )  
 )  
Defendants. )

**F I L E D**

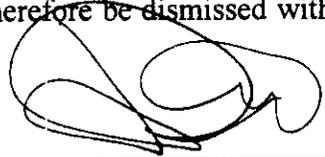
DEC - 5 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

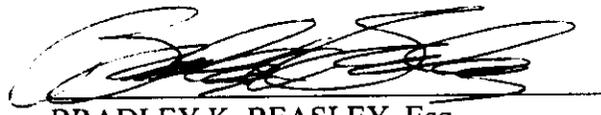
Case No. 97-CV-207-K

**STIPULATION OF DISMISSAL WITH PREJUDICE BY ALL PARTIES**

Pursuant to F. R. Civ. P. Rule 41(a)(1), the plaintiffs, Jeffrey Straubel and Dr. H. William Mott, by and through their attorney, Richard B. O'Connor, and the defendant, Corporate Aviation Services, Inc. ("CASI"), by and through its attorney, Bradley K. Beasley, hereby advise the court that they have reached a mutually satisfactory settlement of the above-captioned case and that the plaintiffs' claims against CASI should therefore be dismissed with prejudice, with each of the parties to bear their own costs and attorney fees.



RICHARD B. O'CONNOR, OBA #10425  
2501 Somerset Place  
Oklahoma City, OK 73116  
Tel.: (405) 842-4310  
Fax: (405) 842-4080  
ATTORNEY FOR PLAINTIFFS



BRADLEY K. BEASLEY, Esq.  
Boesche, McDermott & Eskridge  
100 West Fifth Street, Suite 800  
Tulsa, OK 74103-4216  
Tel.: (918) 583-1777  
Fax: (918) 592-5809  
ATTORNEY FOR DEFENDANT

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

**FILED**

DEC 4 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ROBERT DOSSEY, individually and in )  
his capacity as Director and President of )  
Maricopa Foundation for Affordable )  
Housing, )  
)  
Defendant. )

No. 96-C-714-B ✓

ENTERED ON DOCKET

DATE DEC 05 1997

**JUDGMENT**

Pursuant to the terms of the Stipulation of Settlement entered into by the parties on June 16, 1997, Judgment is entered for the Plaintiff United States of America on behalf of its client agency, The Department of Housing and Urban Development ("HUD"), and against the Defendant, Robert L. Dossey, individually and in his capacity as Director and President of Maricopa Foundation for Affordable Housing, on Count II (Unjust Enrichment) of the Complaint, in the amount of \$225,000.00 plus interest accruing from the date of judgment at the rate of 5.42 percent (%) per annum until the balance is paid; Counts I and III of the Complaint are dismissed with prejudice; and both parties will bear their own costs of litigation and attorney fees.

Dated this 4th day of December, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

22

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

**FILED**

DEC 4 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

No. 96-C-714-B

ROBERT DOSSEY, individually and in )  
his capacity as Director and President of )  
Maricopa Foundation for Affordable )  
Housing, )

Defendant. )

ENTERED ON DOCKET

DATE DEC 05 1997

**ORDER**

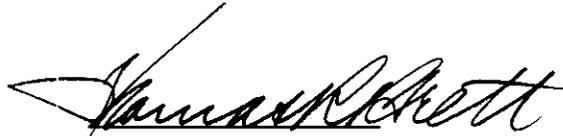
Before the Court is the Motion to Enforce Terms of Settlement and Enter Judgment against the Defendant Robert Dossey ("Dossey") filed by plaintiff United States on November 3, 1997 (Docket No. 19). The United States and Dossey entered into a Stipulation of Settlement effective June 16, 1997. Pursuant to the terms of settlement, Dossey agreed to confess judgment on Count Two of the Complaint and pay the total principal sum of \$225,000.00 plus accrued interest, in exchange for the government's dismissal of Counts One and Three of the Complaint. Although the parties agreed to payment in five installments, the first installment in the amount of \$45,000.00 to be paid within thirty (30) days of June 16, 1997, no payment has been made to the United States as of this date. Accordingly, the United States requests the Court to enforce the settlement agreement and entered judgment on Count Two of the Complaint, awarding plaintiff \$225,000.00 plus interest and to dismiss Counts One and Three of the Complaint.

As these terms of settlement are unambiguous and Dossey has not responded to the

21

government's motion with any explanation for nonpayment, the Court grants plaintiff's motion. A separate Judgment is concurrently entered.

ORDERED this 4th day of December, 1997.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written in a cursive style. The signature is positioned above the printed name and title.

THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 12-5-97

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

OSCAR STEPHEN JARRELL, )  
 )  
 ) Plaintiff, )  
vs. ) No. 97-CV-503-K ✓  
 )  
DAVID ROBERTSON, Attorney at Law, )  
and LYONS AND CLARK, )  
 )  
Defendants. )

**F I L E D**

DEC 05 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Pursuant to 42 U.S.C. § 1983, Plaintiff, a *pro se* state inmate, has paid the filing fee to commence this civil rights action against David Robertson, his retained trial counsel, and Lyons and Clark, the former lawfirm of Mr. Robertson. He alleges that Mr. Robertson "used plaintiff [sic] case to open the door for his new employment that [sic] DA's office." (#1) He also alleges that his retained counsel refused to return jury trial transcripts, preliminary hearing transcripts, any other "material evidence" of his trial, "took [his] money," refused to call witnesses, and basically, "denied [him] effective assistance of counsel." Further, the lawfirm of Lyons and Clark, at which Mr. Robertson was employed while representing Plaintiff, has refused to provide the requested documents and are, therefore, "countable [sic] for the continuance of attorney who violated attorney/client confidentiality and ethical violations of defrauding his clients of all financial assistance he had." (#1)

In an action brought pursuant to 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a person acting under the color of state law.

West v. Atkins, 487 U.S. 42, 48 (1988).

Further, for purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). *Pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110. "[A] court may dismiss *sua sponte* 'when it is patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." Id.

Plaintiff complains that "Mr. Robertson's negligence and secret agenda . . . denied me effective assistance of counsel and eroded fundamental fairness of an [sic] trial by jury." After construing Plaintiff's *pro se* pleading liberally, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law and should be dismissed sua sponte and without opportunity to amend as Plaintiff could not prevail on the facts alleged. "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); see also Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980). Because Plaintiff has failed to allege a constitutional violation committed by a person acting under color of law, the Court finds that Plaintiff has failed to allege an element essential to state a claim under 42 U.S.C. § 1983, and concludes that the *Complaint* should be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights *Complaint* is dismissed with prejudice as it lacks an arguable basis in law. To the extent Plaintiff seeks appointment of counsel or to supplement his petition,<sup>1</sup> those requests are denied as moot.

IT IS SO ORDERED this 4 day of December, 1997.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

---

<sup>1</sup> A "post-it" note was attached to the copies of the civil rights *Complaint* provided by Plaintiff, which note reads, "Sir, I request an attorney be assigned my case as its [sic] hard for me to see and read." Also, a letter was received by the Clerk's office on November 25, 1997, wherein Plaintiff "further prays that the Court grants the Plaintiff a habeas corpus petition and/or motion to vacate sentence..."Neither of these "requests" are in compliance with the Federal Rules of Civil Procedure or the Local Rules of the Northern District of Oklahoma. See Hall, 935 F.2d at 1110.

ENTERED ON DOCKET

DATE 12-5-97

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

CHARLES BOWLDS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
LAMBERT'S ENGINE & PARTS )  
WAREHOUSE, INC., )  
)  
Defendant. )

**FILED**

DEC - 4 1997

Case No. 97 CV-980 K ✓

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

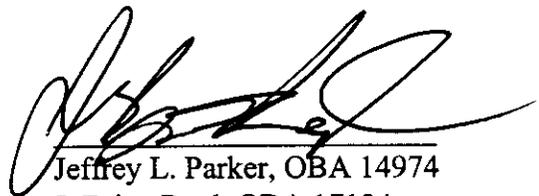
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**DISMISSAL WITHOUT PREJUDICE**

---

**COMES NOW**, Charles Bowlds, Plaintiff, by and through his undersigned attorneys, and dismisses his claim of Intentional Infliction of Emotional Distress, Count II only, of his Complaint against Defendant filed on October 28, 1997.

Respectfully Submitted,

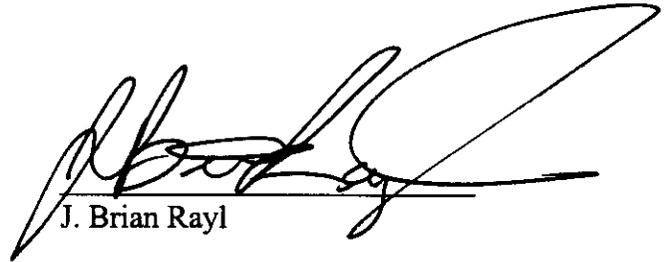


Jeffrey L. Parker, OBA 14974  
J. Brian Rayl, OBA 17124  
Attorneys for Plaintiff  
5139 S. Lewis, Ste. 110  
Tulsa, OK 74105  
Telephone: (918) 748-8118  
Telecopier: (918) 748-8185

**Certificate of Service**

I, J. Brian Rayl, certify that a true and correct copy of the above and forgoing Dismissal Without Prejudice was mailed by first class mail, postage fully prepaid thereon, this 4<sup>th</sup> day of December, 1997, to:

Mark A. Waller, Esq.  
Inhofe & Waller, P.C.  
427 S. Boston, Suite 907  
Tulsa, OK 74103-4114



J. Brian Rayl

ENTERED ON DOCKET

DATE 12-5-97

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

PAUL K. CARR, JR., )  
Plaintiff )  
vs. )  
ALLWASTE RECYCLING, INC., )  
STRATEGIC MATERIALS, INC., )  
Defendants )

No. 97-C-484-K-(M) **FILED**

DEC 9 1997 10

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**DISMISSAL WITHOUT PREJUDICE**

ON the plaintiff's Application for Motion to Dismiss Allwaste, Inc., Without Prejudice, the defendant having no objection, the Court herewith orders that Allwaste, Inc., is herewith dismissed without prejudice.

  
Judge Terry C. Kern

**CERTIFICATE OF SERVICE**

I certify that on the \_\_\_ day of December, 1997, a true and correct copy of this instrument was:

- Mailed postage prepaid thereon;
- Mailed by Certified Mail, Return Receipt Requested, No. \_\_\_\_\_;
- Transmitted via FAX;
- Hand Delivered;

to the following: Richard Carpenter, 1516 S Boston, Ste 205, Tulsa OK 74119.

\_\_\_\_\_

27

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

STEPHENS PROPERTY COMPANY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FLEET NATIONAL BANK, formerly )  
 known as Fleet National Bank of )  
 Massachusetts, formerly named )  
 Shawmut Bank, N.A., a national )  
 banking association, formerly )  
 named Shawmut Bank of Boston, N.A., )  
 as Trustee under Collateral Trust )  
 Indenture dated as of June 1, 1984, )  
 )  
 Defendant. )

Case No. 97-CV-44-K ✓

**FILED**

DEC 05 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER FOR ADMINISTRATIVE CLOSURE**

Upon the Joint Application of Plaintiff, Stephens Property Company, and Defendant, Fleet National Bank, for administrative closure pursuant to N.D. LR 41.0, and for good cause shown,

IT IS HEREBY ORDERED that the Clerk of this Court shall forthwith close this action administratively. The action shall be reopened upon application by either party. In the event an application to reopen is not filed on or before June 15, 1998, the action shall be deemed dismissed without prejudice.

Dated this 5 day of December, 1997.

  
 TERRY C. KERN  
 UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

Russell Cook

Drew Neville, OBA #6641  
Russell Cook, OBA #1874  
LINN & NEVILLE, P.C.  
1200 Bank of Oklahoma Plaza  
201 Robert S. Kerr Avenue  
Oklahoma City, Oklahoma 73102-4289  
Telephone: (405) 239-6781  
Facsimile: (405) 270-5525

Philip J. Eller, OBA #2675  
Kevin H. Wylie, OBA #10534  
Shanann Pinkham Passley, OBA #13603  
ELLER AND DETRICH  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
Telephone: (918) 747-8900  
Facsimile: (918) 747-2665

JON LEE PRATHER, OBA #7278  
6655 South Lewis  
Tulsa, Oklahoma 74136  
Telephone: (918) 481-6691  
Facsimile: (918) 481-6866

Attorneys for Plaintiff  
Stephens Property Company

  
Roy C. Breedlove, OBA #1097  
David C. Cameron, OBA #1437  
FELLERS, SNIDER, BLANKENSHIP,  
BAILEY & TIPPENS  
Sinclair Building  
6 East Fifth Street, Ste. 800  
Tulsa, OK 74103  
Telephone: (918) 599-0621  
Facsimile: (918) 583-9659

-and-

Todd A. Nelson, OBA #15317  
FELLERS, SNIDER, BLANKENSHIP,  
BAILEY & TIPPENS  
100 North Broadway, Ste. 1700  
Oklahoma City, OK 73102-7875  
Telephone: (405) 232-0621  
Facsimile: (405) 232-9659

Attorneys for Defendant  
Fleet National Bank

ENTERED ON DOCKET

DATE 12-5-97

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

DARRYLE LAWRENCE WILLIAMS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RONALD J. CHAMPION, )  
)  
Respondent. )

Case No. 96-C-760-K (J) ✓

**F I L E D**

DEC 05 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge filed on September 29, 1997 (Doc. #13), in this habeas corpus action pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends the petition for habeas corpus be dismissed as Petitioner was not deprived of his due process rights when the State of Oklahoma dismissed his a direct appeal as untimely, nor was Petitioner denied effective assistance of counsel.

On October 9, 1997, Petitioner filed his objection to the Report. Specifically, Petitioner objects to the Magistrate's findings and conclusions that: (1) the decision by the Tenth Circuit in Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991), applies only to those situations resulting from a defendant's conviction by a jury, and (2) Petitioner's ineffective assistance of counsel claim fails to meet the two-prong test under Laycock v. New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989).

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 October 12, 1992, Petitioner pled guilty to charges of kidnapping (sentenced 25 years), lewd molestation (sentenced 5-20 years), forcible sodomy (sentenced 10 years), and assault with intent to rape (sentenced 6-10 years). Petitioner was informed by the trial court at his sentencing that to appeal his conviction after entering a guilty plea, he must file a motion to withdraw his plea within ten days and request an evidentiary hearing before the trial court. (Doc. # 8-1, at 6-7).

Petitioner asserts that he sent a note to the public defender who served as his defense counsel two days after entering his plea of guilty and requested that his defense counsel visit him to discuss the withdrawal of his guilty plea. According to Petitioner, the public defender's office never contacted him, and on October 16, 1992 (four days after he was sentenced), Petitioner was transported to the Lexington Assessment & Reception Center, a facility within the Oklahoma Department of Corrections.<sup>1</sup> Petitioner states that he sent a "second" letter to the public defender on October 28, 1992. In reply to that letter, Ms. Denny Johnson, an assistant public defender, informed Petitioner that the deadline for perfecting his appeal had passed because he had only ten days from the date of his plea of guilty within which to file a motion to withdraw the plea.

Petitioner filed a motion to withdraw his guilty plea in the trial court. The trial court denied the motion because it was not timely filed. Petitioner filed a Petition for a Writ of Certiorari with the Oklahoma Court of Criminal Appeals. On September 2, 1993, the Court denied the Writ and informed Petitioner that he should have filed a request for an appeal out of time in the trial court.

On October 27, 1993, Petitioner filed an Application for Post-Conviction Relief for an Appeal

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<sup>1</sup>At the sentencing hearing, the trial court informed Petitioner that he had "the right to request immediate transportation to the penitentiary or wait 10 days." Petitioner responded, "Immediate." (Doc. #8, at 7).

out of time in the Tulsa County District Court. Petitioner asserted that he was denied an appeal due to the failure of his trial counsel, and that the trial court erred in accepting a guilty plea because no factual basis for the entry of a guilty plea had been pled. On December 14, 1994, the trial court denied Petitioner's motion after finding no support for Petitioner's claim that he was improperly denied an appeal due to the fault of his counsel.<sup>2</sup> The trial court found that Petitioner was adequately informed of his right to appeal, Petitioner made no attempt to appeal during the ten days after he entered his plea of guilty and Petitioner voluntarily and knowingly entered a plea of guilty.

Petitioner filed a Petition in Error in the Oklahoma Court of Criminal Appeals on March 14, 1994. On April 3, 1994, that court entered an Order affirming the trial court's denial of post-conviction relief. The appellate court noted that the "only support [for Petitioner's arguments] consisted of [Petitioner's] self-serving statements." Further, the attorney, who represented Petitioner at the hearing where he pled guilty, executed a sworn affidavit attesting that, after searching her files, the only letter she found from Appellant requesting an appeal was dated October 28, 1992. Petitioner's attorney stated that she responded to Petitioner by letter and informed him that it was too late to file an appeal because Petitioner should have, if he wanted to appeal, filed a motion to withdraw his guilty plea within ten days from the date of his plea. The Court concluded that Petitioner did not offer a sufficient reason for his failure to perfect a statutory direct appeal, and therefore Petitioner had waived his right to assert the issues he was attempting to raise.

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<sup>2</sup>The trial court noted that Petitioner's attorney, by affidavit, stated that the only letter she located from Petitioner, after searching her files, was dated October 28, 1992.

## *DISCUSSION*

### A. Interpretation of *Baker v. Kaiser*, 929 F.2d 1495 (10th Cir. 1991).

In the Report, the Magistrate Judge found that Petitioner failed to show that he was denied due process as a result of the ineffective assistance of counsel. Although Petitioner urged that his counsel violated the Tenth Circuit's findings in *Baker*, *supra*, at 1499, i.e., that counsel has a duty to "explain the advantages and disadvantages of an appeal[,] ... provide the defendant with advice about whether there are meritorious grounds for appeal . . . about the probabilities of success [and] . . . inquire whether the defendant wants to appeal the conviction," the Magistrate Judge concluded that *Baker* does not apply to the case at bar. *Baker* addresses a counsel's duties to his client *following a jury trial and conviction*, not counsel's duties when a client pleads guilty. Two exceptions to this general rule have been recognized: if the defendant asked about the right, or if a claim of error is made on constitutional grounds that could result in setting aside the plea. See *Hardiman v. Reynolds*, 971 F.2d 500, 506 (10th Cir. 1992)(quoting *Laycock v. New Mexico*, 880 F.2d 1184, 1187-88 (10th Cir. 1989)).

The Tenth Circuit has consistently held that when a guilty plea is the basis for a judgment, special considerations apply. *Baker* is limited to only those situations in which a defendant's conviction follows a jury trial. *Hardiman*, 971 F.2d at 506; see also *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994); *Carey v. Leverette*, 605 F.2d 745, 746 (4th Cir. 1979).<sup>3</sup>

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<sup>3</sup>*Baker* was decided after *Laycock*. However, the Magistrate Judge found that in several unpublished cases decided after *Baker*, the Tenth Circuit has declined to extend all of the requirements of *Baker* to cases in which a defendant pled guilty and subsequently argued that counsel was ineffective with respect to the defendant's appeal. See, e.g., *Gardner v. Cody*, 105 F.3d 669 (10th Cir. Jan. 6, 1997) 1997 WL 3388; *Adair v. Cody*, 89 F.3d 849 (10th Cir. June 4, 1996) 1996 WL 293830; *Matlock v. Carr*, 74 F.3d 1249 (10th Cir. Jan. 17, 1996) 1996 WL 15670; *Glasper v. Tulsa County*, 67 F.3d 312 (10th Cir. Sept. 26, 1995) 1995 WL 578983;

Petitioner objects to this conclusion but does not provide any authority in support of his objection. Further, Petitioner argues that because the magistrate relies on several unpublished Tenth Circuit decisions, which were not attached to the Report, "the unpublished decisions . . . should not be considered as controlling in this case." The Court finds Petitioner's argument without merit. Unpublished opinions may be cited if persuasive with respect to a material issue in the case. In addition, Petitioner is advised that the rule regarding attachment of copies of unpublished opinions applies to litigants, not to the court.

**B. Applicability of *Laycock v. New Mexico*, 880 F.2d 1188 (10th Cir. 1989).**

Petitioner next objects to the Magistrate Judge's conclusion that Petitioner is not entitled to relief under *Laycock*, *supra*. Specifically, Petitioner states this conclusion was based on the assumption that Petitioner failed to establish he attempted to contact his attorney within the ten-day statutory period. However, the Magistrate Judge, citing *Laycock*, *supra*, stressed that Petitioner's counsel was required to inform Petitioner about his rights to appeal only (a) *if* Petitioner asked about the right, or (b) *if* a claim of error is made on constitutional grounds that could result in setting aside the pleas. "Request' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue." *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994); 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

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*Briggs v. Carr*, 53 F.3d 342 (10th Cir. May 1, 1995) 1995 WL 250796 (no evidence other than petitioner's own allegations that he attempted to contact his attorney); *Shaw v. Cody*, 46 F.3d 1152 (10th Cir. Jan. 20, 1995) 1995 WL 20425; *Orange v. Cody*, 21 F.3d 1122 (10th Cir. April 15, 1994) 1994 WL 131750 (petitioner claimed he sent a letter to his counsel requesting that counsel file an appeal).

makes it clear that [the defendant] never affirmatively indicated any desire to appeal to his counsel or to the district judge”).

Although Petitioner alleges that during the pertinent time period he wrote or sent a note by way of the deputy to his counsel, the Court has carefully reviewed the record and concludes that the record does not indicate Petitioner attempted to contact his attorney within the ten day time period after his guilty plea. As noted, counsel's duty to inform his client of his limited right to appeal after entering 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. Furthermore, for the reasons explained in the Report, Petitioner's "sworn affidavit" fails to rebut the presumption of correctness which this Court is required to give to State court factual findings. Therefore, the Court agrees with the conclusion of the Magistrate Judge and finds that because the record does not support Petitioner's allegation that he attempted to contact his counsel during the ten day period, Petitioner's counsel had no duty to advise Petitioner of his right to appeal the guilty plea. Laycock, 880 F.2d at 1188.

Petitioner also argues that his sworn affidavit submitted with his "first letter" and attached as an exhibit to his reply brief (Doc. #12) is "new evidence."<sup>4</sup> However, the Court finds that for the reasons stated in the Report, this affidavit and attachment do not constitute clear and convincing evidence sufficient to rebut the state court factual findings to satisfy the first prong of the Laycock requirement. As recounted in the Report, the state court record revealed that Petitioner was informed

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<sup>4</sup>Petitioner explained in his reply brief that his copy of the October 14(16?), 1992 note allegedly sent to his counsel had been "misplaced" and was only discovered after a "thorough search of his files were (sic) done by the inmate paralegal who prepared this response for the petitioner." (Doc. #12, at 7).

by the trial court of his right to appeal:

THE COURT: Here's your right to appeal. You have the right to file a petition in the Court of Criminal Appeals for a Writ of Certiorari. This is a request for that court to review this judgment and sentence. It may be granted or denied. Do you understand that ?

MR. WILLIAMS: Yes.

THE COURT: To appeal from this conviction on your plea of guilty, you must file an application to withdraw the plea of guilty within 10 days from today setting forth in detail the grounds for such withdrawal of the plea and requesting an evidentiary hearing in the trial court. Said trial court must hold said evidentiary hearing and deny said application within 30 days from the filing of the same. No question may be raised in the petition for Writ of Certiorari which requires an evidentiary hearing unless the same has been raised in the application to withdraw plea in the trial court and a hearing held thereon. Do you understand that?

MR. WILLIAMS: (Nods head up and down.)

THE COURT: Petition for Writ of Certiorari must be filed in the Court of Criminal Appeals within 90 days from today.

If you want to appeal, your attorney Ms. Johnson would represent you but you'll have to notify her. Do you understand that?

MR. WILLIAMS: Yes.

THE COURT: Any questions?

MR. WILLIAMS: No.

(Doc. #8-1, Transcript of Proceedings in the District Court for Tulsa County, dated October 12, 1992). The Report indicated the trial court concluded "the petitioner was advised of his right to appeal and the record reflects that petitioner took no steps to attempt or perfect a timely direct appeal. Nor has the petitioner offered any sufficient reason for the petitioner's failure to file a timely direct appeal of petitioner's conviction . . . . The Court finds that no appeal has been sought or

perfected, nor has any sufficient reason been offered by the petitioner for Petitioner's failure to so do." Order of the Tulsa County District Court, dated December 14, 1993, at 3-4. The Magistrate concluded, and this Court agrees, that Petitioner was informed of his limited right to appeal by the state court, and Petitioner's objection based upon the "new evidence" in the form of the missing "first letter" is unavailing. Even assuming Petitioner's first letter was missing and only recently located as claimed by Petitioner, the Court finds the "sworn affidavit and attachment" simply do not constitute clear and convincing evidence sufficient to rebut the presumption of correctness which this Court is required to give to State court factual findings. Therefore, the Court affirms the Magistrate Judge's conclusions that Petitioner did not contact his attorney within the requisite ten days, nor did Petitioner rebut the factual findings of the State court.

The "second prong" under Laycock only applies if a claim is made on a constitutional ground that could result in setting aside the plea. Based on the record and the findings of the Magistrate Judge, the Court finds that Petitioner made no such claims, and a review of the record reveals no such claims.<sup>5</sup> Therefore, this objection made by Petitioner to the Report of the Magistrate Judge is also without merit.

---

<sup>5</sup>In his Application for Post-Conviction Relief for an Appeal Out of Time, filed in the Tulsa County District Court, Petitioner alleged that the trial court violated Oklahoma law by accepting a guilty plea without an appropriate factual basis. Petitioner asserts this argument in his objection to the Report and Recommendation but does not assert this argument in his habeas petition. Regardless, this argument does not implicate a federal constitutional right. See, e.g., Sena v. Romero, 617 F.2d 579 (10th Cir. 1980); Freeman v. Page, 443 F.2d 493 (10th Cir. 1971) *cert denied*, 404 U.S. 1001.

**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. The Court finds that Petitioner has not been deprived of his due process rights and has not been denied effective assistance of counsel. Therefore, the Court concludes that the Report should be adopted and affirmed *in toto* 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. #13) is **adopted and affirmed;**
- (2) The petition for writ of habeas corpus is **dismissed with prejudice.**
- (3) Petitioner's motion for appointment of counsel (#15) is **denied as moot.**

SO ORDERED THIS 5 day of December, 1997.

  
TERRY C. KEEN, Chief Judge  
United States District Court

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

DEC. 4 - 1997

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 JUAN C. FRUSCIANTE, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Action No. 97CV813K(J)

ENTERED ON DOCKET

CLERK'S ENTRY OF DEFAULT

DATE 12-5-97

It appearing from the files and records of this Court as of December 4, 1997 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Juan C. Frusciante**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 4th day of December, 1997.

PHIL LOMBARDI, Clerk  
United States District Court for  
the Northern District of Oklahoma

By A. Schwelke  
Deputy Court Clerk for Phil Lombardi

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

**F I L E D**

DEC 1 1997 *ml*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KELLEE JO BEARD, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
HISSOM MEMORIAL CENTER, et al. )  
 )  
Defendants. )

Case No. 87-C-704-E ✓

ENTERED ON DOCKET

DATE DEC 04 1997

ORDER DISMISSING DEFENDANT PARTIES

The Motion to Terminate Active Court Supervision of the Settlement Agreement and Motion to Dismiss filed by Defendants, The Hissom Memorial Center; Julia Teska, individually and in her official capacity as Superintendent of the Hissom Memorial Center; the Department of Human Services of the State of Oklahoma; Robert Fulton, individually and in his official capacity as the Director of the Department of Human Services; and George Miller as the successor to Robert Fulton as Director of the Department of Human Services comes now before the Court. Plaintiffs in their response admit that these Defendants have substantially complied with the terms of the Settlement Agreement and that they are no longer necessary parties and should be dismissed from this action. The Court finds that these Defendants have substantially complied with all duties and obligations required of them under the Settlement Agreement and that their motion should be granted.

IT IS THEREFORE ORDERED that Defendants, The Hissom Memorial Center; Julia Teska, individually and in her official capacity as Superintendent of the Hissom Memorial Center;

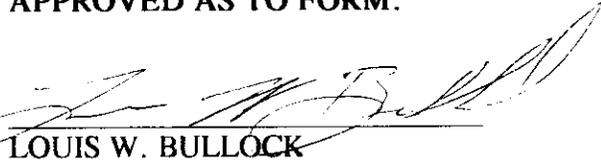
the Department of Human Services of the State of Oklahoma; Robert Fulton, individually and in his official capacity as the Director of the Department of Human Services; and George Miller as the successor to Robert Fulton as Director of the Department of Human Services should be and are hereby dismissed from this action.

DATED THIS 10<sup>th</sup> DAY OF December ~~NOVEMBER~~, 1997.



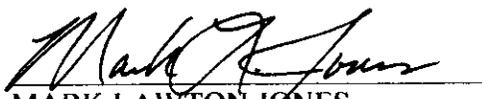
JAMES O. ELLISON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

**APPROVED AS TO FORM:**



LOUIS W. BULLOCK  
PATRICIA W. BULLOCK  
BULLOCK & BULLOCK

ATTORNEYS FOR PLAINTIFFS



MARK LAWTON JONES  
ASSISTANT ATTORNEY GENERAL

ATTORNEY FOR DEFENDANTS  
DEPARTMENT OF HUMAN SERVICES



KAY HARLEY  
GENERAL COUNSEL  
STATE DEPARTMENT OF EDUCATION

ATTORNEY FOR DEFENDANTS  
STATE DEPARTMENT OF EDUCATION

**F I L E D**

DEC - 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

JAMES GARY SWAFFORD,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FARMERS INSURANCE COMPANY	)
INC.,	)
	)
Defendant.	)

Case No. 97-CV-869-B

ENTERED ON DOCKET

DATE DEC 04 1997

ORDER

Before the Court for consideration is Plaintiff James Gary Swafford's Motion To Remand (Docket # 3). Based on a careful review of the record and applicable legal authorities, the Court hereby grants Plaintiff's Motion To Remand.

I.

On May 28, 1997, Plaintiff filed this action against Defendant Farmers Insurance Company, Inc., in the District Court of Tulsa County, Oklahoma. Therein, Plaintiff stated Farmers underwrote a policy of insurance which afforded Plaintiff certain coverage, including medical pay and uninsured/underinsured motorist benefits. Plaintiff alleged Farmers breached its contractual and good faith and fair dealing obligations to provide medical pay and uninsured/underinsured motorist benefits after he suffered bodily injury in an automobile accident. Plaintiff's prayer sought \$30,000.00 in "UM"

coverage<sup>1</sup>, \$10,000.00 in medical pay coverage, in excess of \$10,000.00 in compensatory damages, and in excess of \$50,000.00 in punitive damages. Plaintiff, an Oklahoma resident, stated Farmers was a Delaware corporation with its principal place of business located in Overland Park, Kansas.

On the thirtieth (30th) day following service of Summons and the Petition in the state court action, Farmers initiated a third party action against the alleged uninsured/underinsured tortfeasors, Bent River Lumber Company, Inc., d/b/a Interior Building Products, Clarence Spanyard Jr., Mill Creek Lumber & Supply Company, and Wood Systems, Inc., all residents of Oklahoma. Therein, Farmers sought subrogation/indemnification/contribution for any damages sustained by Plaintiff as a result of the automobile accident. One hundred and two (102) days after filing the state court action, Plaintiff dismissed his "UM" claim against Farmers, but continued pursuit of his alleged medical payments coverage and bad faith claims. Farmers, in turn, dismissed its third party action. That same day, which was one hundred and seventeen (117) days following service of Summons and the Petition in the state court action, Farmers filed a Notice Of Removal.

Plaintiff did not bring any claims against the Third Party Defendants.

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<sup>1</sup>Due to the wording of the Petition and the parties' briefs, the Court is unable to discern whether Plaintiff's "UM" claim is for uninsured or underinsured motorist benefits.

II.

Plaintiff objects to Farmers' Notice Of Removal contending the Notice was not timely filed pursuant to 28 U.S.C. § 1446(b) which states:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Plaintiff states his action was removable at the time it was initially filed in Tulsa County District Court and that he took no steps to alter the posture of the case within the first thirty (30) days of filing.

Farmers' Response states, in pertinent part:

\* \* \*

2. As a result of Plaintiff's affirmative action of alleging failure to pay UM benefits, Farmers had to bring a subrogation action against the responsible party prior to the expiration of the two (2) year statute of limitations. Otherwise, Farmers would risk losing its right to subrogation.

Consequently, on June 30, 1997, fourteen (14) days prior to the deadline for filing Farmers' subrogation claim, Farmers filed a Third-Party Petition against the owner and driver of the adverse vehicle, which is allegedly responsible for the accident.

3. Therefore, at the time of the filing of Plaintiff's initial pleading, Farmers was faced with the option of either removing the matter to Federal Court or losing its ability to bring a subrogation claim.

4. The owner and driver appeared to be both [sic] residents of the State of Oklahoma. Therefore, diversity jurisdiction would not exist if these individuals were joined as parties to the litigation.

5. On September 8, 1997, Plaintiff voluntarily dismissed the uninsured/underinsured motorist claim.... Therefore, as a result of the voluntary act of Plaintiff, the subrogation or third-party action against the Oklahoma residents was no longer necessary or appropriate. Consequently, on September 24, 1997, Farmers dismissed without prejudice its third-party claim.

6. Plaintiff's action became removable upon receipt of Plaintiff's voluntary dismissal of the UM claim.

### III.

Alternative theories exist for granting Plaintiff's Motion For Remand. First, at the time removal was attempted, Farmers failed to make an affirmative showing of all requisite factors of diversity jurisdiction. In its Notice Of Removal, Farmers fails to state the amount in controversy. Although it appears this Court initially would have had subject matter jurisdiction over Plaintiff's uninsured/underinsured motorist coverage, med pay coverage, and bad faith claims, dismissal of the "UM" claim leaves Plaintiff's

prayer somewhere "in excess of \$70,000.00." This does not meet the jurisdictional prerequisite of 28 U.S.C. § 1332. Although discernable from a scouring of the record, Farmers' Notice Of Removal does not declare the citizenship of Plaintiff or Farmers. Failing to show all requisite factors of diversity jurisdiction leaves this Court without subject matter jurisdiction. See Rocket Oil and Gas Company v. Arkansas Louisiana Gas Company, 435 F.Supp. 1306 (10th Cir. 1977); Gaitor v. Peninsular & Occidental Steamship Company, 287 F.2d 252 (5th Cir. 1961).

Further, Farmers' Notice Of Removal was untimely. See 28 U.S.C. § 1446(b). Notwithstanding Farmers' theory, Plaintiff's suit was removable to federal court within thirty (30) days after service of Summons and the Petition in the Tulsa County District Court case because diversity of citizenship existed between the parties and the amount sought exceeded the jurisdictional prerequisite of \$75,000.00. See 28 U.S.C. §§ 1332, 1441(a). The Court disagrees Farmers was forced to choose between removing Plaintiff's suit or bringing the third party action against the alleged uninsured/underinsured tortfeasors. Nothing prevented Farmers from timely removing Plaintiff's suit to federal court, then proceeding with its third party claim against the alleged uninsured/underinsured tortfeasors pursuant to Fed.R.Civ.P. 14 and King Fisher Marine Service Inc. v. 21st Phoenix Corporation, 893 F.2d 1155 (10th Cir.), cert. denied, 496 U.S. 912 (1990).

Farmers' position that Plaintiff's uninsured/underinsured motorist claim somehow

suspended the running of the thirty (30) day time limit for removal under 28 U.S.C. § 1446(b), simply because Farmers desired to seek subrogation, lacks merit.

IV.

For the above reasons, Plaintiff's Motion To Remand (Docket # 3) is granted.

IT IS SO ORDERED this 2<sup>nd</sup> day of December, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

DEC 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SAMUEL J. WILDER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE SALVATION ARMY )  
 (Dormitory Supervisor )  
 Buddy Campbell), )  
 ST. JOHN MEDICAL CENTER; )  
 THE DAY CENTER FOR THE )  
 HOMELESS (Sandra Holden), )  
 et al., )  
 )  
 Defendants. )

Case No. 97-CV-93-BU

ENTERED ON DOCKET  
DEC 03 1997  
DATE \_\_\_\_\_

**JUDGMENT**

This action came before the Court upon Defendant, The Salvation Army's Motion to Dismiss and Alternative Motion for Summary Judgment. Having previously dismissed without prejudice St. John Medical Center and The Day Center for the Homeless and having granted summary judgment in favor of Defendant, The Salvation Army,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant, The Salvation Army, and against Plaintiff, Samuel J. Wilder.

Dated at Tulsa, Oklahoma, this 2<sup>nd</sup> day of ~~November~~ <sup>December</sup>, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

42

**FILED**

DEC 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

SAMUEL J. WILDER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE SALVATION ARMY )  
 (Dormitory Supervisor )  
 Buddy Campbell), )  
 ST. JOHN MEDICAL CENTER; )  
 THE DAY CENTER FOR THE )  
 HOMELESS (Sandra Holden), )  
 et al, )  
 )  
 Defendants. )

Case No. 97-CV-93-BU

**ORDER**

In light of the Court's Orders and Judgment entered this same date, the Court finds that Plaintiff's Objection to Pretrial Order Dated 9-16-97 is MOOT.

ENTERED this 2<sup>nd</sup> day of <sup>December</sup> ~~November~~, 1997

Michael Burrage  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

41

**FILED**

DEC 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

SAMUEL J. WILDER, )  
)  
Plaintiff, )  
)  
vs. )  
)  
THE SALVATION ARMY )  
(Dormitory Supervisor )  
Buddy Campbell), )  
ST. JOHN MEDICAL CENTER; )  
THE DAY CENTER FOR THE )  
HOMELESS (Sandra Holden), )  
et al, )  
)  
Defendants. )

Case No. 97-CV-93-BU ✓

ENTERED  
1997

**ORDER**

This matter comes before the Court upon Defendant, the Salvation Army's Motion to Dismiss and Alternative Motion for Summary Judgment. Plaintiff, Samuel J. Wilder, has not responded to the motion within the time prescribed by Local Rule 7.1(C). Pursuant to Local Rule 7.1(C), the Court, in its discretion, deems the motion confessed.

Upon review of the confessed motion, the Court finds that no genuine issue of material fact exists and that Defendant, The Salvation Army, is entitled to judgment as a matter of law.

Accordingly, Defendant, The Salvation Army's Motion for Summary Judgment (Docket Entry #33-2) is GRANTED. Defendant's Motion to Dismiss (Docket Entry #33-1) is MOOT. Judgment shall issue forthwith.

ENTERED this 2<sup>nd</sup> day of December 1997

Michael Burrage  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

40

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

**FILED**

DEC 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SAMUEL J. WILDER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE SALVATION ARMY )  
 (Dormitory Supervisor )  
 Buddy Campbell), )  
 ST. JOHN MEDICAL CENTER, )  
 THE DAY CENTER FOR THE )  
 HOMELESS (Sandra Holden), )  
 et al., )  
 )  
 Defendants. )

Case No. 97-CV-93-BU ✓

**ORDER**

On June 5, 1997, this Court entered an Order directing Plaintiff, Samuel J. Wilder, to file an amended complaint adding The Day Center for the Homeless and St. John Medical Center and setting forth all claims against The Salvation Army, The Day Center for the Homeless and St. John Medical Center by June 20, 1997. The Court advised Plaintiff that if he failed to file the amended complaint, this action would proceed only against Defendant, The Salvation Army.

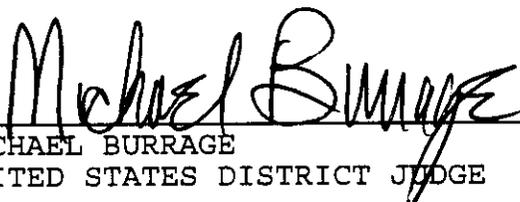
To date, Plaintiff has not filed an amended complaint. Plaintiff has filed a motion seeking leave to file a supplemental brief supporting service of the summons and the complaint, but such motion, even construed liberally, does not constitute an amended complaint.

On March 19, 1997, Plaintiff filed a pleading which the Court construed as an amended complaint. The pleading alleges a claim under 18 U.S.C. § 1341 against The Day Center For the Homeless.

Section 1341 defines a crime for mail fraud. A private party may not recover civil damages under this statute. Creech v. Federal Land Bank of Wichita, 647 F. Supp. 1097, 1099 (D.Colo. 1986). The Court finds no other basis from the pleading for exercising federal jurisdiction against The Day Center For the Homeless. The Day Center for the Homeless is not a state actor for purposes of 42 U.S.C. § 1983. The allegations are insufficient to show the conduct of The Day Center for the Homeless constituted "state action." The Court notes that Plaintiff, in his motion to amend, makes reference to RICO. However, it is not mentioned in the March 19, 1997 pleading. Section 1964 of Title 18 of the United States Code provides for the recovery of civil damages for a private party. However, the Court finds that such claim, even if were alleged, would be subject to dismissal. To the extent the March 19, 1997 pleading alleges a state law claim, the Court declines to exercise supplemental jurisdiction under 28 U.S.C. § 1967.

Accordingly, The Day Center For The Homeless and St. John Medical Center are DISMISSED WITHOUT PREJUDICE.

ENTERED this 2<sup>nd</sup> day of <sup>December</sup>~~November~~, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

DEC - 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

VICKI L. BAXTER, )  
)  
Plaintiff, )  
)  
v. )  
)  
KENNETH S. APFEL, )  
COMMISSIONER OF SOCIAL )  
SECURITY,<sup>1</sup> )  
)  
Defendant. )

Case No. 97-C-842-W

ENTERED ON THE CLERK'S  
DATE DEC 03 1997

**ORDER**

Upon the motion of the plaintiff, Vicki L. Baxter, by and through her attorney of record, Nathan E. Barnard, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for further administrative action pursuant to sentence 6 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g), and for such further relief as this Court may deem just and proper.

Dated this 2<sup>nd</sup> day of December, 1997.

  
\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\baxter

<sup>1</sup>Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

F I L E D

DEC - 2 1997

NANCY BIBBS,  
Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner of  
Social Security Administration,  
Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CIVIL ACTION NO. 97-C-83-W

ENTERED ON DOCKET

DEC 8 1997  
DATE \_\_\_\_\_

**JUDGMENT**

The foregoing motion of the Commissioner having been considered:

IT IS ORDERED, ADJUDGED AND DECREED that the action herein is remanded to the Commissioner for further administrative action pursuant to the fourth sentence of 42 U.S.C. §405(g) so that an Administrative Law Judge (ALJ) may further evaluate the medical evidence, particularly Dr. Lydia Kronfield's opinion regarding the claimant's limitations. The claimant's residual functional capacity should be further considered. The ALJ should determine if a medical expert's testimony would be advisable concerning the medical issues during the pertinent period prior to June 30, 1995, when the claimant was last insured for disability purposes. Supplemental vocational expert testimony should be arranged regarding the jobs the claimant could perform with her restrictions.

Thus Done and Signed at Tulsa, Oklahoma, this 2<sup>nd</sup> day of November, 1997.

/S/ JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE  
UNITED STATES DISTRICT JUDGE

18/25/97  
372

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

DEC - 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )

v. )

CIVIL ACTION NO. 96-C-505-B /

THE SUM OF FORTY-THREE )  
THOUSAND SIX HUNDRED FORTY- )  
SIX AND NO/100 DOLLARS )  
(\$43,646.00) IN UNITED STATES )  
CURRENCY, )

ENTERED ON DOCKET

Defendant. )

DATE DEC 03 1997

**JUDGMENT OF FORFEITURE**

This matter having come before this Court on the 20th day of October, 1997, for trial before a jury for the forfeiture of the defendant currency and determination of the claim of Laroan Verners. The plaintiff appearing by Catherine Depew Hart, Assistant United States Attorney, and Claimant Laroan Verners appearing pro-se.

WHEREAS, the verified Complaint for Forfeiture In Rem was filed in this action on the 5th day of June, 1996, alleging that the defendant currency is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange, or is money used, or intended to be used, to facilitate a violation of Title 21 of the United States Code and subject to seizure and forfeiture to the United States of America;

AND WHEREAS, Warrant of Arrest and Notice In Rem was issued on the 11th day of July 1996, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma

40

for the seizure and arrest of the defendant currency and for publication in the Northern District of Oklahoma;

AND WHEREAS, the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant currency on August 2, 1996;

AND WHEREAS, Laroan Verners and Guessinia Verners have been determined to be the only individuals with possible standing to file a claim to the defendant currency, and, therefore the only individuals to be served with process in this action;

AND WHEREAS All persons and/or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s);

AND WHEREAS, Laroan Verners filed his Claim to the defendant currency on the 7th day of August, 1996, and his Answer on the 15th day of August, 1996. Guessiniai Verners filed her claim to the defendant currency on the 21st day of August, 1996;

AND WHEREAS, no other claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant currency, and no other persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant currency and all persons and/or entities interested therein, save and except the claims of Laroan Verners and Guessiniai Verners;

AND WHEREAS, the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency was located, on August 29, September 5 and 12, 1996. Proof of Publication was filed October 10, 1996;

AND WHEREAS, the claim of Guessiniai Verners was stricken by order of this court dated June 16, 1997;

AND WHEREAS, on the 20th day of October, 1997, before the issues were presented to the jury, the court found that there is sufficient probable cause that the defendant currency is subject to forfeiture. Thereafter, the claim of Laroan Verners as to the defendant currency was presented to the jury on October 20 and 21, 1997, for determination;

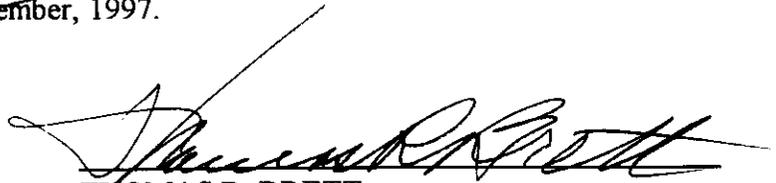
AND WHEREAS, the jury returned its verdict on the 27th day of October, 1997, finding that the entire amount of the defendant currency is subject to forfeiture.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, in accordance with the trial jury's verdict that the defendant currency is subject to forfeiture, the following-described defendant currency:

The Sum of Forty-Three Thousand Six Hundred  
Forty-Six and no/100 Dollars (\$43,646.00) In United  
States Currency

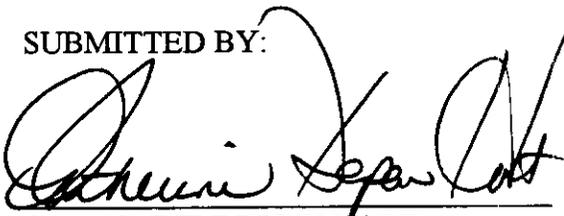
be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 1<sup>ST</sup> day of Dec, 1997.



THOMAS R. BRETT  
Judge of the United States District Court for the  
Northern District of Oklahoma

SUBMITTED BY:



CATHERINE DEPEW HART  
Assistant United States Attorney

NAUDDLPEADEN\FORFEITU\VERNERS2JUDGMENT.

**F I L E D**

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

DEC - 2 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE SUM OF ONE THOUSAND )  
 FOUR HUNDRED FORTY AND )  
 NO/100 DOLLARS (\$1,440.00) )  
 IN UNITED STATES CURRENCY; )  
 et. al. )  
 )  
 Defendants. )

**CIVIL ACTION NO. 96-CV-934-B**

ENTERED ON DOCKET

DATE DEC 03 1997

**ORDER OF DISMISSAL OF  
1985 OLDSMOBILE CUTLASS, VIN #1G3AM1932FD397319**

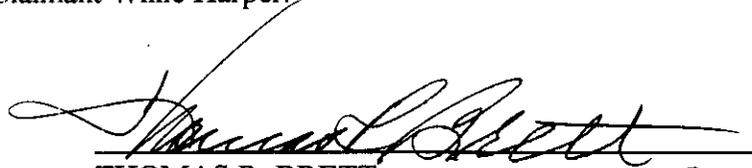
THIS MATTER comes before this court on motion of the government for dismissal as to the defendant 1985 Oldsmobile Cutlass, VIN #1G3AM1932FD397319. Previously this matter came before this court on the 13th day of November, 1997, for settlement conference. The government appeared at the settlement conference by Catherine Depew Hart, Assistant United States Attorney; Claimant Willie Harper appeared pro-se. After discussions held at the settlement conference and based on the motion of the government the Court finds as follows:

Claimant Willie Harper agrees to pay Three Hundred Dollars (\$300.00) to the United States Marshal for the Northern District of Oklahoma as partial payment of expenses. Upon payment of the \$300.00 toward marshal expenses, the 1985 Oldsmobile Cutlass, VIN #1G3AM1932FD397319 shall be dismissed without prejudice from this forfeiture action and returned to Claimant Willie Harper.

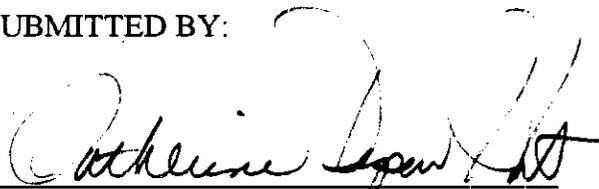
44

IT IS THEREFORE ORDERED that Claimant Willie Harper shall pay to the United States Marshal the sum of Three Hundred Dollars (\$300.00) as partial payment of marshals expenses.

IT IS FURTHER ORDERED that upon the payment of the expenses set forth above, the 1985 Oldsmobile Cutlass, VIN #1G3AM1932FD397319, shall be dismissed without prejudice from this forfeiture action and returned to Claimant Willie Harper.

  
THOMAS R. BRET 12-2-97  
Judge of the United States District Court for the  
Northern District of Oklahoma

SUBMITTED BY:

  
CATHERINE DEPEW HART  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

N:\UDD\LEADEN\FORFEITU\SAFEHOME\HARPER\DISMISSA ORD

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

DEC 1 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

EDITH M. PAULI,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 96-C-0058-E

ENTERED ON DOCKET

DATE DEC 03 1997

**ORDER**

On August 1, 1997, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded to the Commissioner for payment of benefits. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), the parties have stipulated that an award in the amount of \$3,882.45 for attorney fees and \$19.05 for costs, totalling \$3,901.50 for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of \$3,882.45 and costs in the amount of \$19.05, totalling \$3,901.50, under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 1<sup>st</sup> day of December, 1997.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

24

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

92-C-993-E ✓

IN RE: ASBESTOS PRODUCTS  
LIABILITY LITIGATION (NO. VI)

:  
:  
: X CIVIL ACTION NO. MDL 875

This Document Relates to:  
:  
:  
United States District Court  
Northern District of Oklahoma  
:  
:  
See Attachment A

: ENTERED ON DOCKET  
:  
: DATE DEC 02 1997

**FILED**  
NOV 25 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

IT IS ORDERED that defendant OWENS-ILLINOIS, INC. is  
dismissed in the referenced actions.

Date: 11/13/97

*Charles R. Weiner*

Charles R. Weiner, Judge

District Civil Action Caption  
Plaintiff

District Break

OKN 4-92-993

Lyons v. Fibreboard Corp.

Lyons, Doris C.

Lyons, Jeff V.

> S-5/23/94

OKN 4-92-1005

Strome v. Fibreboard Corp.

Strome, Barbara

> S-5/23/94

MICHAEL E. KUNZ  
CLERK OF COURT

CLERK'S OFFICE  
ROOM 2609  
(215)597-8997

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA  
U.S. COURT HOUSE  
601 MARKET STREET  
PHILADELPHIA 19106-1797

November 21, 1997

Philip Lombardi, Clerk  
UNITED STATES DISTRICT COURT  
Northern District of Oklahoma  
333 West Fourth Street  
Tulsa, OK 74103-3819

RECEIVED

NOV 25 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (VI) MDL 875

Dear Deputy Clerk:

92-C-993-E

Enclosed please find executed orders pertaining to the referenced litigation. Since our clerk's office is not maintaining the court records on the involved 68,000 actions, we are forwarding these orders to you for summary entry on the individual dockets, **distribution to counsel of record** and other appropriate action.

Thank you in advance for your time and attention. If you have any questions, please call me at the number listed above.

Sincerely,



CLERK OF COURT  
MICHAEL E. KUNZ

Sheila M. Jeffers  
Deputy Clerk

smj  
enclosure: order(s) 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

92-C-1005-E ✓

IN RE: ASBESTOS PRODUCTS :  
LIABILITY LITIGATION (NO. VI) :  
\_\_\_\_\_ x CIVIL ACTION NO. MDL 875

This Document Relates to: :  
: :  
United States District Court :  
Northern District of Oklahoma :  
See Attachment A

**FILED**  
NOV 25 1997  
ENTERED ON DOCKET  
DATE DEC 02 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

IT IS ORDERED that defendant OWENS-ILLINOIS, INC. is  
dismissed in the referenced actions.

Date: 11 13 97

Charles R. Weiner  
Charles R. Weiner, Judge

District Civil Action Caption  
Plaintiff

District Break

OKN	4-92-993	Lyons v. Fibreboard Corp. Lyons, Doris C. Lyons, Jeff V.	> S-5/23/94
OKN	4-92-1005	Strome v. Fibreboard Corp. Strome, Barbara	> S-5/23/94

MICHAEL E. KUNZ  
CLERK OF COURT

CLERK'S OFFICE  
ROOM 2609  
(215)597-8997

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA  
U.S. COURT HOUSE  
601 MARKET STREET  
PHILADELPHIA 19106-1797

November 21, 1997

Philip Lombardi, Clerk  
UNITED STATES DISTRICT COURT  
Northern District of Oklahoma  
333 West Fourth Street  
Tulsa, OK 74103-3819

RECEIVED

NOV 25 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (VI) MDL 375

Dear Deputy Clerk:

92-C-1005-E

Enclosed please find executed orders pertaining to the referenced litigation. Since our clerk's office is not maintaining the court records on the involved 68,000 actions, we are forwarding these orders to you for summary entry on the individual dockets, **distribution to counsel of record** and other appropriate action.

Thank you in advance for your time and attention. If you have any questions, please call me at the number listed above.

Sincerely,



CLERK OF COURT  
MICHAEL E. KUNZ

Sheila M. Jeffers  
Deputy Clerk

smj  
enclosure: order(s) 1

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

**F I L E D**

NOV 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHAWN D. YOUNGER, )

Plaintiff, )

vs. )

No. 96-CV-818-B

JAMES SAFFLE, LANNY WEAVER, )

RON CHAMPION, and CHARLES )

ARNOLD, )

Defendants. )

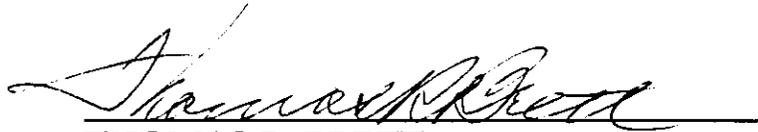
ENTERED ON DOCKET

DATE DEC 02 1997

JUDGMENT

In keeping with the Court's Findings of Fact and Conclusions of Law entered contemporaneous herewith, the Court enters judgment in favor of Defendants James Saffle, Lanny Weaver, Ron Champion, and Charles Arnold, and against Plaintiff Shawn Younger.

IT IS SO ORDERED THIS 26<sup>th</sup> day of November, 1997.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



(Oklahoma) District Court to three (3) counts of Burglary - Second Degree, Case Nos. CRF 95-4647, CRF 96-635, and CRF 96-873.

2. Younger was sentenced to a seven (7) year term of imprisonment on each of the three (3) counts, those sentences to run concurrently.

3. Younger is currently serving his seven (7) year sentences in the James Crabtree Correctional Center ("JCCC"), Helena, Oklahoma, under the supervision of the Oklahoma Department of Corrections.

4. Younger was diagnosed as positive for the human immunodeficiency virus (HIV) in August, 1989.

5. In December, 1992, Younger was diagnosed as having acquired immune deficiency syndrome (AIDS).

6. On April 26, 1996, Younger was transferred to the Dick Conner Correctional Center ("DCCC") in Hominy, Oklahoma.

7. Defendant Weaver is and on June 22, 1996, was a prison corrections officer at DCCC.

8. On June 22, 1996, at about 2:15 a.m., Defendant Weaver reported during a cell check head count seeing "[inmate] Younger, Shawn #132686 had [inmate] Abshire, James #233551 penis in his mouth. This [reporting officer] shine [sic] the flashlight in the cell & told them to stop & go to sleep." Offense

Report, Docket # 21.

9. At trial, Defendant Weaver testified he observed Younger sitting on cellmate James Abshire's ("Abshire") bunk with Abshire straddling Younger, that is, having one leg across the top of Younger's lap and the other leg behind Younger's back. Weaver further testified he saw Younger's head moving around the genital area of Abshire.

10. On June 22, 1996, Younger received a misconduct report for Sexual Activity.

11. Younger and Abshire denied the sexual activity and requested polygraph tests be administered Weaver and them by prison officials. That request was denied.

12. Younger received a copy of the misconduct report for Sexual Activity on June 24, 1996.

13. On June 26, 1996, the charge was amended to a Law Violation. Younger received a copy of the amended misconduct report.

14. On June 28, 1996, a prison disciplinary hearing was conducted. Younger was found guilty of the homosexual law violation, advised of the basis for the finding of guilt, advised of the punishment, and advised of the reason for the punishment.

15. Younger concedes he received the requisite process due him in the prison disciplinary proceeding, save and except his belief polygraph tests were required in this instance as there existed a direct conflict in the testimony of inmates and prison personnel.

16. Younger's punishment for the finding of guilt of the Law Violation included the loss of eighteen (18) days of good time credit, placed Younger in a restrictive housing unit, a form of administrative segregation, for thirty (30) days, and resulted in Younger's transfer from the medium security DCCC to the maximum security Oklahoma State Penitentiary ("OSP") in McAlester, Oklahoma.

17. Younger did not suffer physical injury while incarcerated at DCCC.

18. Younger has not sought relief from the prison disciplinary proceedings through the courts of the State of Oklahoma.

19. The misconduct report has not been overturned, reversed, invalidated, modified, or expunged.

20. Within approximately one (1) week of his arrival at OSP, Younger was assigned to room with inmate Jeff Sheppard ("Sheppard"). Sheppard has certain unidentified mental deficiencies which cause him to, among other things, physically assault other individuals. Sheppard assaulted Younger during their

time as cellmates, therein inflicting cuts to Younger's face which resulted in small, healed scars.

21. Younger claims, and the record supports, OSP personnel knew of Sheppard's propensity to harm others.

22. Younger was not assigned a different cellmate until approximately three (3) weeks after he was assaulted and scarred by Sheppard.

23. McAlester, Oklahoma, is approximately forty (40) miles farther from Younger's parents' home in Tulsa, Oklahoma, than is Hominy, Oklahoma.

24. Younger states visitors to DCCC are allowed to stay "all day," while visitors to OSP are allowed to stay only one (1) hour.

25. At the time of the incidents giving rise to this action, Defendant Larry Fields was the Director of the Oklahoma Department of Corrections. Since that time, Fields has resigned and James Saffle is the current Director of the Oklahoma Department of Corrections. The Court has previously allowed the substitution of Saffle for Fields.

26. At the time of the incidents giving rise to this action, Defendant Charles Arnold was a Major in the Oklahoma Department of Corrections at DCCC.

27. At the time of the incidents giving rise to this action, Defendant Ron

Champion was the Warden at DCCC, Hominy, Oklahoma, for the Oklahoma Department of Corrections.

28. Younger's Complaint does not include any individual defendant responsible for Younger's cell assignment at OSP.

29. Younger seeks compensatory damages in the amount of \$400,000.00 as follows: \$100,000.00 for extended incarceration with denial of medical parole for his terminal case of AIDS; \$100,000.00 for the physical injury received from inmate Sheppard; \$100,000.00 for mental anguish from loss of privileges; and \$100,000.00 for loneliness from lack of visitation by family living in Tulsa, Oklahoma, after Younger was transferred from DCCC in Hominy, Oklahoma, to OSP in McAlester, Oklahoma. Additionally, Younger seeks a reasonable attorney fee for his Court-appointed counsel.

30. Younger seeks restoration of the time credits earned prior to the finding of guilt in the subject prison disciplinary proceeding.

31. Younger believes the Director of the Oklahoma Department of Corrections should request the Chief Administrative Officer of the Pardon and Parole Board to promptly place him on that Board's docket for a parole for medical reasons. No medical evidence was presented at trial relative to Younger's current physical or medical condition.

### Conclusions of Law

1. The Court has proper venue pursuant to 28 U.S.C. § 1391(b).
2. The Court is without subject matter jurisdiction as Younger's request for restoration of the earned good time credits is not cognizable under 42 U.S.C. § 1983. Prieser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).<sup>1</sup>
3. Younger has exhausted his prison administrative remedies.
4. The sole remedy in federal court for a state prisoner seeking restoration of good time credits is a writ of habeas corpus under 28 U.S.C. § 2254.

#### Id.

5. A judgment in favor of Younger on his claim for monetary damages, based on allegations the results of the denied polygraph tests would support his innocence of the sexual activity charge, would necessarily imply the invalidity of the finding of guilt of the prison disciplinary proceeding, and is thus not cognizable under 42 U.S.C. § 1983. Edwards v. Balisok, --- U.S. ---, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Prieser v. Rodriguez, 411 U.S. 475, 93 S.Ct.

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<sup>1</sup>The Court hereafter proceeds on the alternative theory that it has subject matter jurisdiction.

1827, 36 L.Ed.2d 439 (1973).

6. An inmate has no constitutional right to utilize or request that he or a witness in a prison disciplinary hearing be given a polygraph examination. Hester v. McBride, 966 F.Supp. 765 (N.D.Ind. 1997); Geder v. Godinez, 875 F.Supp. 1334 (N.D.Ill. 1995); Flanagan v. Warden, U.S. Penitentiary, 784 F.Supp. 178 (M.D.Pa. 1992); U.S. ex rel. Wilson v. DeRobertis, 508 F.Supp. 360 (N.D.Ill. 1981).

7. The procedures employed by the Oklahoma Department of Corrections throughout the prison disciplinary proceeding did not violate Younger's constitutional right to due process of law. Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

8. Younger is not entitled to be housed at the prison of his selection. Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); Twyman v Crisp, 584 F.2d 352 (10th Cir. 1978).

9. The decision to transfer Younger from DCCC to OSP is a matter for prison administration and is not subject to constitutional scrutiny. Id.

10. There is no constitutional or inherent right of a convicted person to

be conditionally released before expiration of a valid sentence. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

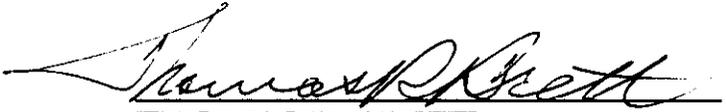
11. No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury. 42 U.S.C. § 1997e(e).

12. No proper defendant is before the Court on Younger's OSP claims regarding being wrongfully placed with Sheppard as a cellmate.<sup>2</sup> Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

13. Counsel for Younger shall be paid a reasonable attorney fee, if timely applied for, pursuant to the Criminal Justice Act.

14. A separate Judgment in keeping with these findings of fact and conclusions of law shall be entered contemporaneous herewith.

SO ORDERED this 26<sup>th</sup> day of November, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup>Had Younger named the proper defendant(s), a 28 U.S.C. § 1983 action might be cognizable if the responsible defendant(s) placed Younger in a cell with Sheppard knowing of Sheppard's propensities to assault others.

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

DERYL WAYNE COOK, )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 )  
 )  
 ) RON CHAMPION, Warden Dick Connor )  
 )  
 ) Correctional Institution, and DREW )  
 )  
 ) EDMONDSON, Attorney General, State )  
 )  
 ) of Oklahoma, )  
 )  
 ) Respondents. )

No. 96-C-757-K(J)

**F I L E D**

DEC 02 1997 *P*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**REPORT AND RECOMMENDATION**

Petitioner, Deryl Wayne Cook, filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 on August 16, 1996. By minute order dated December 31, 1996, the District Court referred the case to the undersigned Magistrate Judge for all further proceedings consistent with his jurisdiction. For the reasons discussed below, the United States Magistrate Judge recommends that the petition for a writ of *habeas corpus* be **DENIED**.

**I. PROCEDURAL BACKGROUND**

Petitioner was convicted by a jury on May 22, 1992 on two counts of indecent exposure after prior conviction of a felony. Petitioner was sentenced to 25 years on the first count and 30 years on the second count.

Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals. Petitioner asserted that the trial court erred by improperly admitting hearsay testimony concerning the license tag on Petitioner's motorcycle, and that the trial court erred by

*9*

admitting testimony of the investigating officer concerning a third party extra-judicial identification and details of the alleged offense. On December 29, 1994, the Oklahoma Court of Criminal Appeals, in a summary opinion, denied Petitioner's appeal.

Petitioner additionally filed an application for post-conviction relief in the trial court. Petitioner asserted that the trial court failed to give the appropriate "burden of proof" instruction, that Petitioner was denied effective trial counsel, and that Petitioner was denied effective appellate counsel. The trial court denied Petitioner's post-conviction application, and Petitioner appealed to the Oklahoma Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals affirmed the denial of Petitioner's application on March 7, 1996. The Oklahoma Court declined to address Petitioner's arguments on the merits and found that Petitioner was procedurally barred from presenting such arguments due to his failure to raise the arguments in his prior appeal. The Court additionally noted that Petitioner had failed to establish ineffective assistance of counsel.

On August 16, 1996, Petitioner filed his Petition for a Writ of Habeas Corpus in this Court. Petitioner asserts that: (1) the trial court erred by allowing the admission of hearsay testimony from witnesses concerning the identification of a license tag number when no evidence indicated the origin of the license tag number, (2) the trial court erred in allowing the admission of hearsay testimony concerning the description of the perpetrator of the crime and the vehicle used, the photo line-up, and a description of the felonies, (3) the trial court erred by giving a presumed "not guilty" instruction rather than instructing that Petitioner was presumed innocent, and (4) trial

counsel was ineffective because he failed to object to the presumed "not guilty" instruction, and because he failed to raise the improper jury instruction in the direct appeal.

## II. ANALYSIS

### EXHAUSTION

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986). As outlined above, each of the claims presented by Petitioner have been previously submitted to and decided upon by the Oklahoma Court of Criminal Appeals. The court finds that the Petitioner meets the exhaustion requirements.

### EVIDENTIARY HEARING

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the court declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part* by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

## HEARSAY TESTIMONY & CONFRONTATION CLAUSE

Petitioner asserts that the trial court improperly permitted testimony by a police officer concerning a license tag which the police officer traced to Petitioner. Petitioner notes that no evidence was presented during the trial to establish how the police officer learned of the license tag number. Petitioner additionally asserts that the trial court improperly permitted the police officer to testify about an out-of-court identification of Petitioner. Petitioner asserts that the trial court violated Petitioner's right to confrontation and Petitioner's due process rights.

The Respondent argues only that admissibility of the testimony implicates state law and does not involve a federal constitutional right. Respondent notes that if no federal constitutional right is involved, this court should not concern itself with alleged violations of state law. Respondent is only partially correct. If a Petitioner alleges violations which implicate only state law, a federal court will not consider the grant of habeas relief. However, in this case, Petitioner alleges this his federal constitutional rights were violated. Specifically, Petitioner alleges that the state trial court proceeding violated his right to confront witnesses against him, and his right to due process of law.

In Tuttle v. State of Utah, 57 F.3d 879 (10th Cir. 1995), the Tenth Circuit addressed whether the admission of certain testimony violated the petitioner's right to confrontation of witnesses. For the purpose of reviewing the alleged error, the Tenth Circuit noted that it assumed that the admission of the testimony violated the

Constitution. The relevant inquiry before the Court was, therefore, whether the admission of such testimony constituted harmless error.

The present standard in determining whether trial error is harmless in federal habeas corpus cases was articulated in Brecht v. Abrahamson, 113 U.S. 619, 113 S. Ct. 1710 (1992), and further clarified in O'Neal v. McAninch, 513 U.S. 432, 437, 115 S. Ct. 992, 995 (1995). Before the Court's decision in Brecht, the same "harmless error" standard applied in both direct appeals and federal habeas corpus cases. That standard was established by the Court in Chapman v. California, 386 U.S. 18 (1967), and required that for a conviction tainted by a constitutional trial error to be upheld, the prosecution must demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24. In Brecht, the Court held that the Chapman standard, although remaining applicable to errors reviewed on direct appeals, no longer applied in federal habeas corpus cases. The Court, instead, adopted the standard previously established in Kotteakos v. United States, 328 U.S. 750 (1946).

The imbalance of the costs and benefits of applying the Chapman harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The Kotteakos standard, we believe, fills the bill. The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Brecht, 113 S. Ct. at 1721 (citations omitted). In determining whether error is harmless, Kotteakos emphasized that the issue is not whether the jury was correct in its ultimate judgment as to guilt or innocence.

[The issue is] what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened.

Kotteakos, 328 U.S. 750, 763 (citations omitted). The standard was further clarified by the Supreme Court in O'Neal v. McAninch, 513 U.S. 432, 435, 115 S. Ct. 992, 994 (1995).

When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win. . . . Grave doubt mean[s] that in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.

In Tuttle, the Tenth Circuit emphasized that the following language from Kotteakos.

But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Tuttle, 57 F.3d 879 at 884, *citing* Kotteakos, 328 U.S. at 765.

The task of this court, therefore, is to determine whether, considering the entire record, the admission of the evidence about which Petitioner complains “so influenced the jury that [the court] cannot conclude that it did not substantially affect the verdict, or whether we have grave doubt as to the harmlessness of the error alleged.” Tuttle, 57 F.3d at 884. The Tuttle court additionally noted the following factors as relevant to the harmless error analysis.

(1) the importance of the witness’ testimony in the prosecution’s case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and, of course, (5) the overall strength of the prosecution’s case.

Tuttle, 57 F.3d at 884, *citing* Delaware v. Van Arsdall, 475 U.S. 673 (1986).

Petitioner asserts the trial court erred by permitting the testimony of the police officer. The police officer testified that he traced a license tag to Petitioner, and that when he showed pictures of Petitioner to two of the witnesses (an 11-year-old girl and her mother) both of the witnesses identified the Petitioner. The police officer also testified about the descriptions which had been given to him of the alleged perpetrator by the 11-year-old girl and her mother.

The Court has reviewed the trial transcript and the testimony of the witnesses. In this case, both the 11-year-old girl and the mother testified and made in-court identifications of the Petitioner. See Transcripts of District Court Proceedings, filed October 21, 1996, at 16-17, 34-35. Based upon the review of the record as a whole,

the Court concludes that the admission of the evidence about which Petitioner complains did not have "substantial and injurious effect or influence in determining the jury's verdict." The undersigned Magistrate Judge recommends that Petitioner's Petition for a Writ of *Habeas Corpus* based on the improper admission of such evidence be denied.

#### PROCEDURAL BAR

Respondent argues that Petitioner's arguments that the trial court improperly instructed the jury that Petitioner is presumed "not guilty," and that Petitioner received ineffective assistance of counsel are procedurally barred.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the highest court of the state declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), *cert. denied*, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

"A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast

majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992)).

The Oklahoma Court of Criminal Appeals declined to address Petitioner's arguments that the jury was improperly instructed. The Oklahoma Court noted that Petitioner failed to assert this argument on direct appeal, and that Petitioner failed to present a sufficient reason to justify not advancing this argument in his direct appeal. The state court's treatment of these issues, and Petitioner's failure to raise these issues in his direct appeal effectively serves as a procedural bar.

The state court's refusal to address these issues is an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. 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 in the district court and/or not briefed on appeal. Therefore, Petitioner procedurally defaulted these claims before the Oklahoma Court of Criminal Appeals.

Because of his procedural default, this court may not consider Petitioner's claim unless Petitioner is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 501 U.S. 722, 749-50. The cause 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. A petitioner is additionally required to establish prejudice, which requires showing "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice."<sup>1</sup> See McCleskey v. Zant, 499 U.S. 467, 494 (1991).

#### Improper Jury Instruction

Petitioner alleges that his assertion that the trial court gave an improper jury instruction meets the "cause and prejudice" standard because he was deprived of effective assistance of counsel. Whether ineffective assistance of counsel is sufficient to constitute cause is measured by the standard announced in Strickland v. Washington, 466 U.S. 668 (1984).

[T]he question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, *supra*, we discern no inequity in requiring him to bear the risk of attorney error that results in procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Murray v. Carrier, 477 U.S. 478, 488 (1986).

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<sup>1</sup> The Supreme Court has consistently recognized that this is a very rare exception. See, e.g. Schlup v. Delo, 513 U.S. 298, 320 (1995) ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence."). In this case, Petitioner presented an alibi defense at the trial of this action. Plaintiff is represented by an attorney in the *habeas corpus* action currently before the court. Petitioner does not assert that a fundamental miscarriage of justice occurred under the facts of this case.

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.<sup>2</sup> To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842-44 (1993) (counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

Petitioner asserts that his trial counsel was ineffective because trial counsel failed to object to a jury instruction. Petitioner asserts that appellate counsel was ineffective because appellate counsel did not appeal the jury instruction. After reviewing the record and the arguments asserted by Petitioner, the court concludes Petitioner's cannot satisfy either prong of the Strickland test.

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<sup>2</sup> "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Furthermore, a *habeas corpus* petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), *cert. denied*, 500 U.S. 909 (1991)), *cert. denied*, 114 S. Ct. 1074 (1994). Federal *habeas corpus* relief is not available for alleged errors of state law, and this Court examines only "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "'[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980)), *cert. denied*, 498 U.S. 961 (1990). Petitioner has not met this burden.

### **RECOMMENDATION**

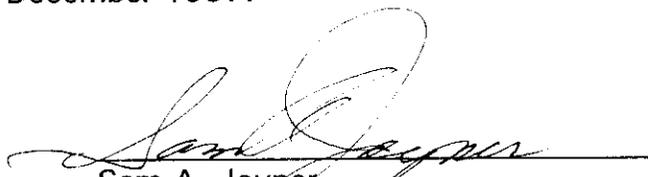
The Magistrate Judge recommends that the District Court deny Petitioner's Petition for a Writ of Habeas Corpus.

### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or

whether to recommit the matter to the undersigned. As part of the review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 2 day of December 1997.

  
Sam A. Joyner  
United States Magistrate Judge

ENTERED ON DOCKET

DATE 12-2-97

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

**FILED**

DEBORAH JOHNSTON, et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
VOLUNTEERS OF AMERICA OF )  
 )  
OKLAHOMA, INC., )  
 )  
Defendant. )

NOV 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-CV-1166-K  
(Consolidated with 97-CV-740-K(W))

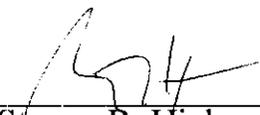
**STIPULATION OF DISMISSAL AS TO PLAINTIFF  
LAJOYA BARNES ONLY**

COME NOW Plaintiffs and Defendant and stipulate to the dismissal of the claim of Lajoya Barnes herein, each party to bear its own costs.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By:

  
\_\_\_\_\_  
Steven R. Hickman, OBA#4172  
1700 Southwest Blvd.  
P.O. Box 799  
Tulsa, OK 74101-0799  
918/584-4724  
Attorney for Plaintiffs

RHODES, HIERONYMUS, JONES, TUCKER &  
GABLE

By:

  
\_\_\_\_\_  
Jo Anne Deaton  
P.O. Box 21100  
Tulsa, OK 74121-1100  
918/582-1173  
Attorney for Defendant

SPZ

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clj

ENTERED ON DOCKET  
DATE 12-2-97

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

**FILED**

NOV 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-161-K /

VICKIE L. TUCKER,  
Plaintiff,

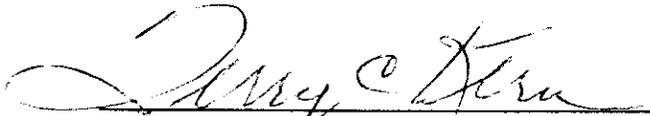
v.

SAMSON INTERNATIONAL, LTD.,  
An Oklahoma corporation,  
Defendant.

ORDER OF DISMISSAL

This cause having come before this Court on the Joint Application for Dismissal with Prejudice, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiff, and that such claims should be dismissed with prejudice, it is, therefore, ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice, with each party to bear its own fees and costs.

So Ordered this 56 day of November, 1997.

  
United States District Judge

APPROVED AS TO FORM AND CONTENT:

  
Attorney for Plaintiff

  
Attorney for Defendant

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

TIM LOVELAND and SUE LOVELAND,

Plaintiffs,

vs.

NEW FRONTIER LAWN CARE, INC.,  
KENNETH MATHIES,

Defendants.

Case NO. 97-CV-438-H(W) ✓

ENTERED ON DOCKET FILED

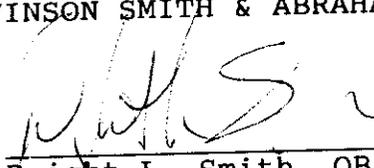
DEC -1 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

The above-named parties, by and through their undersigned counsel of record, do hereby stipulate that this action is hereby dismissed with prejudice. Each party shall bear their own attorneys' fees and costs.

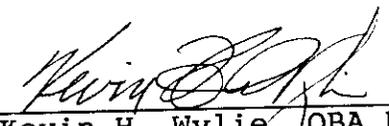
LEVINSON SMITH & ABRAHAMSON

By: 

Dwight L. Smith, OBA No. 008340  
35 East 18th Street  
Tulsa, Oklahoma 74119-5201  
(918) 599-7214

ATTORNEYS FOR PLAINTIFFS

ELLER AND DETRICH,  
A Professional Corporation

By: 

Kevin H. Wylie, OBA No. 10534  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
(918) 747-8900

ATTORNEYS FOR DEFENDANTS,  
NEW FRONTIER LAWN CARE, INC.  
and KENNETH MATHIES

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ct

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

**FILED**

DEC 01 1997

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

ROGER A. COLLINS,  
SSN: 443-34-2189,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,

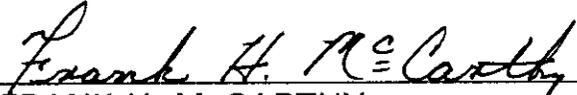
Defendant.

CASE NO. 96-CV-1071-M

ENTERED ON DOCKET  
DATE DEC 6 2 1997

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 1<sup>st</sup> day of Dec., 1997.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

**FILED**

DEC 01 1997

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

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

**ROGER A. COLLINS,  
SSN: 443-34-2189,**

**PLAINTIFF,**

**vs.**

**KENNETH S. APFEL,  
Commissioner of the Social  
Security Administration,<sup>1</sup>**

**DEFENDANT.**

**CASE No. 96-CV-1071-M**

ENTERED ON DOCKET  
DEC 02 1997  
DATE \_\_\_\_\_

**ORDER**

Plaintiff, Roger A. Collins, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>2</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

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<sup>1</sup> Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan, Acting Commissioner, who was previously substituted for Shirley S. Chater, as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

<sup>2</sup> The denial of Plaintiff's September 6, 1994 application for disability benefits on October 19, 1994 was affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held July 24, 1995. By decision dated September 26, 1995 the ALJ entered the findings which are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 20, 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.

10

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might 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. N.L.R.B.*, 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). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge (ALJ) has properly outlined the required sequential analysis. The Court incorporates that information into this order as duplication of the effort would serve no purpose.

Plaintiff was born October 26, 1953 and was, at the time of the decision, a "younger individual." He has an 11th grade education. He claims to be unable to work as a result of chronic pain stemming from a back injury in December 1992. The ALJ granted Plaintiff a "closed period" of disability from May 1, 1993 to October 5, 1994, finding that Plaintiff lacked the residual functional capacity (RFC) to perform

even a limited range of sedentary work during that time. The ALJ determined, however, that, although Plaintiff is unable to perform his past relevant work, his condition had improved by October 5, 1994 to the extent that he was capable of performing limited sedentary work after that date. A vocational expert testified such work exists in the national and regional economies. Therefore, the ALJ concluded Plaintiff is not disabled as that term is used in the Social Security Act. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that he meets Listing 1.05C and that the ALJ failed to adequately evaluate a medical report.

#### **LISTING 1.05C**

Plaintiff alleges the ALJ erred by failing to find that his impairment met or equaled the Listings of Impairments found in 20 C.F.R. Pt. 404, Subpt. P., App.1. The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. Plaintiff argues that he meets the criteria for Listing 1.05C, the text of which follows:

C. Other vertebrogenic disorders (e.g., herniated nucleus puplosus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

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

To support this contention, Plaintiff relies upon a January 11, 1995 report by Jim Martin, M.D. who had examined Plaintiff and his medical records for the purpose of a workers' compensation evaluation. [R. 216-218]. Plaintiff asserts that the findings of Dr. Martin of marked spasm and tenderness over the lumbar musculature, point tenderness over the left sacroiliac joint and left mid buttocks, limited range of motion of the back and positive straight leg raising test "arguably meet or equal the criteria for a finding of disabled" under the listing.

Plaintiff has acknowledged that his treating physician, Mark A. Hayes, M.D., who performed surgery on Plaintiff's back in February 1994, had recommended he go through "a retraining program" upon his release from treatment. [R. 159]. In that October 5, 1994 note, Dr. Hayes wrote:

He would have permanent limitations of no lifting over 35 pounds and no repetitive bending, stooping or twisting. Flexion is 34 degrees, extension of 10 degrees, lateral bending to the left of 13 degrees and lateral bending to the right of 12 degrees.

Plaintiff asserts that the ALJ's reliance upon these limitations in assessing Plaintiff's RFC as of October 5, 1994, was error. Plaintiff states that the ALJ should have applied the findings of Dr. Martin in determining whether or not Plaintiff's condition met the listing. He claims the ALJ did not sufficiently discuss his reasons for

rejecting Dr. Martin's opinion and cites *Clifton v. Chater*, 79 F.3d 1007 (10th Cir. 1996) as "instructive."

It is well-settled that a claimant is required to meet all the specified medical criteria for a listing to apply. See *Sullivan v. Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 891, 107 L.Ed.2d 967 (1990). A finding that an impairment is medically equivalent to a listed impairment must be based solely on medical evidence. *Kemp v. Bowen*, 816 F.2d 1469, 1473 (10th Cir. 1987).

The medical evidence in this record does not prove such a disability. Plaintiff sustained an injury to his back while working as a welder in December 1992 but continued working until May 1993. [R. 159-208]. He was treated for back pain by several physicians with physical therapy and medication. *Id.* He was referred to Mark A. Hayes, an orthopedic specialist, who treated him from November 1, 1993 until at least October 1994 and who, with James A. Rodgers, M.D., performed a laminectomy, discectomy L5-S1 left, and instrumentation and fusion in February 1994. [R. 191]. During this time period, both doctors notified Plaintiff's employer that Plaintiff was "temporarily totally disabled." *Id.* On June 10, 1994, Dr. Rodgers reported to Dr. Hayes that he had re-examined Plaintiff, that he was "still exercising daily, walking daily and taking no medication except occasional Ibuprofen" and that he was doing quite well. [R. 191]. He recommended Plaintiff be given a final rating assessment and released from treatment in August [1994] and "[i]f he needs any rehabilitation or work hardening at that point, I would agree with that plan." *Id.* On October 5, 1994, Dr. Hayes recommended that Plaintiff go through a retraining

program and set forth the limitations on Plaintiff's ability to work in the note quoted above. [R. 159]. The ALJ based his assessment of Plaintiff's RFC upon those limitations and determined that Plaintiff could engage in substantial gainful activity after October 5, 1994.

#### Dr. Martin's Report

Plaintiff argues that the ALJ failed to sufficiently discuss the evidence, specifically Dr. Martin's report, in his decision and cites *Clifton v. Chater*, 79 F.3d 1007 (10th Cir. 1996) as authority for reversing the decision on that basis. 42 U.S.C. 405(b)(1) requires the ALJ to consider all the evidence presented, discuss the evidence and explain why he found a claimant not disabled. However, the ALJ is not required to discuss every piece of evidence. *Clifton*, p.1010. In the *Clifton* case, the ALJ failed to discuss the evidence or his reasons for determining the claimant was not disabled at step three. He stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. The Tenth Circuit reversed and remanded the case "for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three." *Clifton*, p. 1010.

Review of the ALJ's decision in the instant case reveals that he actually discussed Dr. Martin's consultative medical report at length. [R. 20]. Though his focus was more upon Dr. Martin's closing note that Plaintiff "should undergo vocational rehabilitation in order to learn a more sedentary type of employment", his consideration clearly included Dr. Martin's report as well the other medical evidence presented in making his determination of Plaintiff's RFC.

Plaintiff's treating physicians and Dr. Martin obviously were of the opinion that Plaintiff could be retrained for other types of employment. The ALJ applied the limitations set forth by Plaintiff's treating physician in his determination of Plaintiff's RFC for sedentary work. A treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment, is: (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder. *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir. 1986). There is no indication that all of the medical evidence presented was not considered by the ALJ. The medical evidence supports the determination that Plaintiff's condition after October 5, 1994 did not meet listing 1.05C. The determination of the ALJ that Plaintiff could perform sedentary work with the limitations imposed by his treating physician is supported by substantial evidence in the record.

#### Conclusion

The ALJ found that Plaintiff had a residual functional capacity for the performance of sedentary work with the limitations of inability to lift more than 35 pounds or do any repetitive bending, stooping or twisting. [R. 23]. The ALJ received the testimony of a vocational expert who testified that Plaintiff's limitations reduce the number of jobs available but that substantial jobs exist in the national and regional

economies that could be performed by someone having Plaintiff's limitations. [R. 66-68]. The Court finds the ALJ's analysis was performed in accordance with social security regulations and relevant case law. The Court concludes that the decision denying Plaintiff disability benefits is supported by substantial evidence and is, therefore, AFFIRMED.

SO ORDERED this 1<sup>st</sup> day of Dec., 1997.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

FILED

DEC 01 1997

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

PEARLIE M. SMITH,

Plaintiff,

v.

CASE NO. 96-CV-806-M

KENNETH S. APFEL,  
Commissioner of the Social Security  
Administration,

Defendant.

ENTERED ON DOCKET

DATE DEC 02 1997

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 1<sup>st</sup> day of Dec., 1997.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

DEC 01 1997

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

PEARLIE M. SMITH

429-70-1159

Plaintiff,

vs.

KENNETH S. APFEL,<sup>1</sup>  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 96-CV-806-M

RECEIVED  
DATE DEC 2 1997

**ORDER**

Plaintiff, Pearlle M. Smith, seeks judicial review of a decision of the Commissioner of the Social Security Administration determining that her period of disability ceased as of December 1993.<sup>2</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92

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<sup>1</sup> 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.

<sup>2</sup> Plaintiff's request for reconsideration of disability cessation was denied. A hearing before an Administrative Law Judge ("ALJ") was held February 22, 1995. By decision dated June 12, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 9, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal.

F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born October 11, 1942 and was 52 years old at the time of the hearing. She has a General Equivalency Diploma and two years of college. She formerly worked as a bus driver, maintenance supervisor, and home health aide. Plaintiff was previously adjudged to be disabled as a result of a seizure disorder and received disability benefits commencing August 26, 1985. Her case was reviewed and she was notified that her period of disability would cease as of December, 1993. She pursued appropriate administrative remedies, including a hearing before an Administrative Law Judge who determined that medical improvement related to the ability to do work had occurred and that her period of disability ceased as of December, 1993. The ALJ determined that although Plaintiff was unable to perform her past relevant work, she was capable of performing a number of jobs existing in

the economy. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail). Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically Plaintiff argues that the ALJ failed to properly develop the record concerning her alleged mental impairment.

The Tenth Circuit recently discussed at some length the ALJ's duty "to ensure that an adequate record is developed . . . consistent with the issues raised." *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (quotation omitted). In particular *Hawkins* addressed the question: "How much evidence must a claimant adduce in order to raise an issue requiring further investigation?" The Court instructed that some objective evidence in the record must suggest the existence of a condition which could have a material impact on the disability decision requiring further investigation. However, isolated and unsupported comments by the claimant will not suffice to raise the issue. The claimant must in some fashion raise the issue, which on its face must be substantial. The claimant has the burden to make sure the record contains evidence to suggest a reasonable possibility that a severe impairment exists. Once that burden is satisfied, it becomes the ALJ's burden to investigate further. *Id.* However, the Court stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are

adequately explored." *Id.* at 1167-68. It is appropriate for the ALJ to require counsel to identify issues requiring further development.

The *Hawkins* Court stated, "[t]he difficult cases are those where there is some evidence in the record or some allegation by a claimant of a possibly disabling condition, but that evidence, by itself, is less than compelling." 113 F.3d at 1167. The instant case is one such case. Plaintiff argues that the case should be reversed and remanded because the ALJ failed to develop the record concerning her mental impairment in that he neither obtained the records of her psychiatrist, nor ordered a consultative examination.

Here, Plaintiff was represented, but not by counsel; she appointed a non-lawyer representative to assist her who appeared on her behalf at the administrative hearing. [R. 30, 176]. The ALJ specifically asked the representative whether there was "any additional medical that you are aware of that we would need to have introduced into this case?" [R. 179]. A copy of the denial decision was directed to Plaintiff's representative. Plaintiff and her representative were advised of the right to seek Appeals Council review and that new evidence could be submitted. [R. 10-12]. Plaintiff did submit additional medical records to the Appeals Council, but not her psychiatric records. [R. 7-9].

At the hearing Plaintiff testified that she had recently begun seeing Dr. Jin, a psychiatrist, and that she had previously seen a Dr. Torrence. [R. 188-89]. She did not list these doctors in the information submitted to the Social Security Administration, but she did advise that she was unable to concentrate. [R. 38-44,

91-93]. Her hearing testimony concerning her inability to concentrate was related in the context of describing a seizure. [R. 184]. In his decision the ALJ referred to Plaintiff's testimony concerning Dr. Jin and noted, "[t]reatment records from her psychiatrist are not part of this record." [R. 19]. The ALJ also noted: a single entry in the record where Plaintiff's physician noted that she seemed to be very anxious and under stress; that there is no other mention of anxiety or stress; that there was mention of Plaintiff having a histrionic<sup>3</sup> personality; and that Plaintiff had been prescribed Zoloft, an antidepressant. [R. 19]. The ALJ stated that although the record does not contain a definitive diagnosis of mental impairment, the RFC, which limited Plaintiff to work that does not require complex or detailed job instructions took into account problems with concentration and with anxiety or stress. *Id.* Based on the record as a whole, the ALJ completed the psychiatric review technique ("PRT") form.

On the one hand, the ALJ was advised that Plaintiff had seen a psychiatrist, that she had been prescribed antidepressant medication and that she had been confused. On the other hand, Plaintiff's representative stated that he was unaware of any other necessary medical records, mental problems were not specifically identified as an impairment, and Plaintiff's psychiatric records were not submitted to the Appeals Council, although she was given the opportunity to do so.

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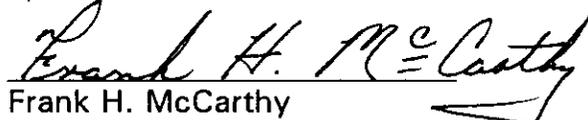
<sup>3</sup> Conscious or unconscious overly dramatic behavior for the purpose of drawing attention to one's self. *Tabors Cyclopedic Medical Dictionary* 906 (17th ed. 1993).

Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). If there was significant additional information relevant to Plaintiff's ability to do work, it was the obligation of Plaintiff and her representative to bring that information either to the attention of the ALJ or the Appeals Council. The *Hawkins* Court said that an "ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment." 113 F.3d at 1168. Applying this precept, the Court finds that the ALJ exercised reasonable good judgment with respect to development of the record, in part because Plaintiff's daily activities demonstrate an ability to work within the RFC level found by the ALJ.<sup>4</sup> [R. 84-89; 182-83].

### CONCLUSION

The Court finds that the ALJ's conclusion that Plaintiff's disability ceased in December, 1993 is supported by substantial evidence in the record. Accordingly the decision of the Commissioner is AFFIRMED.

SO ORDERED this 1st day of December, 1997.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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<sup>4</sup> The ALJ found that Plaintiff could perform light work, reduced by her inability to perform work that requires complex or detailed job instructions, and work that would expose her to unprotected heights, dangerous moving machinery, open flames, or require her to operate motorized vehicles. [R. 22].

ENTERED ON DOCKET

DATE 12-1-97

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

IN RE:	)
	)
BTS INC.,	)
Debtor.	)
	)
VALLEY NATIONAL BANK,	)
	)
Appellant,	)
v.	)
	)
BTS INC.,	)
	)
Appellee.	)

Case No. 97-C-745-K(W) ✓

**F I L E D**

NOV 26 1997 *ff*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This order pertains to the appeal of Valley National Bank ("Valley") from the Order Allowing Proof of Claim with Conditions entered by the United States Bankruptcy Court for the Northern District of Oklahoma on May 31, 1997, which determined the amount of Valley's allowed claim in the bankruptcy case.

The issue in this appeal is whether the bankruptcy court erred in determining the value of an FAA Level B Certified B727-200adv Flight Simulator previously owned by the debtor. Valley states that the determination must be reversed, because the bankruptcy court relied for findings of fact on the incorporation of an "Order of August 30, 1996," which did not exist. Valley also claims that the bankruptcy court's decision incorporated by reference all the factual determinations made in the case over the past two years, and therefore there is no clear understanding of the

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factual basis of the decision and it does not comply with Fed. R. Bankr. P. 7052.<sup>1</sup> Valley argues that the court's findings of fact were based on hearsay evidence, and that the valuation of the simulator at \$910,000 was unsupportable. Valley also argues that the reduction of Valley's claim for pre-bankruptcy attorney fees was not proper.

The district court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact.

Debtor filed this Chapter 11 bankruptcy case on May 18, 1995. Valley was a secured creditor in the case, and its collateral principally consisted of the simulator located in Long Beach, California, which had been in its custody since November of 1994.

On August 15, 1995, Valley filed a motion to modify the automatic stay under 11 U.S.C. §362(d) to allow it to sell the simulator, which the bankruptcy court considered at a hearing on August 29, 1995. One of Valley's witnesses at the hearing was Mr. Russell Kissinger, who maintained and operated the simulator. On cross-examination of Mr. Kissinger, the debtor moved for the admission of four letters addressed to him as an officer of the company which valued the simulator at between

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<sup>1</sup> Fed. R. Bankr. P. 7052 incorporates Fed. R. Civ. P. 52, which states: "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . ."

\$1,400,000 and \$1,835,000. Valley objected to the admission of the letters on the grounds of hearsay and relevance, but Judge Wilson overruled the objection. Debtor offered an appraisal by Mr. Robert Price, who valued the simulator at \$2.5 million after examining it. On October 27, 1995, the bankruptcy court granted the motion to modify the stay.

On August 16, 1996, Valley filed its Amended Proof of Claim, seeking \$1,349,332.11, which was amended at trial to \$1,345,682.11. In the Amended Proof of Claim, it allowed a credit of \$250,000 to debtor for the value of the simulator, which represented the sales proceeds it had received from selling it in July of 1996. A trial was held on September 13, 1996. Valley offered as evidence that the value of the simulator was between \$250,000 and \$350,000 the deposition testimony of an independent expert, Jeff Garst, who did not see the simulator, and Robert Rossi of Delta Airlines, and the testimony of Valley President, Rick Willhour, who stated that Valley had attempted to sell the simulator to 65 potential buyers over a period of time. The debtor offered the opinion of its president, George Moody, that the simulator had a value of \$1,500,000, based on the four letters objected to at the earlier hearing, and the appraisal by Robert Price. After hearing the evidence, the court ruled that the gross value of the simulator was \$945,000, an amount which Valley admits was "basically right in between the evidence." (Docket #2, page 23).

Valley contends that the overwhelming evidence shows that the value of the simulator was \$250,000-\$350,000, and that, without findings of fact as to witness credibility and the weight accorded to the evidence, there is no way for this court to

review the bankruptcy court's decision. Debtor responds that the reference in the bankruptcy court's decision to an order of August 30, 1996 was a scrivener's error, clearly referring to the August 29, 1995 hearing at which the documents, appraisals, and testimony were submitted.

Debtor also contends that the findings of the May 31 order were sufficient. Had Valley desired to submit more detailed findings it could have requested that right, but did not, and it did not file a motion seeking an amendment of the findings. Valley offered at trial the majority of the evidence submitted at the August 29, 1995 hearing, and the court's valuation was between Valley's value of \$250,000 and debtor's value of \$2.5 million. Debtor alleges that, at the trial, Valley stipulated to the admission of the same documents that were admitted at the August 29, 1995 hearing (Transcript of September 13, 1996 proceedings, pgs. 8-9). Debtor argues that the two appraisers who testified for Valley as to the value of the simulator never examined it, while debtor's evidence concerning the value was more convincing and plausible.

A finding of fact is clearly erroneous only if the court has "the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.'" In re Mama D'Angelo, Inc., 55 F.3d 552, 555 (10th

Cir. 1995) (citing Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972)).

The court in Mama D'Angelo, Inc., noted that the "matrix" within which questions of valuation exist in bankruptcy demands that there be no rigid approach taken to the subject. Id. at 557. Because "the value of property varies with time and circumstances," the finder of fact must be free to arrive at a fair valuation by the most appropriate means. Id.

The court's findings in its order of May 31, 1997 were clearly based on evidence submitted at the August 29, 1995 hearing and re-submitted with updates at trial. The bankruptcy judge had the opportunity to hear the testimony and judge the credibility of witnesses, which this court cannot do. Bankruptcy Rule 8013, which conforms to Fed.R.Civ.P. 52 (a), states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."

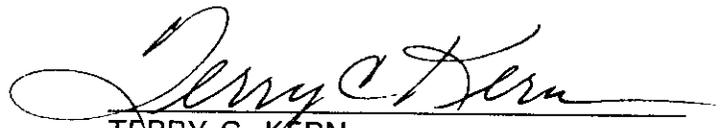
Valley's arguments boil down to a credibility issue. There was a scrivener's error in the order, referring to August 30, 1996, which clearly should have said August 29, 1995 - as debtor points out, Valley made similar errors on some of its submissions to the bankruptcy court. Such an error cannot be the basis of a reversal. The court's conclusion clearly "split the baby down the middle" and set a valuation of the simulator between the value claimed by Valley and that claimed by debtor.

The court's finding concerning Valley's claim for pre-bankruptcy attorney fees is also supported by the evidence and cannot be found clearly erroneous. The court

noted that the pre-petition fees totaled \$120,044.00 for a nine-month period from September 1994 through May 1995, and showed "the combative nature of the claimant Valley even after the Debtor had offered to give and transfer the collateral to Valley." (May 31, 1997 Order, pg. 2). The court observed that there were possible related bankruptcy proceedings in California of a party which might have claimed an interest in the simulator and proceedings in the state court between Valley and debtor. On the basis of this information, the court found that the sum of \$55,000.00 represented reasonable attorney fees, which would be allowed as a part of the claim.

Finding no clear error in the factual findings and decision of the bankruptcy court, the decision of the bankruptcy court is affirmed.

Dated this 26 day of November, 1997.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

s:\orders\bts.bkr

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

**FILED**  
NOV 26 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GARY MICHAEL BARNES, )  
)  
Plaintiff, )  
)  
v. )  
)  
COMPUTER BUSINESS SERVICES, INC., )  
et al., )  
)  
Defendants. )

Case No. 96-CV-939-H ✓

ENTERED ON DOCKET

DATE 11-1-97

**AGREED ORDER OF ADMINISTRATIVE CLOSURE**

On joint motion of the parties and for good cause shown, it is hereby ordered:

1. Each party to this action and his or its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, is hereby permanently enjoined and restrained from discussing this action with any third person.

2. This action case is hereby placed in administrative closure until the 9th day of March, 1998. If plaintiff has not filed a motion to reopen the case on or before that date, then as of that date all plaintiff's claims herein shall be deemed dismissed with prejudice, with each party to bear his or its own attorneys' fees and costs.

DATED this 25<sup>TH</sup> day of NOVEMBER, 1997.

  
SVEN ERIK HOLMES  
United States District Judge

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

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

Plaintiff, )

vs. )

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

Defendants. )

ENTERED ON DOCKET

DATE 12-1-97

Case No. 96-CV-270 H

**FILED**

NOV 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER REOPENING CASE  
AND  
DISMISSAL WITH PREJUDICE**

The Court, being fully advised, and having reviewed the joint motion of the parties, hereby reopens this lawsuit for the purpose of entering a dismissal Order. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the above styled lawsuit is dismissed with prejudice, each party to bear its own costs and attorney's fees.

IT IS SO ORDERED.

Dated this 25<sup>TH</sup> day of November, 1997.

  
Sven Erik Holmes  
United States District Judge

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

**F I L E D**

NOV 26 1997 *ff*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA )  
Plaintiff, )

Case No. 97CV 794 K (M)

vs )

NASIR RANA, INDIVIDUALLY )  
AND NASIR RANA D/B/A )  
FAR'S FOOD MART, )  
Defendant. )

DEFAULT JUDGMENT

This matter comes on for consideration on this 26 day of November 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Nasir Rana, appearing not.

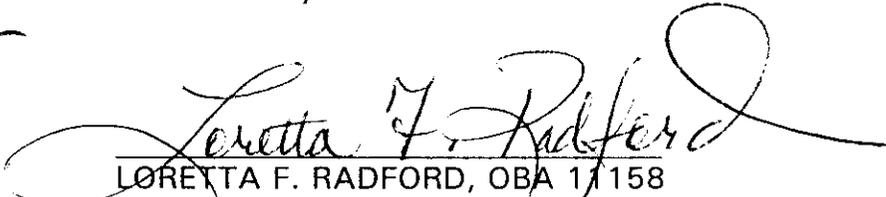
The Court being fully advised and having examined the court file finds that the Defendant, Nasir Rana, was served with Summons and Complaint on September 10, 1997. The time within which the Defendant could have answered, plead or otherwise defended as to the Complaint has expired and has not been extended. The Defendant has not answered, plead or otherwise defended, and default has been entered by the Clerk of this Court. The Court finds that the Plaintiff is entitled to Judgment as a matter of law.

*6*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against the Defendant, Nasir Rana, for the principal amount of \$2,000.00, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. §2412(a)(2), plus interest thereafter at the current legal rate of 5.42 percent per annum until paid, plus the costs of this action.

  
UNITED STATES DISTRICT JUDGE

Submitted by:

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

deft.mx

ENTERED ON DOCKET

DATE 12-1-97

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

VALLEY FORGE INSURANCE )  
COMPANY and LUTHERAN )  
BENEVOLENT INSURANCE )  
EXCHANGE, )

Plaintiffs, )

vs. )

MORRIS DALE VANDERFORD; )  
CATHOLIC DIOCESE OF TULSA; )  
SAINT CECILIA CATHOLIC )  
CHURCH; and GLENN )  
ANDREW PRATER, )

Defendants. )

No. 96-CV-1172 K ✓

**F I L E D**

NOV 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**AGREED JUDGMENT BETWEEN  
VALLEY FORGE INSURANCE COMPANY,  
LUTHERAN BENEVOLENT INSURANCE COMPANY,  
ST. CECILIA CATHOLIC CHURCH, AND CATHOLIC DIOCESE OF TULSA**

This matter comes on for hearing this 26 day of November 1997, and the Court being fully advised finds that Judgment should be entered for the Plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiffs and that the relief requested in Plaintiffs' Complaint is hereby granted; that Plaintiffs, Valley Forge Insurance Company and Jay Angoff, Director of the Missouri Department of Insurance, as Liquidator of Lutheran Benevolent Insurance Exchange, owe no duty to indemnify or defend Morris Dale Vanderford for the acts, damages or claims alleged in Civil Action No. CJ-95-418 styled Glenn Andrew Prater, Plaintiff, vs. Saint Cecilia Catholic Church, Catholic Diocese of Tulsa, and Morris Dale Vanderford, or for any acts, omissions or damages arising out of the incidents giving rise to said lawsuit.

IT IS FURTHER ORDERED that this Judgment is without prejudice to and does not adjudicate the rights or obligations of the Plaintiff to any party to these

proceedings except as specifically adjudicated with respect to the Defendant Morris Dale Vanderford.

Judgment rendered this 26 day of Nov., 1997.

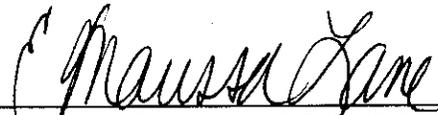
  
Judge of the United States District Court  
for the Northern District of Oklahoma

APPROVED:

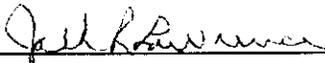
PIERCE COUCH HENDRICKSON  
BAYSINGER & GREEN, P.P.C.

Kevin T. Gassaway, OBA No. 03281  
100 W. 5<sup>th</sup>  
ONEOK Plaza, Suite 707  
Tulsa, OK 74103  
(918) 583-8107  
FAX: (918) 583-8107

AND

  
Gerald P. Green, OBA #003563  
E. Marissa Lane, OBA #013314  
PIERCE COUCH HENDRICKSON  
BAYSINGER & GREEN  
P.O. Box 26350  
Oklahoma City, Oklahoma 73126  
405/235-1611

ATTORNEYS FOR PLAINTIFFS,  
VALLEY FORGE INSURANCE COMPANY  
and LUTHERAN BENEVOLENT INSURANCE COMPANY

  
\_\_\_\_\_

Jack R. Lawrence, OBA #5282  
G. Neal Rogers, OBA #7718  
LAWRENCE & ELLIS, P.A.  
600 Union Plaza  
303 Northwest Expressway  
Oklahoma City, Oklahoma 73112  
Tel: (405) 948-6000  
Fax: (405) 948-8414

ATTORNEYS FOR DEFENDANT,  
THE ARCHDIOCESE OF OKLAHOMA CITY

ENTERED ON DOCKET

DATE 12-1-97

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

FARMERS INSURANCE COMPANY, )  
INC. )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LARRY DEWITT, RICK PAYNE, )  
JENNIFER PAYNE )  
 )  
Defendants. )

No. 97-C-660-K

**FILED**

NOV 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER ENTERING DEFAULT JUDGMENT AGAINST  
DEFENDANT DEWITT

IT IS ORDERED, ADJUDGED, and DECREED that this Court enter the default of the Defendant Larry DeWitt in this declaratory judgment action and granting to the Plaintiff judgment in that Farmers is not required under its policy to compensate Mr. DeWitt and is no longer obligated to perform under the policy in any manner whatsoever for Mr. DeWitt's benefit. This Court has found the Defendant, Mr. DeWitt, in default because he has failed to answer or appear or to otherwise defend in this declaratory action. The Court enters Default Judgment solely against Defendant DeWitt. This Order and Judgment shall have no effect as to Defendants Rick Payne and Jennifer Payne.

ORDERED this 26 day of November, 1997.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 12-1-97

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

DANA CHRISTENSEN, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 THE VIAD CORPORATION, et al., )  
 )  
 Defendants. )

No. 97-C-316-K /

**F I L E D**

NOV 26 1997 *PL*

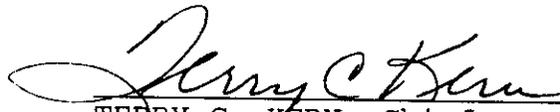
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 26 day of November, 1997.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

1

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

**FILED**

NOV 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DANA CHRISTENSEN and  
JOY CHRISTENSEN,

Plaintiffs,

vs.

EXPRESS METAL FABRICATORS,  
INC., an Oklahoma corporation,

Defendant.

No. 95-C-816 K

ENTERED ON DOCKET

DATE 12-1-97

STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, Dana Christensen and Joy Christensen, the Defendants and Third Party Plaintiffs, Terry Cowan, Jerry Cowan and Ralph Gibson d/b/a Express Metal Fabricators, and Express Metal Fabricators, Inc., and the Third Party Defendant, Wes Stabel, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein, as to these parties only, with prejudice for the reason that all matters, causes of action and issues in the case, between these parties only, have been settled, compromised and released herein, including post and pre-judgment interest

MICHAEL L. BARDRICK

*Michael L. Bardrick*  
\_\_\_\_\_  
Attorney for Plaintiff

STEPHEN C. WILKERSON

*Stephen C. Wilkerson*  
\_\_\_\_\_  
Attorney for Defendant and Third  
Party Plaintiffs

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

FILED

NOV 26 1997 M

NABHOLZ CONSTRUCTION  
CORPORATION, an  
Oklahoma Corporation,

Plaintiff, ) Case No. 96-CV-1184-K

v.

CANNON STEEL ERECTION, INC.,  
a Texas Corporation,

Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

) Tulsa County Case No. CJ-96-04589  
) Judge Peterson

ENTERED ON DOCKET

DATE 12-1-97

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 26 day of November, 1997, it appearing to  
the Court that this matter has been compromised and settled, this  
case is herewith dismissed with prejudice to the refiling of a  
future action.

  
United States District Judge