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IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**  
NORTHERN DISTRICT OF OKLAHOMA **MAR 9 1999**

NORAM GAS TRANSMISSION,  
COMPANY, )  
 )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 COMSTOCK OIL & GAS, INC., )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-534-BU

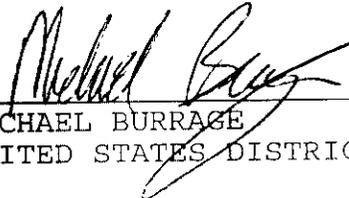
**ENTERED ON DOCKET**

DATE **MAR 10 1999**

**ORDER**

In light of the parties' settlement and compromise of this matter, the Court DECLARES MOOT Plaintiff's Motion for Summary Judgment (Docket Entry #8).

Entered this 9th day of March, 1999.

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

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

ASSOCIATED BUSINESS TELEPHONE, )  
SYSTEMS, CORP., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
XETA CORPORATION, )  
 )  
Defendant/Third Party )  
Plaintiff, )  
 )  
v. )  
 )  
D & P INVESTMENTS, INC., )  
 )  
Third Party Defendant. )

ENTERED ON DOCKET  
DATE MAR 10 1999

Case No. 96-CV-274-H(M)

**FILED**  
MAR 10 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 241) with respect to Defendant/Third Party Plaintiff XETA Corporation's ("XETA") motion to strike certain damage related evidence and claims of Plaintiff Associated Business Telephone Systems, Corp. ("ABTS"), or in the alternative, to allow further limited discovery (Docket # 218). ABTS has filed an objection and a supplemental objection to the Report and Recommendation, and XETA has responded to ABTS's objection.

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(a) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

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Fed. R. Civ. P. 72(a).

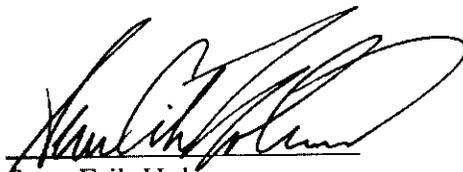
The Magistrate Judge found XETA's request to exclude certain damage related evidence to be inappropriate since XETA had not been significantly prejudiced given that the trial had been postponed and an opportunity for additional discovery had been offered. Report and Recommendation, at 7. The Magistrate Judge instead recommended that "ABTS be assessed reasonable expenses, including attorney fees, XETA incurred in conducting all discovery directed to the documents at issue in [XETA's] motion." *Id.* at 8. The Magistrate Judge further recommended that the Court deny admission of the summary damage calculations relating to the Omni Shoreham/Comtel issue "unless the underlying supporting data for the calculations were produced within the extended discovery time frame." *Id.* at 9. ABTS objected on several grounds including: (1) ABTS provided XETA with the documents it requested; (2) the Magistrate Judge's sanction is excessive; (3) the Magistrate Judge employed affidavits in a manner prohibited under Oklahoma law; and (4) ABTS sent to XETA the documentation relating to the Omni Shoreham/Comtel damage calculations in compliance with the Report and Recommendation.

Based upon a careful review of the Report and Recommendation of the Magistrate Judge, ABTS's objection and supplemental objection, and XETA's response, the Court finds that the Report and Recommendation, assessing against ABTS reasonable expenses and attorney fees relating to the discovery of documents at issue in XETA's motion, and recommending conditional admission of ABTS's Omni Shoreham/Comet summary damage calculations, should be adopted. Accordingly, XETA's motion is hereby denied in part and granted in part insofar as

ABTS failed to produce the necessary supporting data for its Omni Shoreham/Comtel summary damage calculations within the time allowed by the discovery period.

IT IS SO ORDERED.

This 10<sup>TH</sup> day of March, 1999.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes  
United States District Judge

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

PROCEEDS OF REAL PROPERTY LOCATED  
AT 1218 EAST 29TH PLACE, TULSA,  
OKLAHOMA, IN THE AMOUNT OF NINE  
THOUSAND FIVE HUNDRED NINETY-FIVE  
DOLLARS AND 66/100 (\$9,595.66),

Defendant.

ENTERED ON DOCKET

DATE **MAR 10 1999**

CASE NO. 98-CV-692-BU(E)

**FILED**

MAR 9 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER FOR DISMISSAL

THIS MATTER comes on for consideration of the Joint Motion for Dismissal of this case with prejudice and without costs filed herein by the parties, the United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, and Claimant Janis Fritz, by and through her attorney Sam P. Daniel, III, of Daniel and Otey. Upon consideration of the motion, the Court finds that the motion should be and it is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action for the forfeiture of the defendant proceeds is hereby dismissed with prejudice and without costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshals Service shall pay the defendant proceeds to the Clerk of the Court for the Northern District of Oklahoma to be paid toward and credited against the restitution order entered in the Judgment In A Criminal Case in *United States of America v. Steven Ladd Fritz*, United States District Court for the Northern District of Oklahoma Case Number 97-

3/10/99  
3/10/99  
1/1/99

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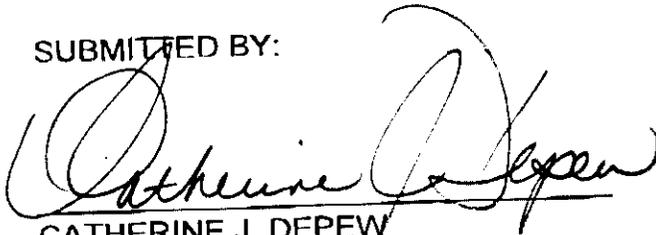
CR-152-001-H.

ENTERED this 9<sup>th</sup> day of March, 1999.



MICHAEL BURRAGE  
Magistrate Judge of the United States District  
Court for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, OK 74013  
(918) 581-7463



SAM P. DANIEL, III  
Daniel and Otey  
1924 south Utica, Suite 802  
Tulsa, OK 74104-6522  
Counsel for Claimant Janis Fritz

N:\udd\psaden\forfeit\friz\Joint Motion to Dismiss.wpd

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

**FILED**

MAR 9 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NORAM GAS TRANSMISSION,  
COMPANY,  
  
Plaintiff,  
  
vs.  
  
COMSTOCK OIL & GAS, INC.,  
  
Defendant.

Case No. 98-CV-534-BU

ENTERED ON DOCKET  
DATE MAR 20 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, 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 stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 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 9<sup>th</sup> day of March, 1999.

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

*mm*

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

**FILED**

MAR 9 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NORAM GAS TRANSMISSION, )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
COMSTOCK OIL & GAS, INC., )  
 )  
Defendant. )

Case No. 98-CV-534-BU

ENTERED ON DOCKET

DATE MAR 26 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, 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 stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 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 9<sup>th</sup> day of March, 1999.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LEO HISE and JACK ISCH, individually )  
and as representatives of a class of others )  
similarly situated, )

Plaintiffs, )

v. )

PHILIP MORRIS INCORPORATED )  
(a Virginia Corporation), R.J. REYNOLDS )  
TOBACCO COMPANY (a New Jersey )  
Corporation), BROWN & WILLIAMSON )  
TOBACCO CORPORATION (a Delaware )  
Corporation), LORILLARD TOBACCO )  
COMPANY (a Delaware Corporation), and )  
THE LIGGETT GROUP d/b/a LIGGETT )  
AND MYERS TOBACCO COMPANY )  
(a Delaware Corporation), )

Defendants. )

“CLASS ACTION” )

**F I L E D**

MAR - 9 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-0947-C (E)

FILED ON DOCKET

DATE MAK 16 1999

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court has referred to the undersigned for Report and Recommendation two motions filed by *pro se* “petitioners” Robert E. Cotner and T. L. Rhine, and defendants’ motions to strike those filings. (See March 1, 1999 Minute Order.) The Cotner and Rhine pleadings are characterized as motions to file amicus briefs and to enter this class action lawsuit. As respondents point out, this class action suit is one in which plaintiffs have sued on behalf of a purported national class of tobacco consumers suffering monetary loss due to increases in tobacco prices resulting from alleged constitutional and antitrust violations.

It is apparent from the language of the Cotner and Rhine pleadings that, technically, Cotner and Rhine seek to intervene. Neither claims to be a tobacco consumer. Both men claim, however,

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that their personal health has been damaged by exposure to second-hand tobacco smoke, and that they are entitled to a share of a settlement between defendants and the State of Oklahoma. Cotner also seeks to assert a wrongful death claim because his father allegedly died from cancer caused by tobacco and his mother allegedly died from second-hand smoke. Rhine also claims that defendants failed to place a warning label on tobacco products that are sold to people who roll their own cigarettes.

It is unclear how the settlement between defendants and the State of Oklahoma could “harm” or “punish” Cotner and Rhine by increased prices if it is second-hand smoke from which they suffer. Cotner asserts that he is harmed by the increased prices because the state will use profits from the price increases to “PAY FOR more state prisons to be built, MORE LAWS TO BE PASSED to keep prisoners in prisons longer, [and] INCREASE the suffering and lack of medical treatment of State prisoners.” (Cotner’s “Traverse to Motion to Strike and Motion to Over Rule Defendant [sic] Response as Moot,” Docket # 22-1.) Both men claim to be disabled because they have been denied access to legal materials, courts, and assistance. Cotner specifically requests that the Court appoint counsel to assist him in this action. Finally, Cotner and Rhine claim that defendants’ motions to strike are possible violations of their rights under the Religious Restoration Act.

Although the Court must construe *pro se* pleadings liberally, see Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the Cotner and Rhine motions are frivolous. Their claims and allegations have nothing to do with the factual or legal issues raised by the plaintiffs in this purported class action. They clearly fail to meet the requirements for intervention of right or permissive intervention pursuant to Fed. R. Civ. P. 24. Petitioners have stated no “direct, substantial, and legally protectable” interest relating to the property or transaction which is the subject of the action. See

Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior, 100 F.3d 837, 840 (10th Cir. 1996); Vermejo Park Corp. v. Kaiser Coal Corp., 998 F.2d 783, 790-91 (10th Cir. 1993). Further, their claims and plaintiffs' claims share no common questions of law or fact. Fed.R.Civ.P. 24(b).

Even if the petitioners' motions could be construed as motions to appear in a more limited role as *amicus curiae*, their appearance would aid neither the Court nor the class. District courts have broad discretion to permit or deny the appearance of *amicus curiae* in any given case. See, e.g., United States v. Ahmed, 788 F. Supp. 196, 198 n. 1 (S.D.N.Y.), aff'd, 980 F.2d 161 (2d Cir. 1992). Accordingly, the undersigned recommends that the Court exercise its discretion to deny petitioners' request to intervene or appear as *amici curiae*.

### CONCLUSION

Based on a review of the record and the briefs, the undersigned proposes findings that the petitioners have not met the requirements of Fed.R.Civ.P. 24 to intervene, and their appearance as *amici curiae* would assist neither the Court nor the class. For these reasons, the undersigned recommends that the "Amucus Curi/Notice [sic] and Petition To Enter Case and Of Interested Parties" filed by Robert E. Cotner (Docket # 13-1), the "Notice of Interested Partie [sic] and CLAIM and Amicus Curiae Petition" filed by T. L. Rhine (Docket # 18-1) be **DENIED**, and that the Motion to Strike and Response of Defendants Philip Morris, Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company to Filing of Robert E. Cotner (Docket # 19-1), Defendant Liggett Group's Motion to Strike and Response to Filing of Robert E. Cotner (Docket # 21-1), certain Defendants' Motion to Strike the Filing of T. L. Rhine

(Docket # 28-1); and Defendant Liggett Group's Motion to Strike Filing of T. L. Rhine (Docket # 29-1) be **DENIED as moot.**<sup>1</sup>

### OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections 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 Thomas v. Arn, 474 U.S. 140 (1985); Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992).

Dated this 9<sup>th</sup> day of March, 1999.

Claire V Eagan  
CLAIRE V. EAGAN  
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

9<sup>th</sup> Day of March, 1999.

<sup>1</sup> Since the granting of a motion to strike is not a final decision subject to immediate appeal, see 28 U.S.C. §1291, and the denial of motions to intervene are immediately appealable, see, e.g., Cook v. Powell Buick, Inc., 155 F.3d 758, 761 (5th Cir. 1998), the undersigned deems it the better course of action to deny the motions to strike as moot if the motions to intervene are denied.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 09 1999

HOMER W. TATE, )  
)  
PLAINTIFF, )  
)  
vs. )  
)  
KENNETH S. APFEL, Commissioner )  
of the Social Security Administration, )  
)  
DEFENDANT. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-CV-576-M

ENTERED ON DOCKET

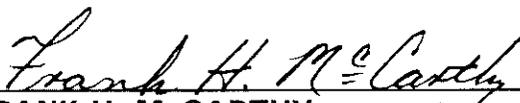
DATE MAR 10 1999

**ORDER**

Plaintiff has applied for an award of attorney's fees and costs pursuant to 42 U.S.C. § 406(b)(1). Defendant, Commissioner of the Social Security Administration, has advised the Court he has no objection to an award of \$5,087,50 in attorney fees as requested by Plaintiff.

The Court finds the hourly rate and number of hours expended to be reasonable. Accordingly, Plaintiff's motion for fees pursuant to 42 U.S.C. § 406(b)(1) is GRANTED in the amount of \$5,087.50. Plaintiff's counsel was previously paid fees pursuant to Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). Plaintiff's counsel shall refund the smaller of the two fee awards to Plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986).

SO ORDERED this 9<sup>th</sup> day of March, 1999.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAR -9 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BURLINGTON NORTHERN AND )  
SANTA FE RAILWAY COMPANY, )

Plaintiff, )

v. )

BINGHAM SAND AND GRAVEL, INC. )  
and BINGHAM TRANSPORTATION, INC., )

Defendants. )

Case No. 98-CV-0248-EA  
(Base File)

ENTERED ON DOCKET

DATE MAR 19 1999

GARY DEAN McMACKIN, )

Plaintiff, )

v. )

BURLINGTON NORTHERN AND )  
SANTA FE RAILWAY COMPANY, et al., )

Defendants. )

Case No. 98-CV-0703-EA  
(Consolidated)

**ORDER**

Now before the Court is the Combined Motion and Brief for Partial Summary Judgment Regarding the Adequacy of the Grade Crossing Warning Devices (Docket #27) filed by Burlington Northern and Santa Fe Railway Company ("BNSF") in the case of Gary McMackin. On October 2, 1998, the Court entered an Order granting partial summary judgment in favor of BNSF and against Bingham Sand and Gravel, Inc, and Bingham Transportation, Inc. on the issue of the adequacy of the grade crossing warning devices. This action was subsequently consolidated with Gary Dean McMackin v. Burlington Northern Railroad and James O. Davidson, Case No. 98-CV-0703-EA on November 20, 1998.

The underlying facts of these consolidated cases are the same: both actions arise out of a collision between a truck and a train at a railroad grade crossing near Quapaw, Ottawa County, Oklahoma in July 1996. Further, the law has not changed since the court's order of October 2, 1998: adequacy of crossing warning devices is an issue that is preempted by federal law, and application of federal law requires a finding in this matter that the warning devices at railroad crossing AAR-DOT #607-386X were adequate at the time of the collision giving rise to this action.<sup>1</sup> For the reasons cited in its Order of October 2, 1998, the Court finds that BNSF's motion should be granted.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see generally Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A party opposing a motion for summary judgment may not rest upon the bare allegations in the complaint, but must set forth specific facts demonstrating a genuine issue for trial. Anderson, 477 U.S. at 248-49. A factual dispute is material only if, under the applicable law, its resolution might affect the outcome of the case. A dispute is genuine only if a reasonable finder of fact could return a verdict for the nonmoving party. Id. There remains no genuine issue of material fact with regard to Gary McMackin's inadequate signalization claim. BNSF, as the moving party, is therefore entitled to partial summary judgment as a matter of law.

---

<sup>1</sup> The Court acknowledges the opinion of the Oklahoma Supreme Court in the case of Akin v. Missouri Pacific Railroad, \_\_\_ P.2d \_\_\_, 1998 WL 730176 (Okla. 1998), holding that preemption does not occur until federally-funded warning devices are installed and operational. However, McMackin does not contest BNSF's statement of undisputed fact that federally-funded warning devices were installed and operational at the subject grade crossing. Akin is therefore inapplicable.

**CONCLUSION**

BNSF's Combined Motion and Brief for Partial Summary Judgment Regarding the Adequacy of the Grade Crossing Warning Devices (Docket #27) is **GRANTED**.

Dated this 9<sup>th</sup> day of March, 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

LR

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

GEORGE C. GIBSON, JR., )  
)  
Plaintiff,) )  
)  
v. )  
)  
CONTINENTAL AIRLINES, INC., )  
a Delaware corporation, )  
)  
Defendant.)

ENTERED ON DOCKET

DATE MAR 09 1999

Case No.: 97-CV-1000E (J) ✓

**FILED**

MAR 08 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL

Pursuant to Rule 41, Fed. R. Civ. Pro., the Plaintiff, George C. Gibson, Jr., and the Defendant, Continental Airlines, Inc., hereby stipulate that the above-styled and numbered case be dismissed, with prejudice, with each party bearing its own costs and attorney fees.

Respectfully submitted,

*Sam C Fullerton IV*

Sam C. Fullerton, IV  
P.O. Box 4771  
Tulsa, Oklahoma 74159-0771  
ATTORNEY FOR PLAINTIFF

ATKINSON, HASKINS, NELLIS, BOUDREAUX,  
HOLEMAN, PHIPPS & BRITTINGHAM

*Walter D. Haskins*

Walter D. Haskins, OBA #3964  
Whitney M. Eschenheimer, OBA #17025  
1500 ParkCentre  
525 South Main  
Tulsa, Oklahoma 74103-4524  
ATTORNEYS FOR DEFENDANT

26

*CLJ*

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

**F I L E D**

MAR 08 1999

ERIC COURTNEY HARRIS,

Plaintiff,

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

vs.

Case No.99-CV-75-Bu(M)

STANLEY GLANZ, LORI LEDFORD,  
GREG GRAVES,

Defendants.

ENTERED ON DOCKET

DATE MAR 9 1999

**REPORT AND RECOMMENDATION**

In accordance with 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 issued an Order directing Plaintiff to pay an initial partial filing fee of \$9.33 to be paid by February 26, 1999. Plaintiff was advised that unless he either (1) paid the initial partial filing fee, or (2) showed cause in writing for the failure to pay, his action would be subject to dismissal without prejudice to refiling. [Dkt. 4].

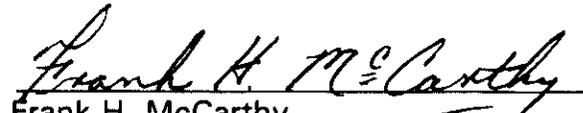
To date, Plaintiff has not paid the partial filing fee or shown cause for his failure to pay. It is therefore the recommendation of the undersigned United States Magistrate Judge that Plaintiff's action be DISMISSED WITHOUT PREJUDICE for his failure to pay the partial filing fee.

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

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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 8<sup>th</sup> day of March, 1999.

  
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

9 Day of March, 1999.  
[Signature] Dep. Clerk

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

ENTERED ON DOCKET  
DATE MAR 09 1999

FLO WALTERS, now GUTHRIE, )  
)  
Plaintiff, )  
)  
vs. )  
)  
AMERICAN MEDICAL SECURITY, )  
UNITED WISCONSIN GROUP, )  
UNITED WISCONSIN LIFE )  
INSURANCE COMPANY, and )  
UNITED WISCONSIN INSURANCE )  
COMPANY )  
)  
Defendants. )

No. 98-CV-596-K ✓

**F I L E D**

MAR 08 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Before the Court is the motion of the Plaintiff to remand. On July 8, 1998, the Plaintiff filed an action against the Defendants in the District Court of Rogers County, State of Oklahoma, for alleged breach of an insurance contract and for the payment of medical bills incurred. The Plaintiff also brought a claim for Defendants' bad faith in breaching that contract.

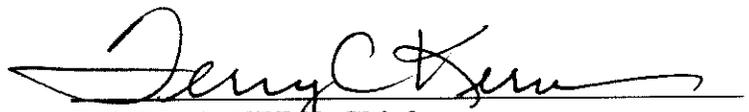
Defendant removed the state court action to this Court, arguing that the claims were preempted by the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. §1132(a)(1)(B), the enforcement provision of ERISA, only grants standing to "participants" or "beneficiaries" under an "employee welfare benefit plan". See Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229, 764 F.2d 147, 152-53 (3d Cir.1985). Furthermore, in order to maintain an ERISA action, the insured must be deemed an "employee" under the statute. Ehrlich v. Howe, 848 F.Supp. 482, 486 (S.D.N.Y. 1994). The Plaintiff contends that she was not an

employee during any time pertinent to this action. The insurance policy in question was purchased by the Plaintiff and paid for by the Plaintiff. Therefore, she contends, ERISA does not govern her claims. She has filed an affidavit in support of her argument.

As the party invoking application of the removal statute, the Defendants have the burden of establishing that the case presents a federal question. Van Camp v. AT & T Information Systems, 963 F.2d 119, 121 (6th Cir.), cert. denied, 113 S.Ct. 365 (1992). Defendants have failed to maintain its burden. In fact, they have failed to respond to the Motion to Remand altogether. Thus, pursuant to Local Rule 7.1.c, the Motion is deemed admitted. Despite the local rule, however, the Court has determined through independent inquiry that the Motion to Remand should be granted.

It is the Order of the Court that the motion of the Plaintiff to remand (#7) is hereby GRANTED. Pursuant to 28 U.S.C. §1447(c), this action is hereby remanded to the District Court for Rogers County, State of Oklahoma, for further proceedings.

ORDERED this 5 day of March, 1999.

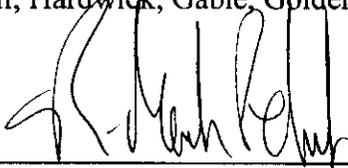
  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE



Submitted by:

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.

By:

A handwritten signature in black ink, appearing to read "R. Mark Petrich", written over a horizontal line.

R. Mark Petrich, OBA #11956  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0464

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

STRIKE AXE NON-PROFIT WATER )  
CO., a non-profit corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
NaDEAN PRATHER, attorney-in-fact )  
For EMELENE W. JONES, )  
 )  
Defendant. )

ENTERED ON DOCKET  
DATE 3/8/99

Case No. 98-CV-0332-K  
**FILED**  
MAR 08 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER ON PLAINTIFF'S MOTION TO REMAND**

This matter comes on before the Court, pursuant to Plaintiff's Motion To Remand. The Court, being advised that the parties have agreed that this case may be remanded back to the District Court of Osage County, State of Oklahoma, finds that Plaintiff's Motion To Remand should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this case should be, and is hereby, remanded to the District Court of Osage County, State of Oklahoma.

DATED: March 5, 1999.

TERRY C. ...

UNITED STATES DISTRICT COURT JUDGE

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

**F I L E D**

MAR - 5 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOHNNY RAY LAMBERT, )  
)  
Plaintiff/Petitioner, )  
)  
vs. )  
)  
BILL McKENZIE, LORINE KRAMER, )  
)  
RON CHAMPION, Warden, RANDY )  
)  
COOK, DOLORES RAMSEY, JACK )  
)  
DAVIS, LARRY ROLLERSON, )  
)  
and DELFIA BREWER, )  
)  
Defendants/Respondents. )

No. 98-CV-502-B

ENTERED ON DOCKET  
DATE MAR 08 1999

**ORDER**

Plaintiff/Petitioner Johnny Ray Lambert, a state inmate currently incarcerated at Oklahoma State Penitentiary, McAlester, Oklahoma, has paid in full the filing fee to commence this civil rights action pursuant to 42 U.S.C. § 1983. Lambert alleges that his due process rights were violated in a prison disciplinary proceeding on May 12, 1995, which resulted in the loss of 120 earned credits and 30 days of disciplinary segregation. In addition, Plaintiff/Petitioner seeks compensatory damages, injunctive relief and "all expenses to this court and petitioner." (#1)

As a preliminary matter and as acknowledged by Plaintiff/Petitioner, the Court takes notice that Lambert has raised due process claims arising from the same disciplinary proceeding in this Court in a prior case, 96-CV-101-K. To the extent those claims challenged the length or duration of his sentence, the Court converted the case to a 28 U.S.C. § 2254 habeas corpus proceeding and dismissed the case without prejudice for failure to exhaust available state remedies. To the extent Lambert was seeking money damages and declaratory relief, the Court dismissed the claims without prejudice finding that the claims, if true, would necessarily imply the invalidity of the misconduct

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conviction and were not cognizable under 42 U.S.C. § 1983 since Plaintiff/Petitioner presented no proof that the misconduct conviction had been “reversed, expunged, invalidated, or impugned.” Edwards v. Balisok, 520 U.S. 641 (1997); Heck v. Humphrey, 512 U.S. 477, 487 (1994).

In light of the disposition of Plaintiff/Petitioner’s previous action, the Court directed Plaintiff/Petitioner to provide in the instant action any “petitions, applications or briefs submitted by Plaintiff/Petitioner to the state courts of Oklahoma and copies of any final orders issued by those courts relevant to the claims raised in the instant case.” (see #3, Order, filed August 25, 1998) Plaintiff/Petitioner has now complied, to the extent possible, with the Court’s request.

A review of the limited information provided by Plaintiff/Petitioner reveals that the misconduct finding has not been overturned or otherwise invalidated. Therefore, to the extent Lambert is now seeking compensatory damages (“all the money he could get”), the Court finds that those claims must be dismissed without prejudice pursuant to Edwards V. Balisok, 520 U.S. 641 (1997); Heck v. Humphrey, 512 U.S. 477, 487 (1994). It is well established that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [overturned].” Heck, 512 U.S. at 487. Furthermore, Plaintiff/Petitioner’s claim for money damages arising from the alleged due process violation has not accrued unless or until his misconduct conviction has been “reversed, expunged, invalidated, or impugned.” Id.

In addition, Plaintiff/Petitioner is not entitled to prospective relief which he requests, i.e. “Petitioner wants an injunction against the Okla. Pardon & Parole Board from ever hearing his parole dockets . . . Petitioner wants a three to five person panel appointed by this court to hear each of

petitioners (sic) parole hearings from now on. Petitioner wants an injunction (sic) against D.O.C. from ever using this type of confidential statement to ship any one else from medium to maximum (sic) security!" (#1, *Complaint/Petition* at 5-A). While a prayer for such prospective relief will not "necessarily imply" the invalidity of a previous loss of good-time credits and may properly be brought under § 1983, see Balisok, 520 U.S. 641, 117 S.Ct. 1584, 1589 (1997), Plaintiff/Petitioner has not shown that he will suffer irreparable injury, nor that he does not have an adequate remedy at law. O'Shea v. Littleton, 94 S.Ct. 669, 678 (1974). Therefore, injunctive relief is not available as "the principles of equity, comity, and federalism" restrain a federal court from issuing an injunction "against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate.'" Id. (quoting Younger v. Harris, 91 S.Ct. 764, 751 (1971)). Consequently, the Court finds that Plaintiff/Petitioner is not entitled to injunctive relief as to his claims against the Oklahoma Pardon & Parole Board and the Department of Corrections.

Upon further review of this matter and given Plaintiff/Petitioner's pro se status, the Court liberally construes Plaintiff/Petitioner's complaint as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.<sup>1</sup> See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). The Court finds that Plaintiff/Petitioner essentially requests restoration of his lost earned credits and expungement of his record.<sup>2</sup> Such request lies in habeas because it challenges the length or duration of his confinement. Preisser v. Rodriguez, 411 U.S. 475, 487-490 (1973); Duncan v. Gunter, 15 F.3d 989 (10th Cir.

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<sup>1</sup>Because the filing fee for a habeas action is \$5.00, Plaintiff/Petitioner is entitled to a \$145.00 refund.

<sup>2</sup>While it is evident Plaintiff/Petitioner seeks compensatory damages ("all the money he can possibly get") and injunctive relief (against the Oklahoma Pardon & Parole Board), the essence of Plaintiff/Petitioner's action is the "erasure of the misconduct," the "restoration of earned credits," and "being allowed to transfer{} back to medium security."

1994); Smith v. Maschner, 899 F.2d at 951. Therefore, Plaintiff/Petitioner's remedy is a writ of habeas corpus under 28 U.S.C. § 2254 rather than a complaint under 42 U.S.C. § 1983. The proper respondent in this matter is the state officer having custody of Petitioner. See Rule 2(a), *Rules Governing Section 2254 Cases*.

Respondent is directed to prepare a response to Petitioner's habeas corpus petition pursuant to Rule 5 of the Rules Governing § 2254 Habeas Corpus Cases. That rule states:

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts...are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court may on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

In addition, the Court is aware that Petitioner has filed one or more mandamus actions in the state courts.<sup>3</sup> Included as part of the response, Respondent shall provide a chronology of the progression of all habeas/mandamus actions related to the disciplinary action at issue in this case brought by Petitioner in the state courts along with copies of all petitions, applications, motions, responses and orders of disposition filed in the state district court and state criminal court of appeals.

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<sup>3</sup>It now appears Petitioner may have filed a petition for writ of mandamus in August, 1995, in the Oklahoma County District Court. This Court takes notice that in the prior federal case, 96-CV-101-K, the State provided no indication that a petition for writ of mandamus had been filed and may have been pending in a state district court.

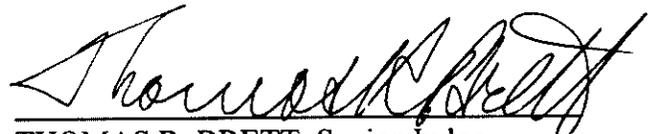
As an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to 28 U.S.C. § 2244, failure to comply with the 1-year limitations period, or lack of jurisdiction.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Plaintiff/Petitioner's claims for compensatory and injunctive relief as a result of his alleged due process violations are dismissed without prejudice.
- (2) Plaintiff/Petitioner's complaint pursuant to 42 U.S.C. § 1983, filed July 9, 1998, is converted to an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254.
- (3) The Clerk is directed to substitute Gary Gibson, Warden, as Respondent in place of Defendants Bill McKenzie, Lorine Kramer, Ron Champion, Randy Cook, Dolores Ramsey, Jack Davis, Larry Rollerson, and Delfia Brewer, and to change the case caption to reflect the substitution.
- (4) The Clerk is directed to refund to Petitioner, Johnny Ray Lambert, the sum of One Hundred Forty-Five Dollars and No Cents (\$145.00).
- (5) The Clerk shall mail a copy of the petition (#1) to the Oklahoma Attorney General and to Petitioner. See Local Rule 9.3(B).
- (6) Respondent shall **show cause** why the writ should not issue and **file** a response to the petition for a writ of habeas corpus within thirty (30) days from the date of entry of this order. Extensions of time will be granted for good cause only. See Rule 4, Rules Governing § 2254 Cases. As part of the response, Respondent shall provide the chronology and the documents discussed above.

- (7) Petitioner may file a **reply brief within thirty (30) days** after the filing of Respondent's response. If Respondent files a **motion to dismiss**, Petitioner has fifteen (15) days from the filing date of the motion to respond. Failure to respond may result in the automatic dismissal of this action. See Local Rule 7.1 for the Northern District of Oklahoma.

SO ORDERED this 5<sup>th</sup> day of March, 1999.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

file

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

**FILED**  
MAR 05 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiff, )

vs. )

Case No. 99-CV-0138-B (J)

RCN CORPORATE SERVICES, INC., )  
a New Jersey corporation, and TEC AIR, INC., )  
a Delaware corporation, )

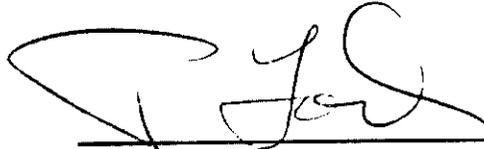
Defendants. )

ENTERED ON DOCKET  
MAR 08 1999  
DATE \_\_\_\_\_

**DISMISSAL WITHOUT PREJUDICE**

The plaintiff, BizJet International Sales & Support, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismisses all claims against RCN Corporate Services, Inc., without prejudice to the refiling of same.

Respectfully submitted,



Thomas M. Ladner, OBA# 5161  
Heather L. Drake, OBA# 17609  
NORMAN WOHLGEMUTH CHANDLER & DOWDELL  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103  
(918) 583-7571  
(918) 584-7846 (Facsimile)

**ATTORNEYS FOR PLAINTIFF, BIZJET  
INTERNATIONAL SALES & SUPPORT, INC.**

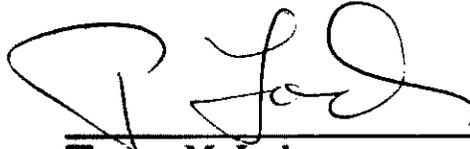
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**CERTIFICATE OF MAILING**

I hereby certify that on the 5<sup>th</sup> day of March, 1999, I mailed a true and correct of the foregoing instrument, with proper postage thereon, to:

T. Lane Wilson, Esq.  
HALL, ESTILL, HARDWICK, GABLE, GOLDEN  
& NELSON, P.C.  
320 South Boston Avenue, Suite 400  
Tulsa, OK 74103



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**Thomas M. Ladner**

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

**FILED**  
MAR 5 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Case No. 85-C-437-E

FILED ON DOCKET  
MAR 08 1999

**ORDER & JUDGMENT**

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on February 8, 1999, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$48,004.20.

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 \$48,004.20, and a judgment in the amount of \$48,004.20 is hereby granted on this day.

ORDERED this 5<sup>th</sup> day of March, 1999.

9/18

s/JAMES O. ELLISON

**HONORABLE JAMES O. ELLISON**  
United States District Court

  
Louis W. Bullock  
Patricia W. Bullock  
BULLOCK & BULLOCK  
320 South Boston, Suite 718  
Tulsa, Oklahoma 74103-3783  
(918) 584-2001

  
Mark Lawton Jones  
Assistant Attorney General  
OFFICE OF THE ATTORNEY  
GENERAL  
4545 North Lincoln, Suite 260  
Oklahoma City, OK 73105-3498

- and -

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

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

ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

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

ANGELA SIPES, )  
)  
Plaintiff, )  
and )  
)  
DELANE HOLLAND-WENTZ, )  
MYCHELLE RENEE TULK, )  
NAOMI E. BLOOD, SANDRA E. )  
FREEZE, BARBARA ANN CRUSSEL, )  
LAVENIA MAY TAYLOR, LORRIE )  
ANN ROTH, JOYCE LUTZ, )  
DIANA M. RUBIN, PATRICE B. )  
MCGUIRE AND DAVID H. MCGUIRE, )  
LISA ANN KEIRSEY & WILLIAM )  
TOM KEIRSEY, )  
)  
Plaintiffs in Intervention, )  
)  
vs. )  
)  
AESTHETECH CORPORATION, et al., )  
)  
Defendants. )

ENTERED ON DOCKET  
MAR 08 1999

FILED

MAR - 5 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NO. 92-C-1013E

ORDER OF DISMISSAL

NOW on this 5<sup>th</sup> day of March, 1999, the above styled  
and numbered cause coming on for hearing before the undersigned  
Judge of the United States District Court for the Northern District  
Oklahoma upon the Stipulation for Dismissal With Prejudice between  
the Plaintiff, Angela Sipes, Plaintiffs in Intervention, Delane  
Holland-Wentz, Mychelle Renee Tulk, Naomi E. Blood, Sandra E.  
Freeze, Barbara Ann Crussel, Lavenia May Taylor, Lorrie Ann Roth,  
Joyce Lutz, Diana M. Rubin, Patrice B. McGuire and David H.  
McGuire, Lisa Ann Keirsey & William Tom Keirsey, and each of them,  
and Defendants, CUI Corporation, INAMED Corporation, McGhan Medical  
Corporation and Minnesota Mining & Manufacturing Company. The  
Court having examined the Stipulation and being well and fully

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advised in the premises, finds that said cause should be dismissed with prejudice as to the Defendants, CUI Corporation, INAMED Corporation, McGhan Medical Corporation and Minnesota Mining & Manufacturing Company.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the above styled and numbered cause be and the same is hereby dismissed with prejudice to the filing of a further action thereon as to the Defendants, CUI Corporation, INAMED Corporation, McGhan Medical Corporation and Minnesota Mining & Manufacturing Company, only, each party to bear their own costs.

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

Law

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

MAR 04 1999 *sc*

J. MICHAEL RITZE, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 A. AINSLEE STANFORD, NORTHWESTERN )  
 MUTUAL LIFE INSURANCE COMPANY, )  
 )  
 Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

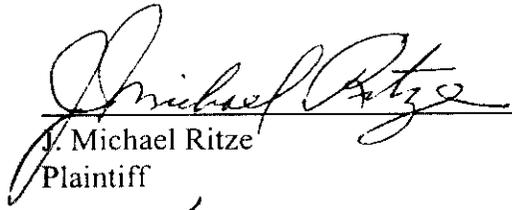
Case No. 98-CV-0057M

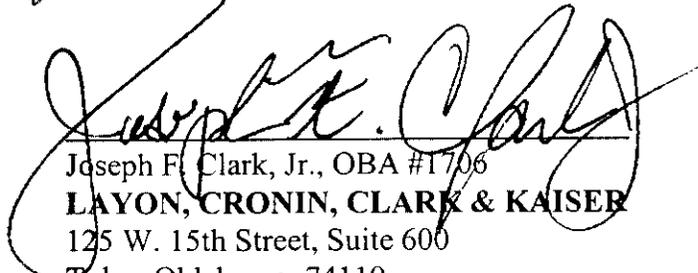
ENTERED ON DOCKET  
DATE MAR 08 1999

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff, J. Michael Ritze, and Defendant, The Northwestern Mutual Life Insurance Company, hereby jointly stipulate for the dismissal of this entire action with prejudice, pursuant to Fed.R.Civ.P. 41(a)(1). The parties are to bear their own respective attorneys fees and costs.

A. Ainslie Stanford has not joined in this Joint Stipulation of Dismissal with Prejudice because Mr. Stanford was previously dismissed with prejudice by Stipulation filed February 20, 1998.

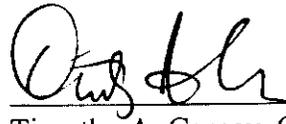
  
J. Michael Ritze  
Plaintiff

  
Joseph F. Clark, Jr., OBA #1706  
**LAYON, CRONIN, CLARK & KAISER**  
125 W. 15th Street, Suite 600  
Tulsa, Oklahoma 74119  
(918) 583-5538

Attorneys for Plaintiff

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CIT



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Timothy A. Carney, OBA #11784

**GABLE & GOTWALS**

2000 NationsBank Center

15 West Sixth Street, Suite 2000

Tulsa, Oklahoma 74119-5447

(918) 582-9201

Attorneys for Defendant,  
The Northwestern Mutual Life  
Insurance Company

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

FIRST MARINE INSURANCE )  
COMPANY, a Missouri Corporation, )  
 )  
Plaintiff, )  
 )  
 )  
 )  
vs. )  
 )  
JAMES W. COULANDER, )  
BEVERLY COULANDER, )  
STILLWATER NATIONAL BANK, )  
WILLIAM B. GADDIS, JR., )  
JAMES W. LEE, )  
 )  
Defendants. )

ENTERED ON DOCKET

DATE MAR 26 5 1999

No. 98-CV-560-K ✓

**FILED**  
MAR 04 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

**I. Statement of the Case**

Before the Court is the Motion of the Plaintiff, First Marine Insurance Company ("First Marine") for Summary Judgment (#21) pursuant to Fed.R.Civ.P. 56. This is a declaratory judgment action, in which First Marine **seeks** an Order from the Court that it has no duty to pay any damages from the James Coulander policy arising out of the accident at issue.

On or about May 29, 1998, a two-boat collision occurred on Grand Lake in Mayes County, Oklahoma. Occupants of the two boats included Defendant William B. Gaddis, his passenger James W. Lee, Jeremy Barlow, Billy Ray Barlow, and Bernadine Kay Johnson.<sup>1</sup> The

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<sup>1</sup>Jeremy Barlow, Billy Ray Barlow, and Bernadine Kay Johnson are no longer Defendants in this action. The opposition to the Motion for Summary Judgment was filed by Defendants James Coulander, Beverly Coulander, and William B. Gaddis, Jr. The Response as filed was adopted by Defendant James W. Lee. Defendant Stillwater National Bank has not responded to the Motion. It is therefore deemed admitted pursuant

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boat driven by Defendant William B. Gaddis was a 1992 Champion.

Defendants James Coulander and Beverly Coulander are husband and wife. Ms. Coulander is the mother of Defendant William Gaddis. Mr. Coulander is the stepfather of Mr. Gaddis. Prior to the collision, on or about April 18, 1997, Defendant James Coulander went alone to the All-American Insurance Agency, to insure the above-referenced Champion boat. Mr. Coulander completed and signed an application for boat insurance with the Plaintiff, First Marine Insurance Company. First Marine subsequently issued Policy Number MB1039890, a Motorboat Policy, on the Champion boat, based upon the information provided by James Coulander. On the application for insurance, James Coulander listed his name and address in the section indicated for "Applicant" information, and also signed on the "Applicant's signature" line. Beverly Coulander was not named on the application.

The application stated: "List all owner's names as they appear on the boat's certificate of title." The only name listed was James Coulander. James Coulander had no legal interest in the boat. His name was not on the title or on the note. The boat was registered to William Gaddis, and the loan/lien was to William Gaddis and Beverly Coulander. On the Official Oklahoma boating Accident Report, Defendant William Gaddis is listed as the "owner" of the Champion boat in question. The application listed James Coulander as a "100 percent" user of the Champion boat in question. The application listed "son" "Bill" as a "1 percent" user of the boat in question. James Coulander admitted that William Gaddis is not his son, but his step-son. James Coulander admitted that this percentage of use attributed by him to William Gaddis was

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to Local Rule 7.1.C.

incorrect.

For the application to be filled out **completely**, it needed information on William Gaddis, which was not obtained. The **completed application** does not include William Gaddis' date of birth, driver's license number, or **social security number**. Jerry Paul Simon, Vice-President of claims for **First Marine Insurance Company**, testified in his deposition that First Marine simply assumed that the information on the **application** was correct and did a driving history and motor vehicle record for the listed operator, **Mr. Coulander**. Based upon the application, First Marine was lead to believe that **Mr. Coulander was the owner and operator of the boat**.

James Coulander indicated on the **insurance application** that he owned his home at 9232 E. 58<sup>th</sup> St., Tulsa, OK. James Coulander **does not** actually own this home; it is owned by his wife, Beverly. James Coulander indicated on the **insurance application** that the boat would not be parked at an apartment complex. **The boat** was in fact parked at a condominium complex. James Coulander indicated on the **application** that neither he nor William Gaddis had any traffic violations or automobile accidents within **three (3) years** of the application date, April 1997. On March 6, 1996, James Coulander was **charged** with speeding. He paid a fine on March 9, 1996. This traffic violation occurred within **three (3) years** of April 1997.

Department of Public Safety records reveal that William Gaddis has the following convictions on his driving record:

9/5/95	Failure to maintain required liability insurance
9/5/95	Driving while revoked
9/23/95	Second or subsequent offense for DUI
8/19/95	Second or subsequent offense for DUI

7/4/94            Driving while suspended, speeding.

All of these violations occurred within three (3) years of April, 1997.

James Coulander indicated on the application that neither he nor William Gaddis had ever had an operator's boat permit or automobile driver's license suspended or revoked.

Between 7/8/90 and 11/1/97, there were 31 Department of Public Safety actions on the driving record of William Gaddis. These include revocations of:

1.     8/7/90            chemical test revocation
2.     10/21/91          points suspension
3.     1/9/94             chemical test revocation
4.     3/1/94             chemical test revocation
5.     9/18/95            chemical test revocation
6.     10/23/95          chemical test revocation
7.     11/6/95            no insurance verification revocation
8.     10/19/97          chemical test revocation

James Coulander indicated on the application that no operators of the boat in question had been convicted of or pled guilty to felony convictions within ten (10) years of the application, April 1997. William Gaddis, a listed operator, did, in fact, have a felony conviction within ten (10) years of the completion of the application. He plead guilty to felony assault and battery with a dangerous weapon. In February of 1992, William Gaddis was sentenced to two (2) years with the Department of Corrections pursuant to this felony conviction, and began his incarceration at the Jackie Brannon Correctional Center in March of 1992.

James Coulander admitted in his recorded statement that he was aware of William

Gaddis' criminal history. James Coulander was asked "at the time you filled out the application did you know Bill had been in trouble with the cops, the DUI's, and all that stuff?" to which he replied, "Yeah."

On the application for insurance, James Coulander stated that the boat in question was a 1989 model. In fact, it was a 1992 model. James Coulander listed on the application the value of the boat at Ten Thousand Dollars (\$10,000.00), though the actual purchase price of the boat was approximately Twelve Thousand Five Hundred Dollars (\$12,500.00).

As part of its investigation into the various claims, First Marine requested the assistance of its only named insured, James Coulander. James Coulander was apparently completely uncooperative in First Marine's investigation. The application for insurance contained the following statement: "Material misrepresentation by applicant on this application may jeopardize applicant's insurance coverage."

## **II. Summary Judgment Standard:**

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

### **III. Misrepresentation**

#### **General Condition Which Apply To Coverages:**

Fraud, Concealment, or Misrepresentation– If you, or any other insured under this policy have intentionally concealed or misrepresented any material fact or circumstance or engaged in fraudulent conduct or made false statements relating to this insurance, whether before or after a loss, this policy is void as to you and any other insured. This policy is also void to any other insured if an insured has committed any policy violation under this contract.

#### **36 O.S. §3609 states in relevant part:**

Misrepresentations, omissions, concealment of facts, and incorrect statement shall not prevent a recovery under the policy unless:

1. Fraudulent; or
2. Material to acceptance of risk or to hazard assumed by insurer; or
3. Insurer in good faith would either not have issued policy, or would not have issued policy in an as large an amount if the true facts had been made known to the insurer.

Under Oklahoma law a “misrepresentation” in an insurance application is “a statement as a fact of something which is untrue and which the insured states with the knowledge that it is untrue and with an intent to deceive, or which he states positively as true without knowing it to be true and which has a tendency to mislead, where such fact in either case is material to the risk.” Claborn v Washington Nat’l Ins. Co., 910 P.2d 1046, 1049 (Okla. 1996). See Massachusetts Mutual Life Insurance Company v. Allen, 416 P.2d 935 (Okla. 1966). The existence of a single misrepresentation in an application for insurance is sufficient to support rescission of the policy. Burgess v. Farmers New World Life Ins. Co., 12 F.3d 992, 993 (10<sup>th</sup> Cir. 1993). The misrepresentation is grounds for voidance of a policy if the insured had the intent to

deceive. Hays v. Jackson Nat'l Life Ins. Co., 105 F.3d 583, 588 (10<sup>th</sup> Cir. 1997). "The language of a contract should be interpreted most strongly against the party who drafted the contract." Dismuke v. Cseh, 830 P.2d 188, 190 (Okla. 1992).

The Plaintiff contends that James Coulander's statements on his application for insurance were fraudulent, material to the acceptance of risk by First Marine, and First Marine in good faith would not have issued a policy had the true facts been known. Per the language of the policy and the relevant Oklahoma statute, Plaintiff argues the policy in question is void.

Specifically, the Plaintiff asserts that Mr. Coulander knew at the time he filled out the application whether he owned the boat he sought to insure, whether he owned his home, and whether he had been convicted of speeding in 1996. The Plaintiff contends, additionally, that Mr. Coulander also certainly knew that the usage attributed to him on the application, 100 percent, was incorrect and he also certainly knew that the usage attributed to William Gaddis, 1 percent, was incorrect.

The Plaintiff argues, further, that prior to indicating on the application that William Gaddis, his purported "son," had no traffic violations in the previous three years, had not had his license revoked, and had no felony convictions within ten years, Mr. Coulander should have verified the truth of this information. In fact, Mr. Gaddis had numerous license revocations, a felony conviction, and several traffic violations, all of which Plaintiff maintains were material to the risk assumed by First Marine.

The Defendants respond that the "misrepresentations," to the extent they exist at all, were the result of the agent failing to inquire as to further information necessary to complete the contract. They have not disputed the facts as laid out by the Plaintiff, but have instead attempted

to avoid summary judgment by introducing the proposition that the omissions on the insurance contract were the result of negligence of First Marine's agent. They have provided this Court with not one bit of legal support for this proposition. Finally, Defendants point out that First Marine did not bother to obtain the appropriate information before extending insurance, but continued to accept Mr. Coulander's premiums and have failed to return them.

As discussed *supra*, under Oklahoma law, a "misrepresentation" in an insurance application is "a statement as a fact of something which is untrue and which the insured states with the knowledge that it is untrue and with an intent to deceive, *or which he states positively as true without knowing it to be true and which as a tendency to mislead, where such fact in either case is material to the risk.*" Claborn v Washington Nat'l Ins. Co., 910 P.2d 1046, 1049 (Okla. 1996). See Massachusetts Mutual Life Insurance Company v. Allen, 416 P.2d 935 (Okla. 1966). While it is impossible to look inside a party's mind to the time of the creation of the contract to determine intent, it is nevertheless apparent to the Court that there were several misrepresentations made by Mr. Coulander on his insurance application with First Marine. First Marine has directed this Court's attention to numerous facts or omissions on the insurance contract which it determines to be "misrepresentations," but this Court will focus on only three crucial discrepancies.

First, the Court agrees that driving and criminal history information regarding a potential operator is essential for an insurance company to set premiums and issue coverage. And while "details" such as Mr. Gaddis' date of birth and social security number were simply omitted, Mr. Coulander provided false answers to questions on the application which directly affected his eligibility for coverage. Where the application asked whether either the insured or the operators

had committed a felony in the past ten (10) years, Mr. Coulander answered "no," even though Mr. Gaddis had committed a felony only five (5) years prior to the application for insurance in 1997. In fact, Mr. Coulander admitted in his recorded statement with Mr. Bradfield, an investigator for First Marine, that he was aware of Mr. Gaddis' criminal history when filling out the application, though he later disputed that fact. During his interview with Mr. Bradfield, James Coulander was asked: "At the time you filled out the application did you know Bill had been in trouble with the cops, the DUI's, and all that stuff?" to which Mr. Coulander answered "Yeah... Yeah. I did."

Secondly, when asked whether the insured or any operators had ever had a license revocation, Mr. Coulander again marked "no" on his application. However, First Marine's investigation found that between 7/8/90 and 11/1/97, there were 31 Department of Public Safety actions on the driving record of William Gaddis. His license had been revoked eight times in the prior seven (7) years.

Finally, when asked on the application if the insured or any operator had any traffic violations in the past ten (10) years, Mr. Coulander again answered "no." Mr. Coulander himself had failed to disclose a violation for speeding which occurred in 1996. But Mr Gaddis, listed as an operator, had five violations within three (3) years of the application for insurance, two of which were for DUI violations.

The Court finds that Mr. Coulander made misrepresentations on the contract for insurance with First Marine. However, in order for the policy to be rescinded, the misrepresentations must have been "material" to the issuance of coverage. There is no question that the misrepresentations made were material to the acceptance of risk or hazard assumed by the Insurer. 36 O.S. §3609. The application in itself clears up any ambiguity on this point. Next to

the question-- "Has any person listed above had an operator's boat permit or automobile driver's license suspended or revoked?"-- is the phrase: "**(If yes, coverage not available.)**" (Emphasis added.) If Mr. Coulander had disclosed the truth about William Gaddis' driving record and history of revocations, DUI's, and felony convictions, First Marine would not have extended coverage under the policy. And, although Mr. Coulander contended in his deposition that he simply was not aware of the relevant information, his recorded conversation with Mr. Bradfield is evidence to the contrary.

This Court agrees with the Defendants that some of the misstatements on the application were merely "semantic," such as whether a stepson must be called a "stepson," or whether "son" is an appropriate designation. But it is not on this ground that the Court basis its findings. Material facts were misrepresented on the application for insurance. These facts were of such import to the very essence of the insurance contract that full disclosure would have altogether precluded coverage. And, Oklahoma law does not require evidence of an intent to deceive, but allows for a finding of misrepresentation where the Insured states a fact positively as true without knowing it to be true and which has a tendency to mislead, where such fact in either case is material to the risk. Claborn v Washington Nat'l Ins. Co., 910 P.2d 1046, 1049 (Okla. 1996).

This Court finds that the undisputed deposition and recorded interview transcripts demonstrate that Mr. Coulander made material misrepresentations in completing the contract for insurance with First Marine. Having found that Defendant James Coulander's answers on the application for insurance constituted a material misrepresentation under Oklahoma law, the motion for summary judgment will be granted. This Court need not reach any other arguments presented in the briefs.

**IV. Conclusion:**

It is the Order of the Court that the Motion of the Plaintiff for Summary Judgment (#21) is hereby GRANTED. Parties may file motions for attorney's fees and costs pursuant to Local Rule 54.2.

ORDERED this 4 day of March, 1999.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

**TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE**

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

FIRST MARINE INSURANCE )  
COMPANY, a Missouri Corporation, )

Plaintiff, )

vs. )

JAMES W. COULANDER, )  
BEVERLY COULANDER, )  
STILLWATER NATIONAL BANK, )  
WILLIAM B. GADDIS, JR., )  
JAMES W. LEE, )

Defendants. )

ENTERED ON DOCKET

DATE MAR 5 1999

No. 98-CV-560-K ✓

**FILED**

MAR 04 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court for consideration of the Motion by Plaintiff First Marine Insurance Company, for Summary Judgment against Defendants James W. Coulander, Beverly Coulander, Stillwater National Bank, William B. Gaddis, Jr., and James W. Lee.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously,

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

ORDERED THIS DAY OF 4 MARCH, 1999.



TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

36

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

**FILED**

MAR 4 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LINDA LITTLE, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WAL-MART STORES, INC., )  
a Delaware corporation, )  
 )  
Defendant. )

Case No. 97-CV-693-BU ✓

ENTERED ON DOCKET

DATE MAR 05 1999

**ORDER**

This matter comes before the Court upon the Motion to Set Aside Jury Verdict, Alter or Amend Judgment, or in the Alternative, Motion for New Trial filed by Plaintiff, Linda Little ("Little"). Defendant, Wal-Mart Stores, Inc. ("Wal-Mart"), has responded to the motion, and upon due consideration, the Court makes its determination.

Little brought this action to recover damages for injuries she allegedly received when a display shelf in Wal-Mart's Bristow store fell. At trial, Little argued that the display shelf was improperly assembled and stocked with certain merchandise which caused it to fall. According to Little, the merchandise from the display shelf struck her, causing injuries to her head, neck and left shoulder. Plaintiff asserted that as a direct result of these injuries, she underwent neck and shoulder surgeries. Plaintiff claimed that she incurred medical bills of approximately \$29,811.68. She also claimed lost wages in the amount of \$35,000.00. She further claimed damages for pain, suffering and disfigurement.

During the trial, Wal-Mart moved for a judgment as a matter of law pursuant to Rule 50(a), Fed. R. Civ. P., which the Court denied. After the close of the evidence, the Court submitted Little's claim to the jury. Following deliberation, the jury returned a verdict in favor of Little and awarded her \$12,000.00 in damages. Judgment was entered in accordance with the jury verdict.

In her motion, Little contends that the Court, pursuant to Rule 59(a), Fed. R. Civ. P., should set aside the jury's verdict or grant a new trial on the basis that the \$12,000.00 damage award is inadequate and against the weight of the evidence. Little states that her treating surgeon, Dr. James Mayoza, M.D., testified that she sustained injuries to her neck and shoulder as a result of being hit by Wal-Mart's display shelf and that she was required to miss two years of work because of those injuries. Little states that Wal-Mart presented no medical evidence in regard to her injuries. Little also states that Wal-Mart's cross-examination of Dr. Mayoza centered on whether or not she was hit by the merchandise. Little maintains that it was Wal-Mart's position that she was not hit by the merchandise and that her history to Dr. Mayoza was incorrect. Little states that because the jury found in her favor, its damage award of \$12,000.00 was not consistent with the undisputed evidence presented in regard to damages.

Absent an award so inadequate as to shock the judicial conscience and to raise and irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.

Barnes v. Smith, 305 F.2d 226, 228 (10<sup>th</sup> Cir. 1962).

"Damages are not grossly inadequate merely because a jury awards less than the plaintiff has requested. The jury is entitled to disregard the damages asked for if they do not agree with the computations or if other evidence is introduced from which jurors could draw their own conclusions.'" Shugart v. Central Rural Electric Coop., 110 F.3d 1501, 1506 (10<sup>th</sup> Cir. 1997) (quoting Luria Bros. & Co. v. Pielet Bros. Scrap Iron & Metal, Inc., 600 F.2d 103, 115 (7<sup>th</sup> Cir. 1979)).

In the instant case, there was conflicting evidence as to the extent and seriousness of Little's injuries directly caused by the negligence of Wal-Mart. Evidence was presented that Little's physical problems may have pre-existed the Wal-Mart accident. Medical records showed that Little had persistent neck and back pain in 1990 from a fall on the ice. Medical records also showed that she had a decreased range in motion in the neck in 1991. In addition, there was evidence that Little did not report to the hospital for approximately three hours after the accident and did not report any neck pain to the doctor. There was also evidence of excessive use of drug medication by Little. Dr. Mayoza testified that Little had taken other medication than what he had prescribed while she was in the hospital for her shoulder surgery. Mr. Mayoza testified that Little had been counseled sternly by him as well as by Dr. Karl Detwiler about being careful not to get addicted to the prescribed drug medication. Dr. Mayoza further testified that a person who has an addiction to pain medication may sometimes

exaggerate symptoms of pain and make up events to obtain pain medication. From the evidence presented, the jury could have chosen to believe that not all of Little's alleged injuries were caused by the Wal-Mart accident.

The Court must determine whether the jury's verdict "shocks the judicial conscience" such that it may infer that "passion, prejudice, corruption or other improper cause invaded the trial." Bennett v. Longacre, 774 F.2d 1024, 1028 (10<sup>th</sup> Cir. 1985). Upon review, the Court cannot infer bias and prejudice was present in this case.

A motion for new trial made on the ground that the verdict is against the weight of evidence presents a question of fact, and not of law, and is addressed to the discretion of the trial court. Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119, 1125 (10<sup>th</sup> Cir. 1995), cert. denied, 516 U.S. 1146 (1996). A trial court's decision to deny a motion for new trial will stand absent a showing of a manifest abuse of discretion. The inquiry focuses on whether the verdict was clearly, decidedly or overwhelmingly against the weight of the evidence.

The amount of damages awarded by the jury can be supported by any competent evidence tending to sustain it. Black v. Hieb's Enterprises, Inc., 805 F.2d 360, 363 (10<sup>th</sup> Cir. 1986). In the instant case, the Court finds that there was competent evidence to support the jury's verdict. In addition, the Court concludes that the record indicates that the jury's verdict of \$12,000.00 to compensate Little for her injuries was not clearly, decidedly, or

overwhelmingly against the evidence.

Little, in her motion, also requests that the judgment be altered or amended under Rule 59(e), Fed. R. Civ. P. A Rule 59(e) motion to alter or amend the judgment should be granted only "to correct manifest errors of law or to present newly discovered evidence." Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1523 (10<sup>th</sup> Cir. 1992) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)). Little has not shown any manifest error of law warranting relief under Rule 59(e).

Based upon the foregoing, Plaintiff's Motion to Set Aside Jury Verdict, Alter or Amend Judgment, or in the Alternative, Motion for New Trial (Docket Entry #22) is DENIED.

ENTERED this 4<sup>th</sup> day of March, 1999.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

LR  
7-25-99

4011-116

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

IN RE: )  
 )  
 LMS HOLDING COMPANY, )  
 PETROLEUM MARKETING COMPANY, )  
 and RETAIL MARKETING COMPANY, )  
 )  
 Debtors. )  
 )  
 BARRY DILL and DIANA DILL, )  
 husband and wife, )  
 )  
 Appellants/Plaintiffs, )  
 )  
 v. )  
 )  
 THE SOUTHLAND CORPORATION, a )  
 corporation, )  
 )  
 Appellee/Defendant. )

**FILED**  
 MAR 4 1999  
 Phil Lombardi, Clerk  
 U.S. DISTRICT COURT

Case No. 97-CV-371-H(J)

ENTERED ON DOCKET  
 DATE MAR 04 1999

ORDER

On February 19, 1999, the Court conducted a hearing on the Magistrate's Report and Recommendation of Dill's appeal from the Bankruptcy Court, together with objections from both Plaintiff and Defendant to the Report and Recommendation. The Plaintiff, Barry Dill ("Dill"), was present in Court, together with his attorney of record, Kelly F. Monaghan, of the law firm of Holloway & Monaghan. The Defendant, The Southland Corporation ("Southland"), appeared through its attorney of record, Wm. Brad Heckenkemper, of the law firm of Barrow Gaddis Griffith & Grimm.

The Court, having reviewed the Magistrate's Report and Recommendation, the Briefs submitted by Plaintiff and Defendant and

having received arguments and statements of counsel, makes the following findings, to-wit:

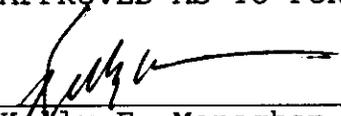
1. Dill's claim against Southland under the theory of principal/agent relationship is dependent on Dill's claim against Retail Marketing Company ("RMC"), the bankrupt Debtor. By virtue of the circumstances related to RMC's bankruptcy case, the Bankruptcy Court was correct in not remanding the case for the reasons set forth in the Report and Recommendation of the Magistrate.

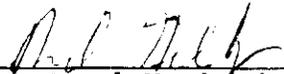
2. The Bankruptcy Court did not err in denying Plaintiff a jury trial based on the rationale cited in Langenkamp v. Culp, 498 U.S. 42, 111 S.Ct. 330, 112 L. Ed. 2d 343 (1990). Having filed his Proof of Claim in the RMC bankruptcy case, Dill submitted his claim to the equitable jurisdiction of that Court, thereby waiving his right to any jury trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's appeal of the Bankruptcy Court's Judgment Order dated December 16, 1996 is denied.

  
\_\_\_\_\_  
THE HONORABLE SVEN ERIK HOLMES  
UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Kelly F. Monaghan  
Holloway & Monaghan  
4111 S. Darlington, Ste. 1100  
Tulsa, OK 74135  
Attorneys for Plaintiff, Barry Dill

  
\_\_\_\_\_  
Wm. Brad Heckenkemper  
Barrow Gaddis Griffith & Grimm  
610 S. Main, Suite 300  
Tulsa, OK 74119-1248  
Attorneys for Defendant,  
The Southland Corporation

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brg 2/22/99

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE MAR 04 1999

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN M. CANTERO,

Defendant.

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No. 98CV0780H(M) ✓

**FILED**

MAR 4 1999 *SA*

DEFAULT JUDGMENT

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

The Plaintiff's Application for Default Judgment comes on for hearing this 19th day of February, 1999. The Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, John M. Cantero, appears not. The Court finds that pursuant to Rule 55 of the Federal Rules of Civil Procedure, notice of the hearing was given to the Defendant and the Defendant failed to appear.

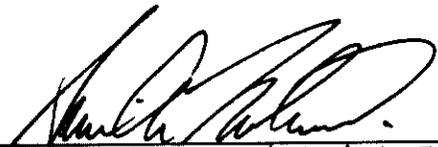
The Court gave due consideration to the pleadings and documents filed in support of the plaintiff's Complaint. The Court finds the plaintiff is entitled to judgment from its review of the supporting documentation.

The Court being fully advised and having examined the court file finds that Defendant, John M. Cantero, was served with Summons and Complaint on November 16, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by

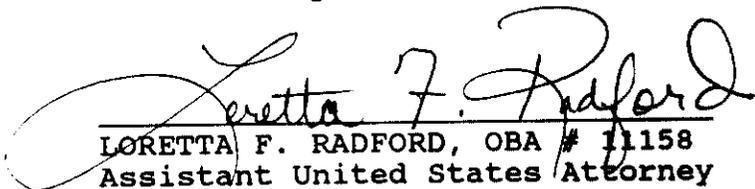
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the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, John M. Cantero, for the principal amount of \$2,742.86, plus accrued interest of \$1,057.35, plus administrative charges in the amount of \$40.00, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.918% percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

LFR/llf

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

STEPHEN JAMES RUMFELT, "JR." )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ONE UNKNOWN TULSA POLICE )  
 OFFICER and/or K9 OFFICER, )  
 D.R. MILLER, and M.D. SECRIST, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE MAR 04 1999  
No. 98-CV-532 H (J) ✓

**FILED**  
MAR 4 1999 *AL*  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

On July 17, 1998, Plaintiff submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered August 13, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he submitted (1) a properly completed motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915(a), including the statement of institutional accounts for the six-month period immediately preceding the filing along with the required certification; and (2) an amended complaint on the proper form, including the exact name of each defendant. Plaintiff was also ordered to submit copies of the amended complaint, additional summonses and Marshal service forms. The Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was advised that these deficiencies were to be cured by September 14, 1998, "otherwise, the Court will dismiss this action without prejudice and without further notice." (#3).

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Thereafter on September 11, 1998, Plaintiff submitted an incomplete amended complaint and an incomplete amended motion for leave to proceed *in forma pauperis* along with the summonses and Marshal service forms. By way of questions directed to the Plaintiff, the Court determined that Plaintiff had been released and was no longer in state custody (#7). The Court issued an order on January 12, 1999, advising Plaintiff that he had failed to cure the deficiencies in his documents and that this action could not proceed unless those deficiencies were cured (#8). Specifically, Plaintiff was advised again that he must submit a certified copy of his trust fund account statement (or institutional equivalent) for the 6-month period immediately preceding the filing of the complaint. See 28 U.S.C. § 1915(a)(2),(b). Although Plaintiff had been released from custody after the filing of this action, Plaintiff was incarcerated at the time the action was initiated and was required to comply with the *in forma pauperis* statute. As a result, the Court granted Plaintiff an additional twenty days, or until February 1, 1999, within which to comply, but advised Plaintiff that this action would be dismissed without prejudice and without further notice unless Plaintiff provided the necessary accounting. In addition, the Court directed Plaintiff to provide a properly signed "Declaration under Penalty of Perjury" (page 9 of the amended civil rights complaint (#4)), and two identical copies of the amended complaint for service on the Defendants. To date, Plaintiff has not submitted the required documents or payment, nor has he shown cause for his failure to do so as directed by this Court.

Because Plaintiff has failed to comply with the Court's Order of January 12, 1999, and has failed to pay the filing fee or file a properly supported motion for leave to proceed *in forma pauperis*, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's civil rights Complaint is  
**dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 3<sup>RD</sup> day of MARCH, 1999.



Sven Erik Holmes  
United States District Judge

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

LARRY THOMAS DYKES,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

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Case No. 98-CV-278-H (E) ✓

ENTERED ON DOCKET

DATE MAR 04 1999

**FILED**

MAR 4 1999 *SPC*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

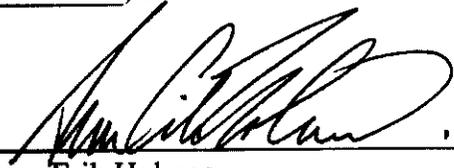
**JUDGMENT**

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

IT IS SO ORDERED.

This 3<sup>RD</sup> day of MARCH, 1999.

  
Sven Erik Holmes  
United States District Judge

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

LARRY THOMAS DYKES, )

Petitioner, )

vs. )

RITA MAXWELL, )

Respondent. )

ENTERED ON DOCKET

DATE MAR 04 1999

Case No. 98-CV-278-H (E) ✓

**FILED**

MAR 4 1999 *FL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Before the Court is Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (Docket #7). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss (#10). Respondent's motion to dismiss is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

**BACKGROUND**

On June 10, 1996, Petitioner was sentenced to ten (10) years imprisonment after entering a plea of *nolo contendere* to Possession of a Firearm, AFCF, in Tulsa County District Court, Case No. CF-95-4447. (#8, Attachment to Ex. A). Petitioner did not perfect a timely direct appeal from his conviction and sentence. Respondent indicates that based on information provided by the court clerk, Petitioner filed an application for post-conviction relief in the trial court on April 9, 1997. (#8

at 1). The trial court denied the requested relief on June 13, 1997 (#8, Attachment to Ex. A). On July 14, 1997, Petitioner filed his petition in error in the Oklahoma Court of Criminal Appeals (#8, Ex. A). The state appellate court affirmed the denial of post-conviction relief on September 16, 1997 (#8, Ex. B). Petitioner filed the instant federal petition for writ of habeas corpus on April 13, 1998 (#1).

### **ANALYSIS**

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final. Also, the limitations period is tolled or suspended during the

pendency of a properly filed state application for post-conviction relief. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed after the expiration of the one-year limitations period. Because Petitioner failed to file a motion to withdraw his *nolo contendere* plea after the June 10, 1996 pronouncement of his Judgment and Sentence, his conviction became final ten (10) days later, or on June 20, 1996. See Rule 4.2(A), *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw *nolo contendere* plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction on plea). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on June 20, 1996, and, absent a tolling event, a federal petition for writ of habeas corpus filed after June 20, 1997, would be untimely.

However, Petitioner did seek post-conviction relief during the one-year period. Therefore, pursuant to § 2244(d)(2), the limitations period is suspended during the time Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. Petitioner filed his application for post-conviction relief on April 9, 1997, or 72 days prior to his June 20, 1997, federal habeas corpus filing deadline. To be timely pursuant to § 2244(d), Petitioner would have to file his federal habeas petition within 72 days of the conclusion of the state courts' review of his "properly filed" post-conviction applications. The Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on September 16, 1997. Thus, Petitioner's federal petition had to be filed within 72 days of September 16, 1997, or by November 27, 1997, to be timely. Petitioner filed the instant federal petition on April 13, 1998, more than four (4) months beyond the deadline. This petition should be dismissed as time-barred unless Petitioner can demonstrate that the limitations period should be equitably tolled.

In his objection to Respondent's motion to dismiss (#10), Petitioner argues his petition should be considered timely because he filed it within a "reasonable time" as required by United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997). In addition, Petitioner asserts that because he filed his state post-conviction application within one year of his conviction and his federal habeas petition within one year of having exhausted his state remedies, his federal petition should be considered timely under the AEDPA. Petitioner also asserts that § 2244(d)(1)(B)<sup>1</sup> applies to his case but fails to describe any unconstitutional impediment to filing his federal petition created by State action. Lastly, Petitioner erroneously asserts that "this case was final prior to the enactment of the AEDPA/PLRA"<sup>2</sup> and that consistent with Texaco, Inc. v. Short, 454 U.S. 516, 527 n.21 (1982), he should be allowed a "reasonable time" to file his petition.

Because Petitioner's conviction became final after the April 24, 1996, enactment of the AEDPA, his reliance on Simmonds and Short is misplaced. In Simmonds, the Tenth Circuit afforded prisoners whose convictions became final before April 24, 1996, a one year grace period, beginning April 24, 1996 and ending April 23, 1997, within which to file a federal petition for writ of habeas corpus. Simmonds, 111 F.3d at 746. Because Petitioner's conviction became final after April 24, 1996, neither Simmonds nor the retroactivity concerns at issue in Short apply to this case.

Although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims), the Court is not persuaded

---

<sup>1</sup>Pursuant to 28 U.S.C. § 2244(d)(1)(B), the limitations period may run from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action."

<sup>2</sup>As noted above, Petitioner's conviction became final on June 20, 1996, *after* enactment of the AEDPA.

by Petitioner's attempts to justify his late filing. Petitioner offers no explanation for his failure to pursue state post-conviction relief until almost one year after his conviction became final. Petitioner's lack of diligence in pursuing these claims precludes equitable tolling in this case. See Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998) (one-year limitation period of AEDPA will be equitably tolled only "in rare and exceptional circumstances"); Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). In addition, the conclusion of post-conviction proceedings in state court does not trigger the commencement of the limitations period as suggested by Petitioner in his response (#10 at 6). Pursuant to § 2244(d)(2), the limitations period is tolled or suspended during the pendency of post-conviction proceedings. Neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to *pro se* prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner). Therefore, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

### **CONCLUSION**

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#7) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

IT IS SO ORDERED.

This 3<sup>RD</sup> day of MARCH, 1999.

  
Sven Erik Holmes  
United States District Judge

FILED

MAR - 3 1999

*mu*

Prithvi S. Sarda, Clerk  
U.S. DISTRICT COURT

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

IN RE:	)
BOBBY G. DAVIS and EUGENIA M.	)
DAVIS,	)
	)
Debtors,	)
	)
BOBBY M. DAVIS and EUGENIA M.	)
DAVIS,	)
	)
Appellants,	)
	)
vs.	)
	)
SCOTT P. KIRTLEY, Trustee, and	)
WAL-MART STORES, INC.	)
ASSOCIATES HEALTH AND WELFARE	)
PLAN,	)
	)
Appellees.	)

ENTERED ON DOCKET  
DATE MAR 04 1999

No. 98-C-246-B(M) /

**ORDER**

Before the Court is Appellants' Objection to the August 3, 1998 Report and Recommendation of Magistrate Judge Frank H. McCarthy ("R&R"). (Docket No. 10). The Magistrate Judge recommends the dismissal of the appeal of Bobby M. and Eugenia M. Davis ("debtors") of an order of the Bankruptcy Court sustaining objections to debtors' claims of exemption. The R&R does not address the merits of debtors' appeal as the Magistrate Judge concludes the district court lacks jurisdiction to consider the appeal. The Court agrees with the Magistrate Judge's recommendation and dismisses the appeal for lack of jurisdiction.

The Bankruptcy Court Order and Judgment which are the subject of this appeal were

entered on February 11, 1998. Although Bankruptcy Rule 8002(a) provides that a notice of appeal must be filed within ten (10) days of the entry of judgment, debtors did not file their notice until March 13, 1998 (thirty (30) days), or their amended notice until March 20, 1998 (thirty-seven (37) days), from the date judgment was entered against them. As, “[t]his court has no jurisdiction absent a timely filed notice of appeal,” the Court must dismiss the appeal. *In re Weston*, 18 F.3d 860, 862 (10<sup>th</sup> Cir. 1994); *Herwit v. Rupp*, 970 F.2d 709, 710 (10<sup>th</sup> Cir. 1992).

Neither is debtors’ jurisdictional defect saved by their argument that their amended notice of appeal was timely as it was filed within ten (10) days of the Bankruptcy Court’s March 10, 1998 Order, which debtors assert modified the February 11, 1998 Order. The February 11, 1998 Order sustained objections to debtors’ claim of exemption for \$89,000 in U.S. Treasury Securities and imposed a constructive trust in favor of Wal-Mart Stores, Inc. Associates’ Health and Welfare Plan (“Wal-Mart”) in the amount of \$85,254.01. Judgment against debtors was entered the same day. The March 10, 1998 Order simply recognizes the earlier order and judgment entered, and pursuant to Wal-Mart’s motion for relief from automatic stay, directs the disbursement of “\$85,254.01 to Wal-Mart in accordance with the [February 11, 1998] Memorandum Opinion and Judgment.” It does not “modify” the February 11, 1998 Order.

Finding the Court lacks jurisdiction over this matter, the Court dismisses the instant appeal.

IT IS SO ORDERED, this 3<sup>rd</sup> day of March, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR 03 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DAVID V. HEMINGER,

Plaintiff,

vs.

UNITED INDUSTRIES CORPORATION,

Defendant.

Case No. 98-CV 0014-H (XV)

ENTERED ON DOCKET

DATE MAR 3 1999

**STIPULATION OF DISMISSAL WITH PREJUDICE**

COME now Plaintiff and Defendant, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and hereby jointly agree and stipulate that this action should be, and hereby is, dismissed in its entirety with prejudice. Each party shall bear its own attorney fee and costs.

Respectfully submitted,

DAVID V. HEMINGER, PLAINTIFF

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ATTORNEYS FOR PLAINTIFF

*Handwritten initials*

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DEFENDANT**

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**ATTORNEYS FOR DEFENDANT**

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

BENNETT STEEL, INC., )  
)  
Plaintiff, )  
)  
vs. )  
)  
FINANCIAL FEDERAL CREDIT INC., )  
)  
Defendant. )

ENTERED ON DOCKET  
DATE MAR 03 1999  
Case No. 98-CV-434-K(M) ✓

**FILED**

MAR 02 1999 *fil*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

This matter comes on for consideration before this Court upon the Joint Application for Administrative Closing Order (the "Application") filed by Bennett Steel, Inc., and Financial Federal Credit Inc., by the Application the parties jointly seek a suspension of these proceedings and entry of an Administrative Closing Order providing for dismissal without prejudice of this action sixty days from the date of entry of the Order unless prior to the expiration of the sixty day period a party to the action submits an application to this Court to lift the suspension and reopen these proceedings.

WHEREUPON, having examined the file and for good cause shown by the parties, it is hereby ORDERED that these proceedings are suspended and this matter will be deemed dismissed without prejudice sixty days from the date hereof unless prior to the expiration of the sixty day period a party to the action submits an application to this Court to reopen the proceedings.

DATED this 2nd day of March, 1999.

  
HONORABLE TERRY KERN  
DISTRICT JUDGE

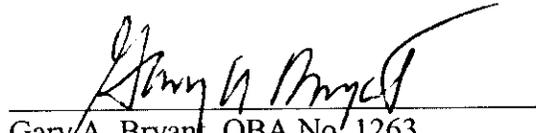
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ATTORNEYS FOR DEFENDANT,  
FINANCIAL FEDERAL CREDIT INC.

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

**FILED**

MAR - 1 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

I.D.G., INC.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
THE ST. PAUL FIRE AND MARINE	)
INSURANCE COMPANY,	)
	)
Defendant,	)
	)
vs.	)
	)
DARRELL BURSON,	)
	)
Third-Party Defendant.	)

No. 97-C-799-B(W) ✓

ENTERED ON DOCKET  
DATE MAR 02 1999

**JUDGMENT**

In accord with the Order filed on March 1, 1999 sustaining the Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendant The St. Paul Fire and Marine Insurance Company and against Plaintiff I.D.G., Inc. Costs are assessed against Plaintiff if properly applied for pursuant to Local Rule 54.1. Any claim for attorney's fees must be timely filed pursuant to Local Rule 54.2.

Dated, this 1<sup>st</sup> day of March, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

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

**F I L E D**

MAR - 1 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

I.D.G., INC., )  
)  
Plaintiff, )  
)  
vs. )  
)  
THE ST. PAUL FIRE AND MARINE )  
INSURANCE COMPANY, )  
)  
Defendant, )  
)  
vs. )  
)  
DARRELL BURSON, )  
)  
Third-Party Defendant. )

No. 97-C-799-B(W)

ENTERED ON DOCKET  
DATE MAR 02 1999

**ORDER**

Before the Court are cross-motions for summary judgment filed by Plaintiff I.D.G., Inc. ("IDG") (Docket No. 19) and defendant The St. Paul Fire and Marine Insurance Company ("St. Paul") (Docket No. 25). IDG seeks summary judgment on its claim that St. Paul has breached the terms of its insurance contract with IDG by failing to defend IDG and Rupert Brent Johnson ("Johnson"), an officer, director and majority shareholder of IDG, in litigation brought by Darrell Burson ("Burson"), a minority shareholder of IDG. In addition and independent of the policy provisions, IDG and Johnson assert they have and had a reasonable expectation of coverage for the claims made by Burson. St. Paul seeks a declaratory judgment against IDG and third-party defendant Burson that there is no coverage afforded IDG under the policy and St. Paul has no duty to defend or indemnify IDG.

### **Statement of Undisputed Facts**

On or about March 11, 1994, Burson filed suit against IDG and Johnson, both individually and as a director of IDG, in the District Court in and for Tulsa County seeking (1) compensation allegedly withheld by IDG while Burson was employed by IDG from January 1 through September 8, 1993; (2) damages for breach of an agreement for the division of royalties for a series of computer programs called SuperVision, SuperVision II, and SuperVision 3 (collectively referred to as "SuperVision") which he and Johnson invented; (3) damages for conversion of SuperVision; (4) to enforce IDG shareholders' rights, through a derivative shareholder action, for the improper transfer of corporate assets to non-employees; and (5) damages for Johnson's misrepresentation to Burson concerning future disbursements of the SuperVision proceeds. On June 29, 1995, Burson filed an amended petition adding defendant Global Interface Solutions, Inc. ("Global") and seeking judgment against Johnson and/or Global that Johnson formed Global with the intent to defraud shareholders and creditors of IDG, and Johnson fraudulently transferred IDG assets to Global and breached his fiduciary duty to IDG and its shareholders. On July 15, 1997, Burson, individually and on behalf of IDG, filed a Second Amended Petition, adding defendant Web Technologies, L.L.C. ("Webtek") and a claim for breach of a Stockholder's Agreement between Burson and Johnson through Johnson's dissemination of confidential information, *inter alia*, sales records, customer lists and marketing information, to Global and Webtek. On September 17, 1997, Burson filed a complaint in federal court in the Northern District of Oklahoma against Johnson, IDG and Global for copyright infringement in Case No. 97-C-863-E. In his federal Complaint, Burson alleges he is the author and owner of copyrighted computer programs, generally known as SuperVision 3 and IDG,

Johnson and Global infringed his copyright by preparing unauthorized copies of the programs for their own profit.

IDG tendered its defense in the Burson state court litigation to St. Paul. After St. Paul denied an obligation to defend or coverage under the policy, IDG filed a claim for breach of its insurance contract against St. Paul in Tulsa County district court on June 30, 1997 for failing to defend IDG in the state court action and for declaratory judgment on coverage for Burson's claims against IDG and Johnson under IDG's insurance policy with St. Paul, Policy RP06631399, covering the period 9/16/92 through 9/16/93 (hereinafter, the "policy").<sup>1</sup> IDG also alleged it had a reasonable expectation of coverage based on St. Paul's funding of IDG's defense and settlement of similar claims brought against IDG and Johnson in a 1992 case in California (the "California case").

The claims in the 1992 California case involved a third-party cross-complaint filed against IDG, Johnson and Burson for inducing breach and breach of contract, breach of partnership agreement, breach of implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, breach of fiduciary duty, intentional and negligent interference with contractual relationships, an accounting, trade libel, defamation, promissory estoppel, tortious breach of implied covenant of good faith and fair dealing, and unfair competition. *Plaintiffs' Ex.*

4. IDG tendered its defense to St. Paul under the same policy at issue here for coverage during the policy period of September 16, 1991 to September 16, 1992. St. Paul agreed to defend IDG with the following reservation of rights, as stated in its letter of September 16, 1992:

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<sup>1</sup> After removal, Plaintiff amended his complaint to correct errors in the original Complaint relating to the applicable policy period and quotations from the policy. See *First Amended Complaint, Docket No. 13*.

There are multiple claims in the underlying loss which are not covered by this policy of insurance. The policy provides two types of coverage. The first is for bodily injury and property damage liability. The second is for personal injury and advertising injury liability. Under the first of these coverages, there must be either bodily injury or property damage caused by an event. There is no bodily injury involved in this loss. There also is no evidence of property damage involved herein. Pure economic loss does not constitute property damage and is therefore not covered.

There also is no evidence of an event or an accident involved in this loss.

California law is quite clear that causes of action for breach of contract, bad faith, fraud, etc. are all intentional in nature and cannot be covered under a policy such as the policy being reviewed here.

A defense is being provided for this loss pursuant to the terms of the personal injury coverage provided within the policy. The twelve and thirteenth causes of action for trade libel and defamation respectively potentially falls with [sic] the realm of the personal injury coverage. Also, please note that the policy contains exclusions for false material and material first made public which are potentially applicable regarding the personal injury coverage.

There may be additional coverage difficulties as well. For instance, obviously there can be no insurance protection in the State of California for punitive or exemplary damages such as those sought in the Complaint. by [sic] setting forth the above St. Paul does not intend to waive any of the terms, conditions or defenses which may be applicable to it.

*Defendant's Ex. D.* With this reservation of rights, St. Paul undertook the defense of IDG and paid amounts in settlement of the California case. Thereafter, IDG continued to purchase the same insurance coverage from St. Paul.

On September 2, 1997, St. Paul removed the case to this Court, answered and filed a counterclaim for declaratory judgment that it had no duty to defend or indemnify IDG for the claims brought by Burson in the state court action. St. Paul also filed a third-party claim against Burson for declaratory judgment that Burson would have no right to recovery of any judgment against IDG from St. Paul under the policy.

The policy provides the following Commercial General Liability ("CGL") Protection:

**Bodily injury and property damage liability.** We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property

damage, or premises damage that:  
happens while this agreement is in effect; and  
is caused by an event.

*Plaintiff's Exhibit 2, p. 55.* "Protected person" is defined to include IDG and its executive officers and directors in the performance of their duties as officers and directors. *Id. at 57-58.*

"Injury or damage means bodily injury, personal injury, advertising injury, property damage or premises damage." *Id. at 56.* "Bodily injury" is defined as

any physical harm, including sickness or disease, to the physical health of other persons. It includes any of the following that results at any time from such physical harm, sickness or disease:

Mental anguish, injury or illness.  
Emotional distress.  
Care, loss of services, or death.

*Id.* "Personal injury" is defined as "injury, other than bodily injury or advertising injury, caused by a personal injury offense," and includes libel or slander. *Id.* "Advertising injury means injury, other than bodily injury or personal injury, caused by an advertising injury offense." *Id.*

"Property damage" is defined as

physical damage to tangible property of others, including all resulting loss of use of that property; or  
loss of use of tangible property of others that isn't physically damaged.  
We'll consider all loss of use of damaged tangible property to happen at the time of the physical damage which caused it. And we'll consider all loss of use of undamaged tangible property to happen at the time of the event which caused it.

*Id.* An "event" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*

The CGL policy contains the following relevant exclusions:

**Intentional Bodily Injury or Property Damage.** We won't cover bodily injury or property damage that is expected or intended by the protected person. Nor will we cover medical expenses that result from such bodily injury.

*Id.* at 65.

**Control of Property.** We won't cover property damage to the following property:

Property you own, rent, lease, occupy or borrow. . . .

\* \* \* \*

Personal property in the care, custody or control of the protected person.

*Id.* at 63.

**Contract liability.** We won't cover the protected person's liability for injury or damage assumed under any contract or agreement.

However, we won't apply this exclusion to liability for injury or damage the protected person would have without the contract or agreement. Nor will we apply this exclusion to the protected person's liability for bodily injury or property damage assumed under a covered contract made before the bodily injury or property damage happens.

*Id.* at 62-63. The policy defines "covered contracts" to include a "license agreement" and "other contract or agreement under which you assume the tort liability of another to pay damages for covered bodily injury or property damage that's sustained by others." *Id.* at 63. "Tort liability means a liability that would be imposed by law without any contract or agreement." *Id.*

Finally, the CGL policy states the following regarding its duty to defend:

**Right and duty to defend.** We'll have the right and duty to defend any claim or suit for covered injury or damage made or brought against any protected person. We'll do so even if any of the allegations of any such claim or suit are groundless, false or fraudulent. But we have no duty to perform other acts or services. And our duty to defend claims or suits ends when we have used up the limits of coverage that apply with the payment of judgments, settlement or medical expenses.

We'll have the right to investigate any claim or suit to the extent that we believe is proper. We'll also have the right to settle any claim or suit within the available limits of coverage.

*Id.* at 56.

### Standard for Summary Judgment

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

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

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. 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).

### **Analysis**

IDG claims it is entitled to judgment on its breach of contract claim against St. Paul as Burson's claims against IDG and Johnson include (1) a claim for conversion which is a claim for property damage caused by an event which occurred during the policy term; and (2) a claim of breach of a license agreement which is a covered contract under which IDG assumed the tort liability of Johnson. IDG further contends it is entitled to the cost of its defense as well as coverage in the Burson state and federal cases based on the "reasonable expectation" doctrine.

St. Paul alleges it is under no duty to defend or cover any loss resulting from the Burson state and federal cases as (1) Burson's claims for back wages and royalty payments are economic losses, which do not constitute property damage; (2) Burson's claim for conversion of the computer programs is not a claim for property damage as (i) ownership interest in computer software programs and withheld profits does not constitute "tangible property"; (ii) conversion is not a "loss of use" claim; and (iii) conversion is intentional conduct which is not an "event" or "accident" as defined by the policy; (3) Burson's shareholders' derivative claims do not pertain to property damage, nor were they caused by an event or accident; (4) Burson's fraud and misrepresentation claims also do not involve property damage, and allege intentional acts; (5) there is no "covered contract" involved in any of Burson's claims; and (6) the California case (the defense assumed under a reservation of rights) significantly differed in claimant and claims, and provides no basis for IDG's claim for reasonable expectation coverage.

An insurer's duty to defend is "separate from, and broader than, the duty to indemnify."

*First Bank of Turley v. Fidelity and Deposit Insurance Co.*, 928 P.2d 298, 303 (Okla. 1996).

A liability insurance policy generally contains two basic duties – the duty to defend and the duty to indemnify its insured. The insurer’s primary duty is to provide indemnity for loss or to pay a specified amount upon determinable contingencies. The duty to defend is separate from, and broader than, the duty to indemnify, but the insurer’s obligation is not unlimited. The defense duty is measured by the nature and kinds of risks covered by the policy as well as by the reasonable expectations of the insured. 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.

*Turley*, 928 P.2d at 302-03 (footnotes omitted). At this juncture, no judgment has been entered against IDG or Johnson. Thus, IDG seeks this Court’s determination of St. Paul’s duty to defend.

IDG contends St. Paul’s duty to defend in the Burson litigation arises not only from the subject policy but also from its reasonable expectation of coverage based on St. Paul’s defense of IDG in the California litigation. The Court’s first inquiry into whether there is a duty to defend, therefore, relates to whether there is potential coverage<sup>2</sup> under the applicable policy “which is ‘a matter of contract interpretation as it relates to a set of facts,’ and not liability, which is ‘concerned with an analysis of the applicable law to the same set of facts.’” *Id.* at 304 n.8 (quoting 7C Appleman, Insurance Law & Practice §4682 at 22). Only if the Court determines there is no potential coverage under the policy does the Court reach the issue of whether IDG had a reasonable expectation of coverage unsupported by the language of the policy so as to credit the insured’s expectation over the policy language. *Max True Plastering Co. v. United States Fidelity and Guaranty Co.*, 912 P.2d 861, 864 (Okla. 1996).

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<sup>2</sup>The phrase “potentially covered” means that “the insurer’s duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the possibility of a recovery under the policy; there need not be a probability of recovery.”

*Turley*, 928 P.2d at 304 n. 14 (quoting 7C Appleman, Insurance Law & Practice §4683.01 at 67).

In determining St. Paul's duty to defend, the Court looks to the petition, first amended petition and second amended petition in the Burson state court litigation, the complaint in the Burson federal litigation, as well as information provided by IDG or other sources available to St. Paul at the time the defense was tendered and refused. *Turley*, 928 P.2d at 304. This inquiry is not "limited by the precise language of the pleadings," however, as the "insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible." *Id.* at 304 n. 15.

In interpreting the policy, the Court must first determine if the pertinent terms are clear, consistent and unambiguous. If so, then the Court must accept the terms in their ordinary sense to determine the parties' express intent. *Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1104 (Okla. 1993). The interpretation of the policy and whether the pertinent terms are ambiguous are matters of law. *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). If the Court finds the terms ambiguous, *i.e.*, susceptible of two meanings, the Court must liberally construe terms of inclusion in favor of the insured and strictly construe terms of exclusion against the insurer. *Phillips*, 859 P.2d at 1104.

Central to St. Paul's defense is its contention that the facts pertaining to Burson's claims against IDG and Johnson do not constitute "property damage" as defined under the policy, and thus, none of Burson's claims are covered. The Court agrees. As noted above, "property damage" is defined in the policy as

physical damage to tangible property of others, including all resulting loss of use of that property; or  
loss of use of tangible property of others that isn't physically damaged.  
We'll consider all loss of use of **damaged** tangible property to happen at the time of the physical damage which caused it. And we'll consider all loss of use of undamaged tangible property to happen at the time of the event which caused it.

*Plaintiff's Exhibit 2, p. 56.* Burson does not allege any physical damage to property. Thus, any covered property damage must consist of Burson's "loss of use" of "tangible" property which happened "at the time of the event which caused it." The Court finds these terms unambiguous and concludes that Burson's claims do not involve "tangible" property; nor does Burson claim "loss of use" of such property.<sup>3</sup>

The property Burson alleges was improperly withheld, transferred or converted by IDG and/or Johnson consists of corporate assets, which includes profits and royalties, as well as SuperVision, a series of software computer programs. Burson also alleges IDG and Johnson infringed his copyright to SuperVision by preparing unauthorized copies of the programs for their own profit. None of this property is "tangible" property.

Understood in its ordinary sense, "tangible property" means "property that may be seen, weighed, measured and estimated by the physical senses and which is capable of being possessed, property which may be touched; 'such as is perceptible to the senses. . . .'" *Perkins v. Oklahoma Tax Comm'n*, 428 P.2d 328, 330 (Okla. 1967) (determining that decedent's interest in partnership property is a right to receive money due upon liquidation and accounting and therefore constitutes intangible, and not tangible property for estate tax purposes); Black's Law Dictionary (6<sup>th</sup> ed. 1990) (defining "tangible property" as "[p]roperty that has physical form and substance and is not intangible. That which may be felt or touched, and is necessarily corporeal,

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<sup>3</sup> The Court also does not believe Burson's alleged damages were caused by an "event," as that term is defined under the policy. An "event" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Plaintiff's Exhibit 2, p. 56.* An accident has "long been held to describe an occurrence which is unexpected, unintended and unforeseen in the eyes of the insured." *Willard v. Kelley*, 803 P.2d 1124, 1128-29 (Okla. 1990). Burson alleges intentional, wrongful conduct on the part of IDG and Johnson, not accidental conduct. See also *City of Jasper, Indiana v. Employment Ins. of Wausau*, 987 F.2d 453, 457(7<sup>th</sup> Cir. 1993); *Red Ball Leasing v. Hartford Accident & Indem. Co.*, 915 F.2d 306, 309 (7<sup>th</sup> Cir. 1990).

although it may be either real or personal . . .”). Intangible property, on the other hand, includes “such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights, and franchises.” Black’s Law Dictionary (6<sup>th</sup> ed. 1990); *Perkins*, 429 P.2d at 330.

Burson’s claims for compensation and royalties from the sales of SuperVision are intangible economic losses and not recoverable under the “property damage” provision of the policy unless they provide a measure of damage to or loss of use of “tangible property.” *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 818 n. 12 (3rd Cir. 1994); *see also Safeco Ins. Co. v. Andrews*, 915 F.2d 500, 502 (9<sup>th</sup> Cir. 1990); *Nutmeg Ins. Co v. Pro-Line Corp.* 836 F.Supp. 385, 388 (N.D. Tex. 1993). IDG argues that SuperVision, a series of computer programs, is “tangible” property and thus is encompassed in the definition of property damage under the policy, citing *Retail Systems Inc. v. CNA Ins. Co.*, 469 N.W.2d 735 (Minn.App. 1991).<sup>4</sup> The Court disagrees. While the series of computer programs at issue here can be reduced to a tangible medium which stores ideas, *e.g.* a computer disk, Burson is alleging conversion of the ideas themselves, the program in which he claims an ownership interest. In other words, it is the intellectual content of SuperVision and not the tangible medium storing that content which is of value to Burson. *Lucker Manufacturing*, 23 F.3d at 820-21 (noting that “by making ‘tangibility’ the touchstone of coverage, the CGL excludes a significant class of property for which liability insurance reasonably could be provided - property like system designs or computer software”);

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<sup>4</sup> In *Retail Systems*, the Minnesota appellate court held that a computer tape which stored information was tangible property. The Court, however, finds the case distinguishable. *Retail Systems* involved the loss a computer tape containing survey data which was entrusted to the insured for processing and which was lost during remodeling of the insured’s computer room. Thus, the tape, the “tangible” storage medium, was lost. Here, Burson seeks damages for IDG’s alleged unauthorized use of the computer programs, not for the loss of a computer disk or tape.

*St. Paul Fire & Marine Ins. Co. v. National Computer Systems, Inc.*, 490 N.W.2d 626, 630-31 (Minn.App. 1992)(distinguishing *Retail Systems* as involving claims for loss of a computer tape entrusted to the insured for processing and storage as the loss consisted of both the information and the medium).

Further, even if the computer programs were “tangible” property, Burson’s claims do not involve a “loss of use” of tangible property to bring them within the scope of coverage under the “property damage” provision. Burson alleges IDG and Johnson converted SuperVision by making unauthorized copies of the program for sale without paying him the royalties from such sales. In other words, Burson seeks to recover lost profits from the unauthorized sale of his “property”, rather than damages for his loss of use of SuperVision. See *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 1994 WL 383909 (N.D.Ill. 1994), *aff’d*, 64 F.3d 1112 (7<sup>th</sup> Cir. 1995)(Conversion of petroleum products is loss of property, not “loss of use” of property.); *Collin v. American Empire Ins. Co.*, 21 Cal.App.4th 787, 817-18, 26 Cal.Rptr.2d 391, 408-09 (Cal.App. 1994)(agreeing with “three state supreme courts and two other courts of appeal” which have held that conversion is loss of property, not loss of use of property); *Nortex Oil & Gas Corp. v. Harbor Ins. Co.*, 456 S.W.2d 489, 493 (Tex.App. 1970)(finding “material difference between ‘property taken’ and ‘property damaged’”). Neither does Burson allege a “diminution in value” to SuperVision to bring his claims within the scope of property damage under the policy. See *Lucker Manufacturing*, 23 F. 3d at 820 n.14 (finding loss of use of design of system for mooring vessels due to a defective component which caused a diminution in the value of the design); *Nutmeg Ins.*, 836 F.Supp. at 388-89 (concluding alleged loss of profits from sales of hair care products not allegation of “diminution in value” of product line to bring within policy’s

“property damage” provision). The Court thus concludes that Burson’s claims against IDG and Johnson do not seek recovery for “loss of use” of property.<sup>5</sup>

Having determined there is no potential coverage under the policy, the Court considers whether IDG had a reasonable expectation of coverage unsupported by the language of the policy so as to credit the insured’s expectation over the policy language. *Max True*, 912 P.2d at 864. As noted above, IDG asserts it had a reasonable expectation of coverage based on St. Paul’s defense of IDG in the California action. The Court disagrees.

The doctrine of “reasonable expectation” is applicable to the interpretation of insurance contracts when the contract language is ambiguous or the exclusions are “masked by technical or obscure language” or “are hidden in a policy’s provisions.” *Max True*, 912 P.2d at 970.

Under the doctrine, if the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy. The doctrine does not negate the importance of policy language. Rather, it is justified by the underlying principle that generally the language of the policy will provide the best indication of the parties’ reasonable expectations.

*Id.* at 864 (footnotes omitted). Thus, the Court looks at the reasonable expectations of the insured only when the policy language is ambiguous or the relevant exclusion obscure, technical or hidden in complex policy language. Otherwise, “insureds could develop a ‘reasonable expectation’ that every loss will be covered by their policy and courts would find themselves engaging in wholesale rewriting of insurance policies.” *Id.* at 868.

As the Court finds the pertinent policy language unambiguous, the doctrine is

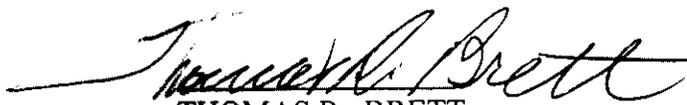
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<sup>5</sup> Because the Court concludes Burson’s claims do not fall within the potential ambit of “property damage” under the subject policy, the Court need not reach the issues of whether IDG’s claimed exclusions apply; *e.g.*, “covered contracts” under which IDG assumed liability for property damage, or “personal property in the care, custody or control of [IDG].”

inapplicable to the facts of this case. However, even if the definition of "property damage" under the policy were ambiguous, viewing the facts in a light most favorable to IDG, the Court cannot find any "reasonable expectation" of coverage and/or defense in the Burson litigation based on St. Paul's defense and settlement of the California case. In its September 16, 1991 letter to IDG, St. Paul agreed to defend IDG in the California case (with a reservation of rights) based on its conclusion that the claims for trade libel and defamation fell within the scope of personal injury coverage under the policy. In so finding, St. Paul expressly noted there was no evidence of "property damage" involved in that case. The letter is in fact clear that St. Paul viewed all the claims in the third-party complaint as falling outside the "property damage" provision. Unlike the California case, the Burson litigation does not involve any claim of trade libel, defamation or other "personal injury" under the policy. Thus, the Court finds no basis for IDG to "reasonably expect" coverage and/or defense in the Burson litigation.

For the reasons set forth above, the Court grants defendant St. Paul's motion for summary judgment (Docket No. 25) and denies IDG's motion for summary judgment (Docket No. 19).

IT IS SO ORDERED this 15 day of March, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MAR - 1 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHANPEN FARRAR,  
SSN: 528-96-2714,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 98-CV-0486-EA ✓

ENTERED ON DOCKET

DATE MAR - 2 1999

**JUDGMENT**

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

It is so ORDERED this 1<sup>st</sup> day of March, 1999.

*Claire V Eagan*

\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

MAR 01 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PEGGY ANN WERNLI, )  
)  
Plaintiff, )  
)  
v. )  
)  
ROBERT JANDEBEUR, *et al.*, )  
)  
Defendants. )

Case No. 96 CV-756-B ✓

ENTERED ON DOCKET

DATE MAR - 1 1999

**DISMISSAL WITH PREJUDICE**

Plaintiff, Peggy Ann Wernli, hereby **dismisses** her claims against all Defendants in this action with prejudice, with each party to bear their own attorneys fees and costs.



Laurence L. Pinkerton (OBA #7168)  
Judith A. Finn (OBA #2923)  
PINKERTON & FINN  
2000 First Place  
15 E. 5th Street  
Tulsa, Oklahoma 74103-4367  
(918) 587-1800

Attorneys for Plaintiff Peggy Ann Wernli

Law

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CIT

**CERTIFICATE OF SERVICE**

I, Laurence L. Pinkerton, do hereby certify that on the 22nd day of February 1999, I caused to be mailed a true and correct copy of the above and foregoing *Dismissal With Prejudice*, with proper postage thereon fully prepaid, to:

Richard T. Garren, Esq.  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
Frisco Building  
502 West Sixth Street  
Tulsa, Oklahoma 74119-1010



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

DOROTHY A. FLIPPO, )  
)  
Plaintiff, )  
)  
vs. )  
)  
BALL-FOSTER GLASS CONTAINER )  
CO., L.L.C., a Delaware corporation, )  
)  
Defendant. )

ENTERED ON DOCKET

DATE MAR - 1 1999

No. 98-CV-157-K ✓

**F I L E D**

FEB 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**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,

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

ORDERED THIS 26 DAY OF FEBRUARY, 1999

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

17

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

DOROTHY A. FLIPPO, )  
)  
Plaintiff, )  
)  
vs. )  
)  
BALL-FOSTER GLASS CONTAINER, )  
CO., L.L.C., a Delaware corporation, )  
)  
Defendant. )

ENTERED ON DOCKET  
DATE **MAR 01 1999**

No. 98-CV-157-K ✓

**FILED**  
**MAR 01 1999**  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Before the Court is the motion of the defendant for summary judgment. Plaintiff brings this action asserting five claims: (1) discriminatory discharge in violation of the Age Discrimination in Employment Act ("ADEA"); (2) discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964; (3) harassment in her employment because of her age in violation of the ADEA; (4) harassment in her employment because of her sex in violation of Title VII; (5) wrongful discharge because of her age/sex in violation of Oklahoma public policy. In 1995, plaintiff had been employed for some time at the Foster-Forbes glass plant as Plant Nurse. On September 15, 1995, the Ball-Foster Glass Container Company was formed through the merger of the Ball Corporation's Glass Division and the Foster-Forbes Glass Division of American National Can. Win Stephens, Ball-Foster's corporate Vice-President of Employee Relations, then 58 years old, made the decision to retain plaintiff (then age 52) in the employment of Ball-Foster following the September 1995 merger.

In a manner not made clear by the record, the "Plant Nurse" at the Sapulpa plant also had

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some responsibilities regarding implementing a safe workplace. The Sapulpa plant had one of the poorest safety records among the Ball-Foster plants. Stephens determined that the Plant Nurse position at the Sapulpa plant was “ineffective” and decided to replace that position with a Health & Safety Coordinator. On May 13, 1997, Randy Mills, Human Resources Manager at the Sapulpa plant, informed plaintiff that her Plant Nurse position had been eliminated and she had been terminated. Plaintiff was age 53 at the time.

On June 16, 1997, Win Stephens hired Chris Patterson, a 24 year old male, to be the new Health & Safety Coordinator at the Sapulpa plant. On May 1, 1997, Amanda Ennis, a 25 year old female, was hired as a payroll clerk at the Sapulpa plant. After plaintiff’s termination, there was no Plant Nurse at the plant. The plant manager requested that Ennis, who happened to have an LPN license, make herself available if needed to render first aid on the day shift until a Health & Safety Coordinator was hired. Defendant asserts that this arrangement was necessary to comply with its collective bargaining agreements.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) F.R.Cv.P. In applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Sundance Assocs., Inc. v. Reno, 139 F.3d 804, 807 (10<sup>th</sup> Cir.1998).

The Tenth Circuit has recently stated that the elements of a prima facie case of discrimination under the ADEA and Title VII “closely parallel” each other. Plaintiff must show: (1) that she is within the protected class; (2) that she suffered an adverse employment action; (3) that she was

qualified for the position at issue; and (4) that she was treated less favorably than others not in the protected class. See Sanchez v. Denver Public Schools, 164 F.3d 527, 1998 WL 909893 (10<sup>th</sup> Cir.1998). For purposes of the present motion, the defendant has not contested that plaintiff has established a prima facie case. (Defendant's opening brief at 9).

Establishing a prima facie case creates a presumption of discrimination that the defendant may rebut by asserting a facially nondiscriminatory reason for the termination. The plaintiff may then resist summary judgment if she can present evidence that the proffered reason was pretextual, i.e., unworthy of belief, or otherwise introduces evidence of illegal discriminatory motive. Jones v. Unisys Corp., 54 F.3d 624, 630 (10<sup>th</sup> Cir.1995). Plaintiff has not contested that defendant has stated a legitimate non-discriminatory reason for discharge. (Plaintiff's Brief at 10). Accordingly, the dispositive issue regarding the two primary claims is the existence of a genuine issue of material fact as to pretext.

The Court refers to the two wrongful discharge claims as "primary" because the record reflects that plaintiff's other claims may be summarily resolved. Plaintiff testified in her deposition that she never felt harassed, either because of her age or her sex, during her employment with defendant. Plaintiff also testified that she had never made any complaints on that basis during her employment. (Plaintiff's depo. pp.132-34). Moreover, allegations of harassment were not contained in plaintiff's EEOC charge. In an unpublished decision, the Tenth Circuit has held that a sexual harassment claim is not "reasonably related" to a claim of discriminatory discharge so as to avoid the requirement of exhaustion of remedies. Malone v. Mapco, Inc., 955 F.2d 49, 1992 WL 26788 (10<sup>th</sup> Cir.). Summary judgment is appropriate as to the harassment claims. Defendant is also correct that plaintiff's public policy claim under Oklahoma law cannot stand. Such a claim is not

appropriate when a plaintiff has adequate remedies under statute. Marshall v. OK Rental & Leasing, Inc., 939 P.2d 1116, 1122 (Okla.1997). The Court finds that the ADEA and Title VII are adequate remedies for plaintiff's claims. Judgment is appropriate regarding the claim for discharge in violation of public policy.

Turning to the statutory claims for wrongful discharge, defendant first points to the fact that Win Stephens (then 58 years old) both retained plaintiff, knowing her age, and also made the decision to discharge plaintiff within a relatively short time. Defendant correctly notes that various circuit courts have recognized a "same actor" inference or presumption under these circumstances. A survey of the existing rulings is contained in Williams v. Vitro Services Corp., 144 F.3d 1438, 1442-43 (11<sup>th</sup> Cir.1998). The Tenth Circuit has not addressed the issue. As the Williams court notes, the circuit courts have applied varying weights to the strength or value of the inference that obtains when the hirer and firer are the same actor. Upon review, this Court finds the Williams position appropriate, i.e., that such facts give rise to a permissible inference, not a presumption, that no discriminatory animus motivated the employer's actions. Such an inference is for a jury to draw, if it so chooses, but is not sufficient to grant summary judgment. Otherwise, the district court risks violating the appropriate summary judgment standard in cases of this type. See Williams, 144 F.3d at 1443 n.4.

Plaintiff faces a difficult hurdle, described by the Tenth Circuit: "[T]his court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives." Doan v. Seagate Technology, Inc., 82 F.3d 974, 978 (10<sup>th</sup> Cir.1996)(citation omitted). In his response brief, plaintiff does not rely upon the fact that Ennis, a younger woman, was asked to be available for first aid duty. Plaintiff has not challenged that such

a duty was required by defendant's collective bargaining agreements, or that plaintiff could have been retained solely in a "first aid" capacity.

Plaintiff does challenge the hiring of Chris Patterson as Health & Safety Coordinator.<sup>1</sup> She contends that he was not qualified, having had no experience in the health and safety area and not having an emergency medical technician (EMT) certification. The qualifications which defendant listed in the newspaper ad for the position included (1) a degree in Health & Safety or a related field (Patterson had a degree in industrial safety from the University of Central Oklahoma) and (2) that the applicant "have or be able to obtain" certification as First Aid Attendant, EMT, LPN or RN. Defendant establishes, albeit in its reply brief, that Patterson met the qualifications at the time of his hiring because he was a certified First Responder. (Affidavit of Randy Mills at ¶¶6, 9). A certified First Responder is an individual who can respond to an accident and render first aid. Moreover, Patterson obtained his EMT certification in February, 1998. (Plaintiff's Exhibit 2).

The principle against review of employer's business decisions does not immunize all potential business judgments from judicial review for illegal discrimination. Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 1169 (10<sup>th</sup> Cir.1998). There may be circumstances in which a claimed business judgment is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination. Id. The Court is not persuaded that the hiring of Patterson is such an instance. This Court is not permitted to sit as a "super-personnel department

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<sup>1</sup>Defendant makes much of the fact that plaintiff did not even apply for the position. Plaintiff contends that Fred Kickey, Plant Manager, promised plaintiff she would be appointed to the Health & Safety Coordinator position. Kickey denies making such a promise. Accepting plaintiff's contention as true, however, it is not implausible that plaintiff felt no application was necessary. In any event, it is not disputed that plaintiff did not meet the qualifications for the new position.

that reexamines an entity's business decisions." Rabinovitz v. Pena, 89 F.3d 482, 487 (7<sup>th</sup> Cir.1996).

Plaintiff also contends that the fact that statistics show poor safety records in 1997 and 1998 for the other Ball-Foster plants (upon which defendant based its decision to implement a Health & Safety Coordinator) demonstrate that the business judgment asserted is a sham. The Court disagrees. "An articulated motivating reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment. The test is good faith belief." McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1129 (10<sup>th</sup> Cir.1998)(citation omitted). Likewise, plaintiff's attempt to demonstrate an inference, by pointing to two other employees who were retrained instead of discharged, fails. She has not shown that these two employees were similarly situated to her, and thus the inference is not appropriate. See EEOC v. Flasher Co., Inc., 986 F.2d 1312, 1320 (10<sup>th</sup> Cir.1992). In sum, plaintiff has been unable to demonstrate a genuine issue of material fact as to pretext and the motivation of the defendant, particularly the decision-maker Win Stephens, as to the employment decision imposed upon plaintiff.

It is the Order of the Court that the motion of the defendant for summary judgment (#12) is hereby GRANTED.

SO ORDERED THIS 26 DAY OF FEBRUARY, 1999.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

mbf:kw  
02-24-99

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

FIRST MARINE INSURANCE COM- )  
PANY, a Missouri Corporation)

Plaintiff, )

v. )

- 1) JAMES W. COULANDER, )
- 2) BEVERLY COULANDER, )
- 3) STILLWATER NATIONAL BANK, )
- 4) WILLIAM B. GADDIS, JR., )
- 5) JAMES W. LEE, )
- 6) BERNADINE KAY JOHNSON, )

Defendants. )

ENTERED ON DOCKET

**MAR - 1 1999**

DATE

Case No.: 98 CV 560K (M)

**FILED**

FEB 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER DISMISSING DEFENDANT BERNADINE KAY JOHNSON ONLY

FOR GOOD CAUSE SHOWN, the Court accepts the stipulation for Order of Dismissal between the Plaintiff First Marine Insurance Company and the Defendant Bernadine Kay Johnson.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court, that the Defendant Bernadine Kay Johnson be dismissed with prejudice from this action. All claims and causes of action between the Plaintiff and this named Defendant have been resolved with each party to bear his or her own attorney's fees and costs.

  
JUDGE OF THE DISTRICT COURT

THOMAS E. BAKER, OBA #11054  
Daniel, Baker & Howard  
2431 East 51st Street, Ste. 306  
Tulsa, Oklahoma 74105  
(918) 749-5988

34

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE MAR - 1 1999

RONALD GENE TUCKER,

Plaintiff,

vs.

TULSA COUNTY SHERIFF'S DEPARTMENT;  
UNNAMED EMPLOYEES OF THE TULSA  
COUNTY SHERIFF'S DEPARTMENT; THE CITY  
OF TULSA, OKLAHOMA; and  
THE STATE OF OKLAHOMA

Defendants.

Case No. 99-CV-117-K(J)✓

**F I L E D**

FEB 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Plaintiff is a prisoner appearing *pro se* and *in forma pauperis*. Now before the Court is Plaintiff's Civil Rights Complaint filed pursuant to 42 U.S.C. § 1983. For the reasons discussed below, the Court dismisses as defendants the City of Tulsa, Oklahoma, and the State of Oklahoma.

Plaintiff is a prisoner as that term is defined in § 1915A(c) (i.e., a person incarcerated for violations of the criminal law). The Defendants in this case are either governmental entities or employees of a governmental entity. The Court is, therefore, required to conduct an initial review of Plaintiff's complaint. See 28 U.S.C. § 1915A(a). During this review, the Court is required to "identify cognizable claims or dismiss the complaint, or any part of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." 28 U.S.C. § 1915A(b)(1).

Plaintiff is also proceeding *in forma pauperis*. In cases where the plaintiff is proceeding *in forma pauperis*, § 1915(e) provides as follows:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court **shall** dismiss the [*in forma pauperis*] case at any time if the court determines that . . . the action . . . fails to state a claim on which relief may be granted . . . .

28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added).

The Court finds that, even if the allegations in Plaintiff's Civil Rights Complaint are accepted as true, the Complaint fails to state a claim upon which relief can be granted as to the City of Tulsa and the State of Oklahoma. See, e.g., Fed. R. Civ. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim).<sup>1</sup>

#### I. THE CITY OF TULSA, OKLAHOMA

At all relevant times, Plaintiff was incarcerated at the Tulsa County, Oklahoma Jail. Plaintiff alleges that because the Tulsa County Jail was overcrowded and because employees at the jail failed to give him a doctor-prescribed shoe for his artificial leg, he slipped and fell after taking a shower, and that this fall resulted in serious injuries. Plaintiff alleges further that the jail staff also refused to provide him medical treatment after his fall.

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<sup>1/</sup> When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept all well-pled factual allegations in the complaint as true, and the Court must view all inferences that can be drawn from those well-pled facts in the light most favorable to plaintiff. Viewing the allegations in the complaint through this lens, the Court may grant a Rule 12(b)(6) motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. The Court finds that this same standard should be applied when deciding whether to dismiss a claim *sua sponte* under either 28 U.S.C. § 1915(e)(2)(B)(ii) or § 1915A(b)(1).

None of the conduct alleged in Plaintiff's Complaint is alleged to have been committed by any employee or agent of the City of Tulsa, Oklahoma. Rather, all of the conduct is alleged to have been committed by employees of the Tulsa County Jail, who are employees of Tulsa County, not employees of the City of Tulsa. Plaintiff's Complaint fails to allege any facts which would state a claim against the City of Tulsa. The City of Tulsa is, therefore, dismissed from this case without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), and 1915A(b)(1).

## **II. UNNAMED EMPLOYEES OF THE TULSA COUNTY SHERIFF'S DEPARTMENT**

In his Complaint, Plaintiff lists as a defendant the "Tulsa County Sheriffs Dept. and Employees." The Federal Rules of Civil Procedure require that a complaint "include the names of all the parties." Fed. R. Civ. P. 10(a). Without specifically naming the "employees" Plaintiff wishes to sue, those employees cannot be served with notice of this lawsuit. Thus, if Plaintiff desires to sue a specific employee of the Tulsa County Sheriff's Department, Plaintiff must file an amended complaint by March 19, 1999 identifying by name those employees he wishes to sue.

## **III. THE STATE OF OKLAHOMA**

### **A. ELEVENTH AMENDMENT IMMUNITY**

The Eleventh Amendment to the United States Constitution prohibits a State's own citizens and citizens of other states from suing a State in federal court. Plaintiff may not, therefore, sue the State of Oklahoma in this court. See Eastwood v. Dep't of Corrections of State of Okla., 846 F.2d 627 (10th Cir. 1988).

**B. PERSONS UNDER 42 U.S.C. § 1983**

Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added).

A State is not a "person" as that term is used in § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989). While § 1983 does provide "a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Id. at 66. Thus, Plaintiff cannot state a § 1983 claim against the State of Oklahoma.

The State of Oklahoma is entitled to Eleventh Amendment immunity. The State of Oklahoma is also not a "person" for purposes of 42 U.S.C. § 1983. The State of Oklahoma is, therefore, dismissed from this case with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), and 1915A(b)(1).

**CONCLUSION**

The City of Tulsa, Oklahoma is dismissed without prejudice for failure to state a claim upon which relief may be granted. The State of Oklahoma is dismissed with prejudice for failure to state a claim upon which relief may be granted. Plaintiff is granted leave to amend his Complaint by March 19, 1999 to name as defendants specific employees of the Tulsa County Sheriff's Department.

SO ORDERED THIS 26 day of February, 1999.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT





## **BACKGROUND**

On June 23, 1994, in Tulsa County District Court, Case No. CF-93-146, Petitioner was convicted by a jury of First Degree Murder. He was sentenced to life imprisonment on July 8, 1994. See #12, Ex. C.

Petitioner perfected a direct appeal. On December 27, 1995, the Oklahoma Court of Criminal Appeals affirmed his conviction and sentence (#12, Ex. A). On December 26, 1996, Petitioner filed an application for post-conviction relief in the state trial court. (#12, Ex. B). The trial court denied the requested relief on February 13, 1997. (#12, Ex. C). On October 20, 1997, Petitioner filed a post-conviction appeal in the Oklahoma Court of Criminal Appeals. (#12, Ex. D). On November 24, 1997, the post-conviction appeal was dismissed as untimely. (#12, Ex. E). Petitioner filed the instant federal petition for writ of habeas corpus on January 9, 1998 (#1).

## **ANALYSIS**

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction becomes final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state applications for post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Nothing in the record indicates Petitioner sought *certiorari* review of his conviction in the Supreme Court. Therefore, his conviction became final on March 26, 1996, after expiration of the ninety (90) day period within which he could file a petition for writ of *certiorari*. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994); Rule 13, *Rules of*

*the Supreme Court of the United States.* Because Petitioner's conviction became final before enactment of the AEDPA, his one-year limitations clock began to run on April 24, 1996. Simmonds, 111 F.3d at 746. Absent a tolling event, a federal petition for writ of habeas corpus filed by Petitioner after April 23, 1997, would be untimely.

However, Petitioner filed an application for post-conviction relief prior to expiration of the one-year grace period. Therefore, pursuant to § 2244(d)(2), the limitations period is suspended during the time Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. Petitioner filed his application for post-conviction relief in the state trial court on December 26, 1996, or 118 days prior to his April 23, 1997, federal habeas corpus filing deadline. Once the state courts concluded review of his "properly filed" post-conviction applications, Petitioner would have to file his federal habeas petition within 118 days to be timely. The state trial court denied post-conviction relief on February 13, 1997. Petitioner's post-conviction appeal was rejected as untimely and, as a result, the period of time spent pursuing the post-conviction appeal cannot toll the limitations period.<sup>2</sup> Thus, Petitioner's federal petition had to be filed within 118 days of February 13, 1997, or by June 11, 1997, to be timely. Petitioner did not file the instant petition until January 9, 1998, almost seven (7) months beyond the deadline. Therefore, this petition should be dismissed unless Petitioner demonstrates any reason that the limitations period should be tolled.

In his reply to Respondent's response (#6), Petitioner argues that his limitations period should be equitably tolled. Although § 2244(d) is not jurisdictional and as a limitation may be subject to

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<sup>2</sup>See Hoggro, 150 F.3d at 1226-27 n. 4; 28 U.S.C. § 2244(d)(2) (requiring a court to subtract time only for the period when the petitioner's "properly filed" post-conviction application is being pursued).

equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims), Petitioner offers no explanation for his lack of diligence in pursuing his federal claims. He offers no reason for his delay in seeking post-conviction relief or for filing his post-conviction appeal eight (8) months after the trial court's denial of relief. The Court concludes that Petitioner failed to pursue his claims diligently. See Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998) (one-year limitation period of AEDPA will be equitably tolled only "in rare and exceptional circumstances"). As a result, equitable tolling is not justified under these facts. Id.; see also Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). Therefore, the Court declines to excuse Petitioner's untimely filing and finds the petition should be dismissed with prejudice as time-barred. Petitioner's motion for summary judgment should be denied as moot.

### ***CONCLUSION***

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, the petition should be dismissed with prejudice.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. The petition for writ of habeas corpus is **dismissed with prejudice.**
2. Petitioner's motion for summary judgment (#8) is **denied as moot.**

SO ORDERED THIS 26 day of February, 1999.

  
\_\_\_\_\_  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

KENNETH DEWAYNE DOUGLAS, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 H. N. "SONNY" SCOTT, )  
 )  
 Respondent. )

ENTERED ON DOCKET

DATE MAR 01 1999

Case No. 98-CV-086-K (J) ✓

**F I L E D**

FEB 24 1999

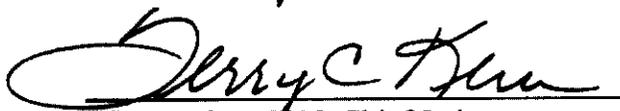
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 26 day of February, 1999.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

(13)

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

KENNETH DEWAYNE DOUGLAS, )

Petitioner, )

vs. )

H. N. "SONNY" SCOTT, )

Respondent. )

ENTERED ON DOCKET

DATE MAR 01 1999

Case No. 98-CV-086-K (J) ✓

**F I L E D**

FEB 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Before the Court is Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (Docket #9). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss (#11). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

***BACKGROUND***

In Tulsa County District Court, Case No. CRF-87-2134, Petitioner was convicted of Second Degree Burglary, AFCF (Count I); Assault With a Dangerous Weapon, AFCF (Count II); and Escape from Lawful Custody, AFCF (Count III). See #10, Ex. A. He received sentences of 25 years, 40 years and 25 years imprisonment on each count, respectively.

Petitioner perfected a direct appeal. On July 10, 1990, the Oklahoma Court of Criminal Appeals affirmed his convictions and modified his sentences to 20 years, Count I; 30 years, Count

II; and 20 years, Count III. (#10, Ex. A). Counsel for Respondent indicates that on March 11, 1997, Petitioner filed an application for post-conviction relief in the state trial court. (#10 at 3). The trial court denied the requested relief on March 31, 1997. (#10 at 3). On April 22, 1997, Petitioner filed a post-conviction appeal in the Oklahoma Court of Criminal Appeals where the denial of post-conviction relief was affirmed on May 20, 1997. (#10, Ex. B). Petitioner filed the instant federal petition for writ of habeas corpus on January 30, 1998 (#1).

### **ANALYSIS**

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction becomes final, a literal application of the AEDPA

limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state applications for post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Nothing in the record indicates Petitioner sought *certiorari* review of his conviction in the Supreme Court. Therefore, his conviction became final on October 8, 1990, after expiration of the ninety (90) day period within which he could file a petition for writ of *certiorari*. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994); Rule 13, *Rules of the Supreme Court of the United States*. Because Petitioner's conviction became final before enactment of the AEDPA, his one-year limitations clock began to run on April 24, 1996. Simmonds, 111 F.3d at 746. Absent a tolling event, a federal petition for writ of habeas corpus filed by Petitioner after April 23, 1997, would be untimely.

However, Petitioner file an application for post-conviction relief prior to expiration of the one-year grace period. Therefore, pursuant to § 2244(d)(2), the limitations period is suspended

during the time Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. Petitioner filed his application for post-conviction relief on March 11, 1997, or 43 days prior to his April 23, 1997, federal habeas corpus filing deadline. Once the state courts concluded review of his "properly filed" post-conviction applications, Petitioner would have to file his federal habeas petition within 43 days to be timely. The Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on May 20, 1997. Thus, Petitioner's federal petition had to be filed within 43 days of May 20, 1997, or by July 2, 1997, to be timely. Petitioner did not file his petition until January 30, 1998, more than six (6) months beyond the deadline. Therefore, this petition should be dismissed unless Petitioner demonstrates any reason that the limitations period should be tolled.

In his objection to Respondent's motion to dismiss, Petitioner argues that the statute of limitations imposed by the AEDPA should not begin to run until the conclusion of state post-conviction proceedings. (#11 at 1). He also indicates that "'extraordinary circumstances' beyond his control . . . made it impossible to file his habeas prior to the statutory period of limitation set forth at § 2244(d)(1) . . . ." (#11 at 5-6).

Petitioner's contention that the conclusion of post-conviction proceedings in state court triggers the commencement of the limitations period is based on an erroneous interpretation of § 2244(d)(2). That section provides that the limitations period is tolled or suspended during the pendency of post-conviction proceedings. Events that trigger the commencement of the period are defined in § 2244(d)(1). Conclusion of state post-conviction proceedings is not identified as a triggering event. See § 2244(d)(1). Neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684,

687 (10th Cir.1991) (cause and prejudice standard applies to pro se prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner).

In addition, although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims), the Court is not persuaded by Petitioner's attempts to justify his late filing. Petitioner merely states that "extraordinary circumstances" made it impossible to comply with the limitations period. However, he fails to identify what the "extraordinary circumstances" were. Petitioner offers no explanation for his failure to raise his claim, based on Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995), prior to March of 1997, nor does he explain why he waited eight (8) months to file his federal petition after the conclusion of his state post-conviction proceedings. The Court concludes that Petitioner failed to pursue his claims diligently. See Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998) (one-year limitation period of AEDPA will be equitably tolled only "in rare and exceptional circumstances"). As a result, equitable tolling is not justified under these facts. *Id.*; see also Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). Therefore, the Court declines to excuse Petitioner's untimely filing and finds Respondent's motion to dismiss should be granted.

**CONCLUSION**

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#9) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 26 day of February, 1999.

  
TERRY C. KEEN, Chief Judge  
UNITED STATES DISTRICT COURT



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

CAROL SUSIE CLARK, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SOUTHWESTERN BELL TELEPHONE )  
 COMPANY, )  
 )  
 Defendant. )

ENTERED ON DOCKET  
DATE MAR 01 1999

No. 97-CV-949-K ✓

**FILED**

FEB 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 26 day of February, 1999.



TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**FILED**

FEB 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RONETTE WEBB, )  
)  
Plaintiff, )  
)  
v. )  
)  
MATHEY DEARMAN, an Oklahoma )  
Corporation, )  
)  
Defendant. )

Case No. 98-CV-0358-K (M) ✓

ENTERED ON DOCKET  
DATE MAR 01 1999

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff Ronette Webb hereby **dismisses** its action against Defendant Mathey Dearman, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), with prejudice to the refiling of same.

JOHN M. BUTLER & ASSOCIATES

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ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

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Ronette Webb, Plaintiff

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