

ENTERED ON DOCKET

DATE 9-30-98

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

IN RE:
HADDCOMM INTERNATIONAL, INC.,
Debtor,
CELLXION, INC.,
Appellant,
vs.
HADDCOMM INTERNATIONAL, INC.,
Appellee.

F I L E D

SEP 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-309-K(M)

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. The appeal has been fully briefed.

Appellant ("CellXion") appeals from the order of the Bankruptcy Court, Dana L. Rasure, J., disallowing CellXion's unsecured nonpriority claim in the amount of \$40,000. For the reasons hereafter discussed, the undersigned United States Magistrate Judge RECOMMENDS that the decision of the Bankruptcy Court be AFFIRMED.

JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White (In re White)*, 25 F.3rd 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings

11

of fact are reviewed under the "clearly erroneous" standard. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988), Bankr. Rule 8013.

PROCEDURAL HISTORY AND FACTS

HaddComm and CellXion negotiated for CellXion to purchase the assets of HaddComm, a corporation which manufactured small prefabricated buildings. The agreed purchase price was \$500,000 with \$40,000 to be deposited in advance. CellXion made a \$40,000 initial deposit and later transferred the remaining \$460,000. For reasons not relevant to this decision, the deal fell through. The \$460,000 was returned to CellXion. However, the \$40,000 was not. CellXion's claim for the \$40,000 is the basis for its Proof of Claim. HaddComm maintained that the \$40,000 deposit was a non-refundable payment. CellXion argued that the deposit was refundable. There was no written agreement concerning whether the deposit was refundable. Both parties submitted testimony to the Bankruptcy Court in support of their positions.

The hearing before the Bankruptcy Court was conducted by way of an affidavit procedure in which direct testimony was submitted by affidavit while cross-examination and re-direct examination of witnesses was conducted live before the Bankruptcy Court.

Based on the testimony presented, the Bankruptcy Court found that the circumstances and conduct of the parties support HaddComm's understanding that the \$40,000 payment was made to enable financially distressed HaddComm to maintain operations until CellXion could complete its due diligence related to the sale. The

Court found: "HaddComm reasonably relied to its detriment on CellXion's representation, whether expressed or implied, that the \$40,000 payment was not refundable. CellXion is estopped from claiming that the payment was non-refundable." [R.185, p.6]. Therefore, the Bankruptcy Court disallowed CellXion's Proof of Claim for \$40,000.

DISCUSSION

CellXion advances two bases for overturning the Bankruptcy Court's order: that taking direct testimony by affidavit denied CellXion due process; and that the ruling is inconsistent with the law and evidence.

USE OF AFFIDAVIT PROCEDURE

At the hearing direct testimony was submitted by way of affidavit. The witnesses were present at the hearing; they were sworn and subjected to cross-examination. In some instances re-direct and re-cross examination occurred. Rebuttal witnesses were also called live. Relying primarily on the Court's reasoning in *In re Burg*, 103 B.R. 222 (B.A.P. 9th Cir. 1989), CellXion argues that the affidavit procedure denied it due process.

In *Burg*, the Bankruptcy Court employed essentially the same procedure at issue in this case. The *Burg* Panel determined:

[B]asic notions of procedural due process compel this Panel to conclude that essential rights of the parties may be jeopardized by a procedure where the oral presentation of evidence is not allowed, where the bankruptcy court's ability to gage the credibility of a witness or evidence is questionable and where rulings on objections to the admissibility of all direct evidence, may be unclear.

Id. at 225. However, in *Adair v. Sunwest Bank*, 965 F.2d 777, 780 (9th Cir. 1992), the Ninth Circuit, considering the same affidavit procedure in *Burg* and in this case, stated: "We disagree with the Burg panel that the bankruptcy court's procedure raises significant due process concerns." The Court found that the bankruptcy judge had an adequate opportunity to observe the declarants' demeanor and to gauge their credibility during oral cross-examination and redirect examination.

The question confronting the courts in both the *Adair* and *Burg* cases was the extent of authority afforded the trial court by Federal Rule of Evidence 611(a) which states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

At the time those cases were decided, Fed. R. Civ. P. 43(a), made applicable to bankruptcy practice by Bankruptcy Rule 9017, stated: "[i]n all trials the testimony of witnesses shall be taken *orally* in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." [emphasis supplied]. In 1996, Rule 43(a) was amended and the word *orally* was omitted. Consequently, Rule 43(a) does not provide any impediment to the affidavit procedure employed by the Bankruptcy Court in this case.

Fed. R. Evid. 103(a) provides that error may not be predicated upon an evidentiary ruling unless the ruling affects a substantial right of the party affected and

a timely objection is made. *See also Tele-Communications, Inc. v. Commissioner of Internal Revenue*, 12 F.3d 1005, 1007 (10th Cir 1993) (an appellate court will not generally consider an issue raised for the first time on appeal). The record contains no indication that either side made any objection to the affidavit procedure. And, the Court notes there has been no demonstration that the procedure affected the substantial rights of CellXion. Although CellXion has made reference to the fact that cross-examination was limited by the scope of direct examination it has not identified any point in the record where this limitation prevented it from introducing evidence.

Since there was no objection to the affidavit procedure; since there is no demonstrated prejudice resulting from the use of the procedure; and since the procedure is not violative of any evidentiary or procedural rule, the Bankruptcy Court's use of the affidavit procedure provides no basis for reversal.

LEGAL AND EVIDENTIARY SUPPORT FOR RULING

CellXion has asserted that the Bankruptcy Court's ruling is inconsistent with the law and evidence. In particular, CellXion argues that there is "no evidence to support an express or implied representation by CellXion on which Haddcomm relied to its detriment." [Dkt. 2, p. 11]. After providing an exposition of the evidence submitted and its interpretation of that evidence, CellXion states: "[i]t is difficult to find a representation made by CellXion on which Haddcomm relied to its detriment." [Dkt. 2, p. 18]. At trial the parties submitted conflicting evidence on this point. The resolution of this issue was purely a question of fact which cannot be disturbed unless it is clearly erroneous. Fed.R.Civ.P. Rule 52(a). A trial court's resolution of factual

issues will not be deemed clearly erroneous unless they are without support in the record or if the appellate court is left with the definite and firm conviction that a mistake has been made. *Doyle v. Resolution Trust Corp.*, 999 F.2d 469, 474 (10th Cir. 1993).

The Bankruptcy Court's disallowance of CellXion's proof of claim was based on the equitable doctrine of promissory estoppel whereby a person who relies to his detriment on another's promise is given by law the benefit of a contract where an agreement did not come to fruition. *Bickerstaff v. Gregston*, 604 P.2d 382, 384 (Okla. App. 1979). In this case the Bankruptcy Court found that HaddComm reasonably relied to its detriment on either the express representation of CellXion's representative, Schoonover, that the \$40,000 payment was non-refundable, or on the representation implied by CellXion's transfer of \$40,000 to HaddComm's operating account that the funds were to be used for HaddComm's operations. [R.184, p. 5]. To reach this conclusion the Bankruptcy Court had to find that the testimony of Haddcomm's witnesses, Babb and Miller, was credible and that the testimony of CellXion's witnesses, Schoonover and Miller, was not credible – a decision reserved exclusively to the Bankruptcy Court as trier of fact.

This Court finds the Bankruptcy Court's decision is supported by the evidence in the record, as accurately outlined in the Bankruptcy Court's decision.

CellXion argues that its mistake of fact concerning whether the \$40,000 was refundable should result in rescission of the contract and return of its \$40,000. The undersigned rejects CellXion's claim of mistake as a basis to reverse the Bankruptcy

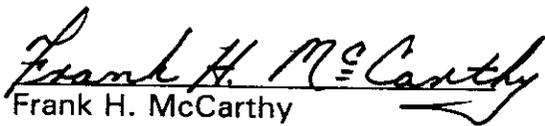
Court's decision. The Bankruptcy Court did not directly address CellXion's mistake of fact argument. However, in the determination that HaddComm reasonably relied to its detriment on CellXion's representation is an implicit determination that the facts do not support CellXion's claim of mistake. The determination whether the facts presented a case for rescission of the contract and return of the \$40,000 was a question of fact for the Bankruptcy Court. The finding that the Bankruptcy Court's decision is not clearly erroneous eliminates mistake as a basis for reversal.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the Bankruptcy Court's Order denying CellXion's Proof of Claim be AFFIRMED.

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

DATED this 30th Day of September, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 30 Day of September, 1998.

L. Schwelke

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

F I L E D

SEP 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RODNEY KEITH DICK,

Petitioner,

vs.

RITA MAXWELL, Warden,

Respondent.

No. 97-CV-289-B

ENTERED ON DOCKET

DATE SEP 30 1998

ORDER

Petitioner, a state inmate appearing *pro se*, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 (Docket #1). Respondent has filed a response and supplemental response (#s 9 and 10), and Petitioner has filed a reply to Respondent's response (#12). Petitioner also has filed "Plaintiff's Motion for Speedy Hearing on Declaratory Judgement Action" (#13). As more fully set out below, the Court concludes that Petitioner's application for a writ of habeas corpus and motion for speedy hearing should be denied.

BACKGROUND

Petitioner was tried by a jury and convicted of First Degree Burglary (count 1) and Robbery by Force (count 2) in Rogers County District Court, Case No. CRF-93-165. On December 10, 1993, he was sentenced to consecutive terms of seven years imprisonment on count 1 and ten years imprisonment on count 2. At trial, Petitioner's former step-sons, Jerry and Johnny Huddleston, testified against him. The boys, who were 15 and 16 years old when the crime was committed, testified that on the night of the burglary/robbery, Petitioner drove them in his truck

to the home of Maxine Williams, who was the grandmother of Petitioner's first wife. The boys' uncle, Ronnie Heape, was also in the truck. Petitioner had been in Williams' home during his marriage to her granddaughter and knew that she kept money in the house. Petitioner drew a map of William's home, then let the boys out of the truck. The boys cut a screen and entered the house; one held down Williams in her bed while the other ransacked the house looking for money. After Williams told them where she kept her money, the boys took it and left the house, and were picked up by Petitioner in his truck. Petitioner claimed an alibi for the time in question and also presented evidence that his truck was not running and was in his father's automotive repair shop on the night of the burglary.

Petitioner was represented by different counsel on appeal and raised only one issue: that he was improperly convicted because the only evidence linking him to the crime was the uncorroborated testimony of three accomplices. In a summary opinion issued August 16, 1995, the Oklahoma Court of Criminal Appeals affirmed his conviction and sentence.¹

Petitioner filed an application for post-conviction relief in the District Court of Rogers County, raising five grounds:

1. The trial court erred in failing to properly admonish the jury and in giving erroneous jury instructions (nos. 19 and 21);
2. The use of perjured testimony by the state in obtaining a conviction;
3. Ineffective assistance of trial counsel in failing to call certain witnesses;

¹On August 4, 1994, while that appeal was pending, Petitioner filed a petition for federal habeas corpus relief in this Court, Case No. 94-CV-756-B. By Order entered December 2, 1994, Petitioner's claims that he was unconstitutionally denied bond pending appeal were found to be without merit, and his petition was dismissed without prejudice for failure to exhaust as to Petitioner's claim of ineffective assistance of counsel.

4. Double jeopardy; and
5. Ineffective assistance of appellate counsel.

The petition was denied by the trial court on July 17, 1996, and the denial affirmed by the Court of Criminal Appeals on January 27, 1997.

Petitioner filed the instant petition for writ of habeas corpus on March 31, 1997, raising the following grounds:

1. Ineffective assistance of trial counsel based on:
 - (A). Conflict of interest;
 - (B). Lack of action;
 - (C). Attorney [in]competence;
 - (D). Violation of attorney canons;
 - (E). Counsel's failure to object to the trial court's abbreviated jury admonishment;
 - (F). Counsel's failure to object to jury instruction number 21 (that if the jury determined Ronnie Heape was an accomplice, his testimony could not be used solely to convict Petitioner);
 - (G). Counsel's failure to call three subpoenaed witnesses, two who would have supported Petitioner's testimony that his truck was in the car shop on the night of the robbery and one who would have contradicted another witness' statement;²

²Grounds (E) through (G) are contained in Petitioner's brief, filed May 15, 1997 (#8), by leave of Court.

2. Ineffective assistance of appellate counsel for failing to argue fundamental errors on appeal;
3. Double jeopardy; and
4. The state's use of res judicata violates due process.

On April 17, 1997, this Court entered its Order (#4) directing Respondent to show cause why the writ should not issue and to file a response to the petition for writ of habeas corpus. Respondent filed her response arguing that Petitioner's first and third grounds are procedurally barred, and that grounds two and four are without merit. (#9). Respondent was granted leave to supplement her response (#11) to include additional argument and authority (#10). Petitioner has filed a reply to the responses (#12).

ANALYSIS

A. Preliminary Matters.

On August 19, 1997, less than three months after he filed his reply, Petitioner filed a Motion for Speedy Hearing to advance this case on the Court's calendar pursuant to Rule 57, Federal Rules of Civil Procedure. Rule 57 provides that "[t]he procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C. § 2201, shall be in accordance with these rules. ...The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." In the instant case, Petitioner is not seeking a declaratory judgment but has filed an application for a writ of habeas corpus, claiming that he is in custody in violation of the U.S. Constitution. Therefore, the "speedy hearing" provision of Rule 57 is not applicable to this case, and this motion should be denied.

Next, after a careful review of the record, the Court determines that Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Coleman v. Thompson, 501 U.S. 722, 732 (1991); Rose v. Lundy, 455 U.S. 509 (1982).

B. Procedural Bar.

Respondent asserts that Petitioner's first and third claims, i.e., ineffective assistance of trial counsel and double jeopardy, respectively, are procedurally barred. The doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims 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 claims 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. 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)).

Applying these principles to the instant case, the Court concludes that Petitioner's third claim, that his right to be free from double jeopardy was violated, is barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeal's procedural bar as applied to Petitioner's double jeopardy claim as presented in his state application for post-conviction relief 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).

As to Petitioner's first claim of ineffective assistance of trial counsel, the Tenth Circuit recently addressed the application of the Oklahoma procedural bar to claims of ineffective assistance of trial counsel and concluded that:

Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

English v. Cody, 146 F.3d 1257, 1264 (10th Cir. 1998).

In the instant case, Petitioner was represented at trial by appointed counsel Ronald Berry and Al Benningfield, and on appeal by Allen Smith of the Oklahoma Indigent Defense System in Norman. Thus, the first condition for imposing the bar is met.

The second condition, that the ineffectiveness claim be capable of resolution solely on the basis of the record, is met as to all grounds of attorney error alleged by Petitioner in his § 2254 petition except for his claim that his attorney erred in failing to call witnesses (claim 1(G) listed above). Petitioner has supplied affidavits outside the record to support that claim. The Court declines to determine whether "Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied," English, 146 F.3d at 1264, because, as discussed below, this alleged error fails to constitute ineffective assistance of counsel. Accordingly, the

Court concludes that Petitioner's claims of ineffective assistance of trial counsel (claims 1(A)-(F)), in addition to his claim of a double jeopardy violation, are procedurally barred.

Because of Petitioner's procedural default as to these claims, this Court may not consider them 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). The "fundamental miscarriage of justice" exception 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's fourth "claim," that the state's use of res judicata violates due process, does not state a separate claim for relief but relates to the imposition of the procedural bar. Petitioner alleges that he did not knowingly or willingly waive these issues; thus, imposition of a bar is unfair. However, as noted above, the procedural bar doctrine does not require a defendant's voluntary waiver of issues. Here, Petitioner does attempt to demonstrate "cause" by alleging that his appellate counsel provided ineffective assistance of counsel by failing to raise the grounds of ineffective assistance of trial counsel and double jeopardy on appeal. After careful review of the record and as discussed below, the Court determines that Petitioner has not established "cause" justifying the procedural default.

Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, 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." Id., at 690. 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.

1. Petitioner fails to show "cause" overcoming the procedural default as to Claims (1)(A)-(F) (ineffective assistance of trial counsel)

Petitioner asserts that he was denied effective assistance of counsel at trial because of (A). Conflict of interest; (B). Lack of action; (C). Attorney [in]competence; (D). Violation of attorney canons; (E). Counsel's failure to object to the trial court's abbreviated jury admonishment; and (F). Counsel's failure to object to jury instruction number 21.

Petitioner does not explain the basis of his claims (A)-(D), listed summarily in his petition (#1 at 5). Therefore, appellate counsel did not err in failing to raise these conclusory claims on appeal, and Petitioner has failed to overcome the procedural default as to them.

In (E), Petitioner claims that counsel failed to object when the trial court issued limited jury admonishments in violation of 22 O.S.A. § 854. This statute provides

The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with any one else on any subject connected with the trial, or to form or express any opinion thereon, until the case is finally submitted to them.

Petitioner alleges that on two occasions during his trial the judge violated this statute. First, when recessing for lunch, the trial court said only to the jury “[y]ou’re again admonished not to discuss the case with anyone, etc.” (Trial Tr. at 275). Next, when recessing for the evening during presentation of the prosecution’s case, the court stated: “[w]e’re going to recess for the evening. Again I want to remind you of the admonition I gave you earlier. You’re not to discuss this case with anyone, not even with your spouse or members of your family.” (Trial Tr. at 417).

Although the admonishments given by the trial judge on these two occasions do not literally follow the language of the statute, in view of the record as a whole the Court cannot say that the practice denied Petitioner a fair trial or otherwise prejudiced him. The Oklahoma Court of Criminal Appeals does not require reversal of a conviction when the admonishment is omitted or abbreviated, in the absence of some showing that a defendant was prejudiced thereby.

Sargeant v. State, 509 P.2d 143, 146 (Okla. Crim. App. 1973); Rutherford v. State, 245 P.2d 96 (Okla. Crim. App. 1952) (that jury allowed to recess in the halls with no admonition not grounds for reversal). Therefore, appellate counsel did not err in failing to raise this issue on appeal.

Finally, Petitioner claims that trial counsel erred in failing to object to jury instruction number 21. Oklahoma law provides that a defendant cannot be convicted on the uncorroborated

testimony of an accomplice. 22 O.S. § 742 (1991). One of the issues at trial was whether Ronnie Heape, who rode in the truck to the crime scene, was an accomplice or a mere bystander to the crime. Petitioner asserts that the trial judge, in overruling defense counsel's demurrer at the close of the government's case, conceded out of the jury's hearing that Heape was a likely participant but thought there was sufficient corroboration in the testimony of other witnesses. (Trial Tr. at 435-36). Petitioner thus claims that defense counsel should have objected when the trial court gave the instruction allowing the jury to determine if Heape was an accomplice and if his testimony could be used for corroboration of the Huddlestons' testimony.

The Court's review of the record reveals that this issue was included by implication in the single ground raised by appellate counsel on appeal: that the state's case rested on the uncorroborated testimony of three accomplices. The trial court's statement cited by Petitioner was made for purposes of ruling on defense counsel's demurrer to the state's evidence and clearly was not the court's definitive finding on Heape's status as an accomplice. Petitioner's appellate brief recognizes that "[r]ather than rule that Heape was an accomplice as a matter of law, however, the judge allowed the jury to determine the issue and instructed the jury on the law of accomplice corroboration." (#9, Ex. B at 10). Therefore, Defendant has failed to overcome the procedural bar as to this issue.

2. *Petitioner fails to show "cause" overcoming the procedural default as to Claim (3)(double jeopardy)*

Petitioner asserts that his constitutional protection against double jeopardy was violated by his prosecution and conviction for the offenses of burglary in the first degree and robbery by force. Petitioner was charged in a two count information with violating 21 O.S. § 1431 (1991)

(count 1) and 21 O.S. § 791 (1991) (count 2). (#8, Ex. S). The relevant portions of the statutes defining the offenses are as follows:

§ 1431. Burglary in first degree

Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such window or shutter; or
2. By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present; or
3. By unlocking an outer door by means of false keys or by picking the lock thereof, or by lifting a latch or opening a window, is guilty of burglary in the first degree.

§ 791. Robbery defined

Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Petitioner contends that burglary is a lesser included offense of robbery, because both involved a common intent to rob. (#8 at 14-16). The Court disagrees.

The Double Jeopardy Clause protects a petitioner from "multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). In cases where a defendant is punished for the same conduct under two different statutory provisions, "the first step in the double jeopardy analysis is to determine whether the legislature ... intended that each violation be a separate offense." United States v. Lanzi, 933 F.2d 824, 825 (10th Cir. 1991) (quoting Garrett v. United States, 471 U.S. 773, 778 (1985)). "If the legislature, as expressed in the language of the statute or its legislative history, clearly intended cumulative punishment under two different

statutory provisions, the imposition of multiple punishment does not violate the Double Jeopardy Clause and the court's inquiry is at an end. Id. (citing Missouri v. Hunter, 459 U.S. 359, 368-69 (1983)).

If the legislative intent is unclear, then "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). "This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" Brown v. Ohio, 432 U.S. 161, 166 (1977) (quoted case omitted).

Clearly, burglary and robbery, while they may arise during the course of a single criminal endeavor, are separate offenses and each requires proof of facts that the other does not. Burglary is complete upon entry of the home, while robbery involves the separate forcible theft. Cannon v. State, 827 P.2d 1339, 1342 (Okla. Crim. App. 1992) ("...merely because multiple transgressions are committed in the criminal episode, a defendant does not escape punishment for each separate offense where proper"). In the instant case, Petitioner was convicted of masterminding the scheme of breaking into the victim's home and then robbing her. The double jeopardy clause clearly is not implicated by Petitioner's prosecution for both burglary and robbery, two wholly distinct offenses. Accordingly, Petitioner's double jeopardy claim lacks merit, and appellate counsel did not err in failing to raise that claim on direct appeal. Petitioner is procedurally barred from raising it at this time.

3. *Petitioner fails to demonstrate a "fundamental miscarriage of justice" sufficient to overcome the procedural bar*

The only other avenue by which Petitioner can have these claims reviewed is by showing that a "fundamental miscarriage of justice" will result if the procedural bar is invoked. This exception applies "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. at 496 (1986). To meet this exception, a petitioner must show that the government has convicted the wrong person of the crime such that "it is evident that the law has made a mistake." Sawyer v. Whitley, 505 U.S. 333 (1992). Application of this exception is "rare" and limited to the "extraordinary case." See Schlup v. Delo, 513 U.S. 298, 323-32 (1995).

Petitioner does allege that he is actually innocent of the crimes. In fact, Petitioner testified in his own defense that he was eating dinner at a restaurant in Tulsa on the night of the burglary and robbery. Therefore, the Court must examine whether this is one of those "extraordinary" cases where imposition of a procedural bar will result in a fundamental miscarriage of justice.

"This inquiry involves three prongs: (1) a constitutional violation; (2) a probable effect on the jury's determination; and (3) the conviction of an innocent man." Parks v. Reynolds, 958 F.2d 989, 995 (10th Cir. 1992). "[W]here the defendant shows no cause for failing to raise these claims earlier, the defendant must show—at the threshold—both a constitutional violation and a colorable showing of factual innocence. Factual innocence must mean at least sufficient claims and facts that—had the jury considered them—probably would have convinced the jury that the defendant was factually innocent." Id.

As discussed above, the Court determined that none of Petitioner's allegations of constitutional violation had merit. Thus, Petitioner fails to meet the first prong of the inquiry—establishment of a constitutional error—and there is no need to determine whether the second and third prongs are satisfied. Accordingly, the Court concludes that this is not one of those "rare and extraordinary" cases where the fundamental miscarriage of justice exception applies, and Petitioner remains procedurally barred from having these claims heard on his § 2254 petition.

C. Ineffective Assistance of Appellate Counsel.

Petitioner alleges that his appellate counsel did not play the role of an active advocate in researching, preparing or assisting in the filing of a meaningful appeal. Petitioner asserts that his appellate counsel never met with him or trial counsel to discuss possible issues, did not have a complete trial transcript, and submitted the appeal brief before Petitioner had a chance to review it. Petitioner attempted to submit a *pro se* brief raising additional issues which the Oklahoma Court of Criminal Appeals refused to consider. One of the issues which Petitioner wanted to raise was an alleged erroneous jury instruction (No. 19), which provided that the minimum sentence for robbery was ten years. Petitioner contends the correct minimum sentence where two or more persons conjointly commit a robbery is five years. Petitioner also contends appellate counsel erred in failing to claim that trial counsel's performance was deficient for failing to call three additional witnesses.

As noted before, to establish ineffective assistance of appellate counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he

must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466 U.S. at 690).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices, see Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993).

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome

of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 113 S. Ct. at 844. To establish prejudice in the appellate context, a petitioner must demonstrate that "there was a 'reasonable probability' that [his] claim would have been successful before the [state's highest court]." Claudio, 982 F.2d at 803 (footnote omitted).

After reviewing the record in this case, the Court first concludes that appellate counsel's alleged failure to consult with Petitioner prior to filing the appellate brief is not in itself deficient representation. See McBride v. Sharpe, 25 F.3d 962, 973 (11th Cir. 1994) (appellate counsel testified that he did not discuss the appeal with the defendant personally because he was confined to the trial record and, in his professional opinion, further discussion would not have been helpful). Counsel had no duty to include all of Petitioner's desired claims on appeal; on the contrary, the weeding out of weak claims to be raised on appeal "is the hallmark of effective advocacy," Tapia v. Tansy, 926 F.2d 1554, 1564 (10th Cir. 1991), because "every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court." United States v. Cook, 45 F.3d 388, 394-95 (10th Cir. 1995) (citation omitted). Petitioner has failed to establish that the ignored issues were more likely to result in a reversal or new trial than the issue actually raised on appeal. See Gray, 800 F.2d at 647.

Petitioner was charged and convicted of first degree robbery. The court instructed the jury, consistent with 21 O.S. § 798 (1991), that the minimum penalty for first degree robbery is

ten years.³ Petitioner cites a separate robbery provision providing that the minimum penalty for robbery committed conjointly by two or more persons is five years. 21 O.S. § 800 (1991). While there appears to be some confusion within the Oklahoma courts as to the proper minimum penalty for those in Petitioner's shoes,⁴ habeas petitions under § 2254 are not available to correct errors of state law made by state courts. King v. Champion, 55 F.3d 522, 527 (10th Cir. 1995).

Even if this claim would have been successful on direct appeal, the Court notes that the failure to raise a particular issue on appeal is not in and of itself indicative of ineffective assistance of appellate counsel. The U.S. Supreme Court has recognized that appellate counsel serves best by winnowing out weaker arguments and focusing upon stronger central claims. Jones v. Barnes, 463 U.S. 745, 751-52. As noted above, Petitioner's appointed counsel focused on the existence of non-accomplice corroborative testimony, Petitioner's best argument under the law and the facts of this case. Therefore, appellate counsel's decision not to present all possible issues on direct appeal did not deny Petitioner the effective assistance of counsel.

Finally, the Court turns to Petitioner's claim that appellate counsel erred in failing to claim that trial counsel's performance was deficient for failing to call three additional witnesses. Petitioner has provided affidavits from two of the witnesses, Donald Hudson and Joe Metzger, who state that they saw Petitioner's truck inside the repair shop on Friday or Saturday and again the following Tuesday or Wednesday (the crime occurred on the intervening Monday night). The

³Effective July 1, 1998, the statute was amended to eliminate the specific penalty for first degree robbery.

⁴See, e.g., Orange v. Cody, No. 93-6346, 1994 WL 131750,*4 (10th Cir. April 15, 1994), an unpublished decision in which the Tenth Circuit noted that "the Oklahoma Court of Criminal Appeals has held that this provision [§ 798] has been repealed by implication, and that the proper minimum sentence is five years. E.g., Meschew v. State, 264 P.2d 391 (Okla. Cr. 1953); Coleman v. State, 540 P.2d 1185, 1186 (Okla. Cr. 1975). Nonetheless, some Court of Criminal Appeals cases still cite the minimum penalty as 10 years. E.g., Duckett v. State, 711 P.2d 944, 946 (Okla. Cr. 1985)."

third witness whom Petitioner claims trial counsel should have called would have testified that Ronnie Heape sold a red and white pickup on the day following the crime. Petitioner claims that this evidence would impeach the testimony of Johnny Huddleston at the preliminary hearing that Heape did not own a red and white truck at the time of the robbery.

To be entitled to an evidentiary hearing on the basis of this evidence outside the record, Petitioner must meet the requirements of 28 U.S.C. § 2254(e)(2), which provides:⁵

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner failed to develop the factual basis of this claim because the state courts held the issue to be procedurally barred since it was not raised on appeal. Petitioner's claim does not meet the requirements of § 2254(e)(2)(A) because it does not involve a new rule of constitutional law or newly discovered evidence that was unavailable previously (Petitioner claims these witnesses were subpoenaed but not called to testify at trial). Petitioner's claim also fails to meet the requirements of § 2254(e)(2)(B), because, even assuming defense counsel erred in failing to

⁵Petitioner filed his habeas petition on March 31, 1997, after enactment of the Antiterrorism and Effective Death Penalty Act on April 24, 1996. Thus, he is subject to its provisions. See *Lindh v. Murphy*, 117 S.Ct. 2059, 2068 (1997).

present this testimony, the Court is unable to conclude that "no reasonable factfinder would have found [Petitioner] guilty of the underlying offense." The testimony of Hudson and Metzger would have been merely cumulative to that of several other witnesses who testified about the truck's presence at the shop on the days surrounding the day of the crime. The third witness' testimony that Ronnie Heape sold his truck on the day following the robbery at best impeaches Johnny Huddleston's statement on a tangential matter, i.e., when Heape sold his truck. At trial, counsel did carefully cross-examine the Huddlestons as to which truck they rode in to the robbery. Jerry Huddleston testified that Ron Heape had a red truck with white pinstripes, but that he rode in Petitioner's truck to the robbery site. (Trial Tr. at 259). Johnny Huddleston testified that they rode in Petitioner's truck (Trial Tr. at 346). No witnesses at trial disputed that Heape owned a similarly colored truck on the night of the robbery; rather, the witnesses testified that the truck driven to the robbery was Petitioner's as opposed to any other vehicle. Thus, additional testimony that Heape owned a red and white truck at the time of the robbery would be merely cumulative and not probative as to Petitioner's involvement in the robbery. The Court concludes that Petitioner is not entitled to an evidentiary hearing.

The Court's review of the trial proceedings establishes that the performance of Defendant's attorney was well within the wide range of professionally competent assistance. Defendant's attorney vigorously cross-examined each of the government's witnesses and presented defense witnesses in an attempt to establish an alibi for Petitioner and the incapacity of his truck. It is clear that Defendant's attorney was acting in an adversarial mode by challenging the prosecution's theory that Defendant was involved in the robbery. The Court will not now

second-guess defense counsel's strategic decision not to call the three witnesses cited by Petitioner.

Accordingly, Defendant has failed to persuade the Court that appellate counsel's performance was outside the realm of a reasonably competent criminal attorney. Strickland, 466 U.S. at 687-88.

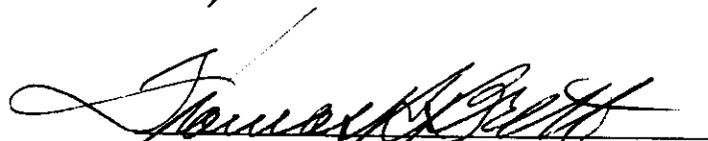
CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- 1) Petitioner's petition for a writ of habeas corpus (#1) is **denied**; and
- 2) Petitioner's motion for a speedy hearing (#13) is **denied**.

SO ORDERED THIS 29th day of Sept., 1998.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

SEP 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VERONICA WILSON and PETE TERRELL WILSON,)
)
Plaintiffs,)

vs.)

Case No. 97-C-910-E /

KENNETH MUCKALA, M.D., COLUMBIA DOCTORS)
HOSPITAL OF TULSA, INC., d/b/a COLUMBIA)
DOCTORS HOSPITAL, COLUMBIA HEALTH TRUST,)
INC., COLUMBIA/HCA HEALTHCARE)
CORPORATION; LESTER J. BOYLE; JOHN F.)
KEOWN, JR., M.D.; ANTHONY R. YOUNG; HERMAN)
C. ROBBINS; A. GEORGE EBER; NANCY J. KACHEL;)
ROBERT H. AIKMAN, M.D.; ROBERT C. HARRIS,)
M.D.; JAMES C. KING, M.D.; RICHARD M. STAMILE,)
M.D.; LUIS GOROSPE, M.D., DAVID GRIFFITHS, M.D.;)
and DAVID SCHOLL, M.D.,)
Defendants.)

ENTERED ON DOCKET
DATE SEP 30 1998

ORDER

Now before the Court is the Motion to Dismiss (Docket #24) Plaintiff's claim for Tortious Interference with Contract and Economic Opportunity of the Defendant Kenneth Muckala, M.D.

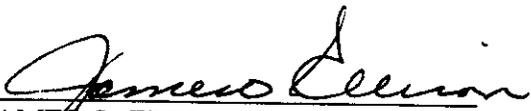
In this case, Plaintiff Veronica Wilson brings claims based on her alleged sexual harassment by Dr. Kenneth Muckala who was Vice Chief and Chief of Staff of Columbia Doctors Hospital while Wilson worked there as a psychiatric nurse. Muckala moves for dismissal of Wilson's Tortious Interference with Contract and Economic Opportunity claim, arguing that, under the authority of *Voiles v. Santa Fe Minerals, Inc.*, 911 P.2d 1205 (Okla. 1996) and *Ray v. American Nat'l Bank & Trust Co.*, 894 P.2d 1056 (Okla. 1994), a tortious interference claim cannot be brought against one acting in a representative capacity for one of the parties to the contract. Plaintiff argues that *Mason*

102

v. *Oklahoma Turnpike Authority*, 115 F.3d 1442 (10th Cir. 1997) stands for the contention that a tortious interference claim can be brought against someone in a representative capacity. A close review of these cases convinces the Court that *Voiles* and *Ray* are directly on point.

The Motion to Dismiss Plaintiff's Tortious Interference with Contract Claim (Docket #24) is granted.

IT IS SO ORDERED THIS 28th DAY OF SEPTEMBER, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

SEP 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RODNEY KEITH DICK,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

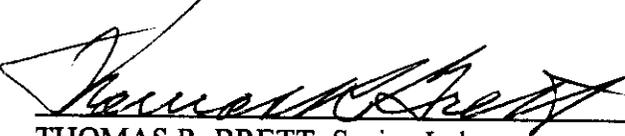
No. 97-CV-289-B

ENTERED ON DOCKET
SEP 30 1998
DATE _____

JUDGMENT

In accord with the Order denying Petitioner's application for a writ of habeas corpus, the Court hereby **enters judgment** in favor of Respondent and against the Petitioner.

SO ORDERED THIS 29th day of Sept., 1998.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

15

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

STEPHENS PROPERTY COMPANY,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
PAINWEBBER INCORPORATED, a)
Delaware corporation, and)
GREATER SOUTHWESTERN FUNDING)
CORPORATION, a Delaware)
corporation,)
)
Defendants.)

FILED

SEP 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-45-BU

ENTERED ON DOCKET
DATE SEP 30 1998

JUDGMENT

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, PaineWebber Incorporated and Greater Southwestern Funding Corporation, and against Plaintiff Stephens Property Company, and that Defendants, PaineWebber Incorporated and Greater Southwestern Funding Corporation, are entitled to recover of Plaintiff, Stephens Property Company, their costs of action, if any.

DATED at Tulsa, Oklahoma, this 30th day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

57

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

STEPHENS PROPERTY COMPANY,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
PAINWEBBER INCORPORATED, a)
Delaware corporation, and)
GREATER SOUTHWESTERN FUNDING)
CORPORATION, a Delaware)
corporation,)
)
Defendants.)

FILED

SEP 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-45-BU ✓

ENTERED ON DOCKET
DATE SEP 30 1998

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendants, PaineWebber Incorporated and Greater Southwestern Funding Corporation. Based upon the parties' submissions, the Court makes its determination.

The relevant undisputed facts are as follows. Plaintiff, Stephens Property Company ("SPC"), brings this action for unpaid principal and interest based on its ownership of \$46,000,000 in aggregate maturity value of certain Serial Zero Coupon Series B Bonds Due 1999-2009 (the "Series B Bonds") issued by Defendant, Greater Southwestern Funding Corporation ("GSW"), with an accreted value of \$11,769,551.¹ SPC purchased the Series B Bonds in August of 1996 from the Varde Fund for total consideration of \$1,725,000. SPC also seeks judgment against Defendant, PaineWebber Incorporated

¹ SPC's original complaint included a second claim for unpaid principal and interest based on its ownership of \$9,687,187 in principal amount of 13.25% Series A Collateral Trust Bonds Due 1999 (the "Series A Bonds"). SPC has abandoned the Series A Bonds claim.

("PWI"), for the debt under an alter ego theory of liability.

The Series A and Series B Bonds (the "Bonds") were issued approximately 14 years ago pursuant to a Collateral Trust Indenture dated June 1, 1984 (the "Indenture") between GSW, the issuer of the Bonds, and Fleet National Bank of Massachusetts, formerly Shawmut Bank of Boston, N.A., the Trustee (the "Trustee").

The proceeds from the Series B Bonds were used as permanent financing for the Mid-Continent Tower in Tulsa, Oklahoma (the "Tower"). The building was designed to serve as the world headquarters of Reading & Bates Corporation ("R&B"). The Tower was owned by Fourth Street Associates ("FSA"), an Oklahoma limited partnership, and leased to RMM Corporation ("RMM") under the terms of a lease (the "Master Lease"). RMM in turn subleased the Tower to R&B for a 25-year term (the "Sublease").

The principal permanent financing for the Tower was accomplished through two sources: the sale of limited partnership interests in Mid-Continent Associates ("MCA"), a limited partner of FSA, the owner of the Tower, and the sale of the Bonds by GSW, which then loaned the proceeds to FSA.

In June 1984, GSW, pursuant to prospectuses, raised approximately \$90.3 million by issuing \$82,400,000 aggregate principal amount of Series A Bonds and \$189,000,000 aggregate (upon maturity) principal amount of the Series B Bonds, which were sold for \$8.6 million, with proceeds to GSW of \$7.9 million. The Bonds, pursuant to their terms, are governed by the Indenture.

GSW loaned the proceeds of the sale of the Bonds to FSA. In

return, FSA issued Series A and B Mortgage Notes (the "Notes"), which Notes were secured by the grant to GSW of a first mortgage interest in the Tower (the "Mortgage"). Additional collateral consisted of the assignment to GSW of FSA's interest in the Master Lease and Sublease, including the right to receive payment of rent.

Pursuant to the Indenture, GSW in turn pledged, inter alia, FSA's Notes and the Mortgage, and the assignment of the Master Lease and Sublease to the Trustee as security for the Bonds. These assets of GSW are defined in the Indenture as the "Trust Estate."

The Series A Bonds were sold to several large institutional investors. The Series B Bonds were resold by PWI, with the exception of \$7 million aggregate principal amount sold to an institutional investor in 1984, pursuant to a prospectus published by PWI and Shearson Lehman Brothers Inc., as underwriters, dated April 1, 1985 (the "Prospectus") at prices ranging from 2.4% to 11.6% of their value at Stated Maturity.

The Prospectus disclosed that:

"Each of [GSW, FSA], MCA and RMM has limited equity capital and none of them can be viewed as a source of payment for the Bonds. Payment of principal and interest on the Bonds will depend on R&B's ability to make rental payments under the Lease...."

"The Mortgage Notes are non-recourse to the Owner, [FSA], that is, there is no personal liability on the part of the Owner or its partners respecting payment of the debt evidenced by the Mortgage Notes. As a consequence, timely payments on the Mortgage Notes and related interest and principal payments on the Bonds, will depend primarily on the abilities of RMM and R&B to meet their obligations under the Master Lease and Lease respectively."

GSW was "formed solely to issue the Collateral Trust Bonds" and "in turn lend the proceeds from the sale of those Bonds to [FSA], the owner of the Property."

GSW covenanted not to "engage directly or indirectly in any business other than that arising out of the ownership of the property pledged under the Indenture."

GSW "has not earned nor does it expect to earn substantial income or incur substantial losses from borrowing or loaning funds as all of the proceeds it received from the issuance of the Bonds have been loaned to [FSA] under exactly the same terms and conditions and [GSW] will not engage in any other business activity."

GSW had no stockholders' equity or retained earnings; its assets equaled its liabilities and its income equaled its expenses.

GSW was structured as a bankruptcy-remote, single-purpose entity as required by the Indenture for the protection and benefit of the Bondholders to assure that they were not subjected to credit risks from the issuer's business operations unrelated to R&B and the real estate securing the Bonds.

On December 1, 1987, R&B defaulted on its lease obligation and GSW defaulted on the Bonds. The Trustee declared an Event of Default under Section 9.01 of the Indenture on December 8, 1987 and advised the Bondholders that the default arose from the failure of R&B to make its timely lease payments.

A restructuring of the Bond debt and a five-year moratorium on foreclosure was negotiated with the Bondholders and Trustee in 1988. Following a moratorium period, on December 24, 1993, the Trustee gave notice of acceleration of the Bonds pursuant to Section 9.02 of the Indenture. As a result of the notice of

acceleration, the unpaid principal balance of the Series A Bonds and the compound accreted value of the Series B Bonds became due and payable on December 8, 1993.

At the time SPC purchased its Bonds, it was aware of the terms of the Prospectus and of all other documents and facts alleged in the Complaint. By no later than December 1994, SPC also knew the Bonds were in default and of the Trustee's foreclosure action on the Mortgage securing the Bonds.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to withstand a properly supported motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but...must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The Court examines the record in a light most favorable to the party opposing a motion for summary judgment. Deepwater Invs. Ltd v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991).

In their motion, PWI and GSW contend that SPC's claim for unpaid principal and interest under the Series B Bonds is barred by Section 9.11 of the Indenture, the "No Action" clause. PWI and GSW also assert that SPC's alter ego claim against PWI is barred by Section 8.3 of the Indenture, the "No Recourse" clause. They also contend that the alter ego claim against PWI fails as a matter of

law because SPC cannot establish either fraudulent or inequitable use of GSW's corporate form by PWI, domination and control of GSW by PWI or that SPC was deceived or injured as result of any misconduct by PWI.

SPC, in response, contends that the "No Action" clause does not apply to this case as SPC is suing on the Series B Bonds and not on the Indenture. Even if the clause were to apply, SPC contends that it would be unenforceable under the Section 316(b) of the Trust Indenture Act of 1939, 15 U.S.C. § 77ppp(b). SPC also asserts that the "No Recourse" clause does not bar its action because under its alter ego claim, PWI and GSW are treated as one entity. SPC further contends that it need not establish either injustice or inequity in order to recover on its alter ego claim. However, even if some injustice or inequity were required, SPC contends that it is present in this case. It further contends that it has presented sufficient evidence to raise a genuine issue of fact as to whether PWI dominated and controlled GSW.

The "No Action" clause

Section 9.11 of the Indenture provides a specific procedure for bringing suit under or with respect to the Indenture. It states as follows:

No Holder of any Bond shall have the right to institute any proceeding, judicial or otherwise, under or with respect to this Indenture, or for the appointment of a receiver or trustee or for any remedy hereunder unless:

A. such Holder has previously given written notice to the Trustee of a continuing Event of Default;

B. the Holders of not less than a majority in principal amount of the Outstanding Bonds shall have made

written request to the Trustee to institute proceedings in respect of such Event of Default in its own name as Trustee hereunder;

C. such Holder or Holders have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request;

D. the Trustee for 30 days after its receipt of such notice delivered pursuant to clause (b) above, request and offer of indemnity has failed to institute any such proceeding; and

E. no direction inconsistent with such written request has been given to the Trustee during such 30-day period by the Holders of 66 2/3% in principal amount of the Outstanding Bonds....

It is undisputed that prior to filing the instant action, SPC did not comply with Section 9.11. However, SPC asserts that Section 9.11 has no application to this action because it is bringing an action "under the [Series B Bonds]" and not an action "under or with respect to the Indenture." This Court disagrees.

The Court concludes that SPC's action is one under or with respect to the Indenture rather than one under the Series B Bonds. SPC is not attempting to collect on a matured bond based upon a promise to pay. Rather, it is seeking to enforce the acceleration of the Series B Bonds following the Trustee's declaration of an Event of Default, a remedy provided for in Section 9.02 of the Indenture.

In support of its position that Section 9.11 does not apply to this action, SPC cites to Envirodyne Industries, Inc. v. Connecticut Mutual Life Co, 174 B.R. 986 (N.D. Ill. 1994) and UPIC & Co. v. Kinder-Care Learning Centers, Inc., 793 F. Supp. 448 (S.D. N.Y. 1992). The Court, however, finds these cases distinguishable.

In the cases, the bondholders were seeking to recover past due interest. The face of the bonds at issue therein provided that interest was to be paid semiannually. Here, SPC is not seeking past due interest or principal that was provided for on the face of the Series B Bonds. It is seeking to obtain principal and interest based upon an acceleration of the Series B Bonds.

SPC contends that the Series B Bonds provide on their face that "[i]f an Event of Default, as defined in the Indenture, shall occur, the Compound Accreted Value of the Bonds may become or be declared due and payable in the manner and with the effect provided in the Indenture." The Court, however, finds that this language establishes that the remedy is provided by and defined in the Indenture.

Section 9.12 of the Indenture provides a narrow exception to the "No Action" clause in Section 9.11. It provides:

Notwithstanding any other provision in this Indenture, the Holder of any Bond shall have the right which is absolute and unconditional to receive payment of the principal of (and premium, if any) and interest on such Bond on the respective Stated Maturities expressed in such Bond (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder....

Under Section 9.12, the unconditional right to bring suit is limited to a suit for payment of principal "on the respective Stated Maturities." "Stated Maturity" is defined in Section 1.01 of the Indenture as "the date specified in such Bond or the coupon representing such installment of interest as the fixed date on which the principal of such Bond or installment of interest is due

and payable."

PWI and GSW contend that SPC does not have a right to bring this action under the exception of Section 9.12 because the unconditional right to suit applies to payments on the respective Stated Maturities.

Section 9.12 incorporates the language of Section 316(b) of the Trust Indenture Act of 1939, except that it uses the phrase "respective Stated Maturities in such Bonds" instead of "respective due dates expressed in such indenture." SPC contends that there is a crucial difference between the phrases. According to SPC, "respective due dates expressed in such indenture security" are not just the Stated Maturity dates. SPC points to the language in the Series B Bonds that "[i]f an Event of Default, as defined by the Indenture, shall occur, the Compound Accreted Value of the Bonds may become or be declared due and payable in the manner and with the effect provided in the Indenture." SPC argues that for purposes of § 316(b), the "due dates expressed" in the bonds include any term in the Indenture which makes the bond due and payable. According to SPC, the Series B Bonds have been accelerated and have reached maturity, thereby resulting in the "due dates expressed" in the bonds. SPC contends that the operative due date is "maturity" which includes "Stated Maturity" and accelerated maturity.

Because Section 9.12 is narrower than TIA § 316(b), SPC contends that PWI and GSW cannot rely upon Section 9.12 to negate its claim. Furthermore, SPC asserts that since it has the

unconditional right to bring its suit under § 316(b), the "No Action" clause cannot bar its suit.

The Court, upon review, concludes that TIA § 316(b) and Section 9.12 only provide an unconditional right to sue on or after the fixed due dates expressed in the Series B Bonds. This interpretation is confirmed by the American Bar Foundation's Commentaries to the Model Debenture Indenture Provisions (1971). In discussing Section 513 of the Model Indenture, which is set forth in Section 9.17 of the Indenture, the Commentaries state:

The exception in clause (1) of Section 513 reflects the requirements of TIA § 316(b) and Section 508² of the Indenture. It should be noted, however, that TIA § 316(b) is limited to defaults on "due dates" and Section 508 is limited to defaults on "Stated Maturities" and "redemption dates". Clause (1) of Section 513 is not so limited and includes any defaults in the payment of principal and interest, including amounts becoming due by reason of an acceleration of maturity.

Commentaries to Model Indenture, p. 240. (Emphasis added).

Because SPC has not complied with the requirements of the "No Action" clause, the Court finds that its action against GSW is barred. In addition, as the direct claims against GSW are barred by the Indenture, the Court finds that SPC's claim to hold PWI secondarily liable under the "alter ego" theory is similarly barred.

Alter Ego Claim

Even if SPC's claim against PWI were not barred by "No Action" clause, the Court finds that summary judgment is appropriate on the

² Section 9.12 of the Indenture is similar in material respects to Section 508.

alter ego claim. Initially, the Court concludes that Delaware law governs the issue of PWI's alter ego liability since PWI and GSW are Delaware corporations. Robert A. Wachslar, Inc. v. Florafax, International, Inc., 778 F.2d 547, 549-50 (10th Cir. 1985) (applying Oklahoma choice of law and expressly adopting the Restatement (Second) Conflict of Laws § 302(2) (1971) which requires the law of the state of incorporation to be applied to determine issues involving the rights and liabilities of a corporation). In reaching its finding, the Court rejects SPC's argument that Oklahoma law governs the alter ego liability issue due to the choice of law provision in the Indenture. SPC has not cited any relevant authority for its position. Moreover, the courts, addressing the issue, have found that the choice of law provision governing contract claims under an indenture is irrelevant in deciding the equitable issue of disregarding the corporate entity. See, Kalb, Voorhis & Co. v. American Financial Corp., 8 F.3d 130, 132 (2nd Cir. 1993) ("The choice of law provisions in the debenture are irrelevant. The issue is [of] limited liability...[not] obligations under the debentures. The law of the state of incorporation determines when the corporate form will be disregarded...."); Dassault Falcon Jet Corp. v. Oberflex, Inc., 909 F. Supp. 345, 348 (M.D.N.C. 1995), ("[A] choice of law provision in a contract is not binding on what law to apply for piercing the corporate veil.")

To prevail on an alter ego theory of liability under Delaware law, a plaintiff must show that the two corporate entities

"operated as a single economic entity such that it would be inequitable...to uphold a legal distinction between them." Fletcher v. Atex, Inc., 68 F.3d 1451, 1458 (2nd Cir. 1995) (quoting Harper v. Delaware Valley Broadcasters, Inc., 743 F.Supp. 1076, 1085 (D.Del. 1990), aff'd 932 F.2d 959 (3rd Cir. 1991), quoting Mabon, Nugent & Co. v. Texas American Energy Corp., Del.Ch., C.A. No. 8576, Berger, V.C., mem. op. at 11, 1990 WL 44267, at *5 (April 12, 1990)). Among the factors to be considered in determining whether two separate legal entities operate as a "single corporate entity" are:

"[W]hether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid; corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder."

Harper, 743 F.Supp. at 1085 (quoting Harco National Insurance Co. v. Green Farms Inc., Del.Ch., C.A., No. 1131, Hartnett, V.C., slip op. at 10, 1989 WL 110537, at *4, quoting United States v. Golden Acres, Inc., 702 F.Supp. 1097, 1104 (D.Del. 1988)). A plaintiff need not allege or plead fraud under an alter ego theory. Harper, 743 F.Supp. at 1085. However, the plaintiff must demonstrate an "overall element of injustice or unfairness." Harco, 1989 WL 110537, at *5 (quoting Golden Acres, 702 F.Supp. at 1104). A plaintiff seeking to persuade a district court to "disregard the corporate structure faces a `difficult task.'" Fletcher, 68 F.3d at 1458 (quoting Harco, 1989 WL 110537, at *4). "Courts have made

clear that "[t]he legal entity of a corporation will not be disturbed until sufficient reason appears.'" Id.

Upon review of the record herein, the Court finds that SPC has failed to present sufficient evidence to raise a genuine issue of fact as to presence of an "overall element of injustice or unfairness." SPC maintains that GSW was "grossly undercapitalized." However, SPC has not presented any evidence that PWI somehow misrepresented or misled SPC about GSW's capitalization. The undisputed evidence shows that GSW's capitalization and financial prospects were fully disclosed in the Prospectus. GSW's balance sheet for 1984, which was included in the Prospectus, revealed that GSW had no retained earnings or stockholders' equity. The Prospectus reflected that GSW's assets equaled its liabilities and its income equaled its expenses. It further disclosed that "[GSW] ha[d] not earned nor [did] it expect to earn substantial income or incur substantial losses from borrowing or loaning funds as all of the proceeds it received from the issuance of the Bonds have been loaned to [FSA] under exactly the same terms and conditions and [GSW] will not engage in any other business activity." Investors were also told that GSW "has limited equity capital and ... [cannot] be viewed as a source of payment of the Bonds." In light of these disclosures, the Court finds no injustice or unfairness relating to GSW's capitalization.

In addition to GSW's capitalization, SPC cites to the fact that GSW was set up as a single-purpose entity. SPC alleges that GSW was structured as it was for no other purpose than to

wrongfully insulate PWI from liability and responsibility for the transaction which it set up as a service for its client, R&B. The Prospectus, however, disclosed the limitation of GSW's corporate purpose. Moreover, the evidence shows that GSW's status as a single-entity was a requirement of the Indenture. Section 14.9 of the Indenture obligated GSW not to "engage, directly or indirectly, in any business other than that arising out of the ownership of the Trust Estate." GSW was required to be a single-purpose entity for the protection and benefit of the Bondholders. The fact that GSW was a single-purpose entity does not persuade this Court to disregard the corporate entities.

SPC claims that PWI knew or should have known, at the time the Prospectus was published and which it failed to disclose, that the Tulsa real estate market was weak and R&B's financial prospects were tenuous. Even if the Court were to find that SPC made a misrepresentation, it is not relevant to SPC, who purchased the Series B Bonds in 1996 with full knowledge of the events in the 1980's. Moreover, the alleged misrepresentation does not relate to the use of the corporate form of GSW.

The Court notes that none of the inequities alleged by SPC affected it in any way. SPC purchased its Series B Bonds in 1996, nine years after their default. They were purchased for a fraction of the accreted value and were purchased with knowledge of the default and the foreclosure action in state court. SPC has failed to present sufficient evidence of unjust or unfair conduct.

In its briefing, SPC asserts that as assignee of the Series B

Bonds, it stepped into the shoes of its predecessors and therefore is entitled to the equitable relief of alter ego without showing it suffered from injustice as a result of PWI's misuse of the corporate form. SPC has not cited to any instrument which expressly assigns to it all remedies of its assignors, rather it relies upon Section 3.07 of the Indenture and Okla. Stat. tit. 12A, § 8-302 to support an implied assignment. Section 3.07, however, does not provide for the transfer of any equitable remedies such as alter ego liability. It simply provides for the transfer of the "security and benefits under [the] Indenture." Specifically, Section 3.07 states that "[a]ll Bonds issued upon any transfer or exchange of Bond shall be valid obligations of the Company, evidencing the same debt, and entitled to the same security and benefits under this Indenture, as the Bonds surrendered upon transfer or exchange." As to Okla. Stat. tit. 12A, § 8-302, such statute gives the purchaser of a security "all rights in the security that the transferor had or had power to transfer." This statute does not provide for the transfer of a right to assert an alter ego theory. It simply grants the purchaser all the rights "in the security."

The Court notes that SPC likens its position to "a person who inherits a bond from a decedent who acquired the bond in the original issuance." The Court, however, finds the positions of SPC and an heir quite different. In the instant case, SPC purchased the Series B Bond with full knowledge of the default and the foreclosure action in state court. SPC entered the transaction

with its eyes wide open and had a choice as to whether or not to purchase the Series B Bonds. The heir, on the other hand, most likely would have had no knowledge regarding the circumstances surrounding the bond prior to the inheritance and would not have had a choice as to whether or not to purchase the bond.

Delaware law requires that an "overall element of injustice or unfairness" be present to disregard the separate legal entities. Fletcher, 68 F.3d at 1458. Other than the fact that SPC has not been paid the principle and interest of the Series B Bonds, SPC has not presented sufficient evidence which would justify the Court to disregard the separate legal entities of PWI and GSW. Therefore, the Court finds that PWI is entitled to summary judgment on the alter ego claim.³

Conclusion

Based upon the foregoing, Defendants' Motion for Summary Judgment (Docket Entry #31) is GRANTED. Judgment shall issue forthwith.

ENTERED this 30th day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

³ In light of the Court's ruling on the alter ego claim, the Court need not address whether the alter ego claim is barred by the "No Recourse" clause of the Indenture.

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

ENTERED ON DOCKET

DATE 9-30-98

INTELICAD COMPUTERS, INC.,)
)
Plaintiff,)
)
vs.)
)
THE TRAVELERS PROPERTY)
CASUALTY COMPANY,)
)
Defendant.)

No. 97-C-975-K ✓

FILED
IN OPEN COURT

SEP 29 1998

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

ORDER

Before the Court is the motion of defendant Travelers Property Casualty Company ("Travelers") for summary judgment. This lawsuit is a declaratory judgment action to determine whether certain insurance policies give rise to a duty to defend plaintiff IntelicAD Computers, Inc., ("IntelicAD") in a lawsuit brought by Construction Technology, Inc. ("CTI") against IntelicAD in the United States District Court for the Eastern District of New York. See Construction Technology, Inc. v. IntelicAD Computers, Inc., Civil Action No. 97-CV-4587 (E.D.N.Y.) (hereinafter referred to as the "underlying action"). The complaint in the underlying action alleges that IntelicAD, by manufacturing, selling, otherwise supplying and/or licensing computer software for designing sheet metal duct work for the heating, ventilating and air conditioning industry, infringed a patent of CTI. Upon receipt of the lawsuit, IntelicAD requested that Travelers retain legal counsel to defend the claims, under the terms of an insurance policy issued by Traverlrs to Oil Capital Sheet Metal, Inc., which named IntelicAD

as an additional insured. Travelers determined that the claims in the underlying action were not covered by the policy. Consequently, Travelers declined to defend the underlying action.

The parties do not dispute, and the Court agrees, that Oklahoma law applies to the issues in this action. Certain principles are established. An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the potential of liability under the policy. First Bank of Turley v. FDIC of Maryland, 928 P.2d 298, 303 (Okla.1996). The duty arises when the allegations in a complaint, and other information gained by the insurer, indicate a possibility of coverage. Id. at 303 n.14 & n.15. When defining a term found in an insurance contract, the language is given the meaning understood by a person of ordinary intelligence. Max True Plastering Co. v. U.S.F.&G. Co., 912 P.2d 861, 869 (Okla.1996) (footnote omitted). A policy term is ambiguous under the reasonable expectations doctrine if it is reasonably susceptible to more than one meaning. Id. Any doubt whether a duty to defend has arisen must be resolved in favor of the insured. Maryland Cas. Co. v. Willsey, 380 P.2d 254, 258 (Okla.1963).

The insurance policy provides coverage for "[a]dvertising injury' caused by an offense committed in the course of advertising your goods, products or services. . . ." "Advertising injury" is further defined by the policy to include, as relevant here, "misappropriation of advertising ideas or a style of doing

business" and "infringement of copyright, title or slogan." Assuming one of these predicate offenses were found to exist, then the second requirement would have to be met, namely that the injury was "caused by an offense committed in the course of advertising [InteliCAD's] goods, products, or services. If no predicate offense exists, then the inquiry ends; there can be no advertising injury and no corresponding duty to defend. See Novell, Inc. v. Federal Ins. Co., 141 F.3d 983, 988-89 (10th Cir.1998).

It is undisputed that the new advertising injury offense of "misappropriation of advertising ideas or style of doing business" replaced the prior advertising offenses of "unfair competition" and "piracy" in standard insurance contracts like the one at issue. The Insurance Services Office, an insurance industry organization which develops standardized policy language, prepared an "Introduction and Overview" form describing this change in language as intending "no change in scope" (InteliCAD Response Brief at 8) IntelicAD therefore argues that potential coverage exists under any or all of these offenses.

Upon review, this Court joins the majority of published decisions, which favors Travelers. See Everest & Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 229 (9th Cir.1994) (no connection shown between patent infringement and advertising); Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1505 (9th Cir.1994) (patent infringement was not piracy related to advertising); Gencor Industries, Inc. v. Wausau Underwriters Ins. Co., 857 F.Supp. 1560, 1566 (M.D.Fla.1994) (piracy and unfair competition

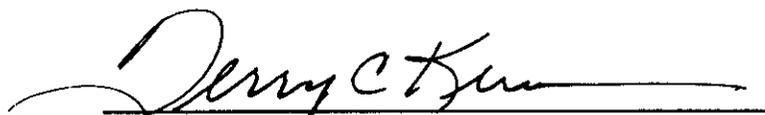
does not include patent infringement); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F.Supp. 423, 428-29 (E.D.Pa.1994) (same), aff'd, 60 F.3d 813 (3d Cir.1995); St. Paul Fire & Marine Ins. Co. v. Advanced International Sys., 824 F.Supp. 583, 585-87 (E.D.Va.1993) (patent infringement does not constitute misappropriation of advertising ideas or style of doing business), aff'd, 21 F.3d 424 (4th Cir.1994).

IntelCAD's attempt to distinguish this authority, by noting that the allegations in the underlying action were claims of inducement to infringe and contributory infringement, is unavailing. This Court agrees with the analysis of Judge Holmes, also of the Northern District of Oklahoma, in BS&B Safety Systems, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, Case No. 96-CV-9-H (Feb.18, 1997), an unpublished opinion which the parties have discussed at length. Addressing identical policy language, Judge Holmes ruled that the policies' definition of "advertising injury" simply cannot be read to include inducement to infringe. Further, even if it could, Oklahoma law prohibits insurance coverage for intentional torts. 15 O.S. §212.

Because the Court has not found no possibility of predicate offense, IntelCAD's subsidiary argument regarding the recent amendment of the Patent Act to include "offers to sell" as a basis for direct and contributory patent infringement liability, does not direct a different result. Under this policy, there is no coverage for any type of patent infringement. Summary judgment is appropriate.

It is the Order of the Court that the motion of the defendant Travelers Property Casualty Company for summary judgment (#10) is hereby GRANTED.

ORDERED this 28 day of September, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 9-30-98

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

INTELICAD COMPUTERS, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 THE TRAVELERS PROPERTY)
 CASUALTY COMPANY,)
)
 Defendant.)

No. 97-C-975-K

FILED
IN OPEN COURT

SEP 29 1998

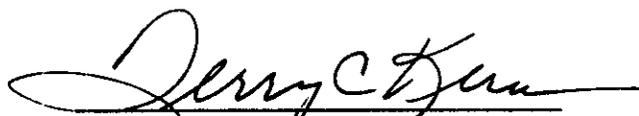
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS 28 DAY OF SEPTEMBER, 1998


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

44

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

ENTERED ON DOCKET
DATE 9-30-98

NOBEL INSURANCE COMPANY,)
)
 Plaintiffs,)
)
 vs.)
)
 PETRO ENERGY TRANSPORT CO.,)
)
)
 Defendant.)

No. 97-C-1079-K

FILED
IN OPEN COURT
SEP 29 1998
F.lli Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On September 11, 1998 Magistrate Judge Joyner entered his Report and Recommendation, The Magistrate Judge recommended that the motion of the defendant to dismiss be denied. Defendant has timely filed an objection to the Report and Recommendation. The Court, as required by Rule 72(b) F.R.Cv.P., has conducted a de novo review of the issues presented. The Report and Recommendation encompasses twenty-eight pages, and reflects great thoroughness of research and reasoning. The defendant's objection, and the arguments of earlier pleadings incorporated therein, also present compelling arguments. This is an exemplary "close call".

To summarize, a lawsuit was filed in Jackson County, Oklahoma, in 1995 by William and Mary Henderson against Petro Energy Transport Co. ("Petro") and Nobel Insurance Company ("Nobel"). The lawsuit arose out of an accident involving a truck operated by Petro; Nobel was named as a defendant because it was Petro's insurer. The lawsuit resulted in a jury verdict in favor of the Hendersons of \$24 million dollars.

The policy limits under the relevant insurance policy were \$5 million dollars. Nobel tendered the policy limits, plus interest and costs, to the Hendersons and obtained a complete release as to Nobel and a partial release (for the amount tendered) as to Petro. On April 4, 1997, the Hendersons filed a petition placing Petro into involuntary bankruptcy in the Western District of Oklahoma. On October 13, 1997, Petro dismissed its appeal of the Jackson County trial. On October 14, 1997, Petro made demand upon Nobel for the balance of the judgment, asserting that Nobel had breached its duty of good faith and fair dealing in various ways. Petro threatened legal action if the dispute were not resolved.

On October 31, 1997, Nobel moved in the Bankruptcy Court for relief from the automatic stay, for the purpose of filing a declaratory judgment action against Petro. Petro opposed the motion, but the Bankruptcy Court granted relief from the automatic stay on December 5, 1997. This action was filed December 8, 1997. Nobel seeks declaratory relief that it fully performed all of its contractual duties and obligations under the contract of insurance between Nobel and Petro. Meanwhile, Petro filed an action in Jackson County, Oklahoma on December 3, 1997, against Nobel and the law firms which represented Petro in the Henderson state court action. Regarding Nobel, Petro alleges in state court that Nobel abandoned Petro, withdrew from the Henderson lawsuit, and left Petro with a \$19 million judgment against it.

Petro asks this Court to dismiss the present action, arguing that the issues are better resolved in the pending state court

proceeding. This Court must consider (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata"; (4) whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective. State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir.1994). The decision is within the discretion of the Court. See Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

The Magistrate Judge concluded, and the Court agrees, that little weight should be given to the fact that the state court action was filed first. The difference was only a matter of days, and Nobel was unable to file earlier because of the automatic stay in the Bankruptcy Court. Essentially, the Magistrate Judge concluded that this action was proceeding more expeditiously than the state court action, and this action involves a narrow issue compared to the potentially vast sweep of the state court action. The Magistrate Judge concluded that, rather than producing friction between state and federal courts, resolution of this action would reflect the courts working "in tandem", with one "thorny legal question" resolved by this Court to the benefit of the parties.

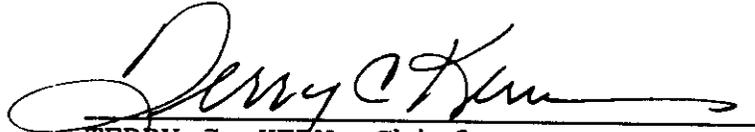
In its objection, Petro protests that a decision in this case will likely result in appeal, and a possible stay of the state

court action. Further, Petro argues that this Court cannot resolve the issue presented simply by reviewing the language of the insurance policy as is normally the case in a declaratory judgment action. Petro contends that, unlike duty to defend and duty to indemnify, an insurance company's response to exhaustion of policy limits is fact-based and contextual. Petro argues that the Jackson County court, by being presented with the full context, will be in a better position to rule on all issues.

At this time, the Court elects to follow the Recommendation of the Magistrate Judge. However, this decision is largely based upon the very lack of factual context which Petro has raised. Nobel has already filed a motion for summary judgment in this case. At the conclusion of its objection herein, Petro advises that it intends to file its own motion for summary judgment on or before September 30, 1998. Petro asks the Court to postpone any decision on the pending summary judgment until briefing can be completed on the Petro motion. The Court will do so. If upon review of the cross-motions for summary judgment and the concomitant factual record, the Court concludes that its discretion would be better exercised permitting the Jackson County court to proceed to judgment on all issues, the Court reserves the right to revisit the retention question.

It is the Order of the Court that the Report and Recommendation of the Magistrate Judge (#36) is hereby AFFIRMED. The motion to dismiss of defendant Petro Energy Transport Co. (#2 & #5) is hereby DENIED.

ORDERED this 28 day of September, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

F I L E D

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:
MICHELLE FELLERS, Debtor,)
)
MICHELLE FELLERS,)
)
Appellant,)
vs.)
)
LONNIE D. ECK,)
)
Appellee.)

No. 98-CV-180-K (M) ✓
(Bankruptcy Case No. 97-2679 M)

ENTERED ON DOCKET

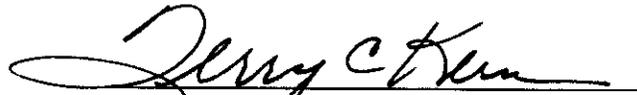
DATE 9-30-98

ORDER

On September 3, 1998, Magistrate Frank H. McCarthy entered his Report and Recommendation regarding the Notice of Appeal filed in the captioned bankruptcy case on October 6, 1997. The Magistrate Judge recommends that the appeal be dismissed for failure to prosecute. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F. R. Civ. Pro. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

It is the Order of the Court that the motion of the respondent to dismiss is hereby GRANTED.

ORDERED this 28 day of September, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT COURT

5

ENTERED ON DOCKET
DATE 9-30-98

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

EARL HEREDEN AND JUDY)
HEREDEN,)
Plaintiffs,)
vs.)
RACA HOWARD)
Defendant.)

Case No. 97-C-1008-K

FILED
IN OPEN COURT

SEP 29 1998

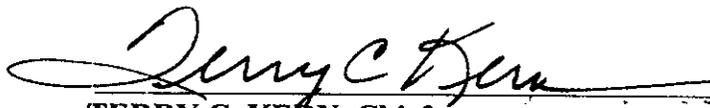
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before the Court is the parties Joint Stipulation for Dismissal With Prejudice. The parties stipulate that they agree that this decision has been reached of their own free will, after consultation with legal counsel.

It is therefore Ordered that this case be dismissed with prejudice.

IT IS SO ORDERED THIS 28 DAY OF SEPTEMBER, 1998.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 9-30-98

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

EDWARD SHANNON AMES,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL, Warden,)
)
Respondent.)

Case No. 97-CV-1085 K (W)

FILED
IN OPEN COURT

SEP 29 1998

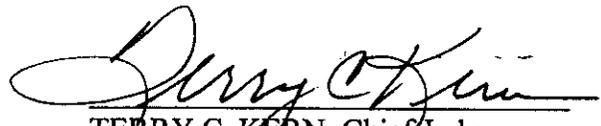
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is Petitioner's motion to withdraw and set aside without prejudice (Docket #5). Petitioner requests dismissal without prejudice of his 28 U.S.C. § 2254 habeas corpus petition as "the petitioner now knows that this case at bar is without merit, legally and factually." The Court finds Petitioner's motion should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motion to withdraw and set aside without prejudice (Docket #5) is **granted** and this action is dismissed without prejudice.

SO ORDERED THIS 28 day of September, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET

DATE 9-30-98

AMERCOOL MANUFACTURING, INC.,)
a Texas Corporation,)

Plaintiff,)

vs.)

No. 96-CV-1016K ✓

ODESSA INDUSTRIES, INC., a foreign)
corporation; and UNIVERSAL)
COMPRESSION SYSTEMS, a foreign)
corporation, aka UNIVERSAL)
COMPRESSION SERVICES; and TSI)
COMPRESSION, a foreign)
corporation,)

Defendant.)

FILED
IN OPEN COURT

SEP 29 1998

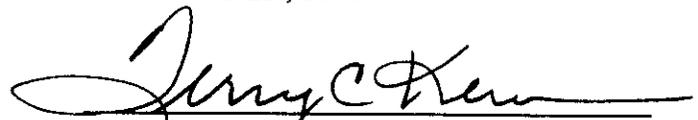
Patricia Compton, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

It has come before this Court the Plaintiff's Application for Assessment of Attorney Fees and Costs (Docket #15) pursuant to a default judgment against Odessa.

IT IS THEREFORE ORDERED that the Plaintiff Americool Manufacturing, Inc., recover from the Defendant, Odessa Industries, the sum of \$5,318.75 (*five thousand, three hundred and eighteen dollars, and seventy-five cents*), with post-judgment interest thereon at the rate provided by law.

IT IS SO ORDERED THIS 28 DAY OF SEPTEMBER, 1998.



TERRY C. KEEN, Chief Judge
United States District Court

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

AMERCOOL MANUFACTURING, INC.,)
a Texas Corporation,)

Plaintiff,)

vs.)

ODESSA INDUSTRIES, INC., a foreign)
corporation; and UNIVERSAL)
COMPRESSION SYSTEMS, a foreign)
corporation, aka UNIVERSAL)
COMPRESSION SERVICES; and TSI)
COMPRESSION, a foreign)
corporation,)

Defendant.)

ENTERED ON DOCKET
DATE 9/30/98

No. 96-CV-1016K

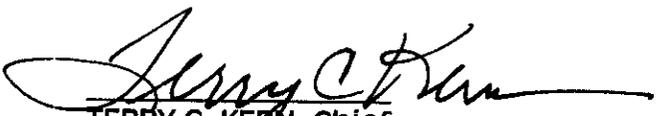
I L E D
U.S. DISTRICT COURT
SEP 29 1998 112
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This was an action for breach of guaranty contract in which Plaintiff prevailed by default judgment rendered against Odessa Industries, Inc. (hereafter "Odessa") issued by this Court and filed on May 16, 1997. Requested in Plaintiff's motion for default judgment against Odessa, and granted by this Court in its Order, was an award of attorney fees and costs.

It is the Order of the Court that the Plaintiff's Application for Assessment of Attorney Fees and Costs (#15) is hereby GRANTED .

ORDERED this 25 day of September, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BAM/dp

JAMES FIELDS AND LYNN FIELDS,)
husband and wife,)

Plaintiffs,)

vs.)

STATE FARM FIRE & CASUALTY)
COMPANY,)

Defendant.)

Case No. 98 CV 591H(E) ✓

ENTERED ON DOCKET

DATE 9/29/98

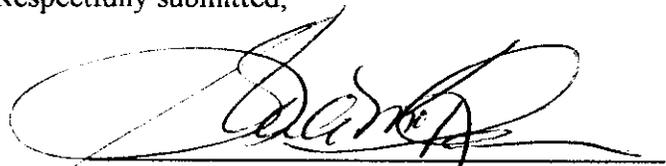
JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties, pursuant to F.R.C.P. 41 submit their joint stipulation for dismissal of the plaintiffs' claims with prejudice to the refiling thereof. The parties are to bear their respective costs and attorney fees. Simultaneously submitted is an order for execution by the Court dismissing this case with prejudice.

Respectfully submitted,


JOHN R. WOODARD, III, OBA #9853

525 S. Main, Suite 1000
Tulsa, OK 74103-4514
(918) 583-7129

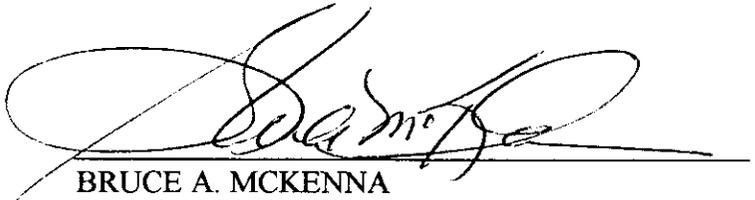


N. FRANKLYN CASEY, OBA #1547
BRUCE A. MCKENNA, OBA #6021
CASEY, JONES & MCKENNA, P.C.
Winston Square, Suite 2
3140 South Winston Avenue
Tulsa, Oklahoma 74135-2069
(918) 747-9654

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was deposited in the U.S. Mail this 24 day of September, 1998, with proper postage thereon fully prepaid, addressed to:

James and Lynn Fields
9205 W. 91st East Ave.
Tulsa, OK 74133-5645



BRUCE A. MCKENNA

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

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMEWARD BOUND, INC., et al.,)
)
Plaintiffs,)
)
v.)
)
THE HISSOM MEMORIAL CENTER,)
et al.,)
)
Defendants.)

Case No. 85-437-E ✓

ENTERED ON DOCKET
DATE SEP 29 1998

ORDER & JUDGMENT

The defendants filed objections to the Applications for Attorney Fees filed by plaintiffs on April 21, 1998, June 2, 1998, and August 7, 1998. The parties have reached settlement of those issues and filed a Stipulation.

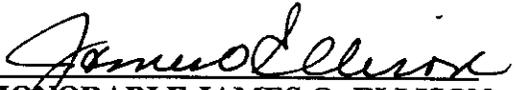
The court has reviewed the Stipulation of parties and hereby approves the Stipulation, including the lodestar hourly rates in the Stipulation.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$11,305.26, and a judgment in the amount of \$11,305.26 is hereby granted on this day.

The hearing scheduled to be held on September 29, 1998, at 10:00 a.m. is hereby stricken.

887

ORDERED this 28th day of September, 1998.


HONORABLE JAMES O. ELLISON
United States District Court

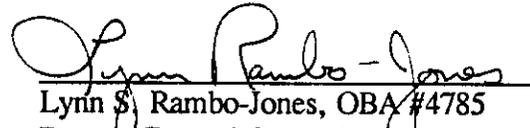

Louis W. Bullock, OBA #1305
Patricia W. Bullock, OBA #9569
BULLOCK & BULLOCK
320 South Boston Ave., Suite 718
Tulsa, OK 74103-3783
(918) 584-2001


Mark Lawton Jones, OBA #4788
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274

- and -

Frank Laski
Judith Gran
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

ATTORNEYS FOR PLAINTIFFS


Lynn S. Rambo-Jones, OBA #4785
Deputy General Counsel
OKLAHOMA HEALTH CARE
AUTHORITY
4545 N. Lincoln, Suite 124
Oklahoma City, OK 73105
(405) 530-3439

ATTORNEYS FOR DEFENDANTS

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

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CYNTHIA L. BUGGS,)
)
 Plaintiff,)
)
 vs.)
)
 COMMERCIAL FINANCIAL SERVICES,)
 INC., an Oklahoma corporation,)
)
 Defendant.)

Case No. 97-CV-921-B(Ea) /

ENTERED ON DOCKET

DATE SEP 29 1998

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff Cynthia L. Buggs' causes of action in this case against Defendant Commercial Financial Services, Inc.

DATED this 25th day of Sept, 1998.

Katherine T. Waller
KATHERINE T. WALLER, OBA No. 15051
403 South Cheyenne Avenue, Suite 1100
Tulsa, Oklahoma 74103
(918) 582-9339
(918) 583-1117 (Fax)

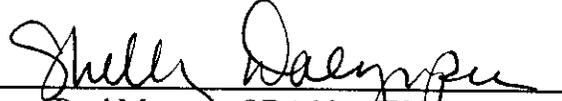
and

KEVIN P. LEGGETT, OBA No. 15030
2211 East Skelly Drive
Tulsa, Oklahoma 74105
(918) 492-4423
(918) 744-8027 (Fax)
Attorneys for Plaintiff

79

CLJ

DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.



Lynn Paul Mattson, OBA No. 5793
Shelly L. Dalrymple, OBA No. 5212
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211
(918) 591-5360 (Fax)
Attorneys for Defendant

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

FILED

SEP 25 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRISTINA M. COX, KEVIN J. COX, and)
DANA COX, individually, and as parents and next)
friends of KELSEY COX, MELISSA COX, and)
BENJAMIN COX, minors,)

Plaintiffs,)

vs.)

Case No. 96-C-206-E

MARVIN BLADES and THE CITY)
OF TULSA,)

Defendants.)

ENTERED ON DOCKET
SEP 28 1998

DATE _____

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #14) of the City of Tulsa and the Motion for Summary Judgment (Docket #17) of the defendant Marvin Blades.

This claim arises out of the murder of Christopher Cox by a gang member on May 11, 1994. Plaintiffs, the parents, spouse, minor child, and minor siblings of Christopher Cox, bring suit based on the Tulsa Police Department's labeling of Christopher Cox as a gang member, and their use of pictures and videotapes taken at the funeral of Christopher Cox in their educational programs on gangs. Plaintiffs make claims against the defendants based on 42 U.S.C. §1983, invasion of privacy, infliction of emotional distress, misrepresentation, negligent supervision and prima facie tort. Defendants seek summary judgment, arguing that there is no policy or custom of the City of Tulsa which caused the deprivation of plaintiffs' constitutional rights, that the actions of defendants did not violate plaintiffs' right to privacy, and that the tort claims are not supported by law, because, if

the elements of intent are present, the City employee, Marvin Blades, acted outside the scope of his employment. Marvin Blades also argues that he is immune from liability under the doctrine of Qualified Immunity.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

§1983 Claim

Defendants assert, correctly, that, in a suit under §1983, plaintiffs must show that there is an official policy or established custom that caused them to be subjected to a deprivation of their constitutional rights. City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2547, 85 L.Ed. 2d 791 (1985). Further, "[i]f the plaintiff asserts the alleged custom or policy comprised a failure to act, he or she must demonstrate the municipality's inaction resulted from deliberate indifference to the

rights of the plaintiff.” Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996)(Citations omitted). Based on this law, the City of Tulsa argues that there is no evidence that it has a policy or custom which caused the alleged constitutional deprivation.

Plaintiffs counter this argument with evidence that there was a lack of supervision within the gang unit, that, in particular, Marvin Blades was not being supervised within the gang unit, that the video presentations of the gang unit were not screened by supervisors in order to approve their content, and that supervisors were aware of the use of funeral videos, and did not prevent it. This evidence raises a question of fact with respect to the requirement of a custom or policy which actually caused the alleged constitutional deprivation.

Defendants’ second argument on the §1983 claim is that there was no constitutional deprivation in connection with the actions of the City or Marvin Blades. Defendant concedes that there is a constitutional “right to privacy,” but asserts that such a right does not exist under the facts of this case. The constitutional right to privacy is limited. It “extends only to highly personal matters representing ‘the most intimate aspects of human affairs.’” Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996)(citations omitted). In determining whether information is of such a personal nature to demand constitutional protection, the court must consider, “1) if the party asserting the right has a legitimate expectation of privacy; 2) if disclosure serves a compelling state interest, and 3) if disclosure can be made in the least intrusive manner.” Denver Policemen’s Protective Association v. Lichtenstein, 660 F.2d 432 (10th Cir. 1981). Here the Court must conclude that the first prong of the test is not met and that there was no legitimate expectation of privacy. The funeral was, in fact, open to the public and announced in the paper. Police were present at the request of the family. As the Court found in similar circumstances in Riley v. St.Louis County of Missouri, _____

F.3d ___, 1998 W1469907 (8th Cir. 1998), though the officer's behavior was inappropriate, it did not violate any constitutional right of privacy, because it was neither a shocking degradation or an egregious humiliation . . . , or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information." Summary Judgment on Plaintiffs' §1983 claim is granted.

State Law Tort Claims

Plaintiffs also assert claims for Intrusion Upon Seclusion, Infliction of Emotional Distress, Prima Facie Tort, and Negligent Supervision. In light of the Court's finding that there was no reasonable expectation of privacy, and no outrageous conduct on the part of the acting officers, See, Riley, each of these state law tort claims must fail. Summary Judgment on Plaintiffs' remaining claims is granted.

Defendants' Motions for Summary Judgment (Docket #'s 14 and 17) are granted. Because the Court concludes that the law does not support the claims asserted by plaintiffs, it does not reach the issue of qualified immunity raised by Marvin Blades.

IT IS SO ORDERED THIS 24th DAY OF JUNE, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

CHRISTINA M. COX, KEVIN J. COX, and)
DANA COX, individually, and as parents and next)
friends of KELSEY COX, MELISSA COX, and)
BENJAMIN COX, minors,)

Plaintiffs,)

vs.)

MARVIN BLADES and THE CITY OF TULSA,)

Defendants.)

FILED

SEP 25 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-206-E ✓

ENTERED ON DOCKET

DATE SEP 28 1998

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motions for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, City of Tulsa and Marvin Blades, and against the Plaintiffs, Chistina M. Cox, Kevin J. Cox, and Dana Cox, individually and as next friend of Kelsey Cox, Melissa Cox and Benjamin Cox. Plaintiffs shall take nothing of their claim.

DATED, THIS 24th DAY OF SEPTEMBER, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

27

ENTERED ON DOCKET
DATE 9-28-98

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

TORDUR WALTER SEGURA and)
ERLA HARDARDOTTIR SEGURA,)
)
Debtors/Appellants,)
)
vs.)
)
WFS FINANCIAL, INC.,)
)
)
)
Appellee.)

No. 98-C-315-K/

F I L E D

SEP 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On August 25, 1998, Magistrate Judge Joyner entered his Report and Recommendation regarding the parties' motions to dismiss this appeal. Appellants borrowed money from appellee at a rate of 21%. Appellants then filed for Chapter 13 bankruptcy and proposed a plan that would repay Appellee at a rate of 10%. Upon objection by Appellee, the Bankruptcy Court after hearing entered an order which confirmed a Chapter 13 plan that would repay Appellee with an interest rate of 17.2%. Appellants filed the present appeal.

While the appeal was pending, the Bankruptcy Court dismissed the underlying Chapter 13 case for failure of Appellants to make payments under the plan. Both sides then filed in this Court motions to dismiss the appeal as moot, but requested additional relief. Appellee asked to be declared the prevailing party under Rule 41(b) F.R.Cv.P.. The Magistrate Judge recommended denial of that request, and Appellee has not filed an objection. Upon review, the Court agrees with the Magistrate Judge.

12

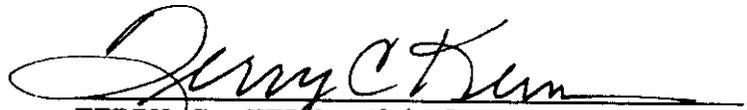
Appellants requested that this Court vacate the underlying order of the Bankruptcy Court. The Magistrate Judge recommended denial of this request as well, citing authority for the proposition that while vacatur may sometimes be appropriate where mootness is caused by happenstance, "[h]appenstance does not include cases resolved by actions attributable to the parties, such as a negotiated settlement." City of Albuquerque v. Browner, 97 F.3d 415, 421 (10th Cir.1996). Appellants argue that, unlike a settlement, this case was not dismissed based upon their voluntary action, but because they were financially unable to make payments. While it appears no decision has directly addressed this point, the Court finds the "bright line" rule recommended by the Magistrate Judge preferable. Adopting the Appellants' argument would leave the path open to a similarly situated Appellant to fail to make payments, whether for lack of funds or as a strategic maneuver, and gain vacatur of the payment order. This would open to relitigation the very issues already decided by the lower court, which is the situation which Browner and the cases it cites warn against.

Even as a practical matter, the Court does not accept Appellants' arguments. Their brief states, in essence, that their conduct could not have been strategic because "[r]elitigation of the issue would not. . . be of any benefit to the Appellants." (Appellants' Brief at 5). If so, there is no reason to vacate the Bankruptcy Court's order. Appellants further contend that the issue represented by the Bankruptcy Court's order is an important one, deserving of appellate review. Dismissal of this appeal as

moot has no effect on future appeals. If some future Chapter 13 debtor is subjected to a similar order, that debtor may appeal. Leaving in place the Bankruptcy Court's order below in no way restricts the appellate rights of another party in a separate case.

It is the Order of the Court that the Report and Recommendation of the United States Magistrate Judge is AFFIRMED. The motions to dismiss of the parties (##5 & 6) are GRANTED in part and DENIED in part. This appeal is declared moot and DISMISSED. Appellee is not declared a prevailing party, and the order of the Bankruptcy Court below is not vacated. This Order constitutes a final order in 98-C-315-K.

ORDERED this 25 day of September, 1998.


TERRY C. KEEN, Chief
UNITED STATES DISTRICT JUDGE

DATE 9-28-98

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

GARLAND LANE,)
)
Plaintiff,)
)
vs.)
)
ELEMENTARY SCHOOL DISTRICT)
NO. 30 OF DELAWARE COUNTY,)
OKLAHOMA a/k/a/ KENWOOD)
PUBLIC SCHOOLS; and JOHNNIE)
BACKWATER,)
)
Defendants.)

No. 96-CV-541-K

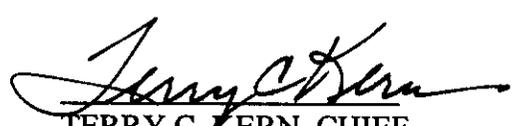
FILED
SEP 28 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Before the Court is Plaintiff's Application for Award of Attorney Fees (Docket #77) pursuant to 42 U.S.C. Section 1988, Rule 54(d) of the Federal Rules of Civil Procedure, and Local Rule 54.2.

IT IS THEREFORE ORDERED that the Plaintiff Garland Land recover from the Defendants the sum of \$110,717.50 (*one hundred and ten thousand, seven hundred and seventeen dollars, and fifty cents*), with post-judgment interest thereon at the rate provided by law.

IT IS SO ORDERED THIS 25 DAY OF SEPTEMBER, 1998.


TERRY C. KERN, CHIEF
United States District Judge

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

ENTERED ON DOCKET
DATE 9-28-98

GARLAND LANE,)
)
Plaintiff,)
)
vs.)
)
ELEMENTARY SCHOOL DISTRICT)
NO. 30 OF DELAWARE COUNTY,)
OKLAHOMA a/k/a/ KENWOOD)
PUBLIC SCHOOLS; and JOHNNIE)
BACKWATER,)
)
Defendants.)

No. 96-CV-541-K ✓

F I L E D

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Plaintiff's Application for Award of Attorney Fees (Docket #77) pursuant to 42 U.S.C. Section 1988, Rule 54(d) of the Federal Rules of Civil Procedure, and Local Rule 54.2.

I. Litigation History

This matter came before the Court for consideration of the parties' cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on April 14, 1997, the Court found summary judgment appropriate in favor of Defendant, Jerry Whiteday, on all claims. Additionally, the Court found summary judgment appropriate in favor of Plaintiff, Garland Lane, as to his Due Process Claim against Elementary School District No. 30 of Delaware County, Oklahoma a/k/a Kenwood Public Schools and Johnnie Backwater. Summary judgment was denied in all other respects, and the issue of damages for the Plaintiff's Due Process Claim was submitted to the jury.

This action came on for jury trial before the Court, the Honorable Terry C. Kern, District Judge, presiding. On May 2, 1997, the jury returned its verdict for the Plaintiff and against the Defendants Elementary School District No. 30 of Delaware County, Oklahoma a/k/a Kenwood Public Schools and Johnnie Backwater as to the Plaintiff's First Amendment and Open Meetings Act claims, and the jury awarded \$140,000 in back pay, \$10,000 in emotional distress, and \$65,000 in front pay damages to the Plaintiff, as to his Due Process and First Amendment claims. Additionally, the jury awarded \$1,000 in punitive damages against Defendant Johnnie Backwater. The punitive damages amount, pursuant to the stipulation of the parties, was remitted by the Court to \$100.

Now pursuant to 42 U.S.C. 1988, plaintiff, as the prevailing party, moves to collect attorney fees from the defendants in the amount of \$110,717.50 (*one hundred and ten thousand, seven hundred and seventeen dollars, and fifty cents*), and asks, also, for a 25% enhancement, bringing the total to \$138,396.88 (*one hundred and thirty-eight thousand, three hundred and ninety-six dollars and eighty-eight cents*). Defendants have objected to plaintiff's Motion.

II. Applicable Law

Title 42 U.S.C. Section 1988, provides statutory authority and jurisdictional power for a federal court to award attorney's fees to the prevailing party in civil rights cases arising under the statute. The Act vests in the Court broad discretion in assessing an award of attorneys fees, and provides, in part:

"In any action or proceeding...to enforce a provision of section...1983 of this title... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

A plaintiff may be considered the "prevailing party" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought

in bringing suit. Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (CA1 1978). Once the plaintiff has been determined to be the "prevailing party," it is up to the discretion of the district court to determine what fee is "reasonable." Carter v. Sedgwick County, Kan., 36 F.3d 952, 956 (10th Cir. 1994). The appellate court may review the district court's determination under an abuse of discretion standard. V-1 Oil Co. v State of Wyoming, Dept. of Environmental Quality, 902 F.2d 1482, 1489 (10th Cir. 1990).

A common method of computation is known as the "lodestar" method. That is, the number of hours reasonably expended on litigation multiplied by the reasonable hourly rate. Smith v. Norwest Financial Acceptance, Inc., 129 F.3d 1408 (10th Cir. 1997). Determining the reasonableness of hours and reasonableness of the hourly rate requires the district court to examine such factors as: the adequacy of documentation of the hours worked and tasks performed; the rate at which the lawyer has billed the client; and fee requests which include tasks deemed redundant, excessive, or unnecessary. Hensley v Eckerhart, 461 U.S. 424 (1983). This, however, is only the initial stage of the inquiry. Id.

The district court may still see fit to adjust the fee award up or down once the product of reasonable hours at a reasonable rate has been determined. The most crucial factor in making such an adjustment is examining the "results obtained." Hensley at 435. This is particularly crucial where the plaintiff is deemed the "prevailing party," even though she succeeded on only one or a few of the claims for relief. Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989). Under these circumstances, the Supreme Court has mandated the inquiry focus on two essential questions. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which she succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? Id.

Where the plaintiff has failed to prevail on a claim that is distinct in all respects from her successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have the attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained. Hensley at 441. It is crucial that the district court's determination, whether adjusting the fee up or down, takes into account the critical element of plaintiff success.

III. Discussion

This Court is asked to decide today whether the plaintiff should be awarded attorney's fees as the "prevailing party" pursuant to the fee-shifting provisions of 42 U.S.C. 1988, and, if so, whether the attorney's fees should be enhanced.

At the outset, no fee award is permissible unless the plaintiff successfully crosses the statutory threshold of "prevailing party" status. Texas State Teachers, 489 U.S. at 789. The "prevailing party" is one who has succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. Nadeau at 278-79. Lane is clearly the prevailing party in this litigation. After a complete trial on the merits, the jury awarded \$140,000 in back pay, \$10,000 in emotional distress, and \$65,000 in front pay damages to the plaintiff, as to his Due Process and First Amendment claims.¹ Lane need not succeed on every claim to be

¹Additionally, the jury awarded \$1,000 in punitive damages against Defendant Johnnie Backwater. The punitive damages amount, pursuant to the stipulation of the parties, was remitted by the Court to \$100.

considered the prevailing party, but only had to succeed on a "significant issue" in the litigation. Id. We determine that Lane has clearly satisfied the definition of "prevailing party" for purposes of fee shifting.

The plaintiff asks this Court to apply the general rule that a prevailing party is entitled to attorney's fees under the fee shifting statute. The plaintiff further urges this Court to apply the "lodestar" method *supra*, as the basis for computing the fees. That method is commonly implemented as the "reasonable" calculation of fees. Carter at 956. Plaintiff's own calculations of fees, utilizing the lodestar calculation method, total \$110,717.50. Plaintiff asks, additionally, for a 25% enhancement on the grounds that the case was novel, complex, and difficult, and adequately satisfies all other criteria for enhancement.

The defendants object to the plaintiff's request on several grounds. First, the defendants assert that the number of hours for which compensation is sought is excessive. Second, the defendants contend that the fees should not be enhanced in this case, as the facts and circumstances arising here are not "exceptional," and thus fail to meet the standards for enhancement. Finally, the defendants argue that the plaintiff is requesting compensation for items not constituting "fees," either by statute or case law. For these reasons, the defendant urges this Court to deny plaintiff's attempts at enhancement of the fees, and, additionally, to adjust the fees downward for unallowable expenses.

Reasonable Attorney's Fees

Defendants contend that the number of hours for which compensation is sought in this case is excessive. The defendants contend that plaintiff's counsel reported over 600 hours of work in this case, whereas the total time for all of defendant's lawyers totaled just over 400 hours. In support for their argument, defendants cite Ramos, asserting that, when making a determination of whether

hours billed are reasonable, the Court must look at the hours spent on each specific task, the total number of hours reported by the lawyer, the number of hours spent on a daily basis in the case, and whether the hours charged are truly billable to the client. Ramos at 552-54.

After a careful application of the Ramos factors, we find that the 600 hours expended on this litigation by plaintiff's counsel is not *per se* unreasonable. Civil rights cases are complex and challenging to undertake, oftentimes turning on carefully crafted recreations of events, and relying only on circumstantial evidence. Although plaintiff's attorney spent a considerable amount of time on this litigation, she did so with considerable success. We do not find that 600 hours expended over a period of more than a year is an unreasonable amount of time in a case of this nature and magnitude.

In following Ramos, we have also examined the application for fees to determine if there is a duplication of services. Duplication of services can rapidly increase a fee calculation, and, when such duplication has occurred, the fee should be reduced accordingly. Id. at 554. Ramos points out, however, that duplication of services generally arises when there is more than one lawyer working on a case. In fact, in Ramos, the court was inquiring into a situation in which more than a dozen attorneys worked on a case, with at least five attorneys spending more than 200 hours each on the case, with 2 additional attorneys spending more than 2000 hours each on the case. There is no comparable duplication here. Lane's attorney was, and is, a sole practitioner, and did not enlist the help of additional counsel.² Although plaintiff's attorney utilized the services of a legal assistant, considering the fact that this case went all the way to trial, we do not find that 68.5 hours time put

²Ramos next instructs that the inquiry turn towards "reasonable hourly rate." The rate at which plaintiff's attorney charges clients is not at dispute in this litigation. The parties have stipulated that plaintiff's counsel's services will be billed at \$175/hour for non-trial hours and \$200/hour for trial hours.

in by the assistant is unreasonable. Furthermore, a careful review of the application for fees indicates no duplication of services.³

Additionally, defendants take issue with the time billed by plaintiff's attorney and her assistant for hours traveling between Oklahoma City and Tulsa for trial. Defendants cite Ramos once again for the argument that the time for travel is not compensable. Ramos states: "...because there is no need to employ counsel from outside the area in most cases, we do not think travel expenses for such counsel between their offices and the city in which the litigation is conducted should be reimbursed." Ramos at 559. First, we find that travel "expenses" in Ramos was referring to costs, not fees. The court in Ramos was dealing with a situation in which the district court had disallowed travel costs to and from Denver for counsel based in Washington, D.C. From a careful examination of the law in this area, we find that statement is not intended to indicate that a lawyer's travel time should not be billed as a regular fee charge. Here, the plaintiff's attorney has included her travel expenses in the bill of costs, which has since been resolved. We find that the actual travel time between plaintiff's attorney's home and trial is a routine fee that would be billed to a client, and is, therefore, properly included in the application for fees.

Defendants, additionally, contend that plaintiff's counsel billed time improperly, and, therefore, those entries should not be included in the application for fees. The defendants dispute plaintiff's attorney's billing methods, time spent litigating dismissed claims, and telephone conversations which the defendant argues were unwarranted. We have reviewed these records and find that, although some efforts undertaken by plaintiff's lawyer were, undoubtedly, futile, there is no blatant running of fees in this case. Although Lane seeks compensation for litigating claims that

³The legal assistant for plaintiff's attorney was billed out at \$25/hour. Defendants do not take issue with this hourly rate.

never came about due to a granted motion to dismiss, we find that plaintiff's success in this case was clear. In the early stages of litigation, avenues inevitably will be explored that will, at times, turn out to be dead-ends. We decline to reduce the attorney's fees on this basis, finding no evidence of a misuse of time and resources.

Enhancement of Fees:

The plaintiff asks this Court to enhance the attorney's fees by 25% based upon the novelty of the question of law presented, the contingent risk of the litigation, and the results obtained by counsel for the plaintiff. In support of the argument for enhancement of fees, plaintiff asks this Court to apply the twelve factors articulated in Ramos which are used to justify enhancement. Ramos v Lamm, 713 F.2d 546 (10th Cir. 1983).⁴ The defendant agrees that most of these factors are applicable in determining whether a fee should be enhanced, but argues that the plaintiff has failed to satisfy the criteria in almost every instance. We agree.

Ramos sets out twelve factors to be applied by district courts when articulating specific reasons for fee awards. The court recognizes, nevertheless, that some are weighed more heavily than others; in fact, some of the factors are "seldom applicable." Ramos at 552. The plaintiff contends that the "exceptional" circumstance referred to in Hensley v Eckerhart, 461 U.S. at 435, which justifies a fee enhancement, exists in this case. The plaintiff argues that, when applying the twelve factors of Ramos, his attorney should be awarded a fee in excess of that reasonably calculated via the lodestar method.

⁴The twelve criteria are as follows: time and labor required; novelty and difficulty of the questions the fee is fixed or contingent; time pressure imposed by the client or the circumstance; the amount involved and the results obtained as a result of the attorney's services; the experience, reputation and ability of the attorney; the undesirability of the case; the nature and length of the professional relationship with the client and; awards in similar cases. Ramos at 546.

We agree that this litigation involved complex facts which were difficult to prove in court. We have found that plaintiff's attorney, in billing more than 600 hours in this litigation, did not expend an unreasonable amount of time working on this case, given its challenging nature. Nevertheless, we do not find that the circumstance rises to the level necessary to justify a fee enhancement, particularly considering the generous hourly rate stipulated to by the parties, and the number of hours expended in this case.

The issues in this case were complicated, but not particularly novel. Civil rights litigation now comprises a large part of federal trial and appellate litigation, and the issues presented here were not cutting-edge. Furthermore, as Ramos points out, though civil rights litigation certainly has the propensity to inspire opposition within a community, that stigma is largely dead due to the increasing volume of civil rights litigation. We agree with the defendants that this case did not carry with it such a burden that the courage it took Lane's lawyer to undertake it warrants an enhancement of the award. See Ramos at 557.

The plaintiff also contends that his attorney has attained such a high level of skill that the fee warrants enhancement. The "brilliance" of an attorney can sometimes be so astonishing as to justify a fee enhancement. Although, as Ramos instructs, the "genius factor" should be viewed in the context of the number of hours expended on a case—as the number of hours increases, the "genius factor" diminishes. Ramos at 557.

The plaintiff, it appears, has overlooked the Supreme Court's holding in Blum v. Stenson, which greatly limited the circumstances in which the lodestar fee can be enhanced. 465 U.S. 886 (1984). In that case, the Court held that the "novelty and complexity of the issues" and "the special skill and experience of counsel" are reflected in the lodestar fee, and therefore cannot be used as a basis for enhancement. Id. at 898-99. In addition, the Court held that although the "quality of

representation" and the results obtained by counsel are generally reflected in the lodestar fee, these two factors can be used to adjust the lodestar fee upwards "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" Id. at 899 (citing Hensley, 461 U.S. at 435). The Court in Blum agreed that the quality of representation of the plaintiff's attorneys was excellent. The Court also found that had it not been for the excellent quality of her attorneys she probably would not have prevailed on any claims, and therefore the results obtained were exceptional. The Court nevertheless concluded that although the attorneys were excellent and the outcome was exceptional given the specific facts of the case, the outcome was not exceptional when one considers the hourly rate the Court awarded to plaintiff's lead attorney. The rate awarded, at \$200/hour, the identical rate in this case for counsel's trial hours, was a premium rate and "accurately reflect[ed] the excellent representation he provided and the exceptional result he obtained." Thus, the Court declined to enhance the lodestar fee. We find the circumstances present in Blum are remarkably similar to the present case.

While plaintiff's attorney is skilled and did achieve considerable success for the plaintiff, we hold that plaintiff's attorney has been compensated for her performance through the lodestar fee. Furthermore, while the attorney obtained a successful verdict for the plaintiff, it was not such an exceptional result as to justify a 25% fee enhancement. The plaintiff has failed to convince this Court that the fees should be enhanced.

Additional Expenses

The Defendants take issue with some of the expenses claimed by plaintiff's lawyer, alleging

that they are costs not covered by the fee shifting statute. These items are properly characterized as "costs" and not "fees," and therefore, have been appropriately dealt with in the Bill of Costs Hearing which took place September 4, 1997.

IV. Conclusion

We find that the hours expended by plaintiff's counsel in this litigation are not unreasonable. Additionally, we find that the plaintiff has failed to satisfy the standard required for an enhancement of fees. All other disputes presented here have been resolved through the Bill of Costs Hearing.

It is the Order of the Court that the motion of the Plaintiff for attorney's fees is hereby GRANTED in the amount of \$110,717.50. The request for a 25% fee enhancement is DENIED.

ORDERED this 25 day of September, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE 9-28-98

HOWARD C. MARQUEZ,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE,)
)
Respondent.)

Case No. 98-CV-625-K (J) /

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Petitioner's motion to dismiss without prejudice to refiling (Docket #3) submitted in compliance with the Court's Order entered September 1, 1998. Petitioner requests dismissal without prejudice of his 28 U.S.C. § 2254 habeas corpus petition due to the pendency of post-conviction proceedings in state court. The Court finds Petitioner's motion should be granted. Petitioner is advised that once the Oklahoma Court of Criminal Appeals issues its final order in a properly filed post-conviction appeal and in the event the state courts do not grant Petitioner's requested post-conviction relief, then Petitioner should refile his federal habeas petition, to include all exhausted claims, within the time remaining on his limitations clock.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motion to dismiss without prejudice to refiling (#3) is **granted** and this action is dismissed without prejudice.

SO ORDERED THIS 25 day of September, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

4

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

ENTERED ON DOCKET
DATE 9-28-98

KENNETH T. REYNOLDS,)
)
Petitioner,)
vs.)
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

No. 98-CV-533-K (M)

FILED
SEP 28 1998

ORDER

Phil Lombard
U.S. DISTRICT COURT

Petitioner, a state prisoner appearing *pro se*, has filed a "Brief in Support of Motion for Writ of Mandamus In Order to Receive Transcripts" (Docket #1). Plaintiff requests an order compelling "the State of Oklahoma . . . pursuant to Okla. Stat. Tit. 20 § 106.4 (1988)" to provide "petitioner's transcripts and other pertinent records of his trial proceedings at public expense and pursuant to Rule (6) of the F.R.C.P."

Even if the Court liberally construes Petitioner's action as one in the nature of mandamus,¹ this Court lacks subject matter jurisdiction to compel state or county officials, such as the Tulsa County District Court or the Tulsa County Public Defender's Office, to perform a duty owed to Plaintiff. See 28 U.S.C. § 1361 (providing that federal court has jurisdiction to compel an officer or employee of the United States to perform a duty owed to plaintiff). Accordingly, Petitioner's action in the nature of mandamus is hereby **dismissed for lack of subject matter jurisdiction.**

IT IS SO ORDERED this 25 day of September, 1998.


Terry C. Kern, Chief Judge
United States District Court

¹The writ of mandamus has been abolished, see Fed. R. Civ. P. 81(b).

4

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

THE TRUST COMPANY OF OKLAHOMA,)
PERSONAL REPRESENTATIVE OF THE)
ESTATE OF JANE SELF, DECEASED,)

Plaintiff,)

vs.)

VIRGINIA MOSBURG,)

Defendant.)

F I L E D

SEP 25 1998 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 9/28/98

CIVIL ACTION NO. 97-CV-1018H(W)✓

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of 9/25/98 and the declaration of L. Cole Cooper of Doerner, Saunders, Daniel & Anderson, L.L.P., that the Defendant, Virginia Mosburg, 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 25 day of Sept, 1998.

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

By: J. Cole
Deputy

DATE 9-28-98

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

JAMES JONES,)
)
 Plaintiff,)
)
 vs.)
)
 WAL-MART STORES, INC.)
 d/b/a SAM'S CLUB, a Delaware)
 Corporation,)
)
 Defendant.)

No. 94-C-867-K ✓

FILED
 SEP 28 1998 (1)
 Phil Lombardi, Clerk
 U.S. DISTRICT COURT

ORDER

Before the Court is the motion of Plaintiff for attorney fees (Docket #84) pursuant to Title VII of the Civil Rights Act, 42 U.S.C. Section 2000(e), and Local Rule 54.2.

I. Litigation History

On September 12, 1994, plaintiff commenced this litigation by filing a complaint alleging racial discrimination pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000(e)-5). On December 31, 1995 the District Court, Northern District of Oklahoma, granted the defendant's motion for summary judgment, and Judge Kern entered a judgment for the defendant, against the plaintiff. The plaintiff appealed this decision to the Tenth Circuit Court of Appeals. The Court of Appeals determined that two of the plaintiff's claims were properly disposed of on summary judgment, but reversed on the claim of discriminatory work assignment, remanding it to the District Court. After a jury trial, a verdict was entered December 23, 1997 for the plaintiff. The judgment, dated January 6, 1998, stated the plaintiff was ordered to recover from the defendant the sum of

\$10,000 in actual damages and \$0 in punitive damages.

Now pursuant to 42 U.S.C. 2000(e) *et seq.*, plaintiff, as the prevailing party, moves to collect attorney fees from the defendant in the amount of \$46,378.00 (*Forty-Six Thousand Three hundred and Seventy-Eight Dollars and 00/100*). Defendants have objected to plaintiff's Motion.

II. Applicable Law

The Civil Rights Act of 1964, Section 701 *et seq.*, codified as 42 U.S.C. Section 2000(e) *et seq.*, provides statutory authority and jurisdictional power for a federal court to award attorney's fees to the prevailing party in civil rights cases arising under the statute. The Act vests in the Court broad discretion in assessing an award of attorneys fees, and provides, in part:

"In any action or proceeding under this title the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs."

A plaintiff may be considered the "prevailing party" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (CA1 1978). Once the plaintiff has been determined to be the "prevailing party," it is up to the discretion of the district court to determine what fee is "reasonable." Carter v. Sedgwick County, Kan., 36 F.3d 952, 956 (10th Cir. 1994). The appellate court may review the district court's determination under an abuse of discretion standard. V-1 Oil Co. v State of Wyoming, Dept. of Environmental Quality, 902 F.2d 1482, 1489 (10th Cir. 1990).

A common method of computation is known as the "lodestar" method. That is, the number of hours reasonably expended on litigation multiplied by the reasonable hourly rate. Smith v. Norwest Financial Acceptance, Inc., 129 F.3d 1408 (10th Cir. 1997). Determining the reasonableness

of hours and reasonableness of the hourly rate requires the district court to examine such factors as: the adequacy of documentation of the hours worked and tasks performed; the rate at which the lawyer has billed the client; and fee requests which include tasks deemed redundant, excessive, or unnecessary. Hensley v Eckerhart, 103 S.Ct. 1933, 1939 (1983). This, however, is only the initial stage of the inquiry. Id.

The district court may still see fit to adjust the fee award up or down once the product of reasonable hours at a reasonable rate has been determined. The most crucial factor in making such an adjustment is examining the "results obtained." Hensley at 1940. This is particularly crucial where the plaintiff is deemed the "prevailing party," even though she succeeded on only one or a few of the claims for relief. Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989). Under these circumstances, the Supreme Court has mandated the inquiry focus on two essential questions. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which she succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? Id.

Where the plaintiff has failed to prevail on a claim that is distinct in all respects from her successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have the attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained. Hensley at 1943. It is crucial that the district court's determination, whether adjusting the fee up or down, takes into account the critical element of plaintiff success.

III. Discussion

This Court is asked to decide today whether the plaintiff should be awarded attorney's fees as the "prevailing party" pursuant to the fee-shifting provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000(e)-5).

At the outset, no fee award is permissible unless the plaintiff successfully crosses the statutory threshold of "prevailing party" status. Texas State Teachers, 489 U.S. at 789. The "prevailing party" is one who has succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. Nadeau at 278-79. Jones is clearly the prevailing party in this litigation, even though he did not succeed on every claim which he initially brought. After a complete trial on the merits, the jury determined that there was validity to Jones' allegation of discriminatory work environment, and he was awarded damages as compensation for his injuries. Jones need not succeed on every claim to be considered the prevailing party, but only had to succeed on a "significant issue" in the litigation. Id. We determine that Jones has clearly satisfied the definition of "prevailing party" for purposes of fee shifting.

The plaintiff asks this Court to apply the general rule that a prevailing party is entitled to attorney's fees under the fee shifting statute. The plaintiff further urges this Court to apply the "lodestar" method *supra*, as the basis for computing the fees. That method is commonly implemented as the "reasonable" calculation of fees. Carter at 956. Plaintiff's own calculations of fees, utilizing the lodestar calculation method, total \$46,378.00.

The defendant objects to the plaintiff's request on several grounds. First, the defendant contends that the plaintiff has failed to demonstrate that the billing method was proper. The defendant argues that the plaintiff's attorneys did not charge the market rate in the relevant community, that billing procedures were not meticulously recorded, and that the billing records

reflect a redundancy in the performance of tasks. Second, the defendant claims that there is a defect in plaintiff's calculation of fees, because there is no substantiation of the difference between the hours expended on plaintiff's only remaining claim at trial after the defendant had succeeded on summary judgment on all other claims. For these reasons, the defendant urges this Court to deny all attorney's fees to plaintiff, or, at a minimum, adjust them downward.

The fee applicant must show that the rates sought are comparable to those prevailing in the relevant community. Blum v. Stenson, 465 U.S. 886 (1984). The attorney fee rate should reflect "the special skill and experience of counsel." They should be the rates received by comparable attorneys in the appropriate geographical area. Blum at 898.

Jones addresses the defendant's objections in *Plaintiff's Unopposed Motion for Leave to Supplement Plaintiff's Reply to Defendant's Response to Plaintiff's Application for Assessment of Attorney Fees*. Plaintiff included with that Motion affidavits from practicing lawyers in the community as evidence of a "reasonable" hourly rate for similar cases from attorneys with similar experience. Those affidavits demonstrate that the plaintiff's lawyers' hourly fees of \$125 and \$200 per hour, were not unreasonable. As the affidavits indicate, the plaintiff's attorneys had comparable experience to the affiants, as well as a certain degree of expertise in the civil rights arena, and their billing procedures and amounts were comparable to their colleagues.¹

Attorney Louis Pappas has eighteen (18) years of experience as a trial lawyer in this area and

¹The affidavit of James E. Frasier, a lawyer in the Tulsa area, having 33 years of experience in civil litigation, including discrimination cases, stated that a \$200/hour charge by Goodwin was fair. Louis Bullock, a trial lawyer in the Tulsa area with 23 years of experience, including civil rights cases, stated that he charged around \$200/hour to clients. He stated further that is a fair rate, particularly for someone with Goodwin's experience, and for litigation taking place in federal court. D. Gregory Bledsoe, also an attorney, stated in his affidavit that he currently charged \$175/hour in this area, and is considering raising his rates to \$200/hour. He stated that \$200/hour was a reasonable fee for federal litigation involving a discrimination suit.

charges \$125/hour for his services. Goodwin, who has more than thirty (30) years of experience, charges \$200/hour. Additionally, the affiants point out that federal litigation is generally considered more complex and intellectually taxing than other areas of trial work, and therefore, the gravitation of the fees towards the higher end of the fee spectrum is not unreasonable.

The defendant claims, furthermore, that the plaintiff's lawyers did not keep accurate records as to how time was spent. Attorney Goodwin, for example, does not record his own time, but leaves that task to members of his staff. The defendant claims that this method results in "block billing" and wholly inaccurate records. Although it is with some trepidation that we approve Attorney Goodwin's "hands-off" billing methods, a lengthy review of those records indicates no wrongdoing or fabrication. The law dictates that legal records be meticulously maintained, and that attorneys explain their services and time spent in detail. We have found that both Attorneys Pappas and Goodwin have done so. From a careful review of the records, we believe plaintiff's attorneys' records satisfy that standard.

In addition, the defendant takes issue with Attorney Goodwin's use of staff. Apparently, in the trial which took one and a half days, plaintiff's attorney enlisted the help of a less senior lawyer, Attorney Michael Goss, who was billed out at \$110/hour, as well as the assistance of a law clerk. The defendant claims that the use of two attorneys and a law clerk was "completely unnecessary and simply an arbitrary decision by the attorney to use more support than necessary under the circumstances."² The defendant alleges that Attorney Goodwin was "completely capable of doing the work he delegated to Mr. Goss." This is most likely true, although this Court is persuaded by plaintiff's explanation of Mr. Goodwin's decision to enlist the help of another attorney. Mr.

²Defendant's Response at 5.

Goodwin's time is billed at a much higher rate (\$200/hour) than Mr. Goss' (\$110/hour). Thus, although Mr. Goodwin could have performed the same services, it actually was more cost effective to delegate these duties to a less senior attorney and law clerk.

Defendant's second argument is that plaintiff's claims can be separated out clearly, and that attorney's fees should be completely stricken regarding those claims on which the plaintiff did not succeed. The defendant focuses primarily on the work of Attorney Pappas who "...made no differentiation in his attorney time for issues on which Defendant prevailed for summary judgment and the one issue in which Defendant initially prevailed that was sent back down..."³ The Defendant further takes issue with the fact that Pappas' time includes the time spent pursuing administrative remedies.

The Supreme Court has held that where plaintiff's claims are based on different facts and legal theories, and the plaintiff has prevailed on only some of those claim, the congressional intent to limit fee awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim. Hensley, 461 U.S. at 435. But, the Supreme Court has recognized that the more typical situation is one in which the plaintiff's claims arise out of a common core of facts, and involve related legal theories, making the inquiry much more complex. In such a case, the Supreme Court has held that the most critical factor is the degree of success obtained. Id. at 436.

The Supreme Court notes that in complex civil rights litigation, "the plaintiff often may succeed in identifying some unlawful practices or conditions," but that "the range of possible success is vast," and the achievement of prevailing party status alone "may say little about whether

³Defendant's Response at 4.

the expenditure of counsel's time was reasonable in relation to the success achieved." Texas State Teachers, 489 U.S. at 789. It is here that the Supreme Court held:

"...the district courts should exercise their equitable discretion in such cases to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff." Id.

In this civil rights case, it is impossible to neatly sort out Jones' claims. From a common core of facts, he brought this lawsuit, alleging racial discrimination. Though his complaint was broken down into claims regarding discrimination in promotion, dismissal, and in job assignment, the core of the case was the same for all three issues. It would be unfair and impossible to attempt to dissect this case, wiping out attorney's fees for those claims on which the plaintiff did not prevail. However, the Supreme Court has held *supra* that it is crucial that the district court award attorney's fees based on the degree of plaintiff's success. It is here that we look more closely at the fees at issue.

The plaintiff, Mr. Jones, initially filed a complaint alleging \$50,000.00 in actual damages, and \$50,000.00 (or more) in punitive damages to punish the defendant for the alleged discriminatory conduct. The jury found, on remand, that Mr. Jones was entitled to \$10,000 in actual damages, but found no evidence of malice on the part of the defendant, and thus awarded the plaintiff \$0 in punitive damages. Obviously, there exists a significant gap between the amount of money plaintiff requested, and that awarded by the jury. It is on these grounds that we reduce the attorneys' fees in this case.

As discussed *supra*, the Supreme Court has held that plaintiff success is the most crucial factor in determining an award of attorney's fees, particularly where the plaintiff is the prevailing party, but did not succeed on all issues. Further, as in Jones' situation, the claims cannot be cleanly separated so that this Court may award attorney's fees to claims on which plaintiff was successful,

but deny them on all others. The nature of civil rights cases is such that, from a complicated core of facts comes several claims on which there is a vast range of possibilities for relief.

Nevertheless, the Supreme Court and the Tenth Circuit have made it clear that, where the plaintiff has achieved limited success in proportion to the demand, the attorney's fees should be diminished accordingly. This Court is bound by that precedent. In the case of Martinez v Schock Transfer and Warehouse Company, Inc., 789 F.2d 848 (10th Cir. 1986), the Tenth Circuit Court of Appeals reviewed a diminishment of attorney's fees by the District Court. In that case, the plaintiff was the prevailing party in a case arising under Title VII Civil Rights Act of 1964. Plaintiff sought \$350,000 in damages. Following a jury trial judgment was entered against one of the defendants for \$7,821. The plaintiff moved for attorney's fees in excess of \$58,000 for more than 500 hours of work at rates between \$75 and \$140/hour. The District court characterized the case as uncomplicated, and concluded that the plaintiff's success was limited and awarded attorney's fees of \$15,000 for 200 hours of time at \$75/hour.

Proving a case of alleged racial discrimination in the workplace is a difficult endeavor, and we do not find this case particularly uncomplicated in relation to other civil rights litigation. However, the fact remains that Jones achieved limited success in this litigation, as two of his claims were dismissed as a matter of law. Additionally, the jury found insufficient evidence of malice and declined to award punitive damages. It is in this context that we examine plaintiff's petition for attorney's fees, which includes over 427 hours of time with attorney rates ranging from \$110/hour to \$200/hour.⁴ Due to the results of this litigation, in keeping with Henley, we hold that the attorney's fees must be decreased to 107.80 hours at \$45/hour in compensation for legal assistant's

⁴This time figure also includes approximately 154 hours of work completed by legal assistants in the range of \$35 to \$55 per hour.

fees, and attorney's fees to be reduced as follows: Pappas 93.87 hours at \$125/hour, Goodwin 45.08 hours at \$200/hour, and Goss 52.78 hours at \$110/hour.

It is the Order of the Court that the motion of the Plaintiff for attorney's fees is hereby GRANTED in the amount of \$31,406.55.⁵

ORDERED this 25 day of September, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

⁵This brings the breakdown of the total fees to \$26,555.55 for attorney's fees, and \$4,851.00 for legal assistant fees.

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

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE: RAYMOND C. LOFTON,)
)
Debtor.)
)
RAYMOND C. LOFTON,)
)
Appellant¹,)
)
vs.)
)
BANK OF INOLA,)
)
Appellee.)

Case No. 97-CV-735-BU

ENTERED ON DOCKET

DATE SEP 28 1998

ORDER

This matter comes before the Court upon the appeal of the Bankruptcy Court's Order denying Appellant Raymond C. Lofton's Motion for New Trial. Upon due consideration of the parties' submissions and the record herein, the Court makes its determination.

On November 9, 1983, Raymond C. Lofton ("Raymond Lofton" or "Lofton"), his wife, Betty J. Lofton, and their son, Mike Lofton, borrowed \$29,290.81 (the "Loan") from the Bank of Inola (the "Bank"). The Loan, which was secured by a second mortgage on the residence of Raymond Lofton and Betty Lofton, was to be repaid in 60 monthly payments of \$733.96. As part of the loan transaction, the Bank obtained an insurance policy on the life of Mike Lofton

¹The Notice of Appeal was filed by Raymond C. Lofton, the Estate of Betty Lofton and Mike Lofton. The appellate briefs, however, only refer to Raymond C. Lofton as the Appellant. The Court shall continue this reference. In any event, the Court notes that the issues and the result herein would be the same as to the Estate of Betty Lofton and Mike Lofton.

from Mercury National Life Insurance Company. The insurance policy of \$30,000.00 was payable to the Bank in the event of the death of Mike Lofton.

On October 2, 1985, the Loan was renewed and the Loftons executed a new note (the "Second Note"). The Second Note was in the amount of \$28,827.94 and was payable in 60 monthly payments of \$705.40. The Second Note was secured by a second mortgage on the residence of Raymond Lofton and Betty Lofton and a security interest in a 1973 International tractor truck. The Second Note was signed by Mike Lofton, Raymond Lofton and Betty Lofton.

The Second Note provided for a credit life insurance policy upon the life of the "Maker" and the transaction included payment of a premium for one person of \$1,812.76.

On June 12, 1986, the repayment of the Loftons' debt was again extended and Raymond Lofton, Betty Lofton and Mike Lofton executed a new note (the "Third Note"). The Third Note, in the amount of \$30,678.66, was payable in 120 monthly installments of \$489.42. The Third Note was also secured by the residence of Raymond Lofton and Betty Lofton and the 1973 International tractor truck. The Third Note provided for a credit life insurance policy on the life of the "Maker" and the premium for one person was \$1,313.51.

Betty Lofton died in September of 1993. Carla Vaught, the daughter of Betty Lofton and the administrator of her estate, could not find evidence of a credit life insurance policy being issued on the life of Betty Lofton. Carla Vaught sent inquiries

to the Insurance Commissioner of the State of Oklahoma about the existence of any credit life insurance policy on Betty Lofton. She also made a demand on the Bank and Integrity Life Insurance Company ("Integrity") for payment. Both the Bank and Integrity indicated that there was no policy on the life of Betty Lofton but that there was a policy on the life of Mike Lofton.

Raymond Lofton filed for relief under Chapter 13 of the Bankruptcy Code on March 14, 1995. Thereafter, on June 26, 1995, the Bank filed a secured claim against the bankruptcy estate in the amount of \$28,921.39. On August 18, 1995, Raymond Lofton filed an adversary complaint against the Bank and Integrity.² The adversary complaint alleged that Raymond Lofton, Betty Lofton and Mike Lofton were the "makers" under the Third Note; that the Third Note provided that the "makers" were covered by credit life insurance; that a premium was charged the "makers" by the Bank to pay for the credit life insurance and that the Bank failed to honor the credit life provision upon the death of Betty Lofton. In the adversary complaint, Raymond Lofton requested that the secured claim of the Bank be disallowed for failure of the Bank to obtain a life insurance policy on the life of Betty Lofton.

During the adversary proceedings, Mike Lofton and the Estate of Betty Lofton were joined as additional plaintiffs.

On July 11, 1996, the Bankruptcy Court conducted a trial upon the adversary complaint. At the conclusion of the trial,

²The claim against Integrity was settled by the parties.

the Bankruptcy Court entered a Judgment Order dismissing the adversary complaint against the Bank. Raymond Lofton, the Estate of Betty Lofton and Mike Lofton filed a Motion for New Trial, which was subsequently denied by the Bankruptcy Court. Raymond Lofton, the Estate of Betty Lofton and Mike Lofton timely filed a Notice of Appeal. Thereafter, the Bankruptcy Court entered findings of fact and conclusions of law pursuant to Rule 7052, Federal Rules of Bankruptcy Procedure.

In his appeal, Lofton contends that the Bankruptcy Court erred in finding that the Third Note was ambiguous and that the Third Note and the surrounding circumstances showed that Mike Lofton, rather than Betty Lofton, was the intended insured of the credit life insurance policy. Lofton also contends that during the adversary proceedings, the Bankruptcy Court erred in dismissing his non-contract claims, thereby denying them a right to a jury trial.

Interpretation of an unambiguous contract is a question of law and is therefore reviewable de novo on appeal. In re Amarex, 853 F.2d 1526, 1529 (10th Cir. 1988); see also, Walker v. Telex Corp., 583 P.2d 482, 485 (Okla. 1978) (interpretation of unambiguous contract is question of law). The determination of ambiguity of a contract is similarly a question of law. Amarex, 853 F.2d at 1530; see also, Panhandle Co-op. Royalty Co. v. Cunningham, 495 P.2d 108, 111 (Okla. 1971) (whether contract is ambiguous is question of law). Only in the event of an ambiguity does the Court resort to extrinsic evidence. In re Kaiser Steel

Corp., 998 F.2d 783, 789 (10th Cir. 1993); see also, Public Service Co. of Oklahoma v. Home Builders Ass'n of Realtors, Inc., 554 P.2d 1181, 1185 (10th Cir. 1976). To the extent the Bankruptcy Court made any factual findings in interpreting the contract, such findings are subject to the clearly erroneous standard of appellate review. Amarex, 853 F.2d at 1529.

Applying these principles, the Court concludes that the Bankruptcy Court did not err in determining that the Third Note was ambiguous. The Insurance Statement of the Third Note shows that (1) the box for "Life Insurance on" is checked; (2) the box for "Maker" is checked; (3) the box for "Co-Maker" is not checked; and (4) the "Cost of One Person" is \$1,313.51. It also shows that Betty Lofton, Raymond Lofton and Mike Lofton all signed in the space provided at the bottom of the Insurance Statement. However, the Insurance Statement does not specifically identify which "Maker" is to be covered by the credit life insurance. Because the credit life insurance shows a premium for only one person and all three makers signed at the bottom of the Insurance Statement, the Court finds that an ambiguity exists in the Third Note as to who was to be covered by the credit life insurance.

The Court rejects Lofton's argument that all three of the makers were covered by credit life insurance based upon the additional terms on the reverse side of the Third Note under the

heading "Joint and Several Responsibility of Maker."³ Initially, the Court notes that these additional terms were not introduced into evidence and therefore not a part of the record. However, even if the additional terms were a part of the record, the Court finds that these terms do not provide a definition of "Maker" for purposes of the credit life insurance policy. The definition of "Maker" to include "each Maker" only applies for joint and several liability purposes. The Insurance Statement differentiates between makers when there is more than one maker. Indeed, there is a box for "Maker" and a box for "Co-Maker." There is also a "Cost for One Person" and a "Cost for Two Persons." The Court finds that the additional terms do not apply to the definition of "Maker" in the Insurance Statement.⁴

In light of the ambiguity as to the identity of the intended insured, the Court finds that the Bankruptcy Court properly considered extrinsic evidence to ascertain the intent of the parties. From the extrinsic evidence presented, the Bankruptcy Court found that Mike Lofton, rather than Betty Lofton, was the intended insured.

³The additional terms are:

Joint and Several Responsibility of Maker. If more than one Maker executes this Agreement, their responsibility hereunder shall be joint and several and the reference to Maker herein shall be deemed to refer to each Maker.

⁴The Court notes that Joe Wilkerson, the general agent for Integrity, testified at the trial that the maximum number of people that can be insured jointly on a credit life insurance policy in Oklahoma is two.

A Bankruptcy Court's findings of fact will be rejected only if clearly erroneous. In re Tulsa Energy, Inc., 111 F.3d 88, 89 (10th Cir. 1997). If the Bankruptcy Court's account of the evidence is plausible in light of the record viewed in its entirety, the district court may not reverse it even though convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). Thus, the factual findings need not be correct, but the district court must uphold them if they fall within the range of permissible conclusions. In re Blinder, Robinson & Co., Inc., 124 F.3d 1238, 1241 (10th Cir. 1997).

Upon review of the record, the Court finds that the Bankruptcy Court's conclusion that Mike Lofton was the intended insured is both logical and reasonable. Further, after considering the entire evidence, the Court is not left with a "definite and firm conviction that a mistake has been committed." Blinder, 124 F.3d at 1242 (quoting Exxon Corp. v. Gann, 21 F.3d 1002, 1005 (10th Cir. 1997)).

In this regard, the evidence before the Bankruptcy Court showed that Betty Lofton, who handled all the loan transactions, asked the Bank to procure credit life insurance on Mike Lofton for the Loan in 1983. An insurance policy was obtained on the life of Mike Lofton from Mercury National Life Insurance Company.

David Frieze, whose testimony the Bankruptcy Court found credible and which finding is entitled to great weight, see, In re Romero, 535 F.2d 618, 622 (10th Cir. 1976), testified that Betty Lofton requested credit life insurance on Mike Lofton in connection with the Second Note and being an agent for Integrity, he issued a policy on Mike Lofton. A document entered into evidence entitled "Creditors Cancellation Copy Integrity Life Insurance Company" reflects that the insured was Mike Lofton, age 27. The document also reflects that the amount of the insurance policy was for \$42,324.00 and that the premium due for the policy was \$1,812.76. The premium stated in the Second Note for one person was \$1,812.76. Joe Wilkerson, the general agent for Integrity, testified that the premium was correctly calculated and that his agency's portion of the premium was properly remitted to him. Mr. Frieze also testified that Betty Lofton asked that the credit life insurance remain in place when the Third Note was executed and he complied. The existing policy on the life of Mike Lofton was therefore kept in place. The evidence showed that the Bank calculated the amount of rebate under the Rule of 78's which would have been paid to the Loftons if the 1985 policy had been canceled and deducted the sum from the balance due on the loan and then disclosed the sum on the Third Note as the credit life premium. This amount was \$1,313.51. Furthermore, the evidence showed that no documents were found which indicated that Betty Lofton was the insured.

Based upon the evidence in the record, the Court concludes

that the Bankruptcy Court's finding that Mike Lofton was the intended insured was not clearly erroneous. The Court further concludes that the Bankruptcy Court's conclusion that Lofton failed to prove that an agreement to provide credit life insurance on the life of Betty Lofton existed and that the Bank breached that agreement.

Finally, Lofton contends that the Bankruptcy Court erred in dismissing his non-contract claims. The record reflects that the Bankruptcy Court entered an order on January 24, 1996, granting Lofton until February 13, 1996 to file an amended complaint grounded in fraud. Lofton filed a Second Amended Complaint on February 20, 1996. Lofton then filed another Second Amended Complaint on March 4, 1996. On April 10, 1996, the Bankruptcy Court, upon motion of the Bank, determined that the February 20, 1996 Amended Complaint would stand and that the March 4, 1996 Amended Complaint would be stricken. Lofton thereafter requested the Bankruptcy Court to clarify its ruling. On May 10, 1996, the Court ordered that the claims against the Bank would be limited to those stated in the February 20, 1996 Amended Complaint, or more specifically to a claim by Lofton against the Bank for breach of contract.

Upon review, the Court finds that the Bankruptcy Court did not err in striking the March 4, 1996 Second Amended Complaint. The March 4, 1996 Second Amended Complaint was filed without permission from the Bankruptcy Court. The Bankruptcy Court had previously granted Lofton leave to file an amended complaint as

to the fraud issue and such pleading was filed on February 20, 1996. The Court further finds that the allegations in the February 20, 1996 Second Amended Complaint failed to properly set forth a fraud claim. The Court concludes that the Bankruptcy Court did not err in proceeding to trial only on the breach of contract claim.

Based upon the foregoing, the Bankruptcy Court's Order denying Appellant, Raymond C. Lofton's Motion for New Trial is AFFIRMED.

Entered this 28th day of September, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

WILLIAM D. CARPENTER,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 97-CV-152-BU

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
SEP 28 1998
DATE _____

ORDER

Before the Court are Plaintiff's civil rights complaint filed pursuant to 42 U.S.C. § 1983 as well as Plaintiff's notice of intent to request depositions (Docket #30), Plaintiff's motion for order requiring Defendants or Courtroom Deputy assigned to take Plaintiff's depositions to locate witness presently in federal custody (#32), Plaintiff's motion for summary judgment on Count II (#33), and Defendants' motion to strike Plaintiff's motion for summary judgment (#35). Plaintiff, a state inmate appearing *pro se*, has been granted leave to proceed *in forma pauperis*. For the reasons discussed below, the Court finds Plaintiff's claims lack any arguable basis in law and are frivolous. Therefore, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), this action should be dismissed with prejudice. All pending motions should be denied as moot

BACKGROUND

During approximately twenty-six (26) days in the month of January, 1997, Plaintiff was housed in the Tulsa County Jail ("TCJ") while facing federal criminal charges filed in the United

States District Court for the Northern District of Oklahoma, Case No. 96-CR-168.¹ In his complaint, filed February 19, 1997 against Defendants Sheriff Stanley Glanz, Detention Officers Sheaffer, Cherry, and England and Corporal Jack Smith, Plaintiff raises two claims arising from events occurring during his stay at TCJ. Plaintiff claims that he was subjected to:

- (1) Unjustified use of O.C. spray, failure to adhere to Tulsa County Sheriff's Office follow up procedures 3.1.9 and S1403 regarding use of Oleoresin Capsicum spray as well as U.S. Dept. of Justice and U.S. District Court Orders.
- (2) Imposition of summary punishment, disciplinary sanctions without due process, equal protection of law as set forth by our United States Supreme Court under the guidelines of Wolff v. McDonnell, 94 S.Ct. 2963 and T.C.S.O. Disciplinary Procedures.

(#5).

In support of his first claim, Plaintiff states that on January 16, 1997, Defendant Sheaffer entered cell S-2-8, the cell adjacent to Plaintiff's cell S-3-8, and sprayed the occupants with O.C. spray (oleoresin capsicum or pepper spray). According to Plaintiff, cell S-3-8 shared the air intake system with cell S-2-8. As a result, the occupants of cell S-3-8 were affected by the O.C. spray "to the point that inmate John Pellegrino threw up his meal he had just eaten and was immediately taken to medical thereby removing him from the gaseous environment [sic] for aprox. one hour after the pepper gas incident." Plaintiff claims he advised Defendants Cherry and Sheaffer that he was "suffering from the effects of the chemical agents and that he needed to go to medical and to be removed from the gaseous environment [sic]." Neither detention officer removed Plaintiff from his cell. Plaintiff also claims he made the same request of Defendant England later in the day, but that Defendant England only advised "he would check on it."

¹For purposes of the constitutional analysis that follows, the Court will assume Plaintiff was a pretrial detainee at the time of the events giving rise to his claims.

Plaintiff complains that “absolutely no attention was given to this plaintiff who was suffering from the exact same symptoms of the chemical agents as inmate Pellegrino.”

In support of his second claim, Plaintiff asserts that on January 8, 1997, Defendants Cherry and Smith imposed “summary punishment” on all four inmates, including Plaintiff, housed in cell S-3-8 by “completely restricting exercise (shower) periods and telephone use for an indefinite [sic] period of time.” According to Plaintiff, the restrictions imposed by Defendant Cherry resulted from the deliberate trashing of the walkway between the cells by “‘someone’ unknown to [Cherry].” Plaintiff claims these restrictions infringed on his right to exercise, to maintain a reasonable degree of hygiene, to confer with his attorney regarding the pending Federal charge against him and otherwise interfered with his ability to file “meaningful pleadings to the Courts” as guaranteed under the provisions of Bounds v. Smith, 97 S.Ct. 1491. Plaintiff complains that these restrictions were imposed without the basic disciplinary due process guarantees set forth in Wolff v. McDonnell, 94 S.Ct. 2964.

Plaintiff seeks monetary damages in the amounts of \$50,000 from each Defendant involved in Count I and \$20,000 from each Defendant involved in Count II.

On July 18, 1997, Defendants submitted their answer (#14) along with a Special Report (#15) in compliance with the Court’s May 20, 1997 Order. Defendants state Plaintiff’s constitutional rights were not violated during his incarceration at TCJ.

ANALYSIS

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii), this Court “shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious” or “fails to state a

claim upon which relief may be granted.” A complaint may be dismissed as frivolous only if “it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S. 319, 325 (1989); see also Fratrus v. Deland, 49 F.3d 673, 674 (10th Cir. 1995). A complaint is subject to dismissal for failure to state a claim only if the plaintiff can prove no set of facts that would entitle him to relief, accepting the well-pleaded allegations as true and viewing them in the light most favorable to the plaintiff. This Court construes Plaintiff’s *pro se* pleadings liberally. See Haines v. Kerner, 404 U.S. 512, 520-21 (1972).

1. Plaintiff’s claim concerning the January 16, 1997 pepper spray incident lacks an arguable basis in law and is frivolous.

The focus of Plaintiff’s first claim is that Defendants violated TCJ procedures when they failed to provide follow up medical care after the spraying of pepper gas in the cell adjacent to Plaintiff’s cell. However, in order to state a constitutional claim for denial of medical care, a plaintiff must allege and prove facts indicating that defendants displayed deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97 (1976); see also Martin v. Board of County Comm’rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990) (holding that under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection for medical care as that afforded convicted prisoners under the Eighth Amendment). In the instant case, Plaintiff has not claimed nor has he presented evidence to indicate that he suffered serious injury requiring medical attention as a result of the pepper gas incident. He merely states that he suffered “from the exact same symptoms of the chemical agents as inmate Pellegrino.” Although inmate Pellegrino was removed from Plaintiff’s cell for medical treatment

after demonstrating a possible allergic reaction to the pepper spray, Plaintiff indicates that Pellegrino was treated by the medical staff for only one hour. Furthermore, other than stating that Pellegrino vomited his recently consumed meal, Plaintiff fails to describe any other symptoms suffered by either himself or inmate Pellegrino. The Court concludes that even if Plaintiff suffered “from the exact same symptoms” as inmate Pellegrino, the relatively minor, short-term effects of pepper spray do not constitute “serious medical needs” implicating a constitutional violation. Thus, Plaintiff’s claim fails.

2. Plaintiff’s claim concerning imposition of “summary punishment” without due process lacks an arguable basis in law and is frivolous.

In Sandin v. Conner, 515 U.S. 472 (1995), the United States Supreme Court cited Bell v. Wolfish, 441 U.S. 520 (1979), as setting the correct standard for assessing the rights guaranteed to pretrial detainees under the Due Process Clause.² In Bell, the Court held that conditions of pretrial detention are constitutional under the Due Process Clause as long as they do not amount to punishment of the detainee prior to an adjudication of guilt. Bell, 441 U.S. at 535-37. The Court expressly recognized a distinction between “punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.” Id. at 537. Restrictions on pretrial detainees that are reasonably related to a prison’s interest in maintaining order and security do not rise to the level of constitutionally prohibited punishment.

²Plaintiff’s belief that he was entitled to the due process protections announced in Wolff v. McDonnell, 418 U.S. 439 (1974), is erroneous. Wolff dealt with the interests of convicted prisoners and not pretrial detainees. In addition, even if the Wolff standards were applicable to Plaintiff, a protected liberty interest must be at stake to trigger the due process protections. These interests are “generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995). The restrictions at issue in this case simply do not rise to the level of protected liberty interests.

Id. at 539-40. Whether such a reasonable relation exists is “peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations [of order and security], courts should ordinarily defer to their expert judgment in such matters.” Id. at 540 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

In the instant case, Plaintiff has failed to state any facts demonstrating that the restrictions were imposed for punitive reasons. According to the Special Report, Defendant Cherry found that cell S-3-8 was “making messes and trashing out the walkway around the cells.” After asking the cell to keep the area clean, he returned on his next round to find that unidentified members of the cell had taken wet newspaper and thrown it on and about the catwalk. Cherry told them that “this was not going to work and that if they did not stop he would pull privileges.” (#15 at 16-17). The Special Report also indicates Defendant Smith inspected the area adjacent to cell S-3-8 after receiving information that the cell was throwing trash on the catwalk. Smith confronted the group of inmates and warned them that creating a mess would not be tolerated. After having the mess cleaned up by trustees, Smith returned later and found the catwalk trashed once more. At that point, he informed cell S-3-8 that he was placing a phone restriction on the cell for failure to clean (see #15, Ex. O, Policy 5.4.3: “Telephones will be available after all unit cleaning is complete . . .”).

It appears the restrictions at issue were imposed by TCJ officials only after the inmates repeatedly threw trash out of their cell and onto the walkway. Thus, Defendants took action they determined to be necessary in order to maintain order within the facility. Plaintiff has failed to provide any evidence to suggest the officials’ response to the January 8, 1997 conditions was

exaggerated. The Court concludes that nothing provided by Plaintiff indicates the imposed restrictions were punitive and the due process clause is not implicated. Therefore, Plaintiff's claim lacks an arguable basis in law and is frivolous.

As to Plaintiff's related claim that he was effectively denied access to the courts as a result of the restrictions on telephone use, the Court again finds that Plaintiff's claim is frivolous. In Bounds v. Smith, 430 U.S. 817, 825 (1977), the Supreme Court held that prisoners were entitled to "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." The Tenth Circuit and many other Circuits have construed Bounds to require some showing of prejudice or injury--i.e., actual denial of access. See Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1990) (interference with plaintiff's right to counsel or to access to the courts without more does not give rise to a constitutional violation); Twyman v. Crisp, 584 F.2d 352, 357-58 (10th Cir. 1978) (use of library restricted to two hours a week did not lead to any prejudice, so no denial of access).³ Accordingly, the temporary inability to confer with counsel and temporary deprivation of legal materials absent a showing of prejudice or actual interference with the right of access to the courts lacks any arguable basis in law. Cf. Chandler v. Baird, 926 F.2d 1057, 1061 (11th Cir. 1991) (to establish denial of access to the courts where alleged deprivations are of minor and short-lived nature and do not implicate general policies,

³Chandler v. Baird, 926 F.2d 1057, 1062 (11th Cir. 1991) (prejudice is required where deprivation of legal material is minor and for a short period); Magee v. Waters, 810 F.2d 451, 452-53 (4th Cir. 1987) (actual injury required of city jail inmate who received books after delay and was allowed one hour of library time a week); Mann v. Smith, 796 F.2d 79 (5th Cir. 1986) (no denial of access to county jail inmate with access to legal assistance but not library who nevertheless was able to file legally sufficient claim); Cookish v. Cunningham, 787 F.2d 1 (1st Cir. 1986) (denial of access to law library, except for emergency matters, during two-week quarantine period does not state violation); Hudson v. Robinson, 678 F.2d 462 (3rd Cir. 1982) (actual injury must be shown; that library is noisy, open at inconvenient times, with no free supplies, and with notary not always available does not state a claim).

inmate must articulate facts indicating some prejudice such as being unable to do timely research on a legal problem or being procedurally or substantively disadvantaged in the prosecution of an action); Vigliotto v. Terry, 873 F.2d 1201, 1202-03 (9th Cir. 1989) (three-day seizure of legal files was not unconstitutional).

In the instant case, Plaintiff alleges he was unable to confer with counsel concerning his pending federal criminal charge and unable to conduct discovery in another civil rights action pending in this Court, Case No. 96-CV-57. Significantly, however, Plaintiff fails to allege or demonstrate that he suffered prejudice in either referenced proceeding.⁴ As a result, the Court concludes Plaintiff was not denied access to the courts as a result of the telephone restriction imposed by Defendants.

CONCLUSION

Plaintiff's claims lack an arguable basis in law and are frivolous. The Court concludes that pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), this action should be dismissed with prejudice.

This dismissal counts as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).⁵

⁴In Plaintiff's criminal case, No. 96-CR-182, the docket sheet indicates Plaintiff entered a guilty plea on January 23, 1997. The Hon. H. Dale Cook entered judgment on May 21, 1997. Plaintiff did not appeal the conviction and sentence. In Plaintiff's civil case, No. 96-CV-57, the Hon. Terry C. Kern granted Defendants' motion for summary judgment and entered Judgment in favor of Defendants on February 9, 1998. Nothing in either record indicates Plaintiff suffered actual prejudice as a result of the January, 1997 restrictions at TCJ. In fact, the docket sheet for Case No. 96-CV-57 indicates that during the month of January, 1997, Plaintiff submitted three motions, one reply, one letter to the Court and one notice to the Court.

⁵Section 1915(g) provides, in pertinent part, as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's complaint is dismissed with prejudice as frivolous.
2. Any pending motion is denied as moot.
3. The Clerk is directed to flag this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 28th day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

THRIFTY RENT-A-CAR SYSTEM,
INC.,

Plaintiff,

vs.

BEST LEASING, INC., and
ALDO MUROS, an individual,

Defendants.

Case No. 96-C-1136-BU

ENTERED ON DOCKET

DATE SEP 28 1998

ORDER

This matter comes before the Court upon Plaintiff, Thrifty Rent-A-Car System, Inc.'s Application for Attorney Fees. The record in this case reflects that Defendants, Best Leasing, Inc. and Aldo Muros, have not responded to the application within the time prescribed by Rule 7.1(C), Local Civil Rules of the United States District Court for the Northern District of Oklahoma. Pursuant to Rule 7.1(C), the Court, in its discretion, deems the application confessed.

Upon review, the Court finds that the attorney fees requested by Plaintiff, Thrifty Rent-A-Car System, Inc., in the amount of \$276,513.64 are reasonable.

Accordingly, Plaintiff, Thrifty Rent-A-Car System, Inc.'s Application for Attorney Fees (Docket Entry #240) is GRANTED. Plaintiff, Thrifty Rent-A-Car System, Inc., is awarded \$276,513.64 as reasonable attorney fees.

ENTERED this 28th day of September, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

SEP 28 1998

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

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

PAUL T. ROZEBOOM, individually,)
and as Next Friend of TARA)
LYNN ROZEBOOM, his minor)
daughter,)

Plaintiffs,)

vs.)

CITY OF BROKEN ARROW, OK,)
J.R. STOVER a/k/a: "SMOKEY")
STOVER, RICK HOLDEN, EZELL)
WARE, MARK WHITMAN, and)
PAULA SCHAFFER,)

Defendants.)

Case No. 97-CV-199-BU

ENTERED ON DOCKET

DATE SEP 28 1998

ORDER

This matter comes before the Court upon various motions of the parties. Upon due consideration of the parties' submissions, the Court makes its determination.

This action arises out of the arrest of the plaintiff, Paul T. Rozeboom ("Rozeboom"), which occurred on December 15, 1995. On that date, Rozeboom went to pick up his daughter, the plaintiff, Tara Lynn Rozeboom ("Tara"), from Central Middle School in Broken Arrow, Oklahoma. Three days prior, on December 12, 1995, Rozeboom had given notice of his intent to exercise his parental rights with Tara on December 15, 1995 by filing a formal notice with the Tulsa County District Court. The notice was mailed to Rozeboom's ex-wife and Tara's mother, the defendant, Paula Schafer ("Schafer"). Tara, however, did not wish to go with Rozeboom and therefore requested that Schafer pick her up after school. Upon seeing Rozeboom at

school, Tara exited the building and proceeded to Schafer's vehicle. Rozeboom followed. Thereafter, an altercation, the facts of which are disputed, occurred between Rozeboom, Tara and Schafer. During the altercation, Rozeboom sat on top of the hood of Schafer's vehicle. With Rozeboom still on top of the hood, Schafer drove the vehicle about five blocks to the City of Broken Arrow police station. When Schafer reached the police station, she requested assistance from the defendant, Rick Holden ("Holden"). Holden, a detective for the City of Broken Arrow, ordered Rozeboom off the vehicle and directed Schafer to park her vehicle. Holden then escorted Rozeboom inside the police station. Holden investigated the incident and requested assistance from a uniform officer. The defendant, Ezell Ware ("Ware"), came to Holden's assistance and Holden ordered Ware to arrest Rozeboom. Rozeboom was arrested for violating a mutual protective order and clinging to a vehicle. Ware then took Rozeboom to the jail which was located in the same building where the arrest took place. The defendant, Mark Whitman ("Whitman"), booked Rozeboom into jail. The book-in process lasted approximately one hour. Bail for the municipal charge of clinging to a vehicle was thereafter posted. Rozeboom was then escorted to the Tulsa County Jail on the charge of violation of a protective order. Bail was posted for the charge the next morning and Rozeboom was released.

Rozeboom pleaded nolo contendere to the municipal charge of clinging to a vehicle. Rozeboom was ordered to pay an administrative fee and costs. Other sentencing was deferred upon

the completion of a 90-day probationary period. Rozeboom paid his administrative fee and costs and successfully completed his probationary period. As a result, the municipal charge was dismissed.

The charge of violating a protective order was filed with and accepted by the Tulsa County District Attorney's Office. The charge, however, was subsequently dismissed upon motion by the prosecutor.

Rozeboom, acting pro se, brought this action against the defendants alleging claims under 42 U.S.C. § 1983, 42 U.S.C. § 1985(3) and 42 U.S.C. § 1986 and under Oklahoma state law. Rozeboom, on behalf of his daughter, Tara, also alleged claims against the defendants based upon Oklahoma state law. All of the defendants except Schafer have filed summary judgment motions. Rozeboom has filed counter-motions for declaratory judgment.

In this action, the defendant police officers have raised the defense of qualified immunity to Rozeboom's federal claims. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To reach the question of whether a defendant public official is entitled to qualified immunity, a district court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right at all. Martinez v. Mafchir, 35 F.3d 1486,

1490 (10th Cir. 1994). This requires the district court to "first determine whether plaintiff's allegations, if true, state a claim for a violation of a constitutional right that was clearly established when defendant acted." Bisbee v. Bey, 39 F.3d 1096, 1100 (10th Cir. 1994) (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)).

In order to carry his burden, the plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it. Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990). Rather, the plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity, Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988), and "demonstrate a `substantial correspondence between the conduct in question and prior law ... establishing that the defendant's actions were clearly prohibited.'" Hovater v. Robinson, 1 F.3d 1063, 1066 (10th Cir. 1993) (quoting Hannula, 907 F.2d at 130). Unless such a showing is made, the defendant prevails. Once the plaintiff has sufficiently alleged the conduct violated clearly established law, then the defendant bears the burden, as movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity." Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994).

The qualified immunity defense applies to equally to claims under Section 1983 and Section 1985. Bisbee, 39 F.3d at 1101-02.

Section 1985(3)

Plaintiff claims that Defendants conspired to violate his rights under the Fourteenth Amendment in violation of 42 U.S.C. § 1985(3). Section 1985(3) provides in pertinent part:

If two or more persons ... conspire ... for the purpose of depriving ... any person ... of equal protection of the laws, or of equal privileges and immunities under the laws; ... [or] cause to be done, any act in furtherance of the object of such conspiracy .. The party so injured or deprived may have an action for the recovery of damages

42 U.S.C. § 1985(3). The essential elements of a Section 1985(3) claim are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom. Murray v. City of Sapulpa, 45 F.3d 1417, 1423 (10th Cir. 1995); Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

The Court finds that Rozeboom has failed to establish the existence of a conspiracy. An allegation of a conspiracy must provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action. Crabtree By & Through Crabtree v. Muchmore, 904 F.2d 1475, 1476 (10th Cir. 1990). A plaintiff may establish a conspiracy by either direct or circumstantial evidence of a meeting of the minds or an agreement among the defendants. Such evidence, however, is completely lacking in the record. Nowhere does Rozeboom point to any admissible evidence, circumstantial or otherwise, which could convince a jury that there was any agreement among the various

defendants to violate his rights under the Fourteenth Amendment.

The Court additionally finds that Rozeboom has failed to demonstrate any deprivation of his equal protection or equal privileges and immunities. Rozeboom must establish a class-based or racially discriminatory motive, behind the alleged conspiratorial activities to establish this element. Lesser v. Braniff Airways, Inc., 518 F.2d 538 (7th Cir. 1975). Section 1985(3) does not "apply to all tortious, conspiratorial interferences with the rights of others," but rather only to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Tilton v. Richardson, 6 F.3d 683, 686 (quoting Griffin, 403 U.S. at 101-02). Assuming, without deciding, that Section 1985(3) reach conspiracies motivated by gender bias, the Court concludes that Rozeboom has failed to prove the actions of the defendant police officers were based upon his gender.

Rozeboom contends that the defendant, City of Broken Arrow ("City") had a de facto policy of arresting males for violation of protective orders rather than females. Rozeboom contends that the defendant police officers implemented this policy in arresting him. In support of his position, Rozeboom submits the arrest sheet and jail logs of the City's police department to establish such policy. According to Rozeboom, the records show that from January 1993 until January 1996, 44 males as opposed to 1 female were arrested for violation of protective orders. Rozeboom states that between the time he complained of the police officers conduct in January of

1996 and the defendant, J.R. Stover's resignation on July 5, 1996, no arrests for protective orders were made. Rozeboom states that the discrimination then resumed between July of 1996 and March of 1997 with the arrest of 10 males to 2 females. After the instant lawsuit was filed, Rozeboom states that the records show that there was an equal arrest rate of males to females (5 to 4, respectively).

Upon review, the Court finds that the arrest sheet and jail logs do not establish that the City had a policy of arresting males rather than females for violation of protective orders. While the arrest sheet and jail logs may show that from January 1993 through January 1996, 44 males compared to 1 female were arrested, the records do not provide any details as to the circumstances of the arrests. The protective orders for which the males were arrested may have been only entered against the males and not females. Moreover, the submitted records do not reflect any details as to whether there were protective orders violated by females and the police officers failed to arrest the females. As to the time period when there were no arrests, there is no showing that there were any reports made of violations of protective orders. The Court concludes that the arrest sheet and jail logs of the City's police department do not establish an unwritten custom or policy of treating males for violation of protective orders differently than similarly situated females.

The Court notes that Rozeboom has also alleged a Section 1985(3) claim against Schafer. However, there is absolutely no

evidence that Schafer was involved in the alleged conspiracy. As stated in regard to the other defendants, there is no evidence of an agreement or meeting of the minds to deprive Rozeboom of equal protection of the laws. The undisputed evidence in the record reveals that Schafer had not met the defendant police officers prior to the December 15, 1995 incident. Moreover, Rozeboom has not shown the alleged actions of the defendant police officers was motivated by gender. Although Schafer, who is proceeding pro se, did not file a motion for summary judgment on the Section 1985(3) claim against her, the Court finds that based upon the record in this case, summary judgment should be granted in her favor sua sponte.

Section 1986

Inasmuch as the Section 1985(3) action is insufficient, the Court finds that the claim under Section 1986 also fails. A claim under Section 1986 exists for refusal to take positive action where the circumstances demand to prevent acts which give rise to a cause of action under Section 1985. As there is no valid Section 1985 claim, the Court finds that there can be no action under Section 1986. Taylor v. Nichols, 558 F.2d 561, 568 (10th Cir. 1977).

Section 1983 - Equal Protection

The equal protection clause of the Fourteenth Amendment guarantees like treatment to persons similarly situated. Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). A claim of denial of equal protection requires a showing of intentional or purposeful discriminatory conduct by a governmental entity.

Washington v. Davis, 426 U.S. 229 (1976).

Rozeboom claims that his arrest was gender-based and that he was deprived of equal protection of the laws due to the City's unwritten policy or custom, implemented by the defendant police officers, of arresting males instead of females for violation of protective orders. It is well-settled that a municipality may be held liable under Section 1983 only when the constitutional deprivation at issue was undertaken pursuant to a "custom" or "policy" of a municipality and not simply on the basis of respondeat superior. See, City of St. Louis v. Praprotnik, 485 U.S. 112, 125 n. 2 (1988).

The Court has previously discussed the alleged unwritten custom and policy of arresting males instead of females for violation of protective orders. The Court has found insufficient evidence of such a policy. The Court notes that the Tenth Circuit has stated that statistics alone may not be enough to prove the existence of a policy or custom. Watson v. Kansas City, 857 F.2d 690, 696 (10th Cir. 1988). In this case, Rozeboom has only submitted the arrest sheet and jail logs to support his claim. He has not submitted any expert opinion in regard to the statistics and has not submitted any other evidence to support his claim.. The Court concludes that Rozeboom has failed to present sufficient evidence to raise a genuine issue as to whether a custom or policy existed.

With the lack of sufficient evidence of a policy or custom of disparate treatment of males in arrests for violation of protective

orders and no other evidence in the record to reasonably infer disparate treatment, the Court finds that Rozeboom's equal protection claim fails. The Court finds that there is insufficient evidence to raise a genuine issue of fact that Rozeboom's arrest was based upon his gender.

Section 1983 - Fourth Amendment

Rozeboom claims that he was arrested without probable cause in violation of the Fourth Amendment. A police officer may arrest a person without a warrant if he has probable cause to believe that the person committed a crime. Probable cause exists if the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense. Jones v. City and County of Denver, 854 F.2d 1206, 1210 (10th Cir. 1988); see also Beck v. Ohio, 379 U.S. 89, 91 (1964). When a warrantless arrest is the subject of a Section 1983 action, the defendant arresting officer is "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest" the plaintiff. Hunter v. Bryant, 502 U.S. 224, 228 (1991).

Even where there is no probable cause to arrest the plaintiff for the crime charged, proof of probable cause to arrest the plaintiff for a related offense is also a defense which may entitle the arresting officer to qualified immunity. Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982); Biddle v. Martin, 992 F.2d 673 (7th Cir. 1993); United States v. Rambo, 789 F.2d 1289 (8th Cir. 1986); Avery

v. King, 110 F.3d 12 (10th Cir. 1997). In this regard, the Fifth Circuit explained that:

A police officer need not actually have had the crime for which probable cause existed in mind at the time of the arrest; rather, the question is "whether the conduct that served as the basis for the charge for which there was no probable cause could, in the eyes of a similarly situated reasonable officer, also have served as the basis for a charge for which there was probable cause."

Gassner v. Garland, 864 F.2d 394, 398 (5th Cir. 1989) (citing Trejo, 693 F.2d at 486).

Applying the above principles, the Court finds that the record in this case would have justified a reasonable officer's belief that he had probable cause to arrest Rozeboom under Section 23-18 of the Broken Arrow Municipal Code. Section 23-18 provides:

No person shall ride on any vehicle upon any portion thereof not designed or intended for the use of passengers. This provision shall not apply to an employee engaged in the necessary discharge of a duty, or to persons riding within truck bodies in space intended for merchandise.

In the instant case, Rozeboom was riding on and/or clinging to the top of the hood of Schafer's vehicle when Holden was summoned for assistance by Schafer. Schafer requested that Holden get Rozeboom off the vehicle. Based upon these facts and the statements of Schafer and Tara given to the defendant police officers, a reasonable law officer could have concluded that probable cause existed to arrest Rozeboom for violating Section 23-18. Consequently, the Court finds that Holden and Ware are entitled to qualified immunity.

To the extent Rozeboom has alleged a claim against Whitman for wrongful arrest, the Court finds that Whitman is entitled to

qualified immunity on the claim. Whitman was not involved in the arrest of Rozeboom. Whitman was in charge of booking Rozeboom into the jail. In order to be liable pursuant to Section 1983, a defendant must have personally participated in the alleged deprivation. Durre v. Dempsey, 869 F.2d 543, 548 (10th Cir. 1989) (citing Meade v. Grubb, 841 F.2d 1512, 1527-28 (10th Cir. 1988)); Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976) (personal participation is essential in a Section 1983 action). There is no evidence of Whitman's personal participation in the arrest of Rozeboom.

In his briefing, Rozeboom complains that the one-hour book-in process was unreasonable. Rozeboom relies upon the testimony of Paul Kroutter but fails to cite such testimony in the record. The undisputed testimony of Whitman reveals that the delay in booking was due in part to the necessity of repeating questions a few times to get a response from Rozeboom and due in part to interruptions generated in the normal part of the jail process. There is no evidence that Whitman was responsible for the delay. Rozeboom asserts that the book-in process was delayed to allow the defendant police officers to come up with a bogus municipal charge to cover the wrongful arrest. Rozeboom, however, has no admissible evidence to support such contention. Rozeboom claims that bond was posted at 4:00 p.m. and yet he was transported to the Tulsa County jail at 5:45 p.m. The Court notes that the evidence upon which Rozeboom relies for the fact that bail was posted at 4:00 p.m. is page 4 of Joint Exhibit 1. The only reference to time on that page is a

notation that the court date for Rozeboom is "Jan 9, 1996 at 4:00 p.m." Moreover, the bond that was posted by Kay Goss on behalf of Roseboom was only for the municipal charge. Bond for the Tulsa County charge was not posted until the next morning. Upon review, the Court concludes that Rozeboom has not shown that the delay in booking violated his constitutional rights. Therefore, summary judgment in favor of Whitman is appropriate.

The Court likewise finds that to the extent Rozeboom is asserting a claim against the defendant J.R. "Smokey" Stover ("Stover") for wrongful arrest, summary judgment is appropriate. At the time of Rozeboom's arrest, Stover was the chief of police. The Tenth Circuit has addressed the limits of supervisory liability under Section 1983 on several occasions. Under the law of the Tenth Circuit, "[a] supervisor is not liable under Section 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or direction, or his failure to supervise.'" Meade, 841 F.2d at 1527 (quoting Specht v. Jenson, 832 F.2d 1516, 1524 (10th Cir. 1987), reh'g en banc granted on other grounds, and judgment, but not opinion, vacated, 837 F.2d 940 (1988)). To be liable, a supervisor must have "participated or acquiesced in the constitutional deprivations of which the complaint is made." Kite v. Kelley, 546 F.2d 334, 337 (10th Cir. 1976). In this case, Rozeboom contends that Stover is liable as supervisor because he acquiesced in and ratified the actions that resulted in his arrest. Specifically, Rozeboom claims that

sometime in January of 1996, he met with Stover and requested him to look into the conduct of the other defendant police officers. Rozeboom contends that Stover did nothing after his request. The Court finds that such fact does not establish Stover's "acquiescence leading to discrimination." Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3rd Cir. 1990). It does not show an "affirmative link" between Stover's actions and the wrongful arrest.

Rozeboom also points to the alleged unwritten policy of arresting males instead of females for violation of protective orders. The Court, however, has previously found insufficient evidence of such a policy.

The Court notes that the predicate to supervisor liability is the existence of a constitutional violation. As stated, a supervisor is liable only if there is an "affirmative link" between the constitutional violation and the supervisor's actions. Mee v. Ortega, 967 F.2d 423, 431 (10th Cir. 1992). In this case, the Court has found that the defendant police officers had probable cause to arrest Rozeboom for violation of Section 23-18 and therefore the defendant police officers did not violate Rozeboom's constitutional rights under the Fourth Amendment. Therefore, Stover is not subject to supervisor liability under Section 1983.

Constitutionality of Municipal Code 23-19

Rozeboom has challenged the constitutionality of Section 23-19 of the Broken Arrow Municipal Code for which he received a municipal citation. Before the Court can address the merits of a

constitutional challenge to a criminal statute, the challenge must clearly demonstrate the existence of "a continuing, actual controversy, as mandated by the Declaratory Judgment Act, 28 U.S.C. § 2201 or by Art. III of the Constitution itself." Ellis v. Dyson, 421 U.S. 426 (1975); Steffel v. Thompson, 415 U.S. 452 (1974). To establish a present case or controversy in federal court, a plaintiff must establish a genuine and credible threat that the plaintiff will suffer from future prosecution under the statute. Ellis, 421 U.S. at 434. When a plaintiff contests the constitutionality of a criminal statute, the plaintiff does not have to "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) (quoting Steffel, 415 U.S. at 459). However, "persons having no fear of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." Babbitt, 442 U.S. at 299 (quoting Younger v. Harris, 401 U.S. 37 (1971)).

The Court finds that no case or controversy exists. Rozeboom has failed to establish a sufficient likelihood that he will again be arrested under Section 23-19. The existence of 23-19 neither subjects him to criminal penalty nor inhibits him from engaging in lawful conduct in which he wishes to engage. Accordingly, Rozeboom cannot challenge the validity of Section 23-19.

In addition, the Court finds that Rozeboom's claim for declaratory relief as to the constitutionality of Section 23-19 is

not cognizable under Section 1983. Rozeboom's claim essentially calls into question the constitutionality of the underlying criminal conviction. A judgment in favor of Rozeboom would necessarily imply the invalidity of his underlying criminal conviction. To recover damages or obtain declaratory relief for an allegedly unconstitutional conviction, or for other harm caused by an action whose unlawfulness would render a conviction invalid, a Section 1983 plaintiff must prove that the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 487 (1994). In this case, Rozeboom did not appeal the conviction under Section 23-19. Moreover, there is no indication in the record that the conviction was expunged, declared invalid or called into question by a federal court's issuance of a writ of habeas corpus. The Court therefore finds that Rozeboom's claim for declaratory relief is not cognizable under Section 1983.

State Law Claims

As the Court has found that summary judgment is warranted on the federal law claims alleged by Rozeboom, the Court declines to exercise supplemental jurisdiction over the state law claims alleged by Rozeboom. 28 U.S.C. § 1367(c). The Court likewise declines to exercise supplemental jurisdiction over the state law claims alleged by Rozeboom on behalf of Tara. These claims shall therefore be dismissed without prejudice.

Based upon the foregoing,

(1) Defendant, J.R. Stover's Motion for Summary Judgment (Docket Entry #36) is **GRANTED** as to the federal law claims;

(2) Defendant, Mark Whitman's Motion for Summary Judgment (Docket Entry #44) is **GRANTED** as to the federal law claims;

(3) Defendant, City of Broken Arrow's Motion for Summary Judgment (Docket Entry #46) is **GRANTED** as to the federal law claims;

(4) Defendant, Rick Holden and Defendant, Ezell Ware's Motion for Summary Judgment (Docket Entry #48) is **GRANTED** as to the federal law claims;

(5) Plaintiff's Counter-Motion for Declaratory Judgment (Docket Entry #66) is **DENIED**;

(6) Plaintiff's Counter-Motion for Declaratory Judgment (Docket Entry #67) is **DENIED**;

(7) Plaintiff's Counter-Motion for Declaratory Judgment (Docket Entry #69) is **DENIED**;

(8) Plaintiff's Counter-Motion for Declaratory Judgment (Docket Entry #70) is **DENIED**; and

(9) Defendant, City of Broken Arrow's Motion to Add Witnesses (Docket Entry #74) is **DECLARED MOOT**;

(10) Summary Judgment is sua sponte granted in favor of Defendant, Paula Schafer, as to the federal law claims;

(11) The state law claims of Plaintiffs, Paul Rozeboom and

Tara Rozeboom, are dismissed without prejudice.

(12) Judgment in favor of Defendants shall issue forthwith.

ENTERED this 28th day of September, 1998.


MICHAEL HURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 28 1998

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

PAUL T. ROZEBOOM, individually,)
and as Next Friend of TARA)
LYNN ROZEBOOM, his minor)
daughter,)

Plaintiffs,)

vs.)

CITY OF BROKEN ARROW, OK,)
J.R. STOVER a/k/a: "SMOKEY")
STOVER, RICK HOLDEN, EZELL)
WARE, MARK WHITMAN, and)
PAULA SCHAFFER,)

Defendants.)

Case No. 97-CV-199-BU

ENTERED ON DOCKET

DATE SEP 28 1998

JUDGMENT

This matter came before the Court upon the motions of Defendants for summary judgment and the issues in regard to the federal law claims of Plaintiff, Paul T. Rozeboom, having been duly considered and a decision having been duly rendered thereon and the state law claims of Plaintiff, Paul T. Rozeboom, having been dismissed without prejudice and the state law claims of Plaintiff Tara Lynn Rozeboom, having been dismissed without prejudice,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that judgment is entered in favor of Defendants, City of Broken Arrow, J.R. Stover a/k/a "Smokey" Stover, Rick Holden, Ezell Ware, Mark Whitman and Paula Schafer, and against Plaintiff, Paul T. Rozeboom, and that Defendants, City of Broken Arrow, J.R. Stover a/k/a "Smokey" Stover, Rick Holden, Ezell Ware, Mark Whitman and Paula Schafer,

are entitled to recover of Plaintiff, Paul T. Roseboom, their costs
of action, if any.

DATED at Tulsa, Oklahoma, this 28th day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ONE FANCY DANCER KACHINA DOLL
CONTAINING PROTECTED BIRD
FEATHERS; and ONE TURQUOISE
AND SILVER NECKLACE CONTAINING
PROTECTED BIRD TALONS,

Defendants.

Case No. 98-CV-66-BU(E)

ENTERED ON DOCKET
DATE SEP 28 1998

ORDER

This matter comes before the Court upon Plaintiff, United States of America's Motion to Strike scheduling Order filed on September 23, 1998. Upon due consideration, the Court GRANTS the motion. The deadlines in this case, including the pretrial conference scheduled for October 1, 1998 at 8:30 a.m. and the trial scheduled for October 19, 1998, are STRICKEN.

ENTERED this 28 day of September, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

COPY

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ONE FANCY DANCER KACHINA DOLL)
 CONTAINING PROTECTED BIRD)
 FEATHERS; and ONE TURQUOISE)
 AND SILVER NECKLACE CONTAINING)
 PROTECTED BIRD TALONS,)
)
 Defendants,)

Case No. 98-CV-66-BU(E)

FILED

SEP 23 1998

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

MOTION TO STRIKE SCHEDULING ORDER

COMES NOW the United States of America and moves the Court to strike the scheduling order entered herein for the following reason set forth:

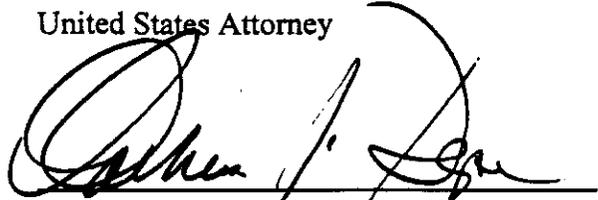
That a Stipulation of Forfeiture between the government and the claimant, Jack Phillips was filed on the 16th day of September, 1998, and the parties have settled this matter. The government is in the process of preparing the documents for submission to the Court for the forfeiture of the Defendant Properties.

The government has contacted Kathy S. Fry, attorney for the claimant, to determine whether she has an objection to the Motion, and she has no objection to the scheduling order being stricken.

WHEREFORE, the government prays that the court strike the current scheduling order while the documents are being prepared for disposal of the matter.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney

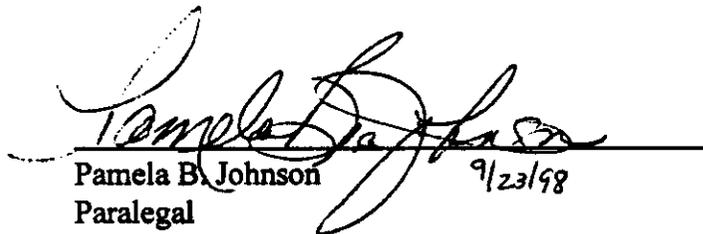


CATHERINE J. DEPEW OBA #3836
Assistant United States Attorney
3460 United States Courthouse
333 W. 4th Street
Tulsa, Oklahoma 74103
(918)581-7463

CERTIFICATE OF MAILING

I, Pamela B. Johnson, do hereby certify that a true and correct copy of the above and foregoing Motion to Strike Scheduling Order was mailed, proper postage fully prepaid thereon:

Kathy S. Fry, Esq.
202 East Second Avenue, Suite 104
Owasso, Oklahoma 74055



Pamela B. Johnson
Paralegal

9/23/98

FILED

SEP 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ENTERED ON DOCKET

DATE SEP 28 1998

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ONE FANCY DANCER KACHINA DOLL)
CONTAINING PROTECTED BIRD)
FEATHERS; and ONE TURQUOISE)
AND SILVER NECKLACE CONTAINING)
PROTECTED BIRD TALONS,)
)
Defendants.)

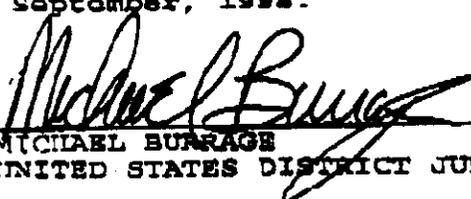
Case NO. 98-CV-66-BU(E)

ADMINISTRATIVE CLOSING ORDER

In light of the Stipulation of Forfeiture between Plaintiff, United States of America, and Claimant, Jack Phillips, it is 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 order or judgment, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 28th day of September, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

F I L E D

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

SEP 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLETTE R. GRIFFIN,)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA, OKLAHOMA)
)
Defendant.)

Case No. 95-C-1203-E

ENTERED ON DOCKET

DATE SEP 25 1998

ORDER

Now before the Court is the Motion For New Trial (Docket #37) of the Plaintiff, Willette R. Griffin.

In August of 1994, plaintiff, Willette Griffin, applied to the city for employment as a firefighter. Her performance on the "physical agility test" was determined to be inadequate and her application for employment was denied. She brought this action for sexual discrimination under a "disparate impact" theory, claiming that fewer women pass the physical agility test and it is not reasonably related to satisfactory job performance. Griffin sought a declaratory judgment adjudicating the invalidity of the physical agility test and injunctive relief precluding the City from using the physical agility test in the future. At the pretrial of this matter, the City announced that a new test was being adopted and that the old test would not and could not be used as of September, 1997. Based on the adoption of a new test, the City sought and was granted dismissal of this action, on the basis that it was not justiciable, or that it was moot.

At the same time that the Order of Dismissal was entered, Judgement was entered in favor of Defendant. Relying on Green v. Branson, 108 F.3d 1296 (10th Cir. 1997), Plaintiff seeks a new

trial, arguing that the finding of mootness does not justify entry of judgment for the Defendant. Plaintiff reasons that if a claim is moot, the Court declines to exercise jurisdiction, and the entry of judgment is an exercise of jurisdiction. The Court agrees.

Plaintiff also argues that the City's adoption of a new test does not constitute proof that the firefighter selection process no longer has a disparate impact on women. Plaintiff misses the point, however. The remedy sought by Plaintiff was injunctive relief precluding the use of the old test. That remedy was realized with the City's adoption of a new test. Further, Plaintiff has no evidence, and has not made any argument that the new test is in any way discriminatory.

Plaintiff's Motion for New Trial (Docket #37) is granted to the extent that the Judgment (Docket # 36) is withdrawn. The Order of Dismissal (Docket #35) remains in full force and effect.

IT IS SO ORDERED THIS 23rd DAY OF SEPTEMBER, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

guilty plea and that his attorney was ineffective because his attorney failed to tell him various important items.^{1/}

In 1992 Petitioner's sentences were accelerated. Petitioner was sentenced on CRF-89-75 on August 12, 1992, to 15 years with 10 years deferred. Petitioner was sentenced on CRF-89-74 to 15 years.

The transcript of the proceedings to accelerate the sentences indicates that Petitioner was informed of his right to appeal the sentences and that Petitioner was also informed that he had to "give notice of [his] intent to appeal within ten (10) days." [Transcript of Proceedings at 344]. When Petitioner was asked by the trial court whether he had anything further for the court, Petitioner stated, "[n]othing further, other than Your Honor that we'll give notice of our intent to appeal in open court at this time." Petitioner's counsel was present at this hearing. Petitioner has also submitted a copy of the court minute for August 12, 1992, which states that "Defendant advises the Court of his intent to appeal." Petitioner has additionally submitted a copy of a newspaper article which discusses the sentencing and indicates that Petitioner's attorney announced, in court, that Petitioner intended to appeal.

No appeal or intent to appeal was filed. The record contains affidavits from Petitioner's former attorney and his former wife. An affidavit submitted by the Respondent from Rex Earl Starr, Petitioner's attorney, notes that Petitioner was represented by a different attorney during the preliminary hearing. According to Mr.

^{1/} Petitioner asserts, in part, that his attorney failed to inform him of his rights regarding the guilty plea and failed to investigate various violations of state law in connection with the charges brought against Petitioner.

Starr, Petitioner was initially "placed on a deferred sentence and paid a fine into the office of the District Court Clerk of Delaware County." The sentence was accelerated. Mr. Starr relates that he discussed the appeal process with Petitioner but that Petitioner

did not meet the financial obligations and requirements that were established and therefore, at a later point in time, the undersigned affiant did not represent the defendant from that point forward. According to Mr. Starr, Defendant's wife, Marilyn Ames, picked up the entire case file from the affiant and affiant was advised that other counsel was to be employed and retained by the defendant to continue the appeal process and further representation of the defendant. The affiant would further state that after the case file was delivered to the wife of the defendant the affiant had no further involvement with the representation of the defendant in any pending matters.

[Doc. No. 14-1, Exhibit C].

The Starr affidavit does not specify when Marilyn Ames retrieved the case file from Petitioner's attorney. In addition, the affidavit provides no explanation as to why Petitioner's attorney did not file a notice of intent to appeal within ten days after Petitioner was sentenced.^{2/}

Petitioner submitted an affidavit signed by Marilyn Ames. The affidavit relates that Ms. Ames had no personal knowledge of any financial obligations between Petitioner and his attorney (Mr. Starr), and that Ms. Ames did not retrieve Petitioner's file from Petitioner's attorney until February 1994. She also notes that to her

^{2/} The brief filed on the behalf of the Respondent states that Mr. Starr informed the Respondent that Ms. Marilyn Ames picked up the file within two days of Petitioner's sentencing. Mr. Starr's affidavit does not state this, and Ms. Ames' affidavit contradicts this assertion.

knowledge Petitioner did not "release" Mr. Starr until after he obtained other counsel. [Doc. No. 19-1, Exhibit 6].

Petitioner filed an Application for Post-Conviction Relief which was denied by the trial court on May 4, 1995. The trial court found that Petitioner had "failed to articulate a sufficient reason or special circumstances explaining his failure to file a direct appeal as required by 22 O.S. 11981(sic), § 1086, or for requesting an appeal out of time through the district court." [Doc. No. 5-1, Exhibit A]. Petitioner appealed the decision to the Oklahoma Court of Criminal Appeals. On October 18, 1995, the Oklahoma Court of Criminal Appeals affirmed the trial court. The Court did not address Petitioner's issues on the merits, but noted that the Court had reviewed the record and concluded that the district court's findings and conclusions were supported by the record. [Doc. No. 5-1, Exhibit B].

Petitioner filed two separate habeas actions in this Court. Petitioner filed his first petition on December 1, 1995, and his second petition on May 24, 1996. The Court consolidated the cases on December 5, 1997.

In the first habeas petition completed by Petitioner, Petitioner challenged only the sentence that he received in CRF-89-75. Petitioner noted, on page two of his petition, that he was not presently serving a sentence imposed for a conviction other than the conviction under attack in the motion. [Doc. No. 1-1, p. 2]. On pages 13-14, in answer to whether Petitioner had any future sentences to serve after the completion of the sentence under attack, Petitioner answered "yes," and referred to CRF-92-70, which Petitioner described as a sentence of "life without parole."

Petitioner additionally noted that he had filed or contemplated filing a petition to attack the judgment with respect to this sentence.

In the second habeas petition filed by Petitioner, Petitioner challenged only the sentence that he received in CRF-89-74. Petitioner again noted, in that petition, that he was additionally serving a sentence of life without parole in CRF-92-70, and that he anticipated challenging that sentence. At the evidentiary hearing, Petitioner's counsel informed the court and Respondent stipulated that Petitioner "successfully" challenged the life without parole sentence, and that it has been modified to a sentence of "life."

II. RIGHT TO COUNSEL

Petitioner asserts that he was improperly denied his right to counsel and thereby denied his right to appeal.

The Tenth Circuit Court of Appeals has held, on several occasions, that the right to counsel "applies to the period between the conclusion of trial proceedings and the date by which a defendant must perfect an appeal." Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991).

The Tenth Circuit noted "[d]efense counsel must explain the advantages and disadvantages of an appeal. The attorney should provide the defendant with advice about whether there are meritorious grounds for appeal and about the probabilities of success." Id. at 1499 (citations omitted). The Court additionally noted that counsel must "inquire whether the defendant wants to appeal the conviction; if that is the client's wish, counsel must perfect an appeal." Id. Furthermore, even if counsel does

not believe that a good faith reason supports an appeal, counsel is obligated to file a notice of appeal and can then withdraw.

If counsel believes the appeal is frivolous, counsel does not have to argue the case, but has the duty to perfect the defendant's right to appeal so that defendant could proceed *pro se*.

Id. at 1499 n.3 (citations omitted).

In this case, the evidence clearly supports Petitioner's assertion that he asked his attorney to file an appeal. The minute taken by the court at the sentencing, the transcript, and the newspaper article all indicate that Petitioner announced that he would appeal in the presence of his attorney. The affidavit of Petitioner's attorney merely states that he was not sufficiently paid by Petitioner, that Petitioner's wife picked up Petitioner's file, and that the attorney never filed an appeal. The failure of Petitioner to pay his attorney does not justify Petitioner's attorney refusal to file a notice of appeal. See Jones v. Cowley, 28 F.3d 1067 (10th Cir. 1994). Respondent provides no reason to justify the failure of Petitioner's attorney to file an appeal. The Oklahoma appellate courts denied subsequent habeas petitions based on Petitioner's failure to timely appeal his convictions. Petitioner was denied effective assistance of counsel, and was denied an appeal due to the deprivation of his right to counsel.

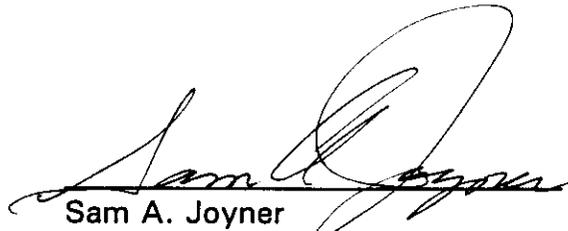
III. RECOMMENDATION

The Magistrate Judge recommends that the District Court **GRANT** a conditional writ of habeas corpus to Petitioner to enable Petitioner to file a direct appeal of his sentence, out of time.

IV. 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 his/her 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 this 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 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 24 day of September 1998.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 25 Day of September, 1998.



522
-
**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**EARL HEREDEN and JUDY
HEREDEN,**

Plaintiffs,

vs.

RACA HOWARD,

Defendant.

FILED

SEP 24 1998 *SAK*

ENTERED ON DOCKET

DATE 9/25/98 Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1008 K (M) ✓

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the parties herein and would hereby mutually stipulate that the above-styled matter should be dismissed with prejudice. The parties further agree that this decision has been reached of their own free will, after consultation with legal counsel. The parties further stipulate that no inference should be drawn as to the merits of the Plaintiffs' claim against the Defendant as a result of this dismissal with prejudice.

It is, therefore, the request of the Plaintiffs and the Defendant that the above-styled matter should be dismissed with a prejudice to its being re-filed, and this Court enter an Order accordingly.

Respectfully submitted,

G. S. Stidham

G. STEVEN STIDHAM
Attorney for Plaintiffs

Marylinn M. Gravis

MARYLINN M. GRAVIS
Attorney for Defendant

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

FILED

SEP 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FLOYD L. WALKER and)
VIRGINIA G. WALKER,)
)
Plaintiffs,)
vs.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Case No. 97-CV-672-BU

ENTERED ON DOCKET
DATE SEP 25 1998

ORDER

This matter comes before the Court upon Plaintiffs' Motion for Award of Attorney Fees, to which Defendant has objected. Upon due consideration of the parties' submissions, the Court makes its determination.

Plaintiffs filed this action to recover a refund of self-employment taxes assessed by the Internal Revenue Service and paid by Plaintiffs. On July 24, 1998, this Court granted summary judgment in favor of Plaintiffs. In the instant motion, Plaintiffs, pursuant to 26 U.S.C. § 7430(a), seek to recover reasonable administrative and litigation costs incurred in connection with the determination of the refund. Plaintiffs assert that they have satisfied the requirements of § 7430(b) and are prevailing parties as defined by § 7430(c)(4)(A).

Defendant, in response, argues that Plaintiffs are not to be treated as prevailing parties in this proceeding because Defendant's position in this litigation was substantially justified. See, 26 U.S.C. § 7430(c)(4)(B). In addition, Defendant

contends that Plaintiffs are not entitled to reasonable administrative and litigation costs as they did not exhaust their administrative remedies with respect to the 1995 tax year.

Section 7430(a) provides for an award of costs and certain fees to the prevailing party in "any administrative or court proceeding ... in connection with the determination, collection, or refund of any tax, interest, or penalty" 26 U.S.C. § 7430(a). However, if the United States establishes that its position was substantially justified, a party shall not be treated as the prevailing party. 26 U.S.C. § 7430(c)(4)(B).

The Court finds that Defendant's position in this proceeding was substantially justified. The Tenth Circuit had not addressed the specific issue before the Court. Upon review of the pertinent authorities, the Court decided to follow the Sixth Circuit's ruling in Bowman v. United States, 824 F.2d 528 (6th Cir. 1987). Defendant had argued that the Bowman case was incorrectly decided and urged the Court to follow the rulings of the Fourth Circuit and the District Court of New York in Hemelt v. United States, 122 F.3d 204 (4th Cir. 1997) and Mazur v. Commissioner, 986 F.Supp. 752 (W.D.N.Y. 1997). The Court concludes that Defendant's position, while rejected by the Court, had a "reasonable basis in law and fact." Pate v. United States, 982 F.2d 457, 459 (10th Cir. 1993). Therefore, the Court finds that Plaintiffs are not to be treated as prevailing parties and are not entitled to reasonable administrative and litigation costs under § 7430(a).

Based upon the foregoing, Plaintiffs' Motion for Attorney Fees

(Docket entry #24) is DENIED.

Entered this 23rd day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

SEP 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

RODNEY BLACK and NONA BLACK)
individually and d/b/a BLACK)
CONSTRUCTION COMPANY, a)
partnership,)

Plaintiff,)

vs.)

A-1 TELEPHONE INSTALLATION, INC.;)
CONOCO PIPELINE COMPANY; OKLAHOMA)
COMMUNICATION SYSTEMS, INC.,)

Defendants.)

NO. 96-CV-575-E
(Consolidated with
NO. 96-CV-759-E)

WYANDOTTE TELEPHONE COMPANY,)

Plaintiff,)

vs.)

A-1 TELEPHONE INSTALLATIONS,)
INC., BLACK CONSTRUCTION, and)
CONOCO PIPELINE CO.,)

Defendants.)

ENTERED ON DOCKET
DATE SEP 24 1998

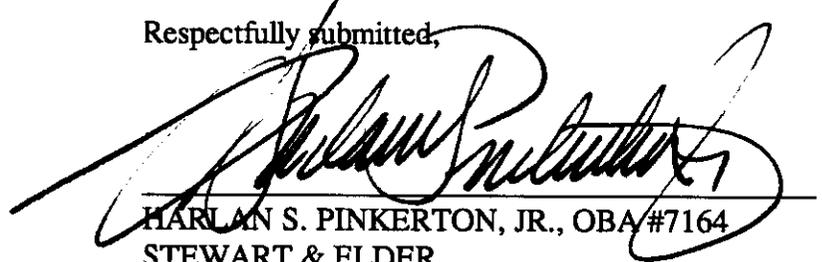
STIPULATION OF DISMISSAL

COME NOW the parties, Rodney Black and Nona Black, individually and d/b/a Black Construction Company, A-1 Telephone Installation, Inc., Oklahoma Communication Systems, Inc., Conoco Pipeline Company, Wyandotte Telephone Company, and American Communications Consultants, by and through their respective attorneys and stipulate that a settlement has been reached whereby this matter may be dismissed with prejudice.

DATED this 23 day of September, 1998.

103

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Harlan S. Pinkerton, Jr.", is written over a horizontal line.

HARLAN S. PINKERTON, JR., OBA #7164

STEWART & ELDER

240 Philtower Building

427 South Boston Avenue

Tulsa, OK 74103-5066

STIPULATION OF DISMISSAL

Bruce W. Gambill

Bruce W. Gambill, OBA #3222

GAMBILL & ASSOCIATES

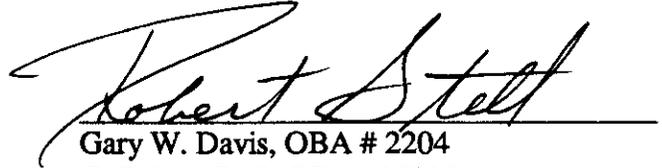
P.O. Box 329

Pawhuska, Oklahoma 74056

918-287-4185

Attorney for Plaintiffs

STIPULATION OF DISMISSAL

A handwritten signature in black ink, reading "Robert Stell", written over a horizontal line.

Gary W. Davis, OBA # 2204

C. Robert Stell, OBA #16312

CROWE & DUNLEVY

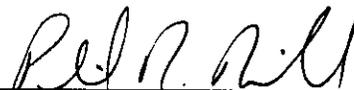
20 North Broadway

Suite 1800

Oklahoma City, OK 73102

**ATTORNEYS FOR DEFENDANT,
CONOCO PIPELINE COMPANY**

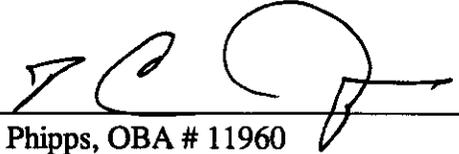
STIPULATION OF DISMISSAL



Phil R. Richards, OBA #10457
Richard E. Warzynski, OBA #14079
RICHARDS & ASSOCIATES
9 East 4th Street, Suite 910
Tulsa, Oklahoma 74103-5103
(918) 585-2394 Fax: 587-8925

**ATTORNEYS FOR OKLAHOMA
COMMUNICATIONS SYSTEMS, INC.,
WYANDOTTE TELEPHONE CO., and
AMERICAN COMMUNICATIONS
CONSULTANTS.**

STIPULATION OF DISMISSAL



K. Clark Phipps, OBA # 11960
525 South Main
Suite 1500
Tulsa, OK 74103

**ATTORNEY FOR DEFENDANT,
A-1 TELEPHONE INSTALLATION, INC.**

wyam v blackpldgetipulation.082198

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

ENTERED ON DOCKET
DATE 9-24-98

PAUL K. CARR, JR.)
)
Plaintiff,)
)
vs.)
)
ALLWASTE CORP., and)
STRATEGIC MATERIALS,)
)
Defendants.)

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

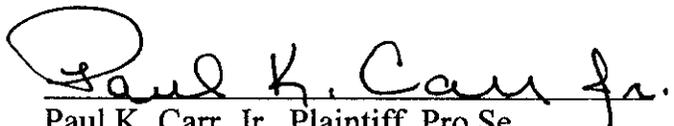
FILED
SEP 24 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

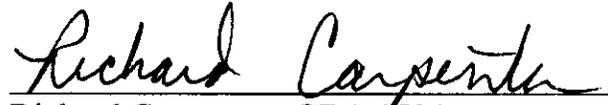
ORDER OF DISMISSAL WITH PREJUDICE

Upon joint application of the parties herein, the above-styled cause is hereby dismissed with prejudice to further claim or action, each party to pay its own attorney's fees, expenses and costs.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:


Paul K. Carr, Jr., Plaintiff, Pro Se


Richard Carpenter, OBA 1504
CARPENTER, MASON & MCGOWAN
1516 S. Boston, Suite 205
Tulsa, Oklahoma 74119
(918) 584-7400 Fax: (918) 584-7161
Attorneys for Defendant Strategic Materials, Inc.

46

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

ENTERED ON DOCKET
DATE 9-24-98

SPIRITBANK, N.A., a National Association Bank,

Plaintiff

vs.

THE CENTRAL OKLAHOMA HOUSING DEVELOPMENT AUTHORITY, an Oklahoma Public Trust, ORLIE BOEHLER, an Individual, RON FRAZE, an Individual, and EASTERN DEVELOPMENT, INC., a Texas Corporation,

Defendants.

Case No. 98 CV 0440K(E) ✓

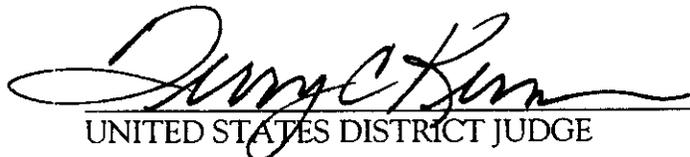
FILED
SEP 24 1998
FBI LOUISVILLE
U.S. DISTRICT COURT

JUDGMENT

The Court, after having considered the Record before it, and determining that the Defendant, Central Oklahoma Housing Development Authority has failed to appear, answer or otherwise defend after being properly served by the Plaintiff, SpiritBank, finds that Plaintiff has properly alleged damages in the amount of \$1,018,809.81 against the defendant. In consideration of the default being entered by the Clerk of the Court, the Court hereby grants Judgment against the Central Oklahoma Housing Development Authority in the amount of \$1,018,809.81.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT JUDGMENT BE ENTERED AGAINST THE CENTRAL OKLAHOMA HOUSING DEVELOPMENT AUTHORITY AND IN FAVOR OF THE PLAINTIFF, SPIRITBANK IN THE AMOUNT OF \$1,018,809.81.

JUDGMENT IS SO ENTERED this 22 day of September, 1998.


UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE 9-24-98

GLENN M. ANDERSON, and
SUSAN F. ANDERSON,
Plaintiffs,

vs.

J. WHITAKER, individually,
and the UNITED STATES OF
AMERICA,

Defendants.

No. 98-CV-570-K

FILED

SEP 23 1998

Phil Lorenberg, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the motion of Defendant, United States of America, to dismiss Plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)1, 12(b)2, 12(b)5, and 12(b)(6). In addressing this Motion, we will also resolve the Defendant's Motion to Extend Date for Filing Joint Case Management Plan and for Stay of Discovery Pending Resolution of Dispositive Motion.

The plaintiffs in this case have failed to respond to the Defendant's Motion to Dismiss. Pursuant to *Local Rule 7.1.C*, all claims asserted in the Motion to Dismiss will be considered confessed when the opposing party has failed to respond. We have, nevertheless, reviewed the Defendant's Motion to Dismiss, and, through an independent inquiry, have determined that the plaintiff has failed to state a claim for which relief can be granted.

For the reasons stated herein, the Defendant's Motion to Dismiss is GRANTED. The Defendant's Motion to Extend Date of Filing Joint Case Management Plan and Stay of Discovery is moot, and therefore DENIED.

ORDERED this 22 day of September, 1998.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

PATTY JENKINS, individually as Widow
of Billy Jack Jenkins,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF WASHINGTON,

Defendant.

F I L E D

SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-183-C

ENTERED ON DOCKET

DATE SEP 23 1998

ORDER

Before the Court is a motion filed by the defendant Board of County Commissioners to dismiss plaintiff's amended complaint for failure to state a claim for deliberate indifference to medical needs under 42 U.S.C. § 1983 and for wrongful death under Oklahoma law. For the reasons stated below, defendant's motion is granted.

On March 5, 1998, plaintiff initiated this action by filing her original complaint and naming as defendants, at that time, Washington County and the Washington County Sheriff's office. In her original complaint plaintiff asserted claims under 42 U.S.C. § 1983 for negligence, deliberate indifference and wrongful death. On March 27, 1998, the original defendants filed a motion to dismiss for failure to name the proper party defendants and for failure to state a claim under §1983. In response, plaintiff requested leave to file an amended complaint which was granted by the Court on April 28, 1998. Plaintiff's amended complaint was filed on May 12, 1998.

In her amended complaint, plaintiff named as defendant, the Board of County Commissioners for Washington County. The amended complaint alleges that plaintiff is the widow of the decedent Billy Jack Jenkins. Plaintiff alleges that during April of 1997, while Billy Jack Jenkins was a detainee in the Washington County Jail, Mr. Jenkins complained to the jailor of suffering from severe chest

pains and shallow breathing at approximately 6:00 A.M. Plaintiff alleges that although Mr. Jenkins requested medical assistance on several occasions, the jailor only gave Mr. Jenkins over-the-counter medication and left him in his cell. Mr. Jenkins died that same day at approximately 12:00 P.M. In support of her claim, plaintiff alleged that “[t]he Jail personnel being knowingly and intentionally indifferent did not furnish and denied medical assistance or treatment to the deceased.” As a result of the “cruel and unusual punishment of knowingly and intentionally not providing medical assistance and treatment to the inmate, Billy Jack Jenkins, the wrongful death occurred and his widow has suffered severe damages, pain and mental suffering.”

The defendant, Board of County Commissioners, now seek dismissal of the amended complaint for plaintiff's failure to allege that the County Commissioners had a custom or practice which resulted in deliberate indifference to the serious medical need of detainees in the county jail. Although plaintiff appears to acknowledge that she has failed to allege such a policy or practice, she now requests the Court to allow these matters to be subject to discovery rather than granting dismissal of her amended complaint.

In her amended complaint, plaintiff merely recites the events leading to the death of the decedent, Mr. Jenkins. Plaintiff does not allege or mention a policy or custom of the County Commissioners which caused his death, nor has she articulated any factual basis to support this essential element of a § 1983 claim against a political subdivision. Without such allegations, even in the barest form, plaintiff fails to state a claim upon which relief may be granted against the County Commissioners. Plaintiff may not file a lawsuit with the hope of using pretrial discovery to determine whether she has a claim against the defendant. A federal lawsuit cannot be used as fishing expeditions. *Sawyer v. County of Creek*, 908 F.2d 663, 668 (10th Cir. 1990). A complaint must at

least set forth the essential elements of each claim for relief. Additionally, under notice pleading, a complaint must also include minimal factual allegations necessary to sustain a conclusion that the County Commissioners had a policy, practice or custom which resulted in the alleged deliberate indifference to the decedent's serious medical needs.

In addition to seeking a claim for relief under § 1983, plaintiff also asserts a claim against the County Commissioners for wrongful death under Oklahoma law. The County Commissioners cannot be held liable for torts under Oklahoma law because Title 51 O.S. § 155 (24) provides an exemption from suing governmental entities for acts involving the operation of a county jail. Accordingly, the County Commissioners are immune from tort liability under the Oklahoma Tort Claims Act. *See, e.g. Myers v. Oklahoma County Board of County Commissioners*, 1998 WL 514300 (10th Cir. 1998).

The relevant provision of the Oklahoma Tort Claims Act provides that:

The state of a political subdivision shall not be liable if a loss or claim results from:

24. Provision, equipping, operation or maintenance of any . . . jail.

Title 51 O.S. § 153 (B) provides that the Oklahoma Tort Claims Act is the exclusive remedy for claims of liability of the state or its political subdivision and abrogates the common law.

Accordingly the Court finds that defendant's motion to dismiss should be and hereby is granted. The amended complaint filed on May 12, 1998, is dismissed without prejudice.

IT IS SO ORDERED this 22nd day of September, 1998.


H. DALE COOK
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 22 1998
FRANCIS J. CLARK
U.S. DISTRICT COURT

FRANCES PIERCE,

Plaintiff,

vs.

Case No. 97CV992B(J)

THOMPSON MEDICAL COMPANY, INC.,
a foreign corporation, and WAL-MART
STORES, INC., a Delaware corporation,

Defendants.

ENTERED ON DOCKET
SEP 23 1998
DATE _____

ORDER FOR DISMISSAL

This matter comes on for hearing on the joint Stipulation of the Plaintiff, Frances Pierce and Defendants, Thompson Medical Company, Inc. and Wal-Mart Stores, Inc., for a dismissal with prejudice of the above captioned cause. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Defendants, Thompson Medical Company, Inc. and Wal-Mart Stores, Inc., pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause against Defendants, Thompson Medical Company, Inc. and Wal-Mart Stores, Inc., be and is hereby dismissed with prejudice to the filing of a future action against said Defendants, the parties to bear their own respective costs.

Dated this 22nd day of September, 1998.


UNITED STATES DISTRICT COURT JUDGE

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

ENTERED ON DOCKET
DATE 9-23-98

CONNIE SMITH,)
)
Plaintiff,)
v.)
)
SHERRY LABORATORIES,)
)
Defendant.)

No. 98-CV-353-H ✓

FILED
SEP 21 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant Sherry Laboratories' Motion for Partial Dismissal filed June 4, 1998 (Docket # 2). The Court held a hearing on the motion on August 20, 1998 and ordered the parties to submit supplemental evidence relating to the equitable tolling argument advanced by Plaintiff in her response to Defendant's motion on or before September 3, 1998. To date, Plaintiff has submitted no such additional evidence.

Plaintiff has been given ample opportunity to supplement the record regarding her equitable tolling claim, but has presented no evidence to this Court that she was mentally incapacitated at any time prior to the expiration of the statute of limitations. Further, the record before this Court indicates Plaintiff was represented by counsel at all times during the period of her alleged incapacity. Based on the facts, the Court finds that this matter is controlled by Biester v. Midwest Health Servs., 77 F.3d 1264 (10th Cir. 1996). Accordingly, Plaintiff's Title VII claim is time-barred and should be dismissed. Defendant's Motion for Partial Dismissal filed June 4, 1998 (Docket #2) is hereby granted.

IT IS SO ORDERED.

This 18TH day of September, 1998.


Sven Erik Holmes
United States District Judge

9

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

FILED
SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEPHEN THOMAS TAYLOR,)
)
Plaintiff,)
)
vs.)
)
PEPSI-COLA COMPANY,)
BEVERAGE PRODUCTS)
CORPORATION, and)
PEPSICO, INC.)
)
Defendants.)

No. 97-CV-911-B

ENTERED ON DOCKET
SEP 23 1998
DATE _____

ORDER

The Court has for decision Defendants' Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 (Docket # 23). For the reasons set out below the Court sustains Defendants' Motion for Summary Judgment.

I. Factual Background

Plaintiff, a former employee of Beverage Products Corporation, ("BPC") filed his complaint, and thereafter amended complaint, against Defendants alleging wrongful termination under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12112; wrongful termination under the Oklahoma Workers' Compensation Act, Okla. Stat. tit. 85, §5; and, intentional and/or negligent infliction of emotional distress.

Defendants filed this dispositive motion urging the undisputed facts establish Plaintiff was not a qualified individual with a disability; no reasonable accommodation was

62

available; Plaintiff's discharge was based upon a nondiscriminatory company policy; and, Defendants' conduct was not extreme or outrageous. The undisputed facts pursuant to N.D. LR 56.1.A. are as follows:

1. Plaintiff was hired in November, 1989, as a conventional Pepsi-Cola route driver (customer service representative).

2. Plaintiff drove a delivery truck along a certain route delivering products to customers on that route. Daily, this position required heavy lifting, pushing and pulling. Plaintiff would pick up his truck at the plant, drive to each individual customer location, unload the product needed to fully stock that customer, and place the product on the customers' shelves. Throughout the work day, Plaintiff would drive a truck, frequently lift 13-40 lbs., bend, reach above his shoulder, stand, walk, and sit; and occasionally push or pull up to 100 lbs., squat, kneel and twist.

3. On June 28, 1995, while unloading product from his truck at a customer location, Plaintiff injured his back.

4. On March 19, 1996, Plaintiff had surgery on his low back to fuse two vertebrae.

5. After his surgery, Plaintiff continued to have pain and see his doctor.

6. At home, Plaintiff and his wife were having marital and financial problems causing him to be very depressed, even suicidal.

7. Plaintiff did not inform anyone at BPC about his problems at home.

8. After August 1995, Plaintiff did not discuss his injury or any related topics with

his supervisors at BPC for any reason until after July 2, 1996.

9. Jim Roth ("Roth"), BPC's Human Resource Manager, and Kevin Hodgins ("Hodgins"), Plaintiff's supervisor, attempted to contact Plaintiff by phone on a number of occasions without success.

10. On May 20, 1996, Roth sent Plaintiff a certified letter asking Plaintiff to contact BPC with information regarding his status. Plaintiff did not claim the letter and it was returned to Roth.

11. On June 17, 1996, Roth sent another certified letter to Plaintiff asking he contact BPC regarding his status. Again, Plaintiff did not claim that letter and it was returned to Roth.

12. On July 12, 1996, Roth sent a third letter to Plaintiff informing him of his termination under BPC's "one year rule."

13. Under the one year rule, if an employee did not perform employment services with BPC for over one year, the employee could be terminated.

14. Plaintiff received the notice of his termination and contacted Roth.

15. During their communications, Plaintiff, for the first time since July, 1995, informed his supervisors of his medical status.¹

16. On or around July 11, 1996, Plaintiff informed Roth it was the opinion of his

¹Plaintiff argues Defendants' Worker's Compensation insurance carrier was aware of Plaintiff's temporary total disability status and this was notice to the employer as well.

doctor that he would not be able to perform his duties as a route truck driver in the future.

17. On July 12, 1996, Plaintiff could not have returned to his former position.

18. On July 12, 1996, Plaintiff could not lift, squat, run, walk, kneel, bend over, or drive a truck when needed.

19. Plaintiff could not suggest any reasonable accommodations which would allow him to perform the essential functions of his job on July 12, 1996.

20. On July 12, 1996, Plaintiff was unable to return to work in any employment position with Defendants and at that time did not know when he would be physically able to return.

21. On July 17, 1996, Roth sent Plaintiff a fourth letter explaining he had been discharged in accord with BPC's policy.

22. On June 2, 1997, approximately ten and one-half months following Plaintiff's discharge, and twenty-three months after his initial injury and ceasing work, he was released from his doctor's care with the following permanent medical restrictions:

- a. Lifting no more than twenty pounds,
- b. Standing restrictions, and
- c. Walking restrictions.

23. Plaintiff discussed with Roth on or about July 11, 1996, the need for training and accommodation under the ADA and Plaintiff's desire to remain employed there. (At the time Plaintiff was temporarily totally disabled and not available for even sedentary-type

employment for another ten and a half months).

24. The stated reason for termination was "job abandonment".

25. Plaintiff was on temporary total disability under Oklahoma's Workers' Compensation law at the time of his discharge. (There was no termination of Plaintiff's worker's compensation benefits).

26. The stated reason Roth did not consider reasonable accommodation for Plaintiff on July 12, 1996, was that he did not know his medical restrictions.

27. Roth stated that the only positions available on July 12, 1996, were those which required qualifications Plaintiff had stated he was unable and would continue to be unable to perform.²

II. Standard of Review

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

²N.D.LR 56.1(B) requires Plaintiff to present in his response brief a concise statement of material facts as to which he contends a genuine issue exists, referring with particularity to those portions of the record upon which he relies. Failure to comply with this rule results in those facts not controverted being deemed admitted. Plaintiff has submitted no references to the record to controvert Defendants' submitted facts.

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

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

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After

the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. ADA Claim

In addressing a claim brought under the ADA where plaintiff has no direct evidence of discrimination and defendant denies plaintiff's disability factored into the employment decision, the Court must apply the summary judgment standard in conjunction with the burden shifting analysis established in *Mc Donnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The Court therefore begins its analysis with a determination of whether Plaintiff has raised a genuine issue of material fact as to each element of his prima facie case. These elements are:

- (1) he is a disabled person as defined by the ADA;
- (2) he is qualified, with or without a reasonable accommodation, to perform the essential functions of the job; and,
- (3) BPC discharged Plaintiff under circumstances which give rise to an inference that the decision was based on his disability.

For purposes of this motion, Defendants concede that Plaintiff was a disabled individual as defined by the ADA. The inquiry then turns to whether genuine issues of fact remain as to Plaintiff's qualification, with or without reasonable accommodation, to perform the essential functions of his job. 42 U.S.C. §1211(8). This is to be viewed as of the date the

employment decision was made. See *Weiler v. Household Finance Corp.*, 101 F.3d 519, 524 (7th Cir. 1996), citing 29 C.F.R. app. §1630.2(m).

BPC has submitted a job description for Plaintiff's position which includes delivering product to customers and stocking their shelves. Essential functions include driving, heavy lifting, pushing, pulling, and constant walking. Plaintiff concedes he was unable to perform these essential functions on July 12, 1996, one year and two weeks following his initial injury. In fact, he was in a body brace or cast following his earlier back surgery on the date he was terminated. Plaintiff's position is that he informed Roth in their telephone conversation on or about the day before he was discharged that he was disabled and felt he needed some type of accommodation. He did not request any particular accommodation but did advise Roth his physician indicated he would never be able to return to the job he previously held as a route truck driver. More importantly, Plaintiff informed Roth he did not know when he would be able to return to work or what his exact limitations would be. In his deposition, Plaintiff first took the position that BPC should supply an assistant on his route to do all the lifting, effectively making Plaintiff a chauffeur. Plaintiff apparently recognized the futility of this position in his response to summary judgment because he did not pursue this argument. Instead Plaintiff now states BPC should have retrained him to perform another unnamed position the essential functions of which are necessarily undefined. He also submits an affidavit stating he believes BPC could have first accommodated him by giving him more time for his medical care.

While courts have recognized that allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation, the Court finds ten and one-half months combined with and following a one year medical leave is not required as reasonable. This is particularly so when Plaintiff had already advised Defendants he would never be able to return to his former position and could not advise when and under what conditions he could return to any work. This conclusion is supported by the tenth circuit decision cited by both Plaintiff and Defendants in support of their respective positions, *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996).

In *Hudson*, the court looked to the condition of the plaintiff at the time of her discharge to determine whether additional time off would constitute a reasonable accommodation. The court cited the fact that plaintiff failed to present any evidence of the expected duration of her impairment at the time of her termination. This, combined with the fact that she was not able to provide the employer with any certainty regarding her prognosis led the court to conclude that MCI was not required to wait indefinitely for her recovery. The Court finds the fact situation in the instant matter to be strikingly similar.

Because the issue of reasonable accommodation must also be viewed as of the date of the employment decision, the Court finds no merit in Plaintiff's claim that Defendants had any obligation to retrain him for another position when they had no way of ascertaining what job he would be capable of performing. As of the date of his termination, Plaintiff could

perform no job for Defendants.³

IV. Workers' Compensation Claim

Plaintiff urges that until he is no longer determined to be temporarily totally disabled under Worker's Compensation, and is in fact released to return to work, BPC is obligated to hold any decision on accommodation in abeyance. Plaintiff asks the Court to declare Defendants' one year termination rule null and void on the grounds it violates Oklahoma law, specifically 85 O.S. §5 (A)(2), which provides: ⁴

"No . . . corporation may discharge an employee during a period of temporary total disability solely on the basis of absence from work."

In support of this position, Plaintiff relies upon the unpublished tenth circuit opinion of *Grimes v. Janesville*, 111 F.3d 140 (10th Cir.Okla.), in which defendant company had a policy limiting leaves of absence to "six months, regardless of the reason for the leave." Plaintiff, Grimes, was terminated under this policy while on temporary total disability. Defendant Janesville defended on the grounds that §5.B. is an absolute defense. This section

³At pre-trial hearing held September 3, 1998, Plaintiff orally requested an extension of discovery as to the newly substituted party, Pepsico, Inc., in connection with a motion to compel filed July 29, 1998, after discovery cut-off date, and originally referred to the magistrate judge for disposition. The discovery sought is jobs filled by any Defendant from the date of Plaintiff's termination forward to the date of his release to return to work over ten and one-half months later. The purpose of this information is to determine whether light duty jobs were available which could have reasonably accommodated Plaintiff. The Court finds the motion to compel and additional discovery of this information should be denied because discovery cut-off date had passed and the information sought is irrelevant in light of the Court's ruling herein.

⁴The Court notes no argument nor claim was asserted by Plaintiff that Defendants' one year termination rule results in disparate impact under the ADA.

provides:

"No employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties. The failure of an employer to rehire or retain any such employee shall in no manner be deemed a violation of this section."

The tenth circuit, interpreting Oklahoma law in a non-binding opinion, predicted that the Oklahoma Supreme Court would find, in cases involving employees who become temporarily totally disabled as a result of a work-related injury, that §5.B. would become operative only after the period of temporary total disability ends, the employee is either physically able to return to work, or the disability becomes permanent.

The Court finds *Grimes* is instructive herein in that Plaintiff, even though remaining on temporary total disability, advised Defendants he would never be able to return to his route driving job, and his physician subsequently confirmed this. In so holding, the Court finds §5.B. is intended to apply to both §5.A.1. and §5.A.2. This is consistent with the reasoning in *Grimes* which is based upon the well established rule of statutory interpretation to give effect to all provisions of the statute.

V. Intentional and/or Negligent Infliction of Emotional Distress

Defendants last proposition must also be sustained. In order to establish his claim for the tort of intentional or negligent infliction of emotional distress,⁵ Plaintiff must establish the following:

⁵Oklahoma does not recognize a separate tort for negligent infliction of emotional distress. *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 916 P.2d 241 (Okla. 1996).

- (1) Defendants acted intentionally or recklessly;
- (2) Defendants conduct was extreme and outrageous;
- (3) Plaintiff actually experienced emotional distress; and
- (4) Plaintiff's emotional distress was severe.

The undisputed facts before the Court do not support conduct on the part of the Defendants that is "beyond all bounds of decency or utterly intolerable in a civilized community." *Eddy v. Brown*, 715 P.2d 74 (Okla. 1986); *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548 (10th Cir. 1995); *Katzer v. Baldor Elec. Co.*, 969 F.2d 935 (10th Cir. 1992); *Merrick v. Northern Natural Gas Co., Div. of Enron Corp.*, 911 F.2d 426 (10th Cir. 1990); *Pylik v. Professional Resources Ltd.*, 887 F.2d 1371 (10th Cir. 1989); *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 916 P.2d 241 (Okla. 1996); *Smith v. Farmers Cooperative Association of Butler*, 825 P.2d 1323 (Okla. 1992).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is granted.

DATED THIS 23rd day of September, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEPHEN THOMAS TAYLOR,)

Plaintiff,)

vs.)

No. 97-CV-911-B /

PEPSI-COLA COMPANY,)
BEVERAGE PRODUCTS)
CORPORATION, and)
PEPSICO, INC.,)

Defendants.)

ENTERED ON DOCKET
DATE SEP 23 1998

J U D G M E N T

In keeping with the Court's Order Sustaining the Defendants' Motion for Summary Judgment filed contemporaneously herewith, judgment is hereby entered in favor of the Defendants, Pepsi-Cola Company, Beverage Products Corporation, and Pepsico, Inc., and against the Plaintiff, Stephen Thomas Taylor, and Plaintiff's action is hereby dismissed. Costs are granted in favor of Defendants if timely applied for pursuant to local rule and the parties are to pay their own respective attorneys' fees.

DATED this 23rd day of September, 1998.



THOMAS R. BRETT
SENIOR UNITED STATES DISTRICT JUDGE

63

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

F I L E D

SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES WAGGONER,)

Plaintiff,)

vs.)

RON CHAMPION and)
JAMES L. SAFFLE,)

Defendants.)

No. 98-CV-228-C (E) ✓

ENTERED ON DOCKET

DATE **SEP 23 1998**

ORDER

On March 24, 1998, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983, and filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by The Prison Litigation Reform Act, Pub.L.No. 104-134, 110 Stat. 1321 (1996). The Court granted leave to proceed in forma pauperis and the Plaintiff was directed to pay an initial partial filing fee of \$2.26 on or before May 1, 1998, or his case would be dismissed. Thereafter, on April 14, 1998, Plaintiff notified the Court that he was having difficulty getting the correctional institution to deduct and send the initial partial filing fee. As a result, on July 16, 1998, the Court granted Plaintiff an additional thirty (30) days in which to submit the initial partial filing fee of \$2.26, providing also that if, after thirty days, Plaintiff was unable to submit the required partial fee, Plaintiff should submit a sworn affidavit, detailing the facts surrounding his problem. As of the date of this Order, Plaintiff has failed to pay the initial partial filing fee of \$2.26, nor has he submitted a sworn affidavit in compliance with the July 16, 1998 order.

6

Upon review of the record, the Court finds that Plaintiff has not paid the initial partial filing fee as directed. Accordingly, Plaintiff's complaint is hereby **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

IT IS SO ORDERED.

This 22 day of Sept., 1998.



H. DALE COOK
United States District Judge

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

F I L E D

SEP 23 1998 *mw*

FIRST MARINE INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
JIM D. SCOTT and BRENDA SCOTT, and CITY)
BANK TRUST COMPANY OF OKLAHOMA)
CITY, OKLAHOMA, now Bancfirst,)
)
Defendants, 3rd Party Plaintiffs,)
)
vs.)
)
STEVE YOUNG,)
)
3rd Party Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-113-E /

ENTERED ON DOCKET
DATE SEP 23 1998

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #6) of the Defendants Jim and Brenda Scott and Bancfirst and the Motion for Summary Judgment (Docket #17) of the Plaintiff, First Marine Insurance Company.

Plaintiff, First Marine Insurance Company, brought this action for a declaratory judgment regarding a policy of boat insurance issued by First Marine to the Defendants. The policy, with a limit of \$85,000, was taken out by the Scotts in February, 1994 to insure a 1993 40' Sea Ray Cabin Cruiser. The boat had an approximate market value of \$150,000, but Mr. Scott chose to insure the boat for only \$85,000, which is how much Mr. Scott owed Bancfirst on the boat at the time he took out the insurance. In fact, in a letter dated February 28, 1994, Mr. Scott was asked by his insurance agent, Steve Young, to sign the enclosed application for insurance and to initial an acknowledgment

that the boat was underinsured by approximately \$65,000.

In November, 1996, the boat was damaged in a windstorm on Grand Lake. It was estimated that it would take approximately \$72,000 to repair the boat, and salvage value is estimated by plaintiffs as approximately \$50,000. First Marine argues that, under the clear and unambiguous terms of the insurance policy, it can pay the Scotts the policy limits of \$85,000.00 and then take the boat for salvage. The Scotts argue that First Marine is not entitled to the boat as salvage, that they are entitled to be paid for damages up to \$85,000, and that the conduct of First Marine amounts to bad faith. Both sides seek summary judgment on their respective positions.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The primary issue is whether, under the terms of the insurance policy, First Marine is entitled

to pay the limits of the policy and receive the boat as salvage. The relevant language of the policy is as follows:

Valuation:

We will pay the amount of the insurance shown for Watercraft and Equipment on the Declarations Page if the insured watercraft and its equipment are completely lost, or if the reasonable expense of recovering and repairing the property and salvage value exceeds the amount of insurance shown on the Declarations Page. We will depreciate losses paid for damages to or theft of machinery, outboard motors, inboard or inboard/outboard units, electronic equipment, sails, upholstery and protective covers of fabric or similar material. Our liability for any one loss will not exceed the amount of insurance shown for Watercraft and Equipment on the Declarations Page, including any and all recovery costs. Any payment made for reasonable expenses incurred to protect and preserve the insured property from additional damages after a loss shall (including raising of the insured watercraft should it sink) not increase the limit of coverage under Coverage A Watercraft and Equipment. Our liability for electronic equipment shall not exceed 20% of the value of the watercraft contained on the Declarations Page.

* * * * *

Salvage and Abandonment:

If we make a payment under this policy for loss or damage and there is salvage as a result of that loss or damage, we have the right to recover that salvage to the extent of our payment. Upon payment of the full amount of insurance shown for Watercraft and Equipment on the Declarations Page, we are entitled to the salvage in its entirety.

You may not abandon your watercraft to us, nor are we responsible for damages caused by property which you abandon.

Plaintiff argues that the letter dated February 28, 1994, must be taken into account as part of the policy. The relevant portions of the letter are as follows:

The coverage bound is effective 2-28-94. Please be advised that your boat is underinsured by approximately \$65,000. Should you have a total loss, the policy will only pay the "agreed value" of \$85,000, less whatever deductibles and/or depreciation may apply.

Please read the following statement and initial where indicated. The statement

merely notes that you understand that your boat is underinsured.

"I, Jim D. Scott, fully understand the referenced pleasurecraft is underinsured and the amount listed on the policy declarations is meant to parallel the amount owed under the mortgage." _____ Jim D. Scott.

Please return this letter along with the application as soon as you can. Thanks!

Sincerely,

STEVE YOUNG

Mr. Scott initialed and returned the letter as requested. He now argues that the letter is a binding part of the Scotts' insurance policy that controls over printed forms or printed form parts. While that may be correct, it does not help the Scotts. The language of the policy hinges on "the amount of insurance shown on the declarations page," not on the value of the boat. Therefore the parties understanding as to the value of the boat, or whether the boat is underinsured has no impact on the provisions in the "Valuation" portion of the policy.

The Scotts also argue that the policy is ambiguous in that it does not define salvage value, and therefore the term must be construed against the insurer. In this regard, the Scotts argue that because their boat is not totaled, or unrepairable, there is no salvage value. This argument does not comport with the ordinary use of the word salvage, and the cases and statutes cited by the Scotts are not applicable to these circumstances.

First Marine argues that parties are bound by policy provisions and failure to read the policy does not relieve him from its provisions. Travelers Insurance Company v. Morrow, 645 F.2d 41 (10th Cir. 1981). First Marine also points out that the insured is responsible for knowing the terms of the policy. Dalton v. LeBlanc, 350 F.2d 95 (10th Cir. 1965). In light of this authority, the relative "sophistication" of Mr. Scott, and the clear language of the policy, First Marine argues that it is

entitled to summary judgment. The Court agrees. Without referring specifically to the value of the boat, but rather to the amount of insurance, the policy clearly provides that the company is to pay the full amount of coverage if the reasonable expense of repairing the property and salvage value exceeds the amount of insurance, and that, upon payment of the full amount of coverage, the company is entitled to the salvage. Under the undisputed facts in this case, those requirements are met.

Plaintiff, First Marine Insurance Company's Motion for Summary Judgment (Docket # 17) is granted. The Motion for Summary Judgment (Docket #6) of the defendants Jim and Brenda Scott and Bancfirst is denied.

IT IS SO ORDERED THIS 21²⁷ DAY OF SEPTEMBER, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FIRST MARINE INSURANCE COMPANY,)

Plaintiff,)

vs.)

JIM D. SCOTT and BRENDA SCOTT, and CITY)

BANK TRUST COMPANY OF OKLAHOMA)

CITY, OKLAHOMA, now Bancfirst,)

Defendants, 3rd Party Plaintiffs,)

vs.)

STEVE YOUNG,)

3rd Party Defendant.)

Case No. 97-C-113-E

ENTERED ON DOCKET

DATE SEP 23 1998

J U D G M E N T

In accord with the Order denying the Motion for Summary Judgment of the Defendants and granting the Motion for Summary Judgment of the Plaintiff filed this date, the Court hereby enters judgment in favor of the plaintiff, First Marine Insurance Company and against Jim D. Scott, Branda Scott, and City Bank Trust Company of Oklahoma City, now BancFirst.

Dated, this 21st day of September, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY and DAVID YERKEY, individually)
and as husband and wife,)

Plaintiffs,)

vs.)

No. 97-CV-646-E ✓

RONALD H. SMITH, LEO BUFORD,)
and HARTFORD UNDERWRITERS)
INSURANCE COMPANY,)

Defendants.)

ENTERED ON DOCKET

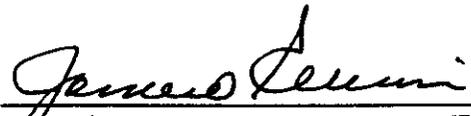
DATE SEP 23 1998

ORDER

Now before the Court is the request of Plaintiff to dismiss this case without prejudice to its refiling. There being no objection by any defendant, the Court finds that the Motion should be granted.

IT IS ORDERED that this case is DISMISSED without prejudice to its refiling.

DATED, THIS 21st DAY OF SEPTEMBER, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANNY PORTER; MANUAL MASON,)
)
Plaintiffs,)
)
vs.)
)
SOFAMOR DANEK GROUP, INC.,)
DANEK MEDICAL, INC.; SOFAMOR,)
S.N.C.,)
)
Defendants.)

Case No. 96-C-1005-BU

ENTERED ON DOCKET

DATE SEP 23 1998

ORDER

This matter comes before the Court upon the motion of Plaintiffs to dismiss their claims against Defendants without prejudice pursuant to Fed.R.Civ.P. 41(b). Defendants have opposed the motion and upon due consideration of the parties' submissions, the Court finds that Plaintiffs' motion should be granted.

The Court opines that judicial economy is served by the dismissal of this action. Plaintiffs have parallel claims pending in the Tulsa County District Court against Defendants. In the state court actions, St. John Medical Center, the hospital where Plaintiffs' surgeries were performed, is a named defendant. St. John Medical Center cannot be joined as a defendant in this action without destroying subject matter jurisdiction. In the Court's view, one judicial proceeding adjudicating all of Plaintiffs' claims arising out of the spinal surgeries will promote judicial economy. It will avoid piecemeal litigation.

Despite Defendants' arguments to the contrary, the Court concludes that Defendants are not prejudiced by the dismissal of

this action. Defendants will be entitled to use the relevant discovery conducted in the multi-district litigation proceedings in the state court actions. Plaintiffs have represented that they do not intend to duplicate the discovery already conducted.

In reaching its decision, the Court notes that Plaintiffs' claims raise state law issues. The state court is clearly capable of adjudicating these issues. Furthermore, the Court notes that Defendants did not object to a dismissal without prejudice involving similar circumstances in the Western District of Oklahoma.

Plaintiffs have requested that this Court should dismiss this action without prejudice upon terms and conditions that preserve their rights under Okla. Stat. tit. 12, tit. 12, § 100. More specifically, Plaintiffs request that this dismissal shall not be deemed to constitute a dismissal which invokes Okla. Stat. tit. 12, § 100 and that this dismissal shall not operate to adversely affect or limit Plaintiffs' right to file a new action if the state court actions should fail otherwise on the merits. The Court, upon review, declines to grant such request. Plaintiffs have not cited any authority other than Fed.R.Civ.P. 41 for such request. The Court declines to rule that this dismissal is not a dismissal "otherwise on the merits" and does not invoke Okla. Stat. tit. 12, § 100.

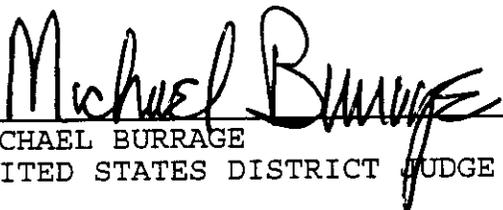
IT IS THEREFORE ORDERED ADJUDGED AND DECREED that:

(1) Plaintiffs' Motion to Dismiss Without Prejudice (Docket Entry #11) is **GRANTED**;

(2) The above-entitled action is **DISMISSED WITHOUT PREJUDICE** to re-filing; and

(3) In light of the dismissal without prejudice of this action, Plaintiffs' Motion for Extension of Time to Submit "Rule 26(a)(2) Expert Reports" (Docket Entry #10) is **DECLARED MOOT**.

ENTERED this 22nd day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD HESS AND CHRISTINE
HESS, individually and as
husband and wife,

Plaintiffs,

vs.

LIBERTY MUTUAL INSURANCE
COMPANY, a foreign insurance
corporation,

Defendant.

Case No. 98-C-599-BU ✓

ENTERED ON DOCKET

DATE SEP 23 1998

ORDER

On August 12, 1998, Defendant removed this action from the District Court of Rogers County, Oklahoma, pursuant to 28 U.S.C. § 1446, Rule 81 F.R.Civ.P. and N.D. LR 81.1. In its Notice of Removal, Defendant asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The amount in controversy is generally determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995). "The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000]." Id. (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (emphasis in original)).

4

Furthermore, there is a presumption against removal jurisdiction.
Id.

In the instant case, Plaintiffs' Petition does not set forth allegations which establish the requisite jurisdictional amount. The Petition merely alleges:

Plaintiffs pray that the Court render judgment in favor of the Plaintiffs and against the Defendant on the First Cause of Action for an amount in excess of Twelve Thousand Two Hundred Fifteen Dollars and 47/100 (\$12,215.47), in addition to attorney fees, costs, and interest, and on the Second Cause of Action, for actual damages in excess of Ten Thousand Dollars (\$10,000.00), and for punitive damages in excess of Ten Thousand Dollars (\$10,000.00) in addition to attorney fees, costs, and interest, and on the Third Cause of Action for actual and consequential damages in excess of Ten Thousand Dollars (\$10,000.00), and for punitive damages in excess of Ten Thousand Dollars (\$10,000.00), **but not to exceed the total sum of Seventy-Five Thousand Dollars (\$75,000.00)....**

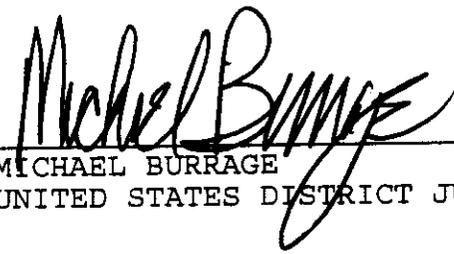
(Emphasis supplied). As a result, Defendant bears the burden of actually proving the facts to support the jurisdictional amount. Gaus, 980 F.2d at 566-67. Here, Defendant has offered no facts whatsoever to support the Court's exercise of diversity jurisdiction. Defendant has simply alleged in the Notice of Removal that "claims of Plaintiffs exceed the sum of \$75,000, exclusive of costs, attorney fees, and interest." This allegation does not, in the Court's view, satisfy Defendant's burden of setting forth, in the removal petition itself, the underlying facts supporting its assertion that the amount in controversy exceeds \$75,000.

Section 1447(c) of Title 28 of the United States Code provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be

remanded." The Court finds that it lacks subject matter jurisdiction and therefore, this action shall be remanded to state court.

Accordingly, this action is **REMANDED** to the District Court of Rogers County, Oklahoma and the case management conference currently scheduled for October 1, 1998 at 11:00 a.m. is **STRICKEN**. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Rogers County, Oklahoma.

ENTERED this 22nd day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

DALE JEAN TERWILLIGER,)
 on behalf of herself and all other)
 employees of HOME OF HOME,)
 INC. similarly situated,)
)
 Plaintiffs,)
)
 v.)
)
 HOME OF HOPE, INC.,)
)
 Defendant.)

FILED

SEP 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV1042H

ENTERED ON DOCKET
DATE SEP 22 1998

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COME NOW Plaintiffs and Defendant, each and all, and, pursuant to Fed. R. Civ. Proc. 41(a)(1), hereby stipulate to the voluntary dismissal in the above-referenced action by the below listed plaintiffs:

1. Barry Heirston;
2. Glenda Donohue;
3. Cora Foreman;
4. Yvonne Littlefield;
5. Robert Parsley;
6. Mary Piepmeyer;
7. Penny Rice;
8. Julie Wandell;
9. Jason Coleman; and
10. Sherry Cornwell

without prejudice.

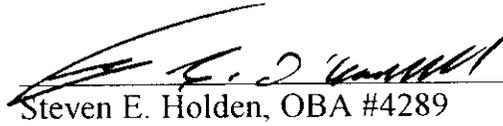
DATED this 21 day of Sept., 19 98.

91

cts

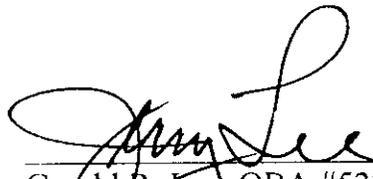
Respectfully submitted,

**BEST, SHARP, HOLDEN, BEST,
SULLIVAN & KEMPFERT**



Steven E. Holden, OBA #4289
Terry S. O'Donnell, OBA #13110
Karen M. Grundy, OBA #14198
100 W. 5th St., Suite 808
Tulsa, OK 74103-4225
(918) 582-1234
Facsimile: (918) 585-9447

ATTORNEYS FOR DEFENDANT



Gerald R. Lee, OBA #5335
117 South Adair
P.O. Box 1101
Pryor, OK 74362
(918) 825-2233
Facsimile: (918) 825-6613

ATTORNEY FOR PLAINTIFFS

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

DALE JEAN TERWILLIGER,)
 on behalf of herself and all other)
 employees of HOME OF HOME,)
 INC. similarly situated,)
)
 Plaintiffs,)
)
 v.)
)
 HOME OF HOPE, INC.,)
)
 Defendant.)

FILED
 SEP 21 1998
 Phil Lombardi, Clerk
 U.S. DISTRICT COURT

Case No. 96CV1042H ✓

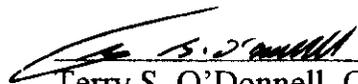
ENTERED ON DOCKET
 DATE SEP 22 1998

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff Jodie Crandlemire and Defendant Home of Hope, Inc.,
 pursuant to Fed. R. Civ. Proc. 41(a)(1), and hereby stipulate to the voluntary dismissal in the
 above-referenced action by Plaintiff Jodi Crandlemire, without prejudice.

DATED this 21 day of September, 1998.

Respectfully submitted,
**BEST, SHARP, HOLDEN, BEST,
 SULLIVAN & KEMPFERT**

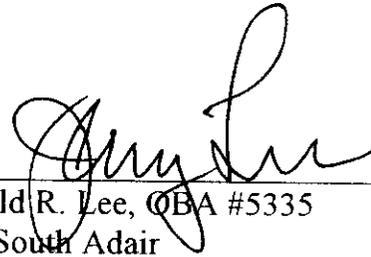


 Terry S. O'Donnell, OBA #13110
 Karen M. Grundy, OBA #14198
 100 W. 5th St., Suite 808
 Tulsa, OK 74103-4225
 (918) 582-1234
 Facsimile: (918) 585-9447

ATTORNEYS FOR DEFENDANT

94

CT



Gerald R. Lee, OBA #5335
117 South Adair
P.O. Box 1101
Pryor, OK 74362
(918) 825-2233
Facsimile: (918) 825-6613

ATTORNEY FOR PLAINTIFFS

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

DALE JEAN TERWILLIGER,)
on behalf of herself and all other)
employees of HOME OF HOME,)
INC. similarly situated,)
)
Plaintiffs,)
)
v.)
)
HOME OF HOPE, INC.,)
)
Defendant.)

FILED
SEP 21 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV1042H

ENTERED ON DOCKET

DATE SEP 22 1998

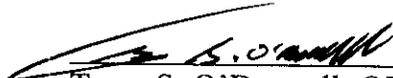
JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff Brenda Hulcher and Defendant Home of Hope, Inc., pursuant to Fed. R. Civ. Proc. 41(a)(1), and hereby stipulate to the voluntary dismissal in the above-referenced action by Plaintiff Brenda Hulcher, without prejudice.

DATED this 21 day of September, 1998.

Respectfully submitted,

**BEST, SHARP, HOLDEN, BEST,
SULLIVAN & KEMPFFERT**

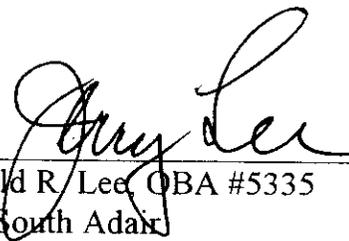


Terry S. O'Donnell, OBA #13110
Karen M. Grundy, OBA #14198
100 W. 5th St., Suite 808
Tulsa, OK 74103-4225
(918) 582-1234
Facsimile: (918) 585-9447

ATTORNEYS FOR DEFENDANT

93

ct



Gerald R. Lee, OBA #5335
117 South Adair
P.O. Box 1101
Pryor, OK 74362
(918) 825-2233
Facsimile: (918) 825-6613

ATTORNEY FOR PLAINTIFFS

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

DALE JEAN TERWILLIGER,
on behalf of herself and all other
employees of HOME OF HOME,
INC. similarly situated,

Plaintiffs,

v.

HOME OF HOPE, INC.,

Defendant.

FILED

SEP 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV1042H

ENTERED ON DOCKET

DATE SEP 22 1998

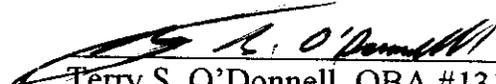
JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW Plaintiff Anna Henry and Defendant Home of Hope, Inc., pursuant to Fed. R. Civ. Proc. 41(a)(1), and hereby stipulate to the voluntary dismissal in the above-referenced action by Plaintiff Anna Henry, without prejudice.

DATED this 21 day of September, 1998.

Respectfully submitted,

**BEST, SHARP, HOLDEN, BEST,
SULLIVAN & KEMPFERT**

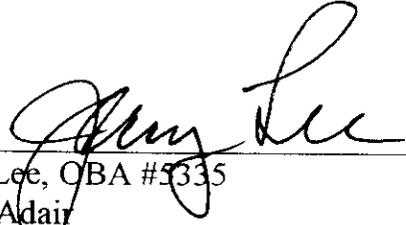

Terry S. O'Donnell, OBA #13110
Karen M. Grundy, OBA #14198
100 W. 5th St., Suite 808
Tulsa, OK 74103-4225
(918) 582-1234
Facsimile: (918) 585-9447

ATTORNEYS FOR DEFENDANT

Handwritten initials

Handwritten initials

Handwritten initials



Gerald R. Lee, OBA #3335
117 South Adair
P.O. Box 1101
Pryor, OK 74362
(918) 825-2233
Facsimile: (918) 825-6613

ATTORNEY FOR PLAINTIFFS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLARENCE STANLEY,
Plaintiff(s),
vs.
JOHN C. CALLAHAN, Commissioner of Social Security,
Defendant(s).

Case No. 97-CV-779-H(J)

ENTERED ON DOCKET

DATE SEP 22 1998

REPORT AND RECOMMENDATION

Plaintiff filed a social security complaint on August 25, 1997. Plaintiff filed no further pleadings in this action. By order dated July 6, 1998, the Magistrate Judge ordered Plaintiff to show cause as to why this action should not be dismissed within ten days. Plaintiff never responded. The District Court dismissed this action by order dated July 22, 1998.

Plaintiff filed a Motion to Set Aside Dismissal on August 3, 1998. [Doc. No. 4-1]. Plaintiff's attorney asserts that he mistakenly believed that the Court was dismissing a case in which he believed dismissal would be appropriate. Plaintiff's attorney later discovered that he was mistaken. Plaintiff's attorney notes that the error was entirely his fault and was through no fault of Plaintiff. Plaintiff's attorney additionally notes that absent setting aside this dismissal Plaintiff would be foreclosed from other appeals due to the failure to timely appeal the final decision of the Social Security Administration.

Because the failure to respond to the Motion to Show Cause was solely the fault of the attorney, the Magistrate Judge recommends that the District Court vacate its dismissal order and judgment, and permit Plaintiff to proceed in this action. Fed. R. Civ. Pro. 60(b); Fed. R. Civ. Pro. 55(c). Plaintiff's attorney should be cautioned as to his conduct in this action.

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 his/her 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 this 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 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 18 day of September 1998.

CERTIFICATE OF SERVICE

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

22nd Day of September, 1998.
C. Parillo, Deputy Clerk


Sam A. Joyner
United States Magistrate Judge

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

JAMES EARL WILLIAMS,)
)
Plaintiff,)
)
v.)
)
KENNETH HAGIN, SR.;)
KENNETH HAGIN MINISTRIES;)
RHEMA CORRESPONDENCE)
BIBLE SCHOOL,)
)
Defendants.)

ENTERED ON DOCKET
DATE SEP 22 1998

Case No. 98-CV-251-H

FILED

SEP 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a complaint filed by Plaintiff on April 2, 1998. No service has yet been obtained on Defendant, and Plaintiff has not yet paid a filing fee or filed a motion to appear in forma pauperis. On April 10, 1998, the Court ordered Plaintiff on or before May 13, 1998 to either pay the filing fee or to file a motion to proceed in forma pauperis and to submit conformed copies of the complaint with completed summonses and USM forms attached. Plaintiff has not responded to the Court's order.

Rule 4(m) of the Federal Rules of Civil Procedure, which governs time limits for service, states in pertinent part as follows:

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 of 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 time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Thus, the Court first must determine whether Plaintiff has shown good cause for the failure to timely effect service. If so, the Court must give Plaintiff a mandatory extension of time. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). However, if

3

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.” Id.

The Court finds that Plaintiff has not demonstrated good cause for failure to effect service. No action has been taken in this case to effect service or to describe to the Court the reasons for failure to timely effect service. The Court further declines to grant a permissive extension of time in which to effect service. Moreover, Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action “[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court.” See also Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir.1976) (stating that a court has inherent authority to dismiss for failure to prosecute). Plaintiff has not complied with the Court’s order directing Plaintiff to file conformed copies of the complaint and pay the filing fee or submit a motion to proceed in forma pauperis. Thus, Plaintiff’s action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 18TH day of September, 1998.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1998

Phil Lomardi, Clerk
U.S. DISTRICT COURT

FRANCES PIERCE,

Plaintiff,

vs.

THOMPSON MEDICAL COMPANY, INC.,
a foreign corporation, and WAL-MART
STORES, INC., a Delaware corporation,

Defendants.

Case No. 97CV992B(J) ✓

ENTERED ON DOCKET
DATE SEP 22 1998

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the attorneys for Plaintiffs, Frances Pierce, and the attorneys for the Defendant, Thompson Medical Company, Inc. and Wal-Mart Stores, Inc., and hereby stipulate and agree that the above captioned cause may, upon Order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein against Defendants, Thompson Medical Company, Inc. and Wal-Mart Stores, Inc., and the said parties hereby request the Court to dismiss said action against Defendants, Thompson Medical Company, Inc. and Wal-Mart Stores, Inc. with prejudice pursuant to this Stipulation.

RHODES, HIERONYMUS, JONES
TUCKER & GABLE

By 
JOHN H. TUCKER, OBA #9110
PO Box 21100
Tulsa OK 74121-1100
(918) 582-1173

Attorneys for Plaintiff, Frances Pierce

37

015

GABLE GOTWALS MOCK
SCHWABE KIHLE GABERINO
Elsie Draper
Dennis Cameron
Amelia A. Fogleman
2000 NationsBank Center
15 West Sixth Street
Tulsa OK 74119

SKADDEN ARPS SLATE
MEAGHER & FLOM
Jeffrey S. Lichtman
919 Third Avenue
New York, NY 10022

By: *Elsie Draper*
ELSIE DRAPER, OBA #2482

Attorneys for Defendants, Thompson Medical
Company, Inc. and Wal-Mart Stores, Inc.

I:\CLIENT.MAT\1322\0001\PLEADING\STIPUL.DM

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

FILED

SEP 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENDA RICHARDS,)
)
 Plaintiff(s),)
)
 vs.)
)
 JAMES W. SMALL, et al,)
)
 Defendant(s).)

Case No. 96-C-67-B ✓

ENTERED ON DOCKET
DATE SEP 22 1998

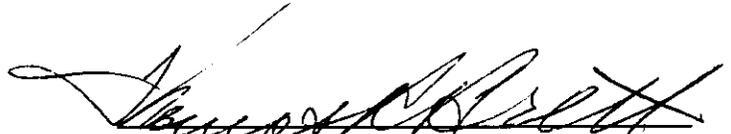
ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

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

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

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

IT IS SO ORDERED this 21st day of September, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

SEP 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

INTERFACE DESIGN GROUP, INC.,
et al.,

Plaintiffs,

vs.

Case No. 98-CV-406-C (M)

AMERICAN AIRLINES, INC.,

Defendant.

ENTERED ON DOCKET

DATE **SEP 21 1998**

REPORT AND RECOMMENDATION

The following motions have been referred to the undersigned United States Magistrate Judge for report and recommendation: American Airlines' Motion to Dismiss [Dkt. 3]; Motion for Summary Judgment filed by Plaintiff, Interface Design Group [Dkt. 11]; American Airlines' Motion to Reconsider Court's Order Granting Application for Leave to File Amended Complaint and Substitution of Party Plaintiff [Dkt. 18]; and IDG, Inc.'s Motion to Amend and Join Additional Party Defendant [Dkt. 27].

AMERICAN AIRLINES' MOTION TO DISMISS

American Airlines moved for dismissal of the Complaint alleging that Plaintiff, Interface Design Group, a California corporation, having had its corporate status suspended by the State of California, lacked the capacity to sue. Subsequently, American Airlines has acknowledged that Interface Design Group, Inc. has had its corporate status reinstated and accedes that with the reinstatement, "American's Motion to Dismiss is now moot." [Dkt. 26, p. 1]. The undersigned RECOMMENDS that the Motion to Dismiss [Dkt. 3] be DENIED as MOOT.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The undersigned RECOMMENDS that Plaintiff's Motion for Summary Judgment [Dkt. 11] be DENIED.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue of material fact" and "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, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986). However, the factual record and reasonable inferences to be drawn therefrom must be construed in the light most favorable to the non-movant. *Gullickson v. Southwest Airlines Pilots' Ass'n.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

Pursuant to a Licensing and Maintenance Agreement between Plaintiff and American Airlines, American Airlines was granted a license to use certain equipment, software and hardware belonging to IDG. IDG alleges: the termination of the agreement; the failure of American Airlines to return all equipment, software, and hardware materials upon termination as specified in the agreement; and damages. IDG

claims there is no question of fact as to these allegations and seeks summary judgment against American Airlines. [Dkt. 11].

Considering the pleadings, affidavits and exhibits, it is abundantly clear that Plaintiff is not entitled to summary judgment. American Airlines has submitted documentation demonstrating that it has not been a party to the subject agreement since 1996 because it assigned its obligations and responsibilities under to agreement to SABRE Group, Inc., which was not a named party as of the filing of the motion for summary judgment. In apparent recognition of the truth of this assertion, since filing its motion for summary judgment, Plaintiff has sought leave to add SABRE as a party defendant. Moreover, apart from the question of the proper party to the agreement, other genuine questions of fact exist. At the very least, the parties filings disclose a genuine question as to whether the subject agreement requires return of software and hardware coincident with the termination of the agreement, and whether that condition has been fulfilled.

**AMERICAN AIRLINES' MOTION TO RECONSIDER
ORDER GRANTING LEAVE TO AMEND**

On July 8, 1998, Plaintiff filed an application seeking to amend its complaint and to substitute party IDG-OkI as plaintiff. In accordance with the court's local rules, the application stated the defendant's objection to the application [Dkt. 13]. On July 14, 1998, before expiration of the time allotted for the defendant to file a response brief, the Court entered an order granting Plaintiff leave to amend its complaint substituting IDG, Inc., an Oklahoma corporation, as party plaintiff. [Dkt. 14].

Defendant, American Airlines, seeks reconsideration of the order granting leave to amend and permitting substitution. American Airlines alleges that the substituted party is not the real party in interest.¹ The undersigned finds that American Airlines has not stated sufficient reason for the Court to rescind its order permitting the amendment.

Fed.R.Civ.P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The decision whether to grant leave to amend is one committed to the discretion of the trial court and is overturned only for an abuse of discretion. *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir. 1996). In *Forman v. Davis*, the Supreme court explained the approach that district courts should take in deciding whether to permit a party to amend the pleadings:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason— such as undue delay, bad faith or dilatory motive on the part of the moveants, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

¹ American Airlines also argued that because the Plaintiff, California corporation Interface Design Group, Inc., had been suspended, and therefore lacked the capacity to sue, it also lacked the capacity to cause amendment of the complaint. Upon review of the case law concerning the rights of California corporations following reinstatement, American Airlines abandoned that argument. [Dkt. 26].

When the requirement that leave to amend should be "freely given," is read in conjunction with admonishment in Fed.R.Civ.P. 17(a) that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest . . .", it becomes clear that American Airlines' claim that the substituted party is not the real party in interest does not constitute sufficient reason for the court to have denied leave to amend in the first instance. Likewise, there is not sufficient reason for the court to reconsider its order. The undersigned RECOMMENDS that American Airlines' Motion to Reconsider [Dkt. 18] be DENIED.

IDG, INC'S MOTION TO AMEND AND TO ADD ADDITIONAL DEFENDANT

Plaintiff seeks to amend its complaint and join SABRE Group, Inc. ("SABRE") as a defendant pursuant to Fed.R.Civ.P. 19. American Airlines has objected, arguing that Plaintiff's motion fails to demonstrate the applicability of Rule 19, which states that a person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction shall be joined as a party if:

- (1) in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. . . . [emphasis supplied].

American Airlines' objection to the joinder of SABRE is wholly without merit. American Airlines opposed Plaintiff's motion for summary judgment on the basis that SABRE is the proper party to the agreement sued upon. [Dkt. 19, p. 6]. American Airlines stated, as fact, that the true defendant is not before the court [Dkt. 19, p. 9 n.3]; that SABRE had possession of the subject software and hardware [Dkt. 19, p. 6]; and that SABRE was obligated to pay and is paying the annual fee under the agreement [Dkt. 19, p.5,14]. Irrespective of the merits of Plaintiff's particular application, based on American Airlines' factual assertions, the court finds that an order under Rule 19 requiring that SABRE be made a party defendant is appropriate. Consequently, the undersigned RECOMMENDS that Plaintiff's Motion to Amend and Join Additional Party Defendant [Dkt. 27] be GRANTED.

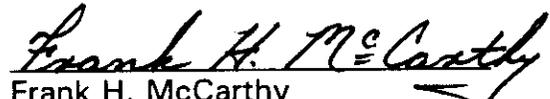
CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that American Airlines' Motion to Dismiss [Dkt. 3] be DENIED as MOOT; Plaintiff's Motion for Summary Judgment [Dkt. 11] be DENIED; American Airlines Motion to Reconsider Order Granting Leave to Amend [Dkt. 18] be DENIED; and Plaintiff's Motion to Amend and to Add Additional Defendant [Dkt. 27] be GRANTED.

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

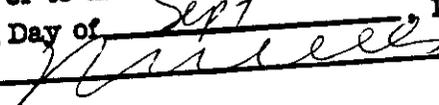
recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 17th Day of September, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

21 Day of Sept, 1998.


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

F I L E D

SEP 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GINA GREEN, individually and as mother)
and next friend of JACOB LEE GREEN)
and JAMIE ILENE GREEN, minor)
children,)

Plaintiff,)

vs.)

No. 97-C-164-B ✓

THE CITY OF TULSA, OKLAHOMA,)
a municipal corporation, RONALD E.)
O'DELL and BOB JACKSON,)

Defendants.)

ENTERED ON DOCKET

DATE SEP 21 1998

ORDER

Before the Court are the Motions for Summary Judgment filed by defendant City of Tulsa ("City") (Docket No. 16) and by individual defendants, Tulsa Police Officers Ronald E. O'Dell ("O'Dell") and Bob Jackson ("Jackson")(Docket No. 17). Plaintiff Gina Green, individually, and as mother and next friend of Jacob Lee Green and Jamie Ilene Green, minor children, filed this action pursuant to 42 U.S.C. §1983 against the City and defendant police officers alleging she was unconstitutionally deprived of the custody of her children. The City of Tulsa claims it is entitled to summary judgment as there is no evidence to support plaintiff's claim of a custom, policy or practice by the City which violated her constitutional rights. The defendant police officers seek summary judgment based on their defense of qualified immunity. The Court grants both motions.

I. Undisputed Facts

On February 25, 1995 at approximately 1:00 p.m., the defendant police officers responded to a "911-Trouble Unknown" call made from a pay phone located outside Kozmo's

29

Family Center ("Kozmo's") at 4404 South Peoria, Tulsa, Oklahoma. When they arrived, no one was at the pay phone so the officers entered Kozmo's and spoke with the manager to determine if he were aware of any problem. The manager knew of no specific problem but told the officers he had seen children playing in the area of the pay phone. While the officers were interviewing the manager, they observed Ms. Green who appeared extremely upset.

The officers approached Ms. Green and asked why she was upset. Ms. Green informed them she was in the process of a divorce involving a custody battle and her husband, Gary Green, was late returning their children and she feared he had kidnaped them. Ms. Green indicated the children were with their father pursuant to a court order which granted Mr. Green supervised visitation every other Saturday. Ms. Green told the officers Mr. Green had sexually molested their children. Ms. Green was visibly disturbed and extremely emotional. The police officers became concerned about Ms. Green's irrational behavior and questioned her concerning whether she was using drugs or if she needed professional counseling. Ms. Green said she was not on drugs and did not need professional counseling. While defendant O'Dell talked with Ms. Green, defendant Jackson spoke with the manager of Kozmo's who advised him that Ms. Green had a pistol in her purse and had stored the purse and a gun clip behind the counter. When the officers questioned Ms. Green about the gun in her purse, she told them she kept it for protection.

While the defendant officers were talking with Ms. Green, Mr. Green arrived with the children and the court-appointed supervisor, Sandra Casler ("Casler").¹ The officers questioned

¹ Ms. Green now asserts Sandra Casler was not the court-appointed supervisor. She cites the affidavit of Linda S. Palmer presented in Ms. Green's lawsuit against Sandra Casler in Tulsa County District Court Case No. CJ-95-1954. *Plaintiff's Response, Ex. 4*. In her affidavit, Ms. Palmer identifies herself as the "exclusive owner of Beginnings a/k/a Beginnings, Inc." (In the temporary order entered in the Greens' divorce proceedings, the court appointed Beginnings, Inc. to provide supervision of Mr. Green's visits with his children.) Ms. Palmer attests Casler shared office space with her from June 1, 1993 until January 15, 1995 and she on occasion referred clients to

Mr. Green and Casler while the children remained in their father's car. Casler stated that nothing out of the ordinary occurred during the visitation and they had arrived at the appropriate time. Mr. Green was questioned about Ms. Green's allegations of sexual abuse, which he denied. Defendant Jackson asked if the allegations had been investigated and when told there had been an investigation, Jackson contacted Gary Stansill, Tulsa Police Department sex crimes detective, by phone regarding Ms. Green's allegations. Detective Stansill stated he was aware of the allegations but there was not enough evidence to substantiate charges of sexual abuse.

During the officers' interviews, Ms. Green was crying hysterically.² Defendants O'Dell and Jackson did not determine if Ms. Green's "hysterical" condition were drug related and/or the result of an emotional problem but felt strongly the children's safety and well-being would be jeopardized if left in Ms. Green's care. The officers considered whether to remove the children from both parents and place them in a shelter. Mr. Green advised he would be willing to take the children home with him to keep them out of the shelter. Casler did not have any reservations with the children going with their father temporarily until the matter could be addressed by the court. The police officers allowed the children to remain with their father. Mr. Green left with the children and the officers left the scene just after 2:00 p.m.

Ms. Green returned to her residence and called "911". Officer D.W. Froemming

Casler during that time. Ms. Palmer, however, states she did not know of the temporary order in the Greens' divorce proceeding and she did not refer the case to Casler.

How or if Casler was assigned the Green case, however, is not particularly pertinent to this Court review of the defendant officers' conduct on February 25, 1995. It is undisputed that Casler was identified to Officers Jackson and O'Dell as the court-appointed supervisor and they had no reason to believe otherwise.

² Ms. Green disputes she was hysterical. However, she stated the following in her affidavit in her lawsuit against Sandra Casler in Tulsa County District Court Case No. CJ-95-1954: "I was crying hysterically because I knew my children were in danger and the Defendant, Sandra Casler, was intentionally preventing their return to me." *Defendant's Supplemental Exhibits, Ex. 4.*

("Froemming") responded to the call which was identified as pertaining to the violation of a protective order. Froemming interviewed Ms. Green and reviewed and verified Tulsa County District Court Protective Order No. 93-4416,³ and the temporary order issued by the Tulsa County District Court, No. FD-94-3133 which granted Mr. Green supervised visitation from 10:00 a.m. to 6:00 p.m. every other Saturday.⁴ Froemming attested that Ms. Green informed him she was upset because Mr. Green was late returning their children from visitation and because she was upset, the court-appointed supervisor, Casler, advised Mr. Green to take the children home with him. Froemming also attested he contacted Mr. Green by phone and asked if he would bring the children back to Ms. Green by 6:00 p.m., the court-ordered time. According to Froemming, Mr. Green told Froemming he knew he would be in violation of the court order but he would not return the children to Ms. Green. Froemming prepared and filed a police report.⁵

³ The Protective Order orders the defendant Gary Green "not to abuse or injure the victim(s)"; "not to visit with, assault, molest, harass, or otherwise interfere with the victim(s) wherever they may be, to include but not be limited to home, school, or place of employment"; "not to threaten the victim(s)"; and "to remain away from the victim(s) and the residence of the victim(s) wherever it may be." *Plaintiff's Response, Ex. 7.*

⁴ The Temporary Order stated in pertinent part the following:

- A. The Defendant [Gina Green] shall have temporary custody of the two minor children, Jacob Green, age five (5) and Jamie Green, age (2).
- B. The Plaintiff [Gary Green] shall have only supervised visitation, to occur every other Saturday from 10:00 a.m. until 6:00 p.m.. The first visit shall be for only two (2) hours, however, and shall occur in a public place. Each visitation shall be supervised by Beginnings, Inc., with confirmation of said supervision to be provided the Defendant. The Plaintiff shall be required to pay for the supervision service.

Plaintiff's Response, Ex. 2.

⁵ The Police report dated February 25, 1995 and signed by Ms. Green states in pertinent part as follows: Upon arrival I spoke with Gina Green. Ms. Green states that she and her two children, Jacob and Jamie, have a protective order against Gary Green. Protective Order 93-4415 was checked through records and verified. The Greens also have a court order (FD 94 3133) granting supervised visitation [sic] 10 AM to 6 PM every other Saturday. When Gary is with the children it must be under the supervision of an employee of Beginnings Inc. - Sandra Casler being the court appointed supervisor. This order was signed by District Judge Robert Perugino.

On today's date, 02-25-95 Gary was returning the children to Gina at a location they had

II. Summary Judgment Standard

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

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The 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 v.*

both agreed upon, 4404 S. Peoria. Gina states they, Gary and Casler were late and she got upset when they finally arrived with the children. Police were called to the disturbance. Due to the fact Gina was hysterical [sic] Casler told Gary to take the children home with him. Casler then left the scene according to Gina and did not follow Gary and the children.

I contacted Gary by phone in Rose Ok. (836-3663) and asked if he would bring the children back to Gina by 1800 hrs which was the court order time. He stated he would not return them. I asked if Sandra Casler was present with him and the children and he stated "No, she's not here." He states that he knows he is in violation of the court visitation order and the protective order but states he will not return the children.

Defendant City of Tulsa's Exhibits, Ex.2.

Zenith, 475 U.S. 574, 585 (1986).

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 must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party.

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. Analysis

A. Qualified Immunity of the Defendant Police Officers

The defendant police officers claim they are entitled to qualified immunity. Once a defense of qualified immunity has been raised, plaintiff has the “burden to show with particularity facts and law establishing the inference that defendant violated a constitutional right.” *Abeyta v. Chama Valley Indep. School Dist., No. 19*, 77 F.3d 1253, 1255 (10th Cir. 1996). The plaintiff then must demonstrate that “the constitutional . . . rights the defendant allegedly violated were clearly established at the time of the conduct at issue.” *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). Only if plaintiff satisfies this burden does the burden shift to the defendants to establish there are no material issues of fact as to whether the defendants’ actions were objectively reasonable in light of the law and information they possessed at the time of their actions. *Guffey v. Wyatt*, 18 F.3d 869, 871 (10th Cir. 1994).

In applying this test, the Court is guided by the analysis in *Hollingsworth v. Hill*, 110 F.3d 733 (10th Cir. 1997). In *Hollingsworth*, a mother brought a civil rights claim against a deputy sheriff and county sheriff, claiming her rights were violated when the deputy sheriff took her two

children from her while serving her with a protective order.⁶ The Tenth Circuit found the deputy violated the mother's right to due process under the Fourteenth Amendment and such right was clearly established in January 1993. The circuit court reasoned parents have a fundamental liberty interest in the "care, custody, and management" of their children. *Id.* at 738-39 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). And as the "state may not deprive a person of her liberty interest without providing a fair procedure for the deprivation," the plaintiff's "interest in the custody of her children was . . . a constitutionally protected liberty interest which could not be deprived without due process." *Id.* at 739. The only exception noted by the court is the existence of "emergency circumstances which pose an immediate threat to the safety of a child"; in such situations, "officials may temporarily deprive a parent of custody without parental consent or a court order." *Id.* The court, however, found that "[a]lthough the Order was intended to protect the children from abuse, injury, molestation, and harassment by their mother, the record contain[ed] no evidence that Ms. Hollingsworth posed an immediate threat to their safety." *Id.* Accordingly, the circuit court concluded the exception did not apply and Ms. Hollingsworth had met her burden of establishing she was deprived of due process. *Id.*

Although finding the plaintiff met her burden of establishing the deputy sheriff violated a clearly established constitutional right, the circuit court concluded the deputy sheriff was entitled

⁶ After a fight with his wife, James Hollingsworth obtained an ex parte emergency protective order limiting Patricia Hollingsworth's contact with him and their two children, an eight-month-old and a two-year-old. The Order named James Hollingsworth and the two children as plaintiffs. The Order ordered Ms. Hollingsworth to (1) "not abuse or injure Plaintiff," (2) "not visit, assault, molest, harass or otherwise interfere with the Plaintiff," (3) "not to come to the residence of the Plaintiff," and (4) "leave the residence of Plaintiff within 3 hours/days [sic] from service of th[e] Order until the hearing date," and also stated "This Order is not to prevent reasonable visitation between the parents with regard to the children." *Id.* at 736.

While Mr. Hollingsworth was obtaining the protective order, Ms. Hollingsworth left home with their children and checked into a motel. Once located by the sheriff's department, the deputy sheriff served her with the protective order at the motel and returned the children to Mr. Hollingsworth.

to qualified immunity as his actions were objectively reasonable in light of the following circumstances: his knowledge of the case was limited to the information contained in the protective order which on its face stated that “both parents had some rights in the children’s care, custody, and maintenance, but apparently that their father was entitled to more than mere visitation”; he sought and relied upon legal advice from the District Attorney’s office concerning his understanding that the order required him to remove the children from their mother’s custody when he served the order; and he removed the children for no other purpose than to carry out the protective order. *Id.* at 742. Based on these facts, the circuit court concluded:

The benefits of our constitutional hindsight clearly reveals that Ms. Hollingsworth was entitled to notice and an opportunity to be heard before she was deprived of custody of her children. Yet, we recognize that Deputy Hill was positioned between two private parties in the midst of a domestic dispute with a valid court order called a “protective” order. In that position at the time, Deputy Hill simply did not have the benefit of the constitutional hindsight that we rely on today. The circumstances prevented Hill from knowing that his actions were unconstitutional. Even if the right to procedural due process was clearly established, Deputy Hill’s actions were reasonable in light of the circumstances he faced at the time he acted. Therefore, we hold that he is entitled to qualified immunity.

Id.

Applying the analysis in *Hollingsworth* to the facts of this case, the Court finds that even if, with the “benefit of constitutional hindsight,” the Court were to conclude defendant police officers had violated Ms. Green’s clearly established constitutional right to due process, the Court holds their acts were objectively reasonable in light of the circumstances the officers faced at the time of the violation. Unlike the deputy sheriff in *Hollingsworth*, the defendant officers were not called to the scene to enforce a protective order. Ms. Green states she never made the “911” call to which the officers responded on February 25, 1995. Rather, after the officers arrived and spoke with the manager at Kozmo’s, they saw Ms. Green crying and went over to her

to see what was wrong. While telling the officers her fears about her children's supervised visitation with their father, Ms. Green became even more upset. She told the officers that her estranged husband was late returning the children and she feared he had kidnaped them. The officers became concerned about her mental and emotional state and then discovered Ms. Green had carried a gun in her purse which she had stored behind the counter at Kozmo's. When Mr. Green and Casler arrived at the appointed time and at the appointed place to return the children, the officers interviewed them. The officers did not rely on Mr. Green's denial of Ms. Green's allegations of sexual abuse; rather, they properly contacted Detective Stansill, the police department's sex crimes detective, regarding Ms. Green's allegations and Stansill stated there was insufficient evidence to substantiate charges of sexual abuse in the Green case. When speaking with Casler, the officers were assured that she had supervised the visit and nothing out of the ordinary occurred during the visitation and they had arrived at the appropriate time. According to Ms. Green's affidavit and consistent with her report to Froemming, Casler also advised that given Ms. Green's hysterical state, the children should go with their father.

As is often the case when state officials are positioned between two private parties in the midst of a custody dispute, the officers faced a difficult decision - whether to turn the children over to Ms. Green although she appeared to the officers (and apparently, Casler) to be mentally and emotional unstable at the time, and in possession of a gun, to allow Mr. Green to keep the children until the matter could be addressed by the court, or to remove the children from both parents and place the children in a shelter. While none of these alternatives is ideal, the Court cannot conclude that any of the alternatives would have been unreasonable actions for the

officers to take under the circumstances.⁷ Accordingly, the Court holds the defendant officers are entitled to qualified immunity from plaintiff's §1983 claim.

B. Municipal Liability

Under §1983, a municipality may be held liable for the constitutional violations of its employees only when the plaintiff can establish (1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the alleged violation. *Jenkins v. Wood*, 81 F.3d 988, 993-94 (10th Cir. 1996)(citing *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)). Ms. Green alleges the City of Tulsa is liable for the unconstitutional acts of its police officers Jackson and O'Dell because of its failure to train its police officers in the proper enforcement of court orders, which failure directly caused the alleged violation of Ms. Green's Fourteenth Amendment right to due process.

Inadequate training can only be the basis for §1983 liability in "limited circumstances." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S.Ct. 1382, 1390 (1997)(quoting *Canton v. Harris*, 489 U.S. 378, 387 (1989)). Such circumstances would include continued adherence to an established training program which municipal decisionmakers "know or should know has failed to prevent tortious conduct by employees," so as to establish "the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability." *Id.* (quoting *Canton*, 489 U.S. at 390 n.10). "In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of

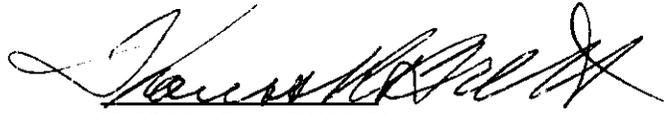
⁷ The difficult nature of the officers' decision is particularly apparent under these circumstances as any of the alternative actions arguably could have given rise to a §1983 claim against the defendant officers by either or both parents.

the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury." *Id.*

Ms. Green has provided no evidence of the City's "continued adherence" to any program which the City knew or should have known failed to prevent tortious conduct of its employees; nor has she provided any evidence of a pattern of tortious conduct by inadequately trained employees. The only "evidence" Ms. Green has placed in the record in support of her claim of municipal liability consists of Plaintiff's Exhibit 9, "Partial copy of the 1998 Tulsa Police Department Rules & Regulations, Policies & Procedures" and Plaintiff's Exhibits 10-11, copies of the 11/17/92 "Chemical Training Logs" of officers O'Dell and Jackson. *Plaintiff's Response, Exs. 9-11.* Ms. Green cites the former in support of her uncontroverted fact ¶16 which states "That the policies and procedures promulgated by the City of Tulsa and ignored by Defendant's government agents failed to provide the Plaintiffs police protection and violated the City of Tulsa's special duty to Plaintiffs," and the latter two exhibits in support of her uncontroverted fact ¶17 which states "That even though Defendants O'Dell and Jackson have combined thirty-five year of experience employment [sic] with the City of Tulsa as police officers, they have not yet been adequately trained to enforce court orders." *Plaintiff's Response, p.6.* A "partial" copy of Tulsa Police Department Policy and Procedure for 1998 when the alleged violation occurred in 1995 taken alone establishes nothing in this case, much less the City's continued adherence to an established program which the City knew or should have known failed to prevent the tortious conduct of its employees. In addition, the Court is at a loss to determine how a log of each officer's completion of a chemical training program in 1992 without more establishes Officers O'Dell and Jackson were not adequately trained to enforce court orders.

In accordance with the above, the Court grants summary judgment to the individual defendants Officers Jackson and O'Dell based on qualified immunity (Docket No. 17) and to the City of Tulsa on municipal liability (Docket No. 16).

ORDERED this th18 day of September, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

FILED

SEP 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

GINA GREEN, individually and as mother)
and next friend of JACOB LEE GREEN)
and JAMIE ILENE GREEN, minor)
children,)

Plaintiff,)

vs.)

No. 97-C-164-B

THE CITY OF TULSA, OKLAHOMA,)
a municipal corporation, RONALD E.)
O'DELL and BOB JACKSON,)

Defendants.)

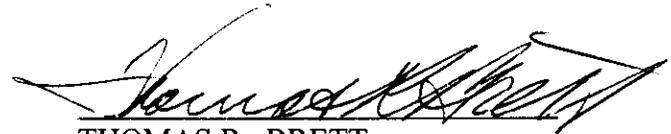
ENTERED ON DOCKET
SEP 21 1998

DATE _____

JUDGMENT

In accord with the Order filed this date sustaining the Motions for Summary Judgment filed by Defendant City of Tulsa and the individual Defendants, Ronald E. O'Dell and Bob Jackson, the Court hereby enters judgment in favor of Defendants City of Tulsa, Ronald E. O'Dell and Bob Jackson, and against Plaintiff Gina Green, individually, and as mother and next friend of Jacob Lee Green and Jamie Ilene Green. Costs are assessed against Plaintiff if properly applied for pursuant to Local Rule 54.1. The parties are to pay their own respective attorney fees.

Dated, this 18th day of September, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

92

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

SEP 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,

vs.

D & D AGENCY, INC., d/b/a WESTERN
JET SALES, a Texas corporation; and
TEXTRON FINANCIAL CORPORATION,
a Delaware corporation,

Defendants.

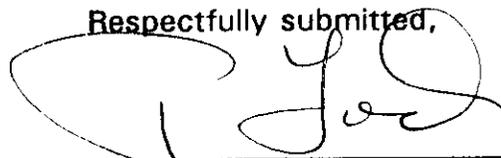
Case No. 97-CV-920-H (W) ✓

ENTERED ON DOCKET
DATE SEP 21 1998

JOINT STIPULATION OF DISMISSAL

Plaintiff, BizJet International Sales & Support, Inc., and defendants, D & D Agency, Inc., d/b/a Western Jet Sales, and Textron Financial Corporation, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this proceeding with prejudice to the refile of same.

Respectfully submitted,



John E. Dowdell, OBA #2460
Thomas M. Ladner, OBA #5161
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR PLAINTIFF, BIZJET
INTERNATIONAL SALES & SUPPORT, INC.

50

AT

Craig W. Hoster

Craig W. Hoster, OBA #4384
Sarah C. Hartmeyer, OBA #17641
CROWE & DUNLEVY
321 South Boston Avenue, Suite 500
Tulsa, OK 74103-3313
(918) 592-9800

- and -

Burton J. Johnson, OBA #4671
Bradley K. Donnell, OBA #15922
LOONEY, NICHOLS & JOHNSON
528 Northwest 12th Street
P. O. Box 468
Oklahoma City, OK 73101-2407
(405) 235-7641

**ATTORNEYS FOR DEFENDANT, D & D
AGENCY, INC., d/b/a WESTERN JET SALES**

J. David Jorgenson

J. David Jorgenson, OBA #4839
INHOFE JORGENSEN & BALMAN
907 Philtower Building
427 South Boston Avenue
Tulsa, OK 74013-4114
(918) 583-4300

**ATTORNEYS FOR TEXTRON FINANCIAL
CORPORATION**