

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

ENTERED ON DOCKET

DATE 4/20/99

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 EDWARD L. SEMONES; BERNEITA L.)
 SEMONES; MAXINE S. MILLER,)
 individually and as trustee for the)
 Maxine Miller Trust; R.P. and ESTHER B.)
 SEMONES; RACHEL A. REINHARDT;)
 BARBARA REINHARDT; and DITRICH)
 LIPAT,)
)
 Defendants.)

Case No. 99-CV-217K (M) 1'

FILE
APR 10 1999

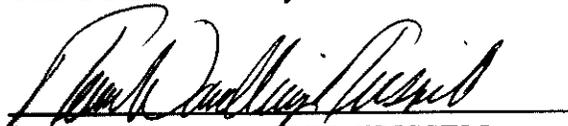
Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

Plaintiff, the United States of America, voluntarily dismisses this action pursuant to Fed. R. Civ. P. 41(a). No adverse party has filed an answer or otherwise entered an appearance in this action.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



TERESA DONDLINGER TRISSELL
Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone (202) 616-8344
DC #453646

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Law

F I L E D

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

APR 19 1999

TULSA GAS TECHNOLOGIES, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 BAX GLOBAL, INC.,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0207K (J)

ENTERED ON DOCKET

DATE 4/30/99

STIPULATION FOR ORDER OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiff, Tulsa Gas Technologies, Inc., by and through its attorney of record, Ann C. Fries, and the Defendant BAX Global, Inc., by and through its attorney of record, John Gladd, and would show the Court that this matter should be dismissed without prejudice pursuant to Fed. R. Civ. P. 41 and, therefore, moves the Court for an Order of Dismissal Without Prejudice.

Respectfully submitted,

Ann C. Fries

Ann C. Fries, OBA #13040
LAW OFFICES OF EARL R. DONALDSON
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ATTORNEY FOR PLAINTIFF

John S. Gladd

John S. Gladd, OBA #12307
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HOLEMAN, PHIPPS & BRITTINGHAM
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Tulsa, Oklahoma 74103-4524
(918) 582-8877
ATTORNEY FOR DEFENDANT

7

DIT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROSE HALEY,
SSN: 441-56-1295

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

APR 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-433-J ✓

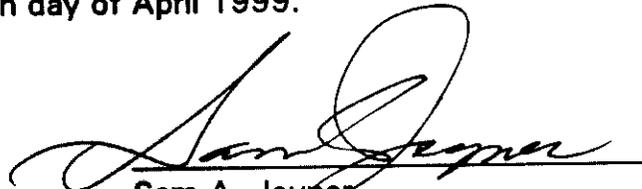
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DATE APR 20 1999

JUDGMENT

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

It is so ordered this 19th day of April 1999.


Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSE HALEY,
SSN: 441-56-1295

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-433-J ✓

ENTERED ON DOCKET
DATE APR 20 1999

ORDER^{1/}

Plaintiff, Rose Haley, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts numerous "issues on appeal."^{3/} For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Administrative Law R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated September 27, 1996. [R. at 18]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 19, 1998. [R. at 5].

^{3/} Plaintiff asserts 11 "issues on appeal." Plaintiff's "issues on appeal" are not easily ascertainable. Plaintiff essentially identified as an "issue on appeal" each mistake which Plaintiff attributes to the ALJ. For example, Plaintiff notes issue number 1 as the ALJ misquoting the doctor that Plaintiff was somewhat depressed, issue number 2 as ignoring the doctor's note that Plaintiff had some depression, and issue number 3 that the ALJ ignored Plaintiff's GAF rating of 50. Although Plaintiff lists each of these as issues on appeal, the actual "appealable issue" could be described as "the ALJ failed to adequately consider Plaintiff's alleged mental impairment." Within the discussion of this error, Plaintiff could explain that the ALJ ignored the GAF and improperly interpreted the findings of Plaintiff's doctor.

I. PLAINTIFF'S BACKGROUND

Plaintiff was 45 years old at the time of her hearing before the ALJ. [R. at 232]. Plaintiff completed high school and additionally completed one semester of classes at Tulsa Junior College. [R. at 232].

Plaintiff injured her right hand while she was employed at Hillcrest Medical Center. Plaintiff had at least two surgeries and skin grafts on her hand. Plaintiff continues to complain of pain in her hand and maintains that she cannot write or otherwise use her right hand. Plaintiff was injured in an automobile accident on July 5, 1994. Plaintiff was treated at the emergency room and complained of neck pain and low back pain. [R. at 112].

In August of 1994, Lawrence A. Reed, M.D., indicated that Plaintiff complained of neck pain, shoulder pain, and headaches. [R. at 120].

An MRI in December 1994 was interpreted as indicating tendinitis, "although a small tear cannot be excluded." [R. at 139].

On November 18, 1994, Dr. Reed wrote that Plaintiff insisted on him issuing a "return to work" slip. [R. at 118]. He provided her with the requested slip but prohibited her from lifting over 20 pounds. [R. at 118]. According to Plaintiff, although she attempted to return to work she was physically unable to perform her work duties, and her employer sent her home. [R. at 240].

On March 8, 1995, Ashok Kache, M.D. indicated that Plaintiff had been taking Elavil due to difficulty sleeping. The doctor additionally noted that her range-of-motion was limited. Plaintiff continued to take Lortab for pain. Plaintiff complained that the

Elavil helped her to sleep but that it made her drowsy throughout the day. [R. at 128, 241]. At least two of Plaintiff's doctors indicated that Plaintiff fell asleep during her examination. [R. at 150].

Plaintiff was reported as being unable to grip with her right hand due to her skin graft surgery. [R. at 129].

The record indicates that Plaintiff voiced a fear of needles on several occasions. However, Plaintiff underwent a right stellate ganglion block in May of 1995, which involves the insertion of needles, in an attempt to lessen the pain in her hand. [R. at 146]. The doctor indicated that the attempt was successful and that Plaintiff's pain "disappeared." [R. at 146]. Plaintiff testified that although her pain dissipated, it returned within five minutes and that she additionally suffered from headaches. [R. at 244].

Several doctors diagnosed Plaintiff as having "reflex sympathetic dystrophy"^{4/} in her hand. [R. at 141, 145].

Plaintiff testified that she suffered from low back, shoulder, leg and ankle pain and that her right hand hurt. [R. at 245]. According to Plaintiff, she could use the thumb on her right hand, but none of her fingers, and she constantly experienced pain. [R. at 247]. Plaintiff testified that she had difficulty sleeping, and that she slept in a reclining chair rather than a bed. [R. at 250].

^{4/} Taber's Cyclopedic Medical Dictionary 1690 (17th ed. 1993), as "A neurovascular complication of CVA [cerebrovascular accident] characterized by severe shoulder pain and stiffness, swelling, and pain in the hand."

Donald R. Inbody, M.D., noted that Plaintiff's current "GAF" (Global Assessment of Functioning) was 50 and that her highest GAF in the year preceding his examination was probably 50. [R. at 155]. The record contains some excerpts from the DSM-IV^{5/} indicating that a GAF of 50 is a "serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." [R. at 176].

Plaintiff's July 26, 1996 medications list indicated Plaintiff was taking Lortab and Tylenol for pain, Naproxen (muscle inflammation, swelling, pain), and Darvocan. [R. at 177].^{6/}

A Residual Functional Capacity ("RFC") Assessment completed on May 10, 1996 by Thurma Fiegel, M.D. indicated Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk six out of eight hours, and sit for six hours in an eight hour day. [R. at 59]. Plaintiff's ability to push and pull was described as limited. In addition, the doctor noted that Plaintiff's "pain does limit" her. [R. at 60].

An RFC Assessment completed by Emil Milo, M.D., one of Plaintiff's treating physicians, on April 12, 1990, indicated that Plaintiff could sit eight hours in an eight hour day, stand eight hours in an eight hour day, and walk eight hours in an eight hour day. [R. at 151]. Plaintiff's ability to lift frequently was limited to five pounds, and occasionally ten pounds. [R. at 151].

^{5/} The Diagnostic and Statistical Manual of Mental Disorders is referred to as the DSM.

^{6/} Plaintiff's medication list, and several other forms, are poorly written, and appear to substantiate Plaintiff's claim that although she is "right-handed," due to her impairment she writes with her left hand. [R. at 243].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{7/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

^{7/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. . If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{8/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{8/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform light work activity involving lifting no more than 20 pounds at a time or ten pounds frequently. [R. at 24]. The ALJ determined that Plaintiff's claimed depression would not interfere with her ability to work. [R. at 25]. The ALJ noted that he had reviewed Plaintiff's complaints of pain and "the pain experienced by the claimant is limiting but, when compared with the total evidence, not severe enough to preclude all types of work." [R. at 25]. The ALJ concluded, based on the Grids,^{9/} that Plaintiff could perform a substantial number of jobs in the national economy. [R. at 27].

IV. REVIEW

APPLICATION OF THE GRIDS: EXERTIONAL VS. NONEXERTIONAL LIMITATIONS

Plaintiff asserts that the ALJ erred because the ALJ applied the Grids although Plaintiff has significant non-exertional limitations.

Limitations imposed by an impairment can be either exertional or nonexertional. The regulations provide that when an impairment affects only exertional limitations,

^{9/} The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2.

the Grids may be applied. 20 C.F.R. § 404.1569(b). When an impairment affects nonexertional limitations, or exertional and nonexertional limitations, the regulations state that the Grids will not direct a conclusion. 20 C.F.R. § 404.1569(c) & (d). Limitations from an impairment (e.g. pain) can be either exertional or nonexertional.

(a) *General.* Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to meet the strength demands of jobs. . . . Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. . . .

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule contained in Appendix 2 of this subpart, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following: (i) You have difficulty functioning because you are nervous, anxious, or depressed; (ii) You have difficulty maintaining attention or concentrating; (iii) You have difficulty understanding or remembering detailed instructions; (iv) You have difficulty in seeing or hearing; (v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g. you cannot tolerate dust or fumes; or (vi) You have difficulty performing

the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the nonexertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations and restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

20 C.F.R. § 404.1569 (italics in original, underline added). In accordance with the regulations, if a claimant has an impairment which affects the claimant's exertional and non-exertional abilities, the Grids should be conclusively applied only if a finding of disabled is directed.

In this case, the RFC completed by the Social Security Administration doctor indicated that Plaintiff was limited in her ability to reach, handle, finger, or feel with her right hand. [R. at 62]. In addition, Dr. Inbody, after his examination of Plaintiff on April 12, 1996, indicated that Plaintiff was moderately limited in the ability to carry out detailed instructions, maintain attention and concentration, perform activities

within a schedule, and complete a normal workday without interruptions. The ALJ does not adequately evaluate the non-exertional limitations which Plaintiff's doctors and the Social Security Administration doctors have indicated Plaintiff has. The ALJ must either (1) adequately discuss and explain why Plaintiff has no non-exertional limitations, or (2) rely on more than the Grids in concluding that Plaintiff is not disabled.

TREATING PHYSICIAN

The ALJ concluded that Plaintiff could perform the physical demands of light work. Plaintiff's treating physician completed an RFC indicating that Plaintiff could lift only five pounds frequently and six to ten pounds frequently. [R. at 151]. The ALJ concluded that Plaintiff could perform "light work activity" which requires lifting no more than 20 pounds at a time and frequent lifting or carrying of objects weighing up to ten pounds. Plaintiff's treating physician indicates that she can frequently carry only five pounds. The ALJ does not discuss the treating physicians' limitations or otherwise explain his conclusion that Plaintiff can lift the amounts required to perform light work.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). A treating physician's opinion may be rejected

"if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

On remand the ALJ should discuss Dr. Milo's opinion that Plaintiff can lift only five pounds frequently and either (1) explain why he disagrees with Dr. Milo's opinion, or (2) present any weight limitations to the vocational expert.

GAF ASSESSMENT

Plaintiff asserts that the ALJ failed to adequately evaluate and consider her GAF Assessment. The ALJ does not discuss the GAF Assessment in his decision. The record does not contain much information with regard to the GAF Assessment. Plaintiff did include, in the record, pages from a DSM-IV Manual suggesting that a GAF of 50 indicated a severe impairment. On remand, the ALJ should evaluate the GAF assessment by Dr. Inbody.

EVALUATION OF PAIN

Plaintiff testified that she experienced severe pain in her right hand. According to Plaintiff, she must take pain relievers, including Lortab, to relieve her pain. However, Plaintiff indicates that the pain medication makes her very drowsy. In addition, two of Plaintiff's physicians have noted that Plaintiff appeared drowsy and fell asleep during their examination.

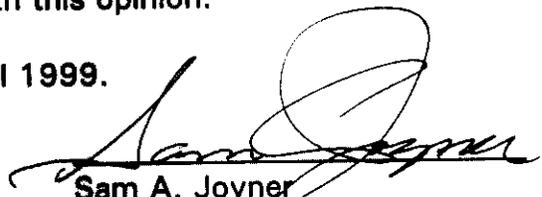
Plaintiff additionally expressed a fear of needles, and Plaintiff's medical records indicate that she informed several of her treating physicians of this fear. However, Plaintiff underwent a procedure, involving the use of needles, in an attempt to decrease the degree of pain that she experienced in her right hand.

In his evaluation of Plaintiff's pain, the ALJ does not discuss either the affect of Plaintiff's medications, or Plaintiff's seeking of pain relief. Each of these factors are factors outlined by the Tenth Circuit Court of Appeal as factors which should be addressed when evaluating an individual's complaints of pain. On remand, the ALJ should give consideration to the factors discussed in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).^{10/}

V. CONCLUSION

The Court concludes that the findings of the Commissioner are not supported by substantial evidence. This case is therefore **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 19th day of April 1999.


Sam A. Joyner
United States Magistrate Judge

^{10/} The Tenth Circuit Court of Appeals indicated that the following factors should be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991).

How

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

FILED

APR 15 1999

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

GILBERT L. WORDEN,

Plaintiff,

v.

DEPARTMENT OF HUMAN SERVICES
OF THE STATE OF OKLAHOMA,

Defendant.

No. 98-CV-424 C (M)

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DATE **APR 20 1999**

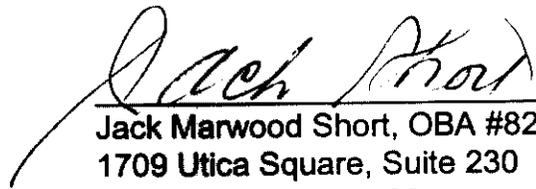
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APR 15 1999

Phil Lombardi, Clerk
S. DISTRICT COURT

STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to F.R. Civ. P. 41(a)(1), Plaintiff Gilbert L. Worden and Defendant Oklahoma Department of Human Services stipulate that the above captioned case be dismissed, with prejudice to refile, with each party to bear its own costs and attorney fees.



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Attorney for Plaintiff



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Assistant General Counsel
Department of Human Services
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(405) 521-3638; Fax: 521-6816
Attorneys for Defendant

ENTERED ON JUDGMENT DOCKET ON

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

FRANKLIN DAGGS,)

Plaintiff,)

v.)

ALEXANDER & ALEXANDER, INC.)
(Oklahoma); ALEXANDER &)
ALEXANDER SERVICES, INC.; AON)
GROUP, INC.; ALEXANDER &)
ALEXANDER, INC.; AON RISK)
SERVICES, INC.; ALEXANDER &)
ALEXANDER PENSION PLAN; AON)
PENSION PLAN; ALEXANDER &)
ALEXANDER THRIFT PLAN; and)
AON SAVINGS PLAN,)

Defendants.)

FILED
APR 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV-967B

ENTERED ON DOCKET
DATE APR 20 1999

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff and Defendants, by and through their respective counsel of record, hereby stipulate and agree as follows:

1. This Court may enter an order, without further notice to the parties, dismissing Plaintiff's Cause of Action under the Americans with Disabilities Act only contained within Plaintiff's Second Amendment to Third Amended Complaint with prejudice as against Defendants.

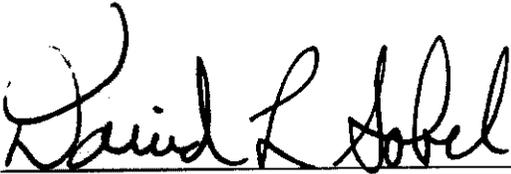
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2. This agreement is made by Plaintiff and Defendants solely for the purpose of dismissing the Americans with Disabilities Act cause of action involved in this matter.

Respectfully Submitted,

FRANKLIN DAGGS

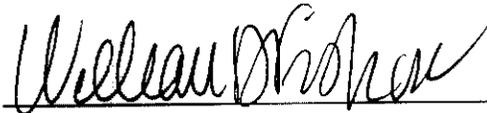
By: 

David L. Sobel OBA #8444
Leblang, Clay, Sobel & Ashbaugh
7615 East 63rd Place, Suite 200
Tulsa, Oklahoma 74133
(918) 254-1414

Attorneys for Plaintiff

and

ALEXANDER & ALEXANDER SERVICES, INC., et al

By: 

J. Patrick Cremin OBA #2013
William D. Fisher OBA #17621
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON
320 S. Boston Avenue, Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

Attorneys for Defendants

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

FILED

APR 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

USA,)
)
Plaintiff(s),)
)
vs.)
)
\$1,440.00 U.S. CURRENCY, et al,)
)
Defendant(s).)

Case No. 96-C-934-B ✓

ENTERED ON DOCKET
DATE APR 20 1999

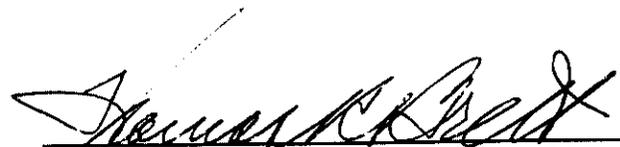
ORDER DISMISSING ACTION

The Court has been advised by counsel that all claims have been resolved. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within 60 days that closing papers have not been completed as to all claims and further litigation is necessary.

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

IT IS SO ORDERED this 19th day of April, 1999.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

APR 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MISTI L. MacDONALD,)
)
Plaintiff,)
)
v.)
)
EBSCO SPRING CO., INC. and)
LAWRENCE J. BABB,)
)
Defendants.)
_____)

Case No. 98-CV-670-B (M)

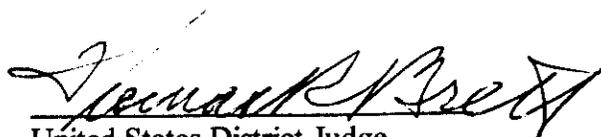
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DATE APR 20 1999

ORDER OF DISMISSAL

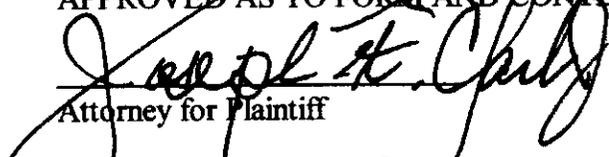
This cause having come before this Court on the Joint Application for Dismissal with Prejudice of the parties, and this Court being fully advised in the premises, and the parties having stipulated and the Court having found that the parties have reached a private settlement of the claims of Plaintiff, and that such claims should be dismissed with prejudice, it is, therefore,

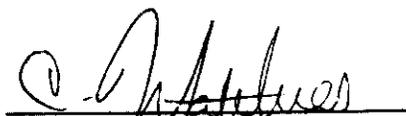
ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiff, together with any causes of action asserted therein, be and hereby are dismissed with prejudice. Each party is to bear their own attorney fees and costs.

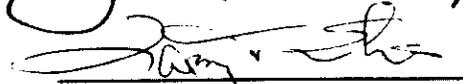
So Ordered this 19th day of Apr., 1999.


United States District Judge

APPROVED AS TO FORM AND CONTENT:


Attorney for Plaintiff


Attorney for Defendants


Attorney for Plaintiff

8

4-8-99
7-15-79

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

FILED

APR 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONOCO, INC., a Delaware corporation,)

Plaintiff,)

v.)

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION (AFL-CIO) and its LOCAL 5-857,)

Defendants.)

Case No. 98-CV-0091 - C (M)

ENTERED ON DOCKET
APR 19 1999

JUDGMENT

This action came on before the undersigned judge on Plaintiff's Motion for Summary Judgment. Therein the Court ruled that Plaintiff was not entitled to judgment setting aside the arbitration award, but that, rather, said award should be enforced.

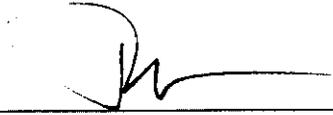
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Conoco, Inc., take nothing, that the action be dismissed on the merits, that the arbitration award be enforced, and that the Defendant, Oil, Chemical & Atomic Workers International Union (AFL-CIO) and its Local 5-857, recover of the Plaintiff its costs of action.

DATED at Tulsa, Oklahoma, this 16th April day of ~~December~~, 1999.

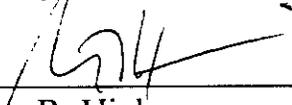
15-


H. Dale Cook, Senior United States District Judge

Approved as to form:



J. Patrick Cremin
Attorney for Plaintiff



Steven R. Hickman
Attorney for Defendant

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

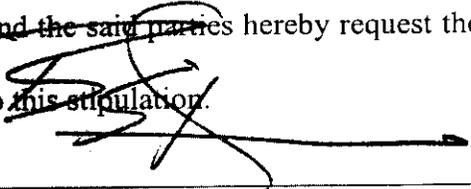
ST. PAUL FIRE & MARINE)
INSURANCE COMPANY,)
)
Plaintiff,)
)
v.)
)
EMERALD RESOURCES, INC.,)
A Delaware corporation, JAMES B.)
CONNORS, and BED-CHECK)
CORPORATION,)
)
Defendants.)

Case No. 98-CV-969-E

ENTERED ON DOCKET
DATE APR 19 1999

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, St. Paul Fire & Marine Insurance, and the Defendants, Emerald Resources, Inc., James B. Connors, and Bed-Check Corporation, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate and agree that the above captioned cause, and all claims asserted therein, be dismissed with prejudice to further litigation pertaining to all matters involved herein and state that a compromise settlement covering all claims and counterclaims involved in the above captioned cause has been made between the parties, and the said parties hereby request the Court dismiss said action with prejudice, pursuant to this stipulation.

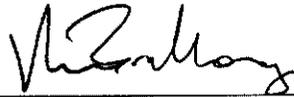

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Law

9

CU



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ATTORNEY FOR BED-CHECK



STEVEN M. HARRIS
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ATTORNEYS FOR EMERALD
RESOURCES, INC., and JAMES CONNORS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 16 1999 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROY E. HARE,
SSN: 467-70-7589

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-272-J ✓

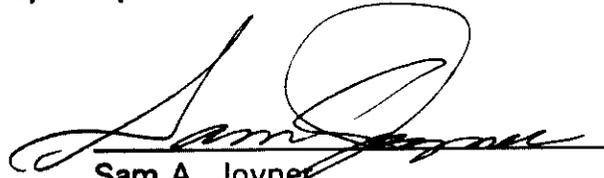
ENTERED ON DOCKET

DATE APR 19 1999

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 16th day of April 1999.



Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

ROY E. HARE,
SSN: 467-70-7589

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

APR 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-272-J

ENTERED ON DOCKET

DATE APR 19 1999

ORDER^{1/}

Plaintiff, Roy E. Hare, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because the testimony of the vocational expert indicated that Plaintiff could not perform his past relevant work when Plaintiff's correct impairments were considered by the vocational expert. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on December 23, 1944, and was 52 years old at the time of his hearing before the ALJ which occurred on March 20, 1997. [R. at 142]. Plaintiff testified that he completed the eighth grade. [R. at 143].

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Administrative Law Judge Stephen C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled in his decision dated July 11, 1997. [R. at 8]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 3, 1998. [R. at 3].

//

According to Plaintiff, he previously worked as a supervisor at an oil field. [R. at 146]. Plaintiff stated that he had to lay down for 45 minutes to one hour at least two or three times each day to relieve pain. [R. at 150].

According to Plaintiff, he experienced pain in his arm and back. [R. at 162]. Plaintiff testified that if he held anything more than a cup of coffee in his left hand he would drop it. [R. at 160]. Plaintiff testified that after 20 - 30 minutes of standing he hurts, and that he needs to sit down after walking approximately one hour. [R. at 164]. Plaintiff believes that he could sit for only 15 - 20 minutes. [R. at 170]. Plaintiff testified that he was unable to climb a ladder, or stoop, or pick up anything with his arms. [R. at 171].

Plaintiff additionally testified that he takes care of fourteen head of cattle, and that he puts hay out for the cows using a tractor. [R. at 175]. Plaintiff noted that he walks approximately three to four hours during the course of a day. [R. at 175].

Plaintiff's medication list indicates that he takes over-the-counter pain relievers and Ibuprofen. [R. at 166]. Plaintiff stated that he had not visited a doctor since November 1995 until a few weeks prior to the hearing because he could not afford it. [R. at 178].

Plaintiff fractured his left elbow on July 1, 1994. [R. at 88]. Plaintiff's injury required surgery. [R. at 100]. By January 16, 1995, Plaintiff's range-of-motion of his left elbow was 30 - 95 degrees. Plaintiff was released from the care of his doctor on March 15, 1995. [R. at 112].

On October 3, 1994, Plaintiff's doctor noted that Plaintiff was three months post-injury and would probably be able to return to his former occupation as a truck driver in three to five months. [R. at 115]. Plaintiff's doctor indicated that because Plaintiff's previous employment as a truck driver required dexterity of both of Plaintiff's arms and hands, additional recuperation was necessary. [R. at 115].

James D. Wheeler, D.O., indicated on September 6, 1995, that 14 months had passed since Plaintiff's injury, but that Plaintiff was not physically capable of returning to his work as a truck driver. [R. at 123].

On November 15, 1996, Plaintiff's treating physician indicated that he last examined Plaintiff on March 15, 1995. The doctor indicated that, to the best of the doctor's knowledge, Plaintiff had no problems sitting, standing, walking, hearing, speaking, traveling, socializing, or performing mental activities. The doctor noted that Plaintiff's range-of-motion of his elbow is limited (from 30 degrees to 90 degrees). The doctor concluded that Plaintiff could perform activity which did not require lifting over 30 pounds with his left arm. [R. at 126].

A Residual Functional Capacity Assessment completed January 12, 1996 indicated that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand for six hours (eight hour day), and sit for six hours (eight hour day). [R. at 39].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

^{3/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{4/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

III. THE ALJ'S DECISION

The ALJ noted that Plaintiff's X-rays were within normal limits, that no gait disturbance was reported, and that prior to one week before the hearing Plaintiff used only over-the-counter pain relief. The ALJ observed that although the Plaintiff testified that he suffered from high blood pressure, Plaintiff took no medication for hypertension and smoked two packs of cigarettes each day. [R. at 17]. The ALJ concluded that Plaintiff's RFC was consistent with the limitations provided by Dr. Kupcha, and that Plaintiff could do any activity which did not require heavy lifting (over 30 pounds), or range-of-motion beyond the 30 to 90 degrees with his left arm. [R. at 18]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could return to his prior occupation as a driller supervisor as that job was performed in the national economy. [R. at 19].

IV. REVIEW

WAIVER AND APPLICATION OF JAMES

In James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996), the Tenth Circuit Court of Appeals noted that "[o]rdinarily issues omitted from an administrative appeal

are deemed waived for purposes of subsequent judicial review." James, 96 F.3d at 1343. The Tenth Circuit concluded that this general rule should also be applied to social security disability adjudications. In James, the claimant did not file a brief at the Appeals Council level but asserted that he was disabled and entitled to benefits. The Court concluded that "[s]uch a statement was plainly inadequate to apprise the Appeals Council of the particularized points of error counsel has subsequently argued in the courts." Id.

In this case, in his decision, the ALJ notified Plaintiff of the James decision and further informed Plaintiff that Plaintiff must specifically state any issues which Plaintiff wanted to assert on appeal to the Appeals Council. [R. at 20]. Plaintiff's request for review stated that Plaintiff asserted as errors that "the ALJ decision is not supported by substantial evidence," and "the ALJ decision is affected by other errors of law." [R. at 5]. These asserted errors are insufficient to have apprised the Appeals Council of the specific error which Plaintiff was appealing. Plaintiff therefore, pursuant to James, has failed to adequately preserve for review the errors which Plaintiff now asserts before this Court.

Plaintiff's waiver of the issues which Plaintiff is currently asserting before this Court is sufficient reason for this Court to affirm the decision of the ALJ. However, the Court additionally concludes that the decision of the ALJ should be affirmed if the merits of Plaintiff's argument are addressed.

VOCATIONAL EXPERT TESTIMONY REGARDING PAST RELEVANT WORK

Plaintiff asserts that in the second hypothetical presented to the vocational expert the ALJ included a limitation that Plaintiff's blood pressure problem would prevent quick postural changes and would probably make Plaintiff dizzy. Plaintiff additionally notes that based on the inclusion of this limitation the vocational expert concluded that Plaintiff would not be able to return to his past relevant work. Consequently, Plaintiff asserts that the record does not contain substantial evidence to support the decision of the ALJ that Plaintiff can return to his past work.

Plaintiff's argument is partially correct. When the limitation of dizziness due to high blood pressure was included in the limitations presented to the vocational expert, the vocational expert testified that Plaintiff would not be able to return to his past work as a drilling supervisor. However, the ALJ, in his determination of Plaintiff's residual functional capacity, did not find that Plaintiff had a limitation for his asserted high blood pressure. The ALJ noted that "although the claimant testified he is disabled, in part, due to high blood pressure, there is no indication that the claimant takes any medication to control his hypertension. Additionally, the claimant testified he continues to smoke two packs a [sic] cigarettes a day." [R. at 17]. The ALJ determined that Plaintiff had the residual functional capacity ("RFC") to perform light level work activity which did not require lifting more than 30 pounds with his left arm or a range-of-motion of his left arm of more than 30 degrees to 90 degrees. [R. at 15]. The RFC contains no additional limitation for dizziness or change of positions

related to hypertension. Based on the RFC presented by the ALJ, the vocational expert concluded that Plaintiff could return to his past relevant work as performed in the national economy and as performed in Oklahoma. Plaintiff does not otherwise challenge the ALJ's RFC or the vocational expert's testimony. Based on the findings of the ALJ and the supporting testimony of the vocational expert, the Court concludes that the decision of the Commissioner is supported by substantial evidence.

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

Dated this 16th day of April 1999.



Sam A. Joyner
United States Magistrate Judge

2/15/99
4-7-99

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

THOMAS B. KRAUSER
aka Thomas Brian Krauser;
BARBARA A. KRAUSER
aka Barbara Alice Krauser;
FARM CREDIT BANK OF WICHITA;
AMERICAN EXCHANGE BANK,
Collinsville, Oklahoma;
COUNTY TREASURER, Mayes County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Mayes County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE APR 16 1999

FILED

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 98-CV-0076-H (J)

DEFICIENCY JUDGMENT

This matter comes on for consideration this 14th day of April, 1999,

upon the Motion of the Plaintiff, United States of America, acting on behalf of Farm Service Agency, formerly Farmers Home Administration, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and Defendants, Thomas B. Krauser aka Thomas Brian Krauser and Barbara A. Krauser aka Barbara Alice Krauser, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to Thomas B. Krauser aka Thomas Brian Krauser, Route 1, Box 260, Big Cabin, Oklahoma 74332, and Barbara A. Krauser

aka Barbara Alice Krauser, Route 1, Box 162, Big Cabin, Oklahoma 74332, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on August 13, 1998, in favor of the Plaintiff United States of America, and against the Defendants, Thomas B. Krauser aka Thomas Brian Krauser and Barbara A. Krauser aka Barbara Alice Krauser, with interest and costs to date of sale is \$335,052.81.

The Court further finds that the appraised value of the real property at the time of sale was \$147,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered August 13, 1998, for the sum of \$221,000.00 which is more than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 5th day of April, 1999.

The Court further finds that the Plaintiff, United States of America on behalf of Farm Service Agency, formerly Farmers Home Administration, is accordingly entitled to a deficiency judgment against the Defendants, Thomas B. Krauser aka Thomas Brian Krauser and Barbara A. Krauser aka Barbara Alice Krauser, as follows:

Principal Balance	\$230,393.35
Interest as of Default Date	82,023.70
Interest From Default Date to Judgment Date	13,600.78
Interest From Date of Judgment to Sale	8,402.99
Publication Fees of Notice of Sale	406.99
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$335,052.81
Less Credit of Sale Proceeds	<u>221,000.00</u>
DEFICIENCY	\$114,052.81

plus interest on said deficiency judgment at the legal rate of 4.732 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the sale proceeds of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of Farm Service Agency, formerly Farmers Home Administration, have and recover from Defendants, Thomas B. Krauser aka Thomas Brian Krauser and Barbara A. Krauser aka Barbara Alice Krauser, a deficiency judgment in the amount of \$114,052.81, plus interest at the legal rate of 4.732 percent per annum on said deficiency judgment from date of judgment until paid.



UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

Deficiency Judgment
Case No 98-CV-0076-II (I) (Krauser)

PP:ess

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

IRON CARBIDE HOLDINGS, LTD.,)
a Colorado corporation,)
)
Plaintiff,)
v.)
)
APPLIED THERMAL SYSTEMS, INC.,)
an Oklahoma corporation, and)
CHARLES A. MARTIN, an individual,)
)
Defendants.)

ENTERED ON DOCKET
DATE APR 16 1999

Case No. 98-CV-93-H(E)

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court pursuant to the Notice of Completion of Settlement Conference filed April 8, 1998 (Docket # 42), wherein the parties indicated that a settlement of this matter had not been reached. After a careful review of the record in this case, the Court declines to exercise supplemental jurisdiction over the state law claims remaining for decision in this case, the Plaintiff's declaratory judgment claims under 28 U.S.C. § 2201 having been dismissed by this Court by order dated August 31, 1998 (Docket # 30). See, e.g., 28 U.S.C. § 1367; Lancaster v. Independent Sch. Dist. No. 5, 149 F.3d 1228, 1236 (10th Cir. 1998). Accordingly, Plaintiff's state law claims are hereby dismissed without prejudice. All motions pending are moot.

IT IS SO ORDERED.

This 15TH day of April, 1999.



Sven Erik Holmes
United States District Judge

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

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AUDRELL L. LUNSFORD,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

Case No. 98-CV-663-E (M)

ENTERED ON DOCKET

DATE APR 16 1999

ORDER

Before the Court is Respondent's motion to dismiss for failure to file within the limitations period (Docket #4). Petitioner has filed a "personal statement" (#6) and a response to the motion to dismiss (#7). 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 was not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On February 14, 1992, Petitioner was convicted by a jury of Lewd Molestation (Count 1), First Degree Rape (Count 2), and Forcible Sodomy (Count 3), in Tulsa County District Court, Case No. CF-91-4825. He was sentenced to fifteen (15) years, forty (40) years, and seventeen (17) years imprisonment, on each count, respectively, to be served consecutively. Petitioner did not perfect a direct appeal.

Respondent indicates that on December 17, 1996, after unsuccessful attempts to secure an appeal out of time (see #5, Exs. A, B, C and D), Petitioner filed his first application for post-conviction relief in Tulsa County District Court. (See #5 at 4). That court denied the requested relief

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on January 17, 1997. (See #5, Ex. E). On March 17, 1997, Petitioner filed a petition in error in the Oklahoma Court of Criminal Appeals (#5, Ex. F). On April 2, 1997, the state appellate court dismissed the appeal, finding it was untimely and, therefore, improperly filed (#5, Ex. E). Thereafter, on an unknown date, Petitioner requested an appeal out of time in the state district court. That request was denied on October 1, 1997 (see #5, Ex. G). Petitioner did not appeal the trial court's denial.

On April 17, 1998, Petitioner filed a second application for post-conviction relief in Tulsa County District Court. (See #5, Ex. G). After the state trial court denied relief on May 13, 1998, Petitioner appealed. The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief on July 15, 1998 (#5, Ex. G).

Petitioner filed the instant petition for writ of habeas corpus on September 1, 1998, asserting two claims: (1) that he was denied a direct appeal through no fault of his own, and (2) that he received ineffective assistance of counsel (#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 became 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. Because Petitioner failed to perfect a direct appeal, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on

February 24, 1992. See Rule 2.5, *Rules of the Court of Criminal Appeals* (requiring the defendant to file a notice of intent to appeal and designation of record within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

However, pursuant to § 2244(d)(2), the running of the limitations period was tolled or suspended during the pendency of any properly filed post-conviction proceedings. Hoggro, 150 F.3d at 1226. Petitioner's first application for post-conviction relief was properly filed in the state district court during the grace period. Thus, the limitations period was tolled, or suspended, for the 31 days of its pendency, from December 17, 1996 to January 17, 1997. However, Petitioner's post-conviction appeal was dismissed by the Oklahoma Court of Criminal Appeals as untimely and improperly filed. Therefore, the period of time from the trial court's denial of relief to the appellate court's dismissal of the appeal cannot toll the limitations period. See 28 U.S.C. § 2244 (d)(2); Hoggro, 150 F.3d at 1226-27 n.4. Also, and possibly during the grace period, Petitioner filed an application for an appeal out of time in the state district court which was denied on October 1, 1997 (see #5, Ex. G). Assuming Petitioner filed his application for an appeal out of time shortly after the dismissal of his post-conviction appeal, the limitations period would be tolled, at most, an additional 182 days, representing the time period from April 2, 1997 to October 1, 1997. Therefore, at most,

Petitioner's federal filing deadline would be extended 213 days¹ beyond April 23, 1997. In other words, after considering Petitioner's state post-conviction efforts,² Petitioner had until November 22, 1997, to submit his federal petition for writ of habeas corpus. Petitioner filed his petition on September 1, 1998, well past the November 22, 1997 deadline. Absent a tolling event, this action is time-barred.

In his response to the motion to dismiss, Petitioner cites 28 U.S.C. § 2244(d)(1)(B) and argues that his petition is not time-barred by the AEDPA because it was filed within one year of March 1998, when a state-created impediment to the filing of his petition was removed. The impediment identified by Petitioner is that the state failed to provide the "information necessary to follow the rules and procedures of the AEDPA until March of 1998." (#7). In support of his position, Petitioner provides the Sworn Affidavit of Ron Turner, dated April 30, 1998 (#7, Attachment). Mr. Turner states that he is the Law Library Supervisor at Mack Alford Correctional Center ("MACC") and that the MACC facility did not receive any new legal materials from August 1995 until November 1996 when updates were received for the Pacific Reporter 2d, the Oklahoma Statutes Annotated, and the Federal Reporter 3d. According to Mr. Turner, in order to keep abreast of changes in the law, inmates at MACC had to rely on weekly editions of the "Oklahoma Bar Journal" and information obtained from Dick Conner Correctional Center and the Oklahoma State Penitentiary.

¹Two hundred thirteen days represents the sum of the 31 days Petitioner's first application for post-conviction relief was pending in the state district court and the 182 days his application for a post-conviction appeal out of time could have been pending in the state district court.

²The time from April 17, 1998 to July 15, 1998, when Petitioner's second application for post-conviction relief was pending, cannot serve to toll the limitations period since the judicially created grace period ended April 23, 1997, prior to the filing of the second application for post-conviction relief.

The Court is unwilling to toll the limitations period based on Petitioner's argument. Although the legal materials at MACC may not have been promptly updated, Petitioner nonetheless could request materials from other Department of Corrections facilities. In addition, Petitioner waited more than three (3) years after his conviction before he began his efforts to seek an appeal out of time. He did not seek post-conviction relief until almost five (5) years after his conviction. Thus, he has not pursued his claims diligently. The Court also finds it significant that the claims raised by Petitioner in the instant petition, that he was denied a direct appeal through no fault of his own and that he received ineffective assistance of counsel, are identical to those raised in state post-conviction proceedings. Thus, assuming *arguendo* that any denial of access to the AEDPA amounted to unconstitutional state action, that action did not prevent Petitioner from filing the instant application. See Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). The Court finds Petitioner's failure to comply with the AEDPA's limitations period is directly attributable to his own lack of diligence and not to any state created impediment.

In his "personal statement," Petitioner asserts that he is "innocent, innocent" of the crimes for which he was convicted (#6).³ However, unless a habeas petitioner has diligently pursued his federal claims, a claim of innocence, in the absence of extraordinary circumstances justifying equitable tolling, is insufficient to toll the limitations period. See *id.* Therefore, the Court declines to apply equitable tolling in this case and concludes that the petition for writ of habeas corpus is untimely. Respondent's motion to dismiss this petition as time-barred should be granted.

³Other than the conclusory assertion of innocence found in his "personal statement," Petitioner provides nothing to support his claim of innocence.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss for failure to file within the limitations period should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

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 (#4) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 15th day of April, 1999.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AUDRELL L. LUNSFORD,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

Case No. 98-CV-663-E (M) ✓

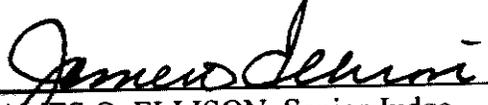
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JUDGMENT

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 15th day of April, 1999.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

KR

IN THE UNITED STATES DISTRICT COURT
FOR THE ~~EASTERN~~ DISTRICT OF OKLAHOMA
Northern

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES FOR USE AND BENEFIT OF
PERRY PLASTERING, INC.,

Plaintiff,

vs.

MANHATTAN CONSTRUCTION COMPANY
AND FEDERAL INSURANCE COMPANY,

Defendants.

Case No. 99-CV-0233K(M) ✓

ENTERED ON DOCKET

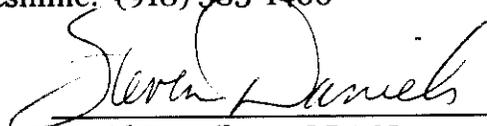
DATE APR 16 1999

DISMISSAL WITH PREJUDICE

Comes now the Plaintiff, Perry Plastering, Inc., and its attorneys of record, Steven Daniels and Wayne M. Copeland, stating they have received full satisfaction of all their claims, and dismiss the above-styled and numbered cause with prejudice toward the bringing of any further action, each party to bear their own costs.

WILSON, CAIN & ACQUAVIVA
1516 South Boston, Suite 316
Tulsa, OK 74119
Telephone: (918) 583-4777
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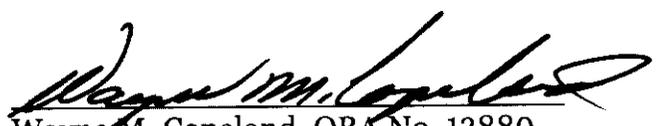
By:



David D. Wilson, OBA No. 9722
Steven W. Daniels, OBA No. 12259

AND

By:



Wayne M. Copeland, OBA No. 13880
1516 South Boston, Suite 315
Tulsa, OK 74119
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Facsimile: (918) 583-1466

Attorneys for Perry Plastering, Inc.

C15

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

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TYLER LEE FERRELL,)

Plaintiff,)

vs.)

Case No. 98-CV-0749-B(M)

CITY OF TULSA, a municipality;)
TULSA POLICE DEPARTMENT; OFFICER)
S.E. HICKEY, an individual, OFFICER)
J.T. GATWOOD, an individual,)

Defendants.)

ENTERED ON DOCKET
APR 16 1999

ORDER

Before the Court is the motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted filed by defendants, S.E. Hickey ("Hickey") and J.T. Gatwood. ("Gatwood") (Docket No. 5).

Plaintiff Tyler Lee Ferrell ("Ferrell") brings this action pursuant to 42 U.S.C. § 1983 against the City of Tulsa, the Tulsa Police Department, and Hickey and Gatwood, two officers of the Tulsa Police Department. In response, Hickey and Gatwood assert the defense of qualified immunity and move to dismiss Ferrell's claim against them pursuant to Rule 12(b)(6).

At the Rule 12(b)(6) stage, qualified immunity protects defendants performing discretionary functions from individual liability under 42 U.S.C. § 1983 unless, on the face of the complaint, plaintiff alleges the violation of "clearly established statutory or constitutional rights of which a reasonable person would have known." *Baptiste v. J.C. Penney Co., Inc.*, 147 F.3d 1252, 1255 (10th Cir. 1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Once the defendant pleads qualified immunity, the plaintiff must (1) allege sufficient facts showing that the defendant's actions violated a constitutional or statutory law, and (2) show "that the

relevant law was clearly established when the alleged violation occurred.'" *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997)(quoting *Gehl Group v. Koby*, 63 F.3d 1528, 1533 (10th Cir. 1995)). In determining the above, the Court must construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded allegations as true and draw all reasonable inferences in plaintiff's favor. *Dill v. City of Edmond, Oklahoma*, 155 F.3d 1193, 1203 (10th Cir. 1998). However, when a defendant moves to dismiss based on qualified immunity, the Court applies a heightened pleading standard which requires the complaint to contain "specific, non-conclusory allegations of fact sufficient to allow [the Court] to determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in light of clearly established law.'" *Id.* at 1204 (quoting *Breidenbach v. Bolish*, 126 F.3d 1288, 1293 (10th Cir. 1997)).

In his complaint, Ferrell generally alleges Hickey and Gatwood shot him with their service pistols, causing serious and life-threatening injuries to Ferrell, when Ferrell attempted to elude them during a vehicular pursuit. Ferrell alleges this conduct "showed a reckless disregard for the life of the plaintiff," was "unrelated to the legitimate object of arresting the Plaintiff for eluding, and are therefore arbitrary and constitutionally reckless and conscious-shocking," and resulted in the "denial of [his] rights, privileges, and immunities secured by the Constitution of the United States." Ferrell also alleges Hickey and Gatwood "had reasonable options available to them other than the use of deadly force to effect an arrest."

The Court finds these conclusory allegations without more do not meet the heightened pleading standard required by the Tenth Circuit in the context of a qualified immunity defense.

The purpose of the heightened pleading requirement is rooted in the purpose of the qualified immunity doctrine itself. When the Supreme Court reformulated its qualified immunity test in *Harlow* to focus on the "objective reasonableness" of an

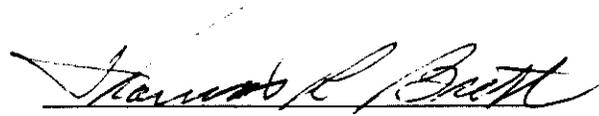
officer's actions as opposed to his or her subjective intent, the Court sought to shield government officials not only from the "substantial costs" of subjecting officials to the risks of trial, but also from "[j]udicial inquiry into subjective motivation," including "broad-ranging discovery and the deposing of numerous persons." The Court held that such inquiries "can be peculiarly disruptive of effective government." In keeping with this important concern for shielding government officers from burdensome discovery in cases where subjective intent is at issue, this court and several other circuits have imposed a more stringent pleading requirement where a qualified immunity defense is asserted.

The heightened pleading standard requires that a plaintiff do more than assert bare allegations of a constitutional violation. . . . "The complaint must include 'all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.'" If the original complaint is deficient, the plaintiff must amend his or her complaint to include specific, non-conclusory allegations of fact sufficient to allow the district court to determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in light of clearly established law.

Breidenbach v. Bolish, 126 F.3d 1288, 1292-93 (10th Cir. 1997)(citations omitted).

As Ferrell's complaint is deficient under this standard, the Court grants defendants' motion, and dismisses Ferrell's claims against defendant officers S.E. Hickey and J.T. Gatwood. (Docket No. 5).

IT IS SO ORDERED THIS 15th DAY OF APRIL, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY BIG ELK and SAM McCLANE)

Plaintiffs,)

v.)

Case No. 96-C-87-B

DONNA KASTNING, individually and in)
her official capacity as a Deputy)
Sheriff for Osage County, Oklahoma; et al.,)

Defendants.)

FILED ON DOCKET
APR 16 1999

ORDER

Comes on for hearing Plaintiffs' Rule 59 (E) Motion to Alter or Amend Judgment on Jury Verdict (Docket #163), Defendants' Motion to Alter or Amend Judgment (Docket # 164), and Defendants' Motion For Court to Determine Whether It Can Hear Defendant Donna Kastning's Application for Indemnification (Docket #172), and the Court, being fully advised, finds as follows:¹

Plaintiffs' Motion to Alter or Amend Judgment urges three somewhat overlapping propositions. First, Plaintiffs urge the judgment entered by this Court following jury trial should be amended to include prejudgment interest in the award of actual damages. Next,

¹The post trial motions follow jury award to Plaintiff Big Elk against Defendants Donna Kastning and Osage County for \$20,325 compensatory damages and to Plaintiff McClane against the same defendants for \$5,000 compensatory damages. Each Plaintiff was awarded \$5000 punitive damages against Defendant Donna Kastning. Defendants Hively and Penland were exonerated.

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Plaintiffs urge the Court should construct a class action pursuant to Fed.R.Civ.Pro. 23(B)(2) for the purpose of constructing injunctive relief. In connection with this, Plaintiffs urge the Court should enter an Order for declaratory and injunctive relief. Finally, Plaintiffs state the Court should enter the relief sought even if the Defendants voluntarily agree to cease any unconstitutional practices.

The Court concludes prejudgment interest is not appropriate under the facts of this case. The absence of a federal statute addressing this issue compels application of judicial principles to its resolution. *See Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 336-337 (1988), *citing Rodgers v. United States*, 332 U.S. 371, 373 (1988) (concluding that congressional silence as to the availability of interest on an obligation created by federal law does not by itself manifest “an unequivocal congressional purpose that the obligation shall not bear interest.”) It is clear that federal law controls the decision to award prejudgment interest on federal claims. *See City of Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 194 (1995).

The Tenth Circuit has addressed this issue and concluded that the decision to award prejudgment interest when there is no statute regulating the particular claim requires a two step analysis. It is not recoverable as a matter of right. *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1256 (10th Cir. 1988), implied overruling on other grounds recognized by *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1231 (10th Cir. 1996). The rationale underlying an award of prejudgment interest is “to compensate the

wronged party for being deprived of the monetary value of his loss from the time of the loss to the payment of judgment.” *Id.* at 1256.

The first step in the process is for the Court to determine whether an award of prejudgment interest would serve to compensate the wronged party. *See Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1289 (10th Cir. 1998). If the Court finds that the award of interest would serve this purpose, the Court must then determine whether the equities preclude such an award. *Id.* at 1289. *See also Zuchel v. City and County of Denver, Colo.*, 997 F.3d 730, 746 (10th Cir. 1993).

Plaintiffs posit that prejudgment interest should be awarded in this case because the verdict is manifest evidence of the jury’s desire to compensate them and that the jury was unable to fully compensate them due to constraining jury instructions. Plaintiffs also reference a note sent from the jury indicating a desire to compensate them as fully as reasonably possible.²

In response, Defendants argue that the delay of the commencement of Plaintiffs’ suit, until 17 months after the return of Plaintiffs’ horses, shows that there is no need to award prejudgment interest as compensation. Additionally, Defendants state that the damages awarded to Plaintiffs were on the high end and this provides adequate compensation without resort to prejudgment interest.

In this case, Plaintiffs’ loss of the actual physical presence of the horses lasted

²The Court notes the jury note does not indicate to which parties the jury wished to award court costs and attorneys fees. The jury found in favor of two of the Defendants as well as the Plaintiffs.

over a period of about three months. The suit was commenced some 17 months after the return of the horses to Plaintiffs. Under these facts, awarding compensation in the form of prejudgment interest would serve to enrich Plaintiffs for a substantial period of time after the return of their horses and the Court concludes it is not warranted.

The Court next addresses Plaintiffs' request for class certification and finds the same should be denied. The Court has been presented with no evidence which compels a reversal of the Court's earlier ruling on this issue.

Plaintiffs next request this Court issue declaratory or injunctive relief for the purpose of preventing future violations of constitutional due process by the Osage County Sheriff's department "standby" policy ("Policy") allowing creditors to bypass state judicial remedies. They claim that the presence of Osage County Sheriff's deputies on "standby" in non-judicial collection proceedings constitutes state supported denial of due process guaranteed by the Fourteenth Amendment, necessitating injunctive relief.

Plaintiffs' characterization of the Policy is that it allows possession of property to be arbitrarily transferred by Osage County citizens with the tacit approval of the County, thereby constituting a violation of due process under the Fourteenth Amendment and possibly raising Fourth Amendment concerns as well. This would be true if a sheriff's deputy ("deputy") favored one side over another in a dispute or if a deputy was present at a patently unlawful repossession, but not in cases where a deputy acts in a neutral capacity during a lawful repossession. *See Soldal v. Cook County*, 506 U.S. 56 (1992)

(concluding that when deputy participated in a forcible eviction that was patently unlawful, the homeowner's Fourth Amendment rights against unlawful seizure were implicated).

Plaintiffs' argument is similar to one raised by the appellants in *Cofield v. Randolph County Com'n*, 90 F.3d 468 (11th Cir. 1996). There, the appellants argued that even in instances of lawful self-help repossession, such as that authorized by state statutes similar to Okla. Stat. Ann. tit.12A § 9-503 (West 1991), mere presence of a law enforcement officer at the scene constitutes a violation of the Due Process Clause of the Fourteenth Amendment. They also contended that even in cases of lawful repossession when a deputy is present, a violation of the Fourth Amendment occurred as well. *Id.* at 471.

The basic premise that the mere physical presence of state officers at lawful repossessions, standing alone, violates either the Fourth and Fourteenth Amendments is unsupported. *Soldal* is distinguishable on the basis that the actions taken in that case were patently unlawful and the officers were knowledgeable of the unlawfulness of the actions being taken.

Plaintiffs argue that the Sheriff's Department "standby" policy encompasses more than the fact of mere presence of the deputy and that the deputy also could intervene to prevent "mild physical force" on the part of the debtor that would hinder the repossession. Plaintiffs urge the additional intervention implicates state-supported or county-supported

denial of the debtor's due process guarantee under the Fourteenth Amendment. This allegation is unsupported by the record.

Plaintiffs contend that the deputy's presence serves to foreclose a debtor's use, at the least, of mild physical force to object to the repossession. Using this one instance of the possibility of physical force, Plaintiffs extrapolate that a deputy present at the scene is privileged to use force in assisting the creditor in removing the property when confronted with the debtor's objections. However, the sheriff testified that the deputy, when faced with an impending breach of the peace, that is, a loud verbal argument or physical blows, was to remove the creditor from the scene (Cottle Dep. p. 34). In other deposition testimony, the sheriff testified that when a debtor objects to the repossession, the deputy was, at that point, to stop the creditor from forcing the issue, in order to prevent a breach of the peace, and then the deputy would leave along with the creditor. If the deputy was asked to leave by either the creditor or debtor, the deputy was to leave, despite the possibility that a breach of the peace could occur after the deputy's departure (Cottle Dep. p. 31). The sheriff emphatically states that the policy does not allow the deputy to assist in the removal of the property (Cottle Dep. p. 30).

In light of the stated parameters by the sheriff as to the deputy's role in the "standby" procedure, it is incongruous to perceive that the deputies are by means of force or other tactics assisting the creditor in removal of property over the objections of the debtor. The Policy relies upon presence, and in the event of escalation of the situation,

removal of the creditor, and does not amount to a violation of Constitutional Due Process on its face.

Plaintiffs alternatively allege that the Policy violates state law and that this Court may enter an injunction requiring county officials to conform their conduct to state law. The Court finds this request should also be denied.

The Court next addresses Defendants' motion for this Court to determine whether it can hear Defendant Donna Kastning's application for indemnification. Plaintiffs filed no response brief and are therefore deemed to have confessed the motion pursuant to N.D. LR 7.1 C. Nevertheless, because this motion is directed to the jurisdiction of the Court, the Court reviews the motion on its merits.

Defendants present the issue as whether a federal court, having entered judgment in favor of a plaintiff following jury trial in a civil rights action brought pursuant to 42 U.S.C. §1983 for violations of the Fourth and Fourteenth Amendments, has jurisdiction to hear Defendants' application for indemnification against a political subdivision of the state of Oklahoma.

An employees right to indemnification from the state or political subdivision for which they are employed is a statutory privilege granted by Oklahoma state law as codified in 51 O.S. 1998 Supp. §162. In particular, §162(B)(1) provides, in part, that "[t]he exclusive means of recovering indemnification from a political subdivision shall be by filing an application for indemnification in the trial court where the judgment was

entered. If the federal trial court cannot hear the action, such application shall be filed in the district court of the county where the situs of the municipality is located.”

Defendant Kastning has filed an Application for Indemnification with the District Court of Osage County, Oklahoma, a copy of which is attached to this motion. It is Defendants’ position that the issue of indemnification is best decided by the state court which will be applying state law.

There is ample authority for this Court finding it has jurisdiction of this matter. *Vukadinovich v. McCarthy*, 59 F.3d 58 (7th Cir. 1995); *Wilson v. City of Chicago*, 120 F.3d 681(7th Cir. 1997). In *Wilson*, the plaintiff sought, after remand, to add claims against the city to hold it liable under state law for any judgment against the defendant police officer on a § 1983 claim. The state law at issue in that case provided that a local government subdivision must pay any tort judgment or settlement for compensatory damages for which it, or an employee while acting within the scope of his employment, is liable. The city was a defendant in the initial action, but was exonerated by a jury. The appellate court reversed the exoneration of the defendant officer but not the city. The plaintiff wanted to bring the city back in under the above referenced state statute because, although judgment against the officer had not yet been entered, the city had already indicated it would not pay any judgment in favor of the plaintiff. The court found that ancillary jurisdiction permitted the court to bring the city back into the action even though no judgment had yet been rendered. *Id.* at 684.

Yang v. City of Chicago, 137 F.3d 522 (7th Cir. 1998) involved a proceeding to collect a judgment from a third person not party to the original suit. In *Yang*, a Chicago store owner brought an action against Chicago police officers and the city of Chicago based on 42 U.S.C. § 1983. The city was dismissed and the district court entered judgment for only one of the two police officers. On remand, the court entered judgment against the other officer and plaintiff then filed a petition for indemnification pursuant to an Illinois indemnification statute. Eventually, the district court ruled that it lacked subject matter jurisdiction over plaintiff's petition, but the court of appeals reversed, finding the proceeding to be within the supplemental jurisdiction of the district court. *Id.* at 524.

In the present case, the political subdivision defendant was directly involved in defending the action which resulted in the judgment and the indemnification issue arises from the same core of operative facts. Under these circumstances, the Court would appear to have supplemental jurisdiction over the application to determine indemnification.³

However, even if this Court does have supplemental jurisdiction, it does not necessarily follow that the Court must exercise it. Title 28 U.S.C. §1367(c)(4) gives the Court the authority, in exceptional circumstances, to decline jurisdiction because of other

³See Steven H. Steinglass, *New Act May Broaden the Scope of Claims Involving Section 1983*, NATL L.J., April 22, 1991, at 21, 35.

compelling reasons. In deciding whether to exercise federal jurisdiction, "a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." *Carnegie - Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

In the instant case, the issue of indemnification could have been raised by the Defendants during the pretrial proceedings, at which time it would have been relatively simple to incorporate a finding of whether the individual defendants were acting within the scope of their employment into the trial and judgment. No particular judicial economy is served by this Court making that determination at this time. Further, the Court agrees that it is appropriate to allow the state courts to address the interpretation of Oklahoma statutes where these are the only issues remaining before the Court. Accordingly, this Court finds the issue of indemnification should be addressed by the District Court of Osage County.

Finally, the Court addresses Defendants' Motion to Amend and finds it should be granted. Defendants seek to set off the Judgment entered against the County and Defendant Donna Kastning by the \$3000.00 settlement entered into by Plaintiffs and Defendants Tina, Michael and Calvin Kastning pursuant to Okla. Stat. Ann. tit. 12 §832 (West 1991). The settling Defendants were named Defendants in the original Complaint as joint participants with state actors and Plaintiffs sought damages for violation of their constitutional rights jointly and severally for the seizure of horses. The same allegations

were raised against the other named Defendants. The general release entered into by Plaintiffs and the settling Defendants did not delineate the damages to which the settlement fund applied. Based upon this record, a set off of the \$3000.00 is warranted. *See Creech v. Roberts*, 908 F.2d 75 (10th Cir. 1990).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Rule 59 (E) Motion to Alter or Amend Judgment on Jury Verdict (Docket #163) is denied, Defendants' Motion to Alter or Amend Judgment (Docket # 164) is granted, and Defendants' Motion For Court to Determine Whether It Can Hear Defendant Donna Kastning's Application for Indemnification (Docket #172) is granted and the Court finds the Indemnification Issue should be determined by the District Court for Osage County. The parties are further ordered to submit an Amended Judgment which reduces the amount of compensatory damages each Plaintiff is awarded by the amount each received of the \$3000 prior settlement funds within 10 days of this Order.

DONE THIS 15th DAY OF APRIL, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH J. HERRION,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

Case No. 99-CV-11-H(M)

(Base File)

ENTERED ON DOCKET

DATE APR 16 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 \$10.37, to be paid by April 2, 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. 3].

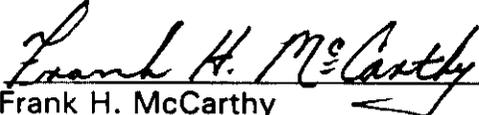
To date, Plaintiff has not paid the partial filing fee or shown cause for his failure to pay. It is therefore the recommendation of the undersigned United States Magistrate Judge that Plaintiff's action be DISMISSED WITHOUT PREJUDICE for his failure to pay the partial filing fee.

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 15th day of April, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN OKLAHOMA

DENISE MARCHIONDA, Administratrix
of the Estate of ROBERT MARCHIONDA,
Plaintiff,

Case No. 98-CV-0787-K ✓

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

ENTERED ON DOCKET

DATE APR 16 1999

MARY ELIZABETH SMITH, Administratrix
of the Estate of STEVEN A. SMITH,
Plaintiff,

Case No. 98-CV-0788-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

F I L E D

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUSAN M. SEAMANS, Administratrix
of the Estate of DAVID A. SEAMANS,
Plaintiff,

Case No. 98-CV-0789-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

MONICA L. SULLIVAN, Administratrix
of the Estate of JOHN F. SULLIVAN,
Plaintiff,

Case No. 98-CV-0790-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

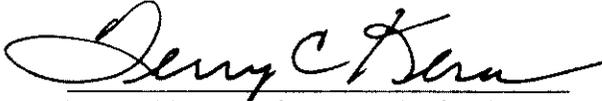
ORDER OF DISMISSAL

After review of the plaintiffs' Consolidated Motion for Court Ordered Dismissal Pursuant to Fed.

R. Civ. P. 41(a)(2), it is hereby **ORDERED** that the above-captioned cases be dismissed without
prejudice.

Dated 14 day of April, 1999.

By the Court:


Honorable Terry C. Kern, Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN OKLAHOMA

DENISE MARCHIONDA, Administratrix
of the Estate of ROBERT MARCHIONDA,
Plaintiff,

Case No. 98-CV-0787-K ✓

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

MARY ELIZABETH SMITH, Administratrix
of the Estate of STEVEN A. SMITH,
Plaintiff,

Case No. 98-CV-0788-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

ENTERED ON DOCKET
DATE APR 16 1999

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUSAN M. SEAMANS, Administratrix
of the Estate of DAVID A. SEAMANS,
Plaintiff,

Case No. 98-CV-0789-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

MONICA L. SULLIVAN, Administratrix
of the Estate of JOHN F. SULLIVAN,
Plaintiff,

Case No. 98-CV-0790-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

ORDER OF DISMISSAL

After review of the plaintiffs' Consolidated Motion for Court Ordered Dismissal Pursuant to Fed.
R. Civ. P. 41(a)(2), it is hereby **ORDERED** that the above-captioned cases be dismissed without
prejudice.

Dated 14 day of April, 1999.

By the Court:


Honorable Terry C. Kern, Chief Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN OKLAHOMA

DENISE MARCHIONDA, Administratrix
of the Estate of ROBERT MARCHIONDA,
Plaintiff,

Case No. 98-CV-0787-K ✓

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

MARY ELIZABETH SMITH, Administratrix
of the Estate of STEVEN A. SMITH,
Plaintiff,

Case No. 98-CV-0788-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

SUSAN M. SEAMANS, Administratrix
of the Estate of DAVID A. SEAMANS,
Plaintiff,

Case No. 98-CV-0789-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

MONICA L. SULLIVAN, Administratrix
of the Estate of JOHN F. SULLIVAN,
Plaintiff,

Case No. 98-CV-0790-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

ORDER OF DISMISSAL

After review of the plaintiffs' Consolidated Motion for Court Ordered Dismissal Pursuant to Fed.
R. Civ. P. 41(a)(2), it is hereby **ORDERED** that the above-captioned cases be dismissed without
prejudice.

Dated 14 day of April, 1999.

By the Court:


Honorable Terry C. Kern, Chief Judge

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 16 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN OKLAHOMA

DENISE MARCHIONDA, Administratrix
of the Estate of ROBERT MARCHIONDA,
Plaintiff,

Case No. 98-CV-0787-K ✓

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

MARY ELIZABETH SMITH, Administratrix
of the Estate of STEVEN A. SMITH,
Plaintiff,

Case No. 98-CV-0788-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

SUSAN M. SEAMANS, Administratrix
of the Estate of DAVID A. SEAMANS,
Plaintiff,

Case No. 98-CV-0789-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

MONICA L. SULLIVAN, Administratrix
of the Estate of JOHN F. SULLIVAN,
Plaintiff,

Case No. 98-CV-0790-K

v.

SOUTHWEST AEROSERVICE, INC.,
Defendant.

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

After review of the plaintiffs' Consolidated Motion for Court Ordered Dismissal Pursuant to Fed.
R. Civ. P. 41(a)(2), it is hereby **ORDERED** that the above-captioned cases be dismissed without
prejudice.

Dated 14 day of April, 1999.

By the Court:


Honorable Terry C. Kern, Chief Judge

ENTERED ON DOCKET
DATE APR 16 1999

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

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JESSE LEE WILLS,
Plaintiff,
vs.
USA,
Defendant.

)
)
)
)
)
)
)
)
)
)

Case No. 98-MC-14-B

ENTERED ON DOCKET

4-15-99

ADMINISTRATIVE CLOSING ORDER

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

If, by 6-14-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this ¹⁵th day of April, 1999.



THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

RIVER OAKS DEVELOPMENT CORPORATION,)
an Oklahoma corporation; Lorice T. Wallace,)
Trustee of the LORICE T. WALLACE REVOCABLE)
TRUST, and The LORICE T. WALLACE FAMILY)
LIMITED PARTNERSHIP, an Oklahoma Limited)
Partnership,)

Plaintiffs,)

vs)

MNA, INC., a Colorado corporation; NAIM G. NASSAR,)
an individual; and MACE L. PEMBERTON, an individual,)

Defendants.)

FILED

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-68H ✓

ENTERED ON DOCKET

DATE APR 15 1999

DISMISSAL WITH PREJUDICE

Pursuant to the joint motion of plaintiffs and defendants informing the Court that all claims made therein have been settled, the above-styled action is hereby dismissed with prejudice.

Dated this 14TH day of APRIL, 1999.



JUDGE OF THE DISTRICT COURT

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

FILED

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 15 1999

CIVIL ACTION NO. 98-CV-109-H

JAYNE L. REED,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

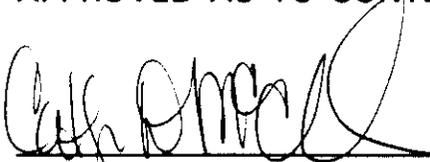
ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Jayne L. Reed, against the United States of America are hereby dismissed with prejudice.

Dated this 14TH day of APRIL, 1999.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:


CATHRYN McCLANAHAN OBA #14853
Assistant United States Attorney
333 West 4th Street
Tulsa, OK 74103
(918) 581-7463
Attorney for the Defendant


J.L. Franks, OBA #13592
Attorney at Law
P. O. Box 799
Tulsa, OK 74101
(918) 584-4724
Attorney for Plaintiff

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FILED

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ROLEX WATCH U.S.A., INC.,)
)
 Plaintiff,)
)
 vs.)
)
 DEAN WRIGHT JEWELERS and)
 DEAN DOUGLAS WRIGHT,)
)
 Defendants and)
 Third-Party Plaintiffs,)
)
 vs.)
)
 MONTRES ROLEX, S.A.,)
)
 Third-Party Defendant.)

No. 98-C-477-B(EA)

FILED ON DOCKET
APR 15 1999

ORDER

Before the Court is the motion to **dismiss** for failure to state a claim for which relief can be granted filed by plaintiff, Rolex Watch U.S.A., Inc., (hereinafter "Rolex") (Docket No. 15).

Rolex brings this action for **trademark infringement**, 15 U.S.C. § 1114(1), and false designations of origin, false descriptions **and representations**, 15 U.S.C. § 1125(a). Rolex also requests this court to exercise **supplemental jurisdiction** pursuant to 28 U.S.C. § 1967 for state law claims of **unfair competition and dilution, and deceptive trade practices**, 78 O.S. § 53.

This motion comes before the Court in response to defendant Dean Wright Jewelers¹ (hereinafter "Dean Wright") counterclaim for **restraint of trade** in violation of federal antitrust

¹ The named defendants in this case are **Dean Douglas Wright** and **Dean Wright Jewelers**. At the Case Management Conference on December 17, 1998, **Dean Douglas Wright** entered an appearance on his own behalf and that of **Dean Wright Jewelers**. As Mr. **Wright cannot represent** a corporation, the Court assumes **Dean Douglas Wright** is doing business as **Dean Wright Jewelers** and the latter is not an incorporated entity. If this is not the case, the parties should so inform the Court.

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laws, 15 U.S.C. § 1 *et seq.* Dean Wright does not specify the statute that has been allegedly violated by Rolex, but instead refers generally to Rolex's restraint of trade.

To dismiss Dean Wright's counterclaim under Fed. R. Civ. P. 12(b)(6), the Court must consider "the allegations set forth in the [counterclaim], accept all the well-pleaded allegations of the complaint as true and draw all reasonable inferences in [defendant's] favor." *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248, 1250 (10th Cir. 1998). In other words, the court in accepting all the well-pleaded allegations of the complaint will "construe them in the light most favorable to the [defendant]." *Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir.1995). Dismissal is only appropriate when the defendant can prove no set of facts to support a claim for relief. *See Noland v. McAdoo*, 39 F.3d 269, 273 (10th Cir.1994). Viewing the allegations of Dean Wright's counterclaim as true and drawing all reasonable inferences therefrom in his favor, the Court nonetheless concludes the counterclaim must be dismissed because Rolex is entitled to immunity from antitrust liability under the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine rests upon the fundamental premise that "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56 (1993). From its initial recognition in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (hereinafter "*Noerr*") to more recent rulings, the doctrine has expanded to include not only citizen redress from the legislative and executive branches of government, but also private actions in state and federal courts. *See Professional Real Estate*, 508 U.S. at 56-57. *See also California Motor Transport Co., et. al. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (extending the right to petition to groups who utilize state and federal agencies and courts to advocate their causes *vis-a-vis* their competitors).

The rationale behind the immunity of the *Noerr-Pennington* doctrine is based upon the First Amendment and the Supreme Court's interpretation of the Sherman Act, 15 U.S.C. § 1 *et seq.*, in the *Noerr* case. In *Noerr*, the Supreme Court concluded that because of the government's power to act in a representative capacity and take action through its legislative and executive branches to restrain trade, it would be contrary to the Sherman Act's purpose of regulating business activity to hold that citizens who solicit governmental action with respect to the passage and enforcement of laws cannot engage in such activities. *Noerr*, 365 U.S. at 137-138. This holding, as noted above, was extended in *California Motor* to include citizen redress through the judicial system. The same philosophy, then, governs the approach of citizens or groups of them to all three branches of the government. *California Motor*, 404 U.S. at 510. The right to petition, protected by the First Amendment, "[c]ertainly...extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *Id.* at 510. Immunity under the *Noerr-Pennington* doctrine thus protects a citizen's constitutional right to petition which would otherwise be invaded if such use would violate antitrust laws. *Noerr*, 365 U.S. at 137-38. Hence, it is clear that citizens or groups with common causes may petition the courts to advocate their causes against their competitors. *California Motor*, 404 U.S. at 510-511.

This immunity, however, does not extend to situations in which the right to petition becomes an "integral part of conduct which violates a valid statute," or when used as "the means or pretext for achieving "substantive evils." *California Motor*, 404 U.S. at 514-15. This qualification is referred to as the "sham" exception to *Noerr-Pennington* immunity. It was first explained in *Noerr* where the court stated that there may be times when the petition represents a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the

business relationships of a competitor and the application of the Sherman Act would be justified.” *Noerr*, 365 U.S. at 144. The Tenth Circuit regards the “sham” exception as particularly applicable in situations involving bribery or misuse or corruption of governmental processes. See *Obendorf v. City and County of Denver*, 900 F.2d 1434, 1441, overruled on other grounds, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). See also *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819 (10th Cir. 1987) (recognizing the application of the “sham” exception to conduct which corrupts and bars access to governmental processes). The “sham” exception has been further refined since *Noerr* and the Supreme Court’s most recent pronouncement in *Professional Real Estate* outlined a two part test for application of the exception.

The first prong is to determine if the lawsuit is “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Professional Real Estate*, 508 U.S. at 60. If this test is not satisfied, the inquiry ends. If the court finds, however, that the challenged litigation is meritless, then the court proceeds to the second prong, which is an evaluation of the litigant’s subjective motivations in bringing the litigation. Here, the court’s focus is on discovering whether the meritless litigation hides “an attempt to interfere directly with the business relationships of a competitor.” *Noerr*, 365 U.S. at 144. The interference must be established through the “use of the governmental process - as opposed to the outcome of that process...” *City of Columbia*, 499 U.S. at 380. In sum, the two-step test “requires the [litigant] to disprove the challenged lawsuit’s legal viability before the court will entertain evidence of the suit’s economic viability.” *Professional Real Estate*, 508 U.S. at 61.

Utilizing this two-step process to analyze defendant’s counterclaim for antitrust liability, then, requires this Court to first look at the plaintiff’s claim from the perspective of a reasonable

litigant to determine if such a litigant could realistically expect success on the merits. In assessing the objective baselessness of the suit, the court may assess the probable cause of success, as used in the tort of wrongful civil proceedings, to guide its inquiry. See *Professional Real Estate*, 508 U.S. at 62. Probable cause in that context is found when there is a “reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.” *Id.* at 62-63 (quoting *Hubbard v. Beatty & Hyde, Inc.*, 178 N.E.2d 485, 488 (Mass. 1961)); Restatement (Second) of Torts § 675, Comment e, pp. 454-455 (1977). If a litigant is concluded to have probable cause to sue, then the litigant also has demonstrated a realistic expectation of success on the merits as noted in the first step to the “sham” exception and the litigant is entitled to *Noerr* immunity. *Professional Real Estate*, 508 U.S. at 63.

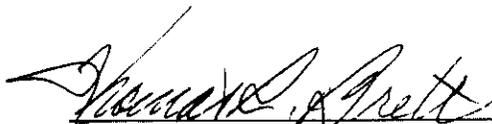
In this case, in assessing Rolex’s claim for trademark infringement from the perspective of a reasonable litigant, the Court concludes that Rolex has probable cause to sue for trademark infringement under the Lanham Trademark Act, 15 U.S.C. §1051 *et seq.* The essential element in a claim for trademark infringement is likelihood of confusion. See *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550 (10th Cir. 1998). Unauthorized use of “any reproduction, counterfeit, copy, or colorable imitation” of a registered trademark in a way that “is likely to cause confusion” in the marketplace concerning the source of the different products constitutes trademark infringement under the Lanham Act, 15 U.S.C. §1114(1)(a). *Universal Money Centers, Inc. v. American Telephone and Telegraph Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994). Rolex alleges it has registered certain trademarks, including “Rolex,” qualifying it for protection under the Lanham Trademark Act. Rolex also alleges Dean Wright holds himself out as an authorized and/or official “Rolex” watchmaker. Based on these allegations, the Court concludes

that a similarly situated plaintiff could reasonably believe that a trademark infringement suit could succeed.

Moreover, even if this Court is to construe Dean Wright's allegations of plaintiff's intimidating marketplace tactics and a vague notion of conspiracy with "as yet, unnamed participants" as true, as is required under Rule 12(b)(6), these allegations concern the subjective motivation of the plaintiff's activities which this Court does not reach, having found that Rolex's initiation of this litigation is not objectively baseless. See *Professional Real Estate*, 508 U.S. at 61; *Classic Communications, Inc., v. Rural Telephone Service Co.*, 956 F.Supp 910 (D.Kan. 1997) (finding allegations of a litigant's subjective motives irrelevant in assessing the first step of whether the litigant's petitioning activity is objectively baseless).

For the reasons set forth above, the Court grants the plaintiff's motion to dismiss defendant's counterclaim for failure to state a claim for which relief can be granted. (Docket No. 15).

IT IS SO ORDERED THIS 13th DAY OF APRIL, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM F. McCRACKEN,)
)
Plaintiff(s),)
)
vs.)
)
USA,)
)
Defendant(s).)

Case No. 98-C-142-B ✓

ENTERED ON DOCKET

APR 15 1999

ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

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

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

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

IT IS SO ORDERED this 15th day of April, 1999.



THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT CRUTCHFIELD,
Plaintiff(s),
vs.
JOHNSON BROKERS & ADMINISTRATORS,
INC., et al,
Defendant(s).

Case No. 98-C-568-B

ENTERED ON DOCKET
APR 15 1999

**ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT**

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

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

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

IT IS SO ORDERED this 15th day of April, 1999.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

APR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDY DARNELL SMITH,)
)
Petitioner,)
)
vs.)
)
NEVILLE MASSIE,)
)
Respondent.)

Case No. 98-CV-335-E (M)

ENTERED ON DOCKET
APR 15 1999
DATE _____

ORDER

Before the Court are Respondent's motion to dismiss petition for writ of habeas corpus (Docket #17) and Petitioner's motion to dismiss without prejudice (#19). Petitioner, a state inmate appearing *pro se*, has not filed a response to Respondent's motion to dismiss. Respondent's motion is premised on three grounds: (1) 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; (2) on Petitioner's failure to satisfy the "in custody" requirement of § 2254; and (3) on Petitioner's failure to satisfy the exhaustion requirement of § 2254. In his motion to dismiss, Petitioner acknowledges that he has not exhausted available state remedies and requests that his petition be dismissed without prejudice for that reason. For the reasons discussed below, the Court finds that the petition is time barred and Respondent's motion to dismiss should be granted. Because the petition is time-barred, the Court will not address the other grounds for dismissal urged by Respondent. Petitioner's motion to dismiss should be denied as moot.

BACKGROUND

On May 15, 1989, Petitioner entered a plea of guilty to Count 1, Assault with a Dangerous Weapon; and Count 2, Petit Larceny, AFCF, in Tulsa County District Court, Case No. CRF-89-1646. He was sentenced to three (3) years imprisonment on each count, to be served concurrently. Petitioner did not file a Motion to Withdraw his plea or otherwise perfect a direct appeal. After fully discharging his sentence on December 16, 1990, Petitioner filed an application for post-conviction relief in Tulsa County District Court on August 14, 1997 (#20). That court denied the requested relief on October 27, 1997 (#20). Petitioner filed another application for post-conviction relief in the state trial court on April 16, 1998 which was denied on June 11, 1998 (#20). Petitioner did not appeal the denials of post-conviction relief to the Oklahoma Court of Criminal Appeals. Petitioner filed the instant petition for writ of habeas corpus on May 7, 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 became 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. Because Petitioner failed to move to withdraw his guilty plea or to otherwise perfect a direct appeal following entry of the Judgment and Sentence on his plea, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on or about May 25, 1989. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the

defendant to file an application to withdraw guilty 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 of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

Any application for post-conviction relief properly filed during the grace period would serve to toll the running of the limitations period. See § 2244(d)(2); Hoggro, 150 F.3d at 1226. However, Petitioner failed to seek post-conviction relief during the grace period. Each of his applications was filed after the end of the grace period. As a result, the Court concludes this petition, filed May 7, 1998, more than one year after the April 23, 1997 deadline, is time-barred and should be dismissed with prejudice. This ruling renders moot Petitioner's motion to dismiss without prejudice for failure to exhaust state remedies.

Petitioner may continue to seek post-conviction relief in the courts of the State of Oklahoma. However, he is barred from challenging directly his conviction in Tulsa County District Court, Case No. CRF-89-1646, in federal court.

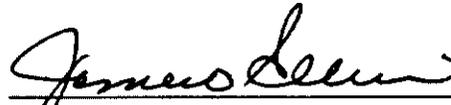
CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to **dismiss** petition for writ of habeas corpus (#17) is **granted**.
2. The petition for writ of habeas corpus (#1), as amended (#5), is **dismissed with prejudice**.
3. Petitioner's motion for to **dismiss** petition without prejudice for failure to exhaust state remedies (#19) is **denied as moot**.

SO ORDERED THIS 14th day of April, 1999.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

1/2
3/20/99

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

UNION PACIFIC RAILROAD COMPANY,)
a corporation,)
)
Plaintiff,)
)
vs.)
)
JIMMIE N. DOOLEY, an individual, and)
TOWN OF CHOUTEAU, STATE OF)
OKLAHOMA, a municipal corporation,)
)
Defendants.)

ENTERED ON DOCKET

APR 15 1999

Case No. 98CV940 H (M) ✓

FILED

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

The Court has reviewed the Stipulation Between Plaintiff Union Pacific Railroad Company ("Union Pacific") and Defendant Jimmie N. Dooley ("Dooley") for Entry of Agreed Judgment filed herein on January 14, 1999 and the Stipulation Between Union Pacific and Defendant Town of Chouteau, State of Oklahoma ("Town") for Entry of Agreed Judgment filed herein on March 10, 1999. Having also reviewed the Court file and applicable law, the Court hereby finds that it has jurisdiction of the parties and the subject matter of this action, and that in accordance with the aforementioned Stipulations, the Union Pacific should have and recover Judgment in its favor and against Dooley and the Town as set forth below.

For purposes of this Judgment, the term "Exhibit B Property" means the rectangular tract of land in Mayes County, Oklahoma, having dimensions of 170 feet by 100 feet, and more particularly described as follows:

A tract of land, which is a part of the Union Pacific Railroad Company main line right-of-way in the Town of CHOUTEAU, Mayes County, State

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of Oklahoma, according to the U.S. Government Survey and plat thereof and being situated in a part of the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 20 North, Range 18 East of the Indian Base and Meridian more particularly described as follows, to-wit: Beginning at a point where the West right-of-way of U.S. Highway No. 69 intersects the South right-of-way of Main Street of the aforementioned Town of the CHOUTEAU. Thence Southwesterly along the said Highway 69 right-of-way for a distance of 170 Feet; Thence Northwesterly at a right angle to said right-of-way for a distance of 100 Feet; Thence Northeasterly, parallel to said West U.S. 69 Highway right-of-way to an intersection with the South Boundary of said Main Street; Thence Southeasterly, along said Main Street South right-of-way to the point of beginning.

For purposes of this Judgment, the term "Exhibit H Property" means the rectangular tract of land in Mayes County, Oklahoma, having dimensions of 450 feet by 150 feet, and more particularly described as follows:

A tract of land, which is a part of the Union Pacific Railroad Company right-of-way in the Town of CHOUTEAU, Mayes County, State of Oklahoma, according to the U.S. Government Survey and plat thereof and being situated in a part of the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, Township 20 North, Range 18 East of the Indian Base and Meridian more particularly described as follows, to-wit: Beginning at a point where the West right-of-way of U.S. Highway No. 69 intersects the South right-of-way of Main Street of the aforementioned Town of the CHOUTEAU. Thence Southwesterly along the said Highway 69 right-of-way for a distance of 450 Feet; Thence Northwesterly at a right angle to said right-of-way for a distance of 150 Feet; Thence Northeasterly, parallel to said West U.S. 69 Highway right-of-way to an intersection with the South Boundary of said Main Street; Thence Southeasterly, along said Main Street South right-of-way to the point of beginning.

IT IS HEREBY ORDERED, ADJUDGED, DECREED AND DETERMINED that:

(a) by virtue of the rights granted by the Acts of Congress of July 25, 1866 (14 Stat. 236) and July 26, 1866 (14 Stat. 289), the Union Pacific owns fee simple absolute title to the Exhibit B Property, the Exhibit H Property, and to all of its main line right-of-way within the corporate limits of the Town;

(b) the Union Pacific's lease of the Exhibit B Property to Dooley (the Land Lease attached as Exhibit C to the Complaint as amended by the Supplemental Agreement attached as Exhibit D to the Complaint), was validly terminated by the Union Pacific effective as of November 20, 1998;

(c) the Town has no reversionary interest under the provisions of the Act of Congress of April 26, 1906 (34 Stat. 137) or otherwise, in the Exhibit B Property, the Exhibit H Property, or in any of the Union Pacific's main line right-of-way within the corporate limits of the Town;

(d) Dooley has no right, title or interest in the Exhibit B Property, and as between the Union Pacific and Dooley, fee simple absolute title to the Exhibit B Property is hereby quieted in the Union Pacific;

(e) the Town has no right, title or interest in the Exhibit B Property, the Exhibit H Property, or in any of the Union Pacific's main line right-of-way within the corporate limits of the Town, and as between the Union Pacific and the Town, fee simple absolute title to the Exhibit B Property, Exhibit H Property, and to all of the Union Pacific's main line right-of-way within the corporate limits of the Town is hereby quieted in the Union Pacific;

(f) the Union Pacific is entitled to exclusive possession, dominion and control over the Exhibit B Property, the Exhibit H Property, and over all of its main line right-of-way within the corporate limits of the Town;

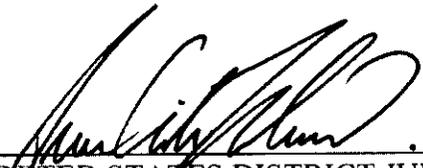
(g) Dooley is hereby enjoined and restrained from asserting any right, title or interest in the Exhibit B Property, and from committing any act of trespass, encroachment, or other wrongful assertion of possession, dominion or control over the

Exhibit B Property, or from taking any other action in derogation of the Union Pacific's fee simple absolute right, title and interest in the Exhibit B Property; and

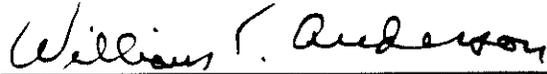
(h) the Town is hereby enjoined and restrained from asserting any right, title or interest in the Exhibit B Property, the Exhibit H Property, or in any of the Union Pacific's main line right-of-way within the corporate limits of the Town, and from committing any act of trespass, encroachment, or other wrongful assertion of possession, dominion or control over the Exhibit B Property, the Exhibit H Property, or over any of the Union Pacific's main line right-of-way within the corporate limits of the Town, or from taking any other action in derogation of Union Pacific's fee simple absolute right, title and interest in the Exhibit B Property, Exhibit H Property and in its main line right-of-way within the corporate limits of the Town.

The Union Pacific, Dooley and the Town shall each bear their own attorney fees and costs.

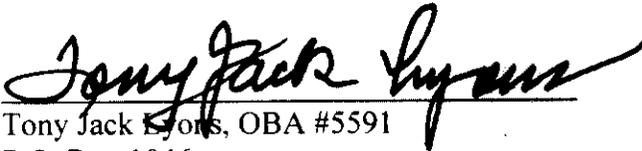
Dated this 14TH day of APRIL ~~March~~, 1999.


UNITED STATES DISTRICT JUDGE

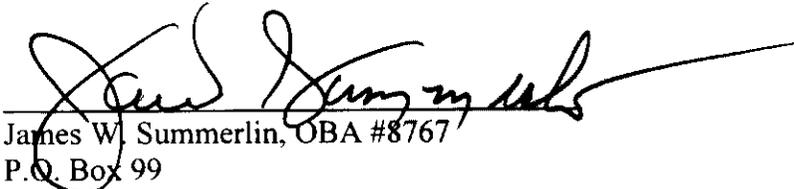
APPROVED AS TO FORM:



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P.O. Box 99
Claremore, Oklahoma 74018
Attorney for the Town of Chouteau, State of Oklahoma

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

FILED
APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROGER DAVIS; et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 SOFAMOR DANEK GROUP, INC.;)
 et al.,)
)
 Defendants.)

Case No. 96-CV-1007-BU ✓

ENTERED ON DOCKET
DATE **APR 15 1999**

ORDER

This matter came before the Court on April 14, 1999 for a case management conference. At the conference, Plaintiffs orally re-urged their Motion to Dismiss Without Prejudice, which had been denied by this Court on February 16, 1999.¹ Defendants did not object to the re-urged motion. Upon due consideration, the Court finds that the above-entitled action should be dismissed without prejudice.

IT IS THEREFORE ORDERED that the above-entitled action is DISMISSED WITHOUT PREJUDICE.

ENTERED this 14th day of April, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹In its February 16, 1999 Order, the Court specifically permitted Plaintiffs to re-urge their dismissal motion upon remand of this action to this judicial district by the Judicial Panel on Multidistrict Litigation.

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

FILED

JANE ANN SPANGLER, individually)
and as Guardian for WHITNEY)
PAGE SPANGLER and JESSICA LANE)
SPANGLER,)

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,)

vs.)

Case No. 98-CV-702-BU

UNUM LIFE INSURANCE COMPANY)
OF AMERICA,)

ENTERED ON DOCKET

Defendant.)

DATE APR 15 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, Plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 14th day of April, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

25

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

DONALD FRY AND BETTY FRY,)
)
Plaintiffs,)
)
v.)
)
AEGIS SECURITY INSURANCE)
COMPANY, a foreign insurance)
company,)
)
Defendant.)

ENTERED ON DOCKET
APR 15 1999

DATE _____

Case No. 98-C-452-H ✓

FILED

APR 14 1999

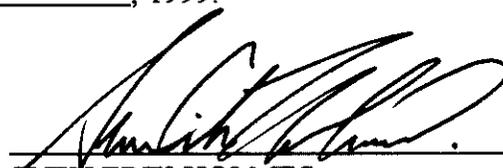
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

It appearing to the Court that the above entitled action has been fully settled, adjusted and compromised, and based on Stipulation; Therefore,

IT IS ORDERED AND ADJUDGED that the above entitled action be, and it is hereby dismissed without cost to either party and with prejudice to the Plaintiffs.

DATED this 14TH day of April, 1999.


SVEN ERIK HOLMES
U.S. District Judge

Joseph F. Clark, Jr., OBA#1706
1605 South Denver
Tulsa, Oklahoma 74119
(918)583-1124

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

FILED

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FELIX DUNEVANT, et al.,
Plaintiffs,
vs.
TEREX CORPORATION, d/b/a
UNIT RIG,
Defendant.

Case No. 97-CV-951-BU ✓

ENTERED ON DOCKET

DATE APR 15 1999

ORDER

This matter came before the Court for hearing on April 14, 1999 on Plaintiffs' Motion for Injunctive Relief and Plaintiffs' Motion for Attorney's Fees. For the reasons stated on the record, the Court ORDERS as follows:

1. Plaintiffs' Motion for Injunctive Relief (Docket Entry #53) is DENIED at this time. Plaintiffs may re-apply for injunctive relief within 180 days of the date of this Order if they believe that injunctive relief is warranted.

2. Plaintiffs' Motion for Attorney's Fees (Docket Entry #52) is GRANTED. Plaintiffs are awarded \$24,540.00 as a reasonable attorney's fee.

ENTERED this 14th day of April, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

67

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GALE MARTIN,
SSN: 445-44-5370 and 447-40-0642,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-0570-EA

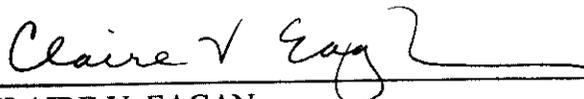
ENTERED ON DOCKET

DATE **APR 15 1999**

JUDGMENT

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

It is so ordered this 14th day of April 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 14 1999

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

GALE MARTIN,)
SSN: 445-44-5370 and 447-40-0642,¹)

Plaintiff,)

v.)

KENNETH S. APFEL, Commissioner,)
Social Security Administration,²)

Defendant.)

Case No. 97-CV-0570-EA

ENTERED ON DOCKET

DATE APR 15 1999

ORDER

Claimant, Gale Martin, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.³ In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate

¹ Claimant filed an application for widow's Social Security disability benefits on the account of her husband, Billy G. Martin.

² Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

³ On March 18, 1994, claimant protectively applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 *et seq.*). Claimant's application for benefits was denied in its entirety initially (July 25, 1994), and on reconsideration (October 6, 1994). A hearing before Administrative Law Judge Stephen C. Calvarese (ALJ) was held September 29, 1995, in Tulsa, Oklahoma. By decision dated October 11, 1995, the ALJ found that claimant was not disabled on or before July 18, 1997 (the date claimant was last insured for disability benefits under Title II). On April 11, 1997, the Appeals Council denied review of the ALJ's findings. That denial was subsequently vacated on May 19, 1997, but the Appeals Council again denied claimant's request for review. (R. 4) Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES** and **REMANDS** the Commissioner's decision.

I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment..." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if her "physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work in the national economy" *Id.*, § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. *See* 20 C.F.R. § 404.1520.⁴

⁴ Step one requires claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. *See* 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment, or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that she does not retain the residual functional capacity (RFC) to perform her past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account her age, education, work experience, and RFC--can perform. *See Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

II. CLAIMANT'S BACKGROUND

Claimant was born on January 22, 1943. She was 52 years old at the time of the administrative hearing in this matter. She has a high school education and some vocational training (computer classes). She last worked for two months and one week in 1992 as a part-time cook in a convenience store/fast food restaurant. She has also previously worked as a cashier, office cleaner, and babysitter. Claimant alleges an inability to work beginning July 1, 1990 due to severe headaches, limited mobility, and pain in her back, hands, arms, and legs. (She has also characterized her disability as arising from depression, arthritis, a ruptured disc, and weakness from muscle and tissue loss in her arms, legs, and hips as a result of shots/injections). Her husband, an insured worker, died on July 18, 1990. The prescribed period for her to qualify for widow's benefits expired July 18, 1997.

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fourth and fifth steps of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform the exertional and nonexertional requirements of light work except for lifting/carrying no more than 20 pounds occasionally and 10 pounds frequently (20 C.F.R. §§ 404.1545, 416.945). The ALJ concluded that she could perform her past relevant work as a cook and cashier. Having concluded that claimant could perform her past relevant work, the ALJ concluded at step four that she was not disabled. Further, the ALJ found that there were other jobs existing in significant numbers in the national and regional economies that claimant could perform, based on her RFC, age, education, and work experience, and thus concluded at step five claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 24-26)

IV. REVIEW

Claimant asserts as error the ALJ's: (1) finding that claimant's past work as a cook and cashier was past relevant work; (2) finding that claimant retained the capacity to perform the prolonged standing and lifting required of light work; (3) failure to properly evaluate the evidence of claimant's mental impairment. The Court finds that the ALJ did not err in his finding that claimant's experience as a cook qualified as past relevant work, but he did err in his analysis of claimant's RFC and mental impairment.

Past Relevant Work

It is well settled that claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). At step four, claimant bears the burden of proving an inability to perform her past relevant work. Andrade v. Secretary of Health

& Human Servs., 985 F.2d 1045, 1050 (10th Cir. 1993). The three requirements for a job to qualify as past relevant work are: it was performed within the last fifteen years; it lasted long enough for claimant to learn to do it; and it was substantial gainful activity. 20 C.F.R. §§ 404.1565, 416.965. Under the regulations, substantial gainful activity is work that involves “significant [and productive] physical or mental duties,” and is done “for pay or profit.” 20 C.F.R. §§ 404.1572, 416.910. Earnings guidelines in the regulations suggest that income above \$300 per month after 1979 and before 1990, and above \$500 per month after 1989, generally is to be considered substantial. 20 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2).

Throughout most of 1985 claimant worked part-time as a cashier in a grocery store, and she cleaned offices after her work day as a cashier ended. (R. 53-54, 108) However, her earnings record indicates that she earned only \$878.80 in 1985. (R. 103, 105) She also babysits her two grandchildren, and her daughter makes the house payment of \$267 (or \$278) per month for her help. (R. 40, 59, 108) Claimant’s work as a cashier does not qualify as past relevant work; nor does her work cleaning offices or babysitting.

However, her work as a cook is past relevant work. Claimant’s job as a cook lasted for two months and one week in 1992 (R. 39-40, 108), and she earned approximately \$1,212.31 (R. 104-05) in that position. Thus she earned more than the \$500 per month generally considered to be substantial. The United States Department of Labor’s Dictionary of Occupational Titles indicates that it takes only a month to master the skills required to be a fast-food worker (Vol. 1, at 311.472-010 (4th ed. rev. 1991)), as claimant and the vocational expert described her position. (R. 40, 61) Contrary to claimant’s assertions, the vocational expert did not testify that her work as a cook did not last long enough “for her to learn how to do it sufficiently to qualify as relevant work experience.”

(Cl. Br. at 3.) Instead, the vocational expert testified that she did not perform the work long enough to obtain transferable skills. (R. 61-62) The ALJ correctly found that claimant's past position as a cook qualifies as past relevant work.

Notwithstanding that finding, the ALJ is required to find, at step four of the sequential evaluation process, that claimant could have performed her past relevant work. Claimant testified that she stopped working at the convenience store because "[t]hey thought I should be faster." (R. 53) In other words, she was fired or asked to resign because her employer believed that she could not, or would not, perform the job. The ALJ failed to make the correct findings at step four of the sequential evaluation process.

Step Four Analysis

In making his determination at the fourth step of the sequential evaluation process, an ALJ is required to: (1) assess the nature and extent of claimant's physical and mental limitations to determine claimant's RFC for work activity on a regular and continuing basis, supported by substantial evidence from the record; (2) make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and (3) make findings about claimant's ability to meet the physical and mental demands of that past relevant work. Winfrey v. Chater, 92 F.3d 1017, 1023-26 (10th Cir. 1996).⁵ The ALJ must also "obtain a precise description of the particular job duties which

⁵ Although the ALJ issued his decision in 1995, and Winfrey was not decided until 1996, Winfrey is a restatement of existing law, incorporating Social Security regulations and rulings, and the Tenth Circuit decisions in Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993), and Washington v. Shalala, 37 F.3d 1437 (10th Cir. 1994).

are likely to produce tension and anxiety . . . ,” where a mental impairment is involved. Id. at 1024 (quoting S.S.R. 82-62, 1975-1982 Rulings, Soc. Sec. Rep. Serv., 809, 812 (West 1983)).

The ALJ failed to meet any of the Winfrey requirements. He did assess the nature and extent of claimant’s physical and mental limitations, but he failed to apply the correct legal standards, and the Court has some reservations as to whether his findings were supported by substantial evidence. The ALJ did not even make any findings regarding the physical and mental demands of claimant’s past relevant work or about claimant’s ability to meet the physical and mental demands of that past relevant work. Nor did he obtain a precise description of the particular job duties which are likely to produce tension and anxiety.

Claimant’s Physical Limitations

Claimant alleges that she is disabled due to arthritis, headaches, a ruptured disc in her back, muscle and tissue loss from medical injections in her arms and legs, and depression. The ALJ reviewed the medical evidence and determined that claimant retained the functional capacity to function at the light exertional level. The ALJ discussed claimant’s brief hospital stay in October 1990, when she was treated for the abscesses in her arms and legs, depression and chronic headaches. (R. 20, 185-87) Doctors opined that sterile injections of certain drugs caused the abscesses (R. 186), and the discharge summary from the hospital indicates that claimant improved with treatment. (Id.) The discharge summary also indicates that claimant had previously been given daily injections of Demerol to help her deal with her grief after her husband died, and she suffered from “tension” headaches associated with her grief and depression. (R. 186-87)

The ALJ stated that claimant was never diagnosed as having migraine headaches, despite her complaints that these occurred once or twice a year. (R. 19) The ALJ’s factual assertion is incorrect.

Claimant was diagnosed as having migraine cephalgia and treated for it when she went to the emergency room at St. John Medical Center on November 30, 1990. (R. 179-80) While this error might be considered harmless, his written decision contains no discussion of claimant's arthritis other than a remark that she has "arthralgias of the knees and hands." (R. 24) The ALJ also misstates the record regarding claimant's back pain.

Following claimant's hospital stay in October 1990, claimant was evaluated for back pain. X-rays showed bone spur formation, bony eburnation of the apophyseal joint, sciatica, lumbar spondylosis, disc degeneration, and joint disease. (R. 172-78, 184, 201-02) In his initial examination, John B. Vosburgh, M.D., noted that claimant moved about the examination room without difficulty, that her reflexes were 2+ and equal. Her sensory and motor functions were intact in her lower extremities. Her range of motion in her back was 50% of normal, and she was able to raise her straight leg to 60 degrees before experiencing pain. (R. 172) However, Dr. Vosburgh subsequently performed a myelogram and CT scan which suggested a "herniated disc with nerve root entrapment at the lumbosacral level, possibly L4-5 level." (Id.) Although he recommended surgery (id.), claimant rejected his recommendation. She testified that she still owed him money, she could not afford surgery, she did not think surgery would help her, and she was afraid she might have to be in a wheelchair after the surgery. (R. 44-45)

The ALJ discussed the x-ray findings, but relied upon Dr. Vosburgh's initial examination observations as to claimant's reflexes, motor functions, and range of motion. (R. 20) He did not mention the surgery recommendation. He stated that claimant reported, on November 30, 1990 (before the myelogram and CT scan of December 10, 1990), that she was having "no more low back pain" (Id.) The November 30, 1990 report, however, indicates that claimant reported "no further

LBP” (R. 203) after previously reporting, on November 11, 1990, “no complaints, no change - still has pain - no worse” (R. 202) with regard to the sciatica she had complained of on October 31, 1990. (R. 201) Thus, “no further LBP” may not have meant “no more” pain, but merely “no worse” pain.

The ALJ erroneously stated that claimant had no significant medical records since 1990. (R. 22) The record shows that claimant went to the emergency room at the OMH Medical Center in 1989, 1991 and 1993, complaining of back pain. (R. 141-44) In each instance, she was prescribed medication. (Id.) The ALJ is required to “evaluate every medical opinion” he receives, 20 C.F.R. § 404.1527(d), and to “consider all relevant medical evidence of record in reaching a conclusion as to disability,” Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989), even though he is not required to discuss every piece of evidence. “Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects.” Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996) (citations omitted).

Further, the ALJ disregarded the report of William R. Grubb, M.D., who evaluated claimant for the Social Security Administration in July 1994. Dr. Grubb reported possible degenerative disease of the lumbosacral and cervical spine, back and neck pain, arthralgias, and headaches. (R. 150-55) The ALJ’s mistakes concerning the record, and his disregard of significantly probative evidence indicate that he did not properly take claimant’s physical limitations into account when he determined that claimant could perform light or sedentary work.

Claimant’s Mental Limitations

In addition, the ALJ failed to properly assess the nature and extent of claimant’s mental limitations. The Tenth Circuit requires an ALJ to follow the procedures in 20 C.F.R. § 404.1520a

(and 20 C.F.R. § 416.920a for Supplemental Security Income) when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

A staff psychologist prepared a PRT form in October 1994 as part of the initial disability determination. That PRT form indicates that claimant's alleged impairment, an affective disorder characterized by sleep disturbance or decreased energy, was not severe. (R. 84-94) The hearing in this matter was held on September 9, 1995. Although the ALJ found that claimant's depression was not vocationally severe so as to "affect the claimant's physical or mental work-related activities more than minimally" (R. 20), he did not follow the mandatory procedures. The procedures require the ALJ to complete another PRT at the hearing level. 20 C.F.R. §§ 404.1520a , 416.920a. The ALJ did not complete a PRT and attach it to his decision.

Instead, the ALJ stated that those who evaluated claimant did not consider her condition "clinical depression." (R. 20) He referenced a report in which a doctor stated that those who evaluated claimant for depression did not deem her suicidal and she "did not fit the criteria for being completely depressed . . ." (R. 187) The ALJ did not mention the report by another doctor, Ronald

C. Passmore, M.D., who performed an examination of claimant for the Social Security Administration and stated “she does show evidence of depression, which at this stage is still mild. I am sure it was . . . right after her husband died. She needs to be on medication for this. I explained to her this would help her pain some.” (R. 157) The ALJ’s failure to properly assess claimant’s mental limitations and complete a PRT form necessitates a remand.

Remaining Issues

Under the Social Security Medical-Vocational Guidelines (the “grids”), persons approaching advanced age (age 50-54) may be significantly limited in vocational adaptability. Ordinarily, they will be deemed disabled if they are restricted to sedentary work, they can no longer perform vocationally relevant past work, and they have no transferable skills. (20 C.F.R. Pt. 404, Subpt. P, App. 2 §§ 201.00(g); 201.14). The ALJ acknowledged that claimant was “closely approaching advanced age” (R. 19), and that she lacked transferable skills (R. 25), but he did not otherwise discuss the impact of her age, presumably because he determined that she could perform light work. Agency regulations require consideration of whether her age “may seriously affect [her] ability to adjust to a significant number of jobs in the national economy.” 20 C.F.R. § 404.1563(c). After reciting the vocational expert’s testimony regarding the number of jobs available, the ALJ summarily concluded that claimant “would be expected to be able to make a vocational adjustment to other work.” (R. 23) On remand, the ALJ may wish to expand his discussion of claimant’s age.

Given the ALJ’s error in assessing claimant’s physical and mental limitations, the Court need not determine whether the ALJ performed a proper pain and credibility analysis in accordance with Luna v. Bowen, 834 F.2d 161, 165-166 (10th Cir. 1987). The Court notes, however, that “if an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from

that impairment are sufficiently consistent to require consideration of all relevant evidence.” Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Luna, 834 F.2d at 164). Notably, the Hargis court found that it was reversible error for the ALJ to deny a claimant’s application for benefits on the ground that the claimant’s depression did not meet the listing criteria for mental disorders. Hargis, 945 F.2d at 1492. That is exactly what the ALJ did in this matter (see R. 20). As set forth above, he failed to consider all relevant evidence, just as he failed to complete and attach a PRT form to his decision.

Further, the ALJ’s errors at step four of the sequential evaluation process are fatal to his analysis at step five, where the ALJ found that there were other jobs existing in significant numbers in the national and regional economies that claimant could perform. (R. 23) It is not error *per se* for an ALJ to offer an alternative disposition based on step five analysis after having concluded that claimant is not disabled at step four of the sequential evaluation process. See Murrell v. Shalala, 43 F.3d 1388, 1389 (10th Cir. 1994). In this matter, however, the ALJ’s flawed RFC analysis of claimant’s physical and mental limitations precludes affirmation.

VII. CONCLUSION

It is for the ALJ to determine how to proceed on remand. Further development of the record may or may not be required. The ALJ’s opinion was a thorough analysis, but the ALJ’s failure to discuss significant probative evidence and to complete a PRT form constitutes reversible error. “[I]f the ALJ failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand

“simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 14th day of April, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

United States District Court
for Northern District of Oklahoma
April 14, 1999

NO

Charles C Bourque Jr, Esq.
Aubert & Pajares
3850 N Causeway Blvd
Ste 1650 Two Lakeway Ctr
Metairie, LA 70002

ENTERED ON DOCKET

DATE 4-14-99

C I V I L M I N U T E S

4:97-cv-00361

Hamlet v. Advanced Spine

DOCKET ENTRY

MINUTE ORDER: by Senior Judge Thomas R. Brett, dismissing
case pursuant to 3-11-99 Order #7. (cc: all counsel)

Hon. Thomas R. Brett, Judge

THIS NOTICE SENT TO ALL COUNSEL

United States District Court
for Northern District of Oklahoma
April 14, 1999 *NO*

Charles C Bourque Jr, Esq.
Aubert & Pajares
3850 N Causeway Blvd
Ste 1650 Two Lakeway Ctr
Metairie, LA 70002

ENTERED ON DOCKET

DATE 4-14-99

C I V I L M I N U T E S

4:97-cv-00360 ✓

Decker v. Advanced Spine

DOCKET ENTRY

MINUTE ORDER: By Senior Judge Thomas R. Brett dismissing
case pursuant to 3-11-99 Order #10. (cc: all counsel)

Hon. Thomas R. Brett, Judge

THIS NOTICE SENT TO ALL COUNSEL

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

LEWIS AARON COOK,)
)
 Plaintiff,)
)
 vs.)
)
 CITY of TULSA, J.E. WHITESHIRT,)
 Tulsa Police Officer, G.S. MILLER,)
 Tulsa Police Officer, AL STOREY)
 WRECKER, Inc., et al,)
)
 Defendants.)

ENTERED ON DOCKET

DATE ~~APR 14 1999~~

No. 98-CV-100-K ✓

FILED

APR 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the Defendants', City of Tulsa, J.E. Whiteshirt and G.S. Miller's, Motion to Dismiss (#9) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff filed this action February 5, 1998, pursuant to 42 U.S.C. §1983 for violations of his civil rights which allegedly occurred during a traffic stop by the Tulsa Police. Plaintiff seeks restitution, compensatory damages, and punitive damages.

I. Standard for Motion to Dismiss:

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 586 (10th Cir. 1994). For purposes of making this determination, a court must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff."

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Ramirez, 41 F.3d at 586; *Meade v. Grubbs*, 926 F.2d 994, 997(10th Cir. 1991). In determining whether to grant a motion to dismiss, courts look solely to the material allegations of the complaint. *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 870 (10th Cir. 1992). Additionally, granting a motion to dismiss is a harsh remedy which must be "cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986).

II. Discussion:

Defendants seek dismissal of this case pursuant to Fed.R.Civ.P. 12(b)(6), arguing that the Plaintiff's Complaint is time-barred.

Congress has not enacted a statute of limitations expressly applicable to §1983 and other civil rights statutes. Thus, 42 U.S.C. §1988 requires federal courts to adopt the most analogous limitations period provided under state law. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84, 100 S.Ct. 1790 (1980). The Supreme Court has held that the applicable statute of limitations for §1983 actions should be the state's personal injury statute. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985). Oklahoma's personal injury statute dictates that the limitation on filing claims is two years from the date of the incident. *Scheerer v. Rose State College*, 950 F.2d 661, 664 (10th Cir. 1991).

The traffic stop which Plaintiff alleges gave rise to the civil rights violations detailed in his Complaint occurred on February 7, 1996. Plaintiff's Complaint was filed with this Court on February 5, 1998, clearly within the two year statute of limitations. In Plaintiff's initial Complaint, however, Plaintiff failed to explicitly name the Defendants herein, J.E. Whiteshirt and G.S. Miller, as Defendants. Plaintiff's original Complaint names "One Male Police Officer" and "Two Female Police Officers." The Plaintiff filed an "Amended Complaint" on March 18, 1998. This was the first filing in which Whiteshirt and

Miller were named as Defendants in this action. Thus, the appropriate question for the Court is whether Fed.R.Civ.P. 15(c) allows Plaintiff to relate the Amended Complaint naming Whiteshirt and Miller back to his original Complaint filed on February 5, 1998 pursuant to Fed.R.Civ.P. 15(c).

"When a plaintiff amends a complaint to add a defendant, but the plaintiff does so subsequent to the running of the relevant statute of limitations, then Rule 15(c)(3) controls whether the amended complaint may 'relate back' to the filing of the original complaint and thereby escape a time lines objection." *Wilson v US*, 23 F.2d 559, 562-63 (1st Cir. 1994). Rule 15(c) provides:

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintain a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party....

The Plaintiff urges that Rule 15(c) is applicable to his situation since the change in the style of the Complaint "did not add a defendant, but Dropped, a defendant, From one Male Officer, and two Unknown Female Police Officers to, J.E. WHITESHIRT, AND G.S. MILLER....."¹

Corrections of misnomers are permitted under Rule 15(c). *Travelers Indemnity Co. v. United*

¹Plaintiffs Pro Se's Second Response to, Defendants Whiteshirt, Millers– Reply at 2.

States ex rel. Construction Specialties Co., 382 F.2d 103 (10th Cir. 1967), *Wynne v. United States ex rel. Mid-States Waterproofing Co., Inc.*, 382 F.2d 699 (10th Cir. 1967); *Wirtz v. Mercantile Stores, Inc.*, 274 F.Supp. 1000 (E.D.Okl.1967). Generally, in the cases cited the plaintiff actually sued and served the correct party, the party he intended to sue, but mistakenly used the wrong name of defendant. The defendant, in these cases, of course, had notice of the suit within the statutory period and was not prejudiced by a technical change in the style of the action.

In order for the Plaintiff to prevail, he must show that a misnomer is involved to take advantage of the relation back doctrine incorporated in Rule 15(c). But this is not a true misnomer situation, or at least not the type of misnomer Rule 15(c) was envisioned to correct. What Plaintiff actually accomplished by his Amended Complaint was to add or substitute a party.

The addition or substitution of parties who had no notice of the original action is not allowed. *United States ex rel. Statham Instruments, Inc. v. Western Casualty & Surety Co.*, 359 F.2d 521 (6th Cir. 1966); Barron & Holtzoff, *Federal Practice and Procedure*, §451 (Wright ed.). Substitution of a completely new defendant creates a new cause of action. Permitting such procedure would undermine the policy upon which the statute of limitations is based. Professor Moore states the general rule as being that '15(c) will not apply to an amendment which substitutes or adds a new party or parties for those brought before the court by the original pleadings whether plaintiff or defendant.' 3 Moore Par. 15.15(4.-1), p. 1041. This Circuit has recognized an exception to this rule where the new and old parties have such an identity of interest that it can be assumed that relation back will not prejudice the new defendant. *Travelers Indemnity Co. v. United States ex rel. Construction Specialties Co.*, *supra*.

In this case, however, the Defendants had no "identity in interest" to the unnamed police officers,

and were not timely notified of the case pending against them.² The Court docket shows that the summons and Complaint were mailed to the City Attorney's Office on October 20, 1998, 259 days from the filing of the original Complaint. However, the City Attorney's Office was not the service agent for Defendants. Whiteshirt and Miller were not notified of this action pending against them until November 17, 1998, over nine (9) months after the initial filing of the Complaint.

The Plaintiff may not avail himself of the "relate back" provision pursuant to Fed.R.Civ.P. 15(c). Therefore, the Complaint is time-barred and **must be dismissed** as to the Defendants Whiteshirt, Miller, and the City of Tulsa. Thus, the only remaining Defendant is Storey Wrecker, Inc. The Court finds there are insufficient allegations to maintain a federal cause of action against the remaining Defendant. It is within the federal district court's discretion to **decline to hear** state law claims arising under the supplemental jurisdiction statute. Because this Court has **granted Defendants' Motion to Dismiss** on the 42 U.S.C. §1983 claims, any state law claims which might **arise against** Storey Wrecker, Inc. will be dismissed. 28 § 1367(c)(3). The Plaintiff is entitled to have **these claims** heard on the merits in the court of appropriate jurisdiction.

ORDERED this 12 day of APRIL, 1999. The Defendants' Motion to Dismiss (#9) is GRANTED. All other pending motions are moot.



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

²There is no indication that these "unnamed police officers" were served with a summons and Complaint.

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

FILED

APR 14 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIAN DALE DUBUC,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

No. 96-CV-430-BU (M) ✓

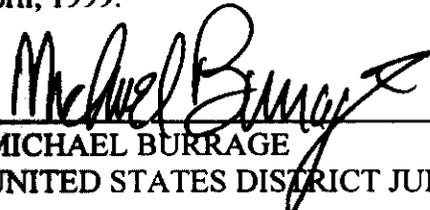
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DATE **APR 14 1999**

AMENDED JUDGMENT

This matter came before the Court upon Defendants' motions to dismiss and/or for summary judgment. To the extent Ron Isaac, misnamed as Ron Isman, was properly served, Plaintiff's claims against him have been dismissed. Having previously dismissed Defendants Satayabama C. Johnson, Roseanne Rodriguez and Linda Russell, the Court considered and granted summary judgment on all claims against the remaining Defendants.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants¹ Stanley Glanz, Doyle Edge, Earl E. McClafin, Jane Cook, Arthur E. Martain (Martin), Zachary J. Vierheller, Officer Warren (Warren Crittenden), Officer Shawn (Robert S. Cartner), and Wencesleo Aguila, and against Plaintiff and that Plaintiff take nothing by his claims.

SO ORDERED THIS 14th day of April, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹Complete names of certain Defendants, as determined from pleadings filed by counsel for Defendants, are indicated in parentheses.

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

FILED
APR 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDY DARNELL SMITH,)
)
 Petitioner,)
)
 vs.)
)
 NEVILLE MASSIE,)
)
 Respondent.)

Case No. 98-CV-336-B (E) /

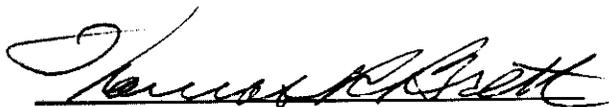
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DATE **APR 14 1999**

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 13th day of apr., 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED
APR 13 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDY DARNELL SMITH,)
)
Petitioner,)
)
vs.)
)
NEVILLE MASSIE,)
)
Respondent.)

Case No. 98-CV-336-B (E) /

ENTERED ON DOCKET

DATE APR 14 1999

ORDER

Before the Court are Respondent's motion to dismiss petition for writ of habeas corpus (Docket #24) and Petitioner's motion to dismiss without prejudice (#28). Petitioner, a state inmate appearing *pro se*, has not filed a response to Respondent's motion to dismiss. Respondent's motion is premised on three grounds: (1) 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; (2) on Petitioner's failure to satisfy the "in custody" requirement of § 2254; and (3) on Petitioner's failure to satisfy the exhaustion requirement of § 2254. In his motion to dismiss, Petitioner acknowledges that he has not exhausted available state remedies and requests that his petition be dismissed without prejudice for that reason. For the reasons discussed below, the Court finds that the petition is time barred and Respondent's motion to dismiss should be granted. Because the petition is time-barred, the Court will not address the other grounds for dismissal urged by Respondent. Petitioner's motion to dismiss should be denied as moot.

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BACKGROUND

On June 5, 1978, Petitioner entered a plea of *nolo contendere* to a charge of Grand Larceny in Tulsa County District Court, Case No. CRF-78-1237. He received a one-year suspended sentence. Petitioner did not file a Motion to Withdraw his plea or otherwise perfect a direct appeal. After fully discharging his sentence on October 9, 1985, Petitioner filed applications for post-conviction relief in Tulsa County District Court on August 7, 1997 and August 14, 1997 (#26). That court denied the requested relief on October 1, 1997 (#26). Petitioner filed another application for post-conviction relief in the state trial court on April 16, 1998 which was denied on May 27, 1998 (#26). Petitioner did not appeal the denials of post-conviction relief to the Oklahoma Court of Criminal Appeals. Petitioner filed the instant petition for writ of habeas corpus on May 7, 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 became 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. Because Petitioner failed to move to withdraw his *nolo contendere* plea or to otherwise perfect a direct appeal following entry of the Judgment and Sentence on his plea, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on or about June 15, 1978. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty 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 of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

Any application for post-conviction relief properly filed during the grace period would serve to toll the running of the limitations period. See § 2244(d)(2); Hoggro, 150 F.3d at 1226. However, Petitioner failed to seek post-conviction relief during the grace period. Each of his applications was filed after the end of the grace period. As a result, the Court concludes this petition, filed May 7, 1998, more than one year after the April 23, 1997 deadline, is time-barred and should be dismissed with prejudice. This ruling renders moot Petitioner's motion to dismiss without prejudice for failure to exhaust state remedies.

Petitioner may continue to seek post-conviction relief in the courts of the State of Oklahoma. However, he is barred from challenging directly his conviction in Tulsa County District Court, Case No. CRF-78-1237, in federal court.

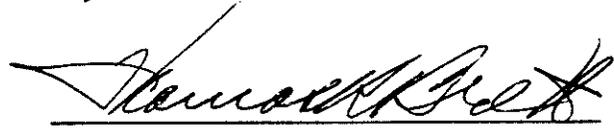
CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus (#24) is **granted**.
2. The petition for writ of habeas corpus (#1), as amended (#5), is **dismissed with prejudice**.
3. Petitioner's motion for to dismiss petition without prejudice for failure to exhaust state remedies (#28) is **denied as moot**.

SO ORDERED THIS 13th day of Apr., 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

APR 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDREA LACY,)

Plaintiff,)

vs.)

Case No. 98-CV-355B(J)

THE STATE OF OKLAHOMA, ex rel.,)

THE OKLAHOMA DEPARTMENT OF)

TOURISM AND RECREATION, and)

JOE B. SCOTT, Individually,)

Defendants.)

ENTERED ON DOCKET

DATE APR 14 1999

ORDER DISMISSING WITH PREJUDICE

Upon both parties stipulation filed herewith and for good cause, the Court finds that the above-captioned matter should be dismissed with prejudice as to the Defendant The State of Oklahoma, ex rel., The Oklahoma Department of Tourism and Recreation.

IT IS THEREFORE ORDERED that this case is dismissed with prejudice as to the Defendant The State of Oklahoma, ex rel., The Oklahoma Department of Tourism and Recreation, with each party to bear her and its own costs of this action, with no further action to be taken with regard to the matter herein.

Dated: April 13th, 1999.


UNITED STATES DISTRICT COURT JUDGE

FILED

APR 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JODI ROACH, an individual,

Plaintiff,

vs.

WAL-MART STORES, INC.,
a Delaware corporation,

Defendant.

)
)
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)
)
)
)
)
)
)
)

ENTERED ON DOCKET

DATE APR 14 1999

No. 99-C-007-B(M)

Creek Cty: CJ 97-477

ORDER

Before the Court is Plaintiff's Motion to Remand (Docket #2) and the Court finds the same should be granted on the ground that the Defendant's Notice of Removal, with attached Petition and other pleadings filed in the District Court of Creek County, does not establish jurisdiction in this Court.

The Court has reviewed the Notice of Removal pursuant to the directive of this circuit in *Laughlin v. Kmart Corp.*, 50 F.3rd 871 (10th Cir. 1995), and concludes that neither the Petition nor the Notice of Removal establish the requisite jurisdictional amount for purposes of diversity jurisdiction. Defendant says it learned on Dec. 22, 1998, in a telephone conversation with counsel for Plaintiff that the value of the case was \$150,000. This is based upon past and future medical bills, the Plaintiff's economic

damages and a letter dated December 3, 1998 from the treating doctor stating that Plaintiff has permanent damage without assigning a value to the permanent damage.

Defendant attaches Plaintiff's current medical bills of \$8,254.36, lost business expenses of \$7,463.80 and Plaintiff's future medical bills "per Drs statements" of \$23,000. These total less than \$40,000. This leaves in excess of \$35,000.00 which Defendant has the burden of establishing is claimed by Plaintiff in order to properly remove. One of Plaintiff's treating doctors, Dr. Wilson, from whose opinion the verbal \$150,000 figure was supposed to have originated, states that he doesn't feel Plaintiff will require any further surgical intervention so it does not appear to the Court that any additional bills for this could be included.

Defendant asserts this Court should consider the verbal statement of Plaintiff's counsel sufficient to establish Plaintiff's claim as being worth more than the jurisdictional amount of \$75,000.00. However, Defendant cites no authority in support of its position and the language of the removal statute lends none.

Title 28 U.S.C. §1446.(b) provides in pertinent part as follows:

"[a] notice of removal may be filed . . . through service . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case . . . is . . . removable . . ."
(emphasis added)

Plaintiff cites to *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489 (5th Cir. 1996), in which the Court addressed virtually this same issue. The Court held that a telephone conversation with plaintiff's counsel, during which counsel allegedly estimated that

damages exceeded the amount required for federal jurisdiction, even when reduced to an affidavit memorializing the conversation prepared by defendant's counsel, did not commence the time within which removal must be filed. The Court's ruling was that the affidavit did not constitute "other paper" for the purposes of §1446.(b). Similar rulings have come from the district courts of Georgia and Pennsylvania. *Smith v. Bally's Holiday*, 843 F. Supp. 1451 (N.D. Ga., 1994); *Gottlieb v. Firestone Steel Products Company*, 524 F. Supp. 1137 (E.D. Pa.1981).

Defendant responds with a disingenuous argument that Plaintiff can't assert in a telephone conversation that her case is worth more than the jurisdictional amount and then refuse to state to the Court whether she believes it is or is not, but merely rely upon the burden of proof to remain outside the jurisdiction of this Court. However, that is precisely the law. Defendant carries the burden of establishing the amount in controversy by a preponderance of the evidence. *Barber v. Albertsons, Inc.*, 935 F. Supp. 1188 (N.D.Okla 1996), citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993).¹

Removal statutes are narrowly construed and uncertainties resolved in favor of remand. The presumption is against removal jurisdiction. If it appears from the notice and any exhibits thereto that removal should not be permitted, "the Court shall make an

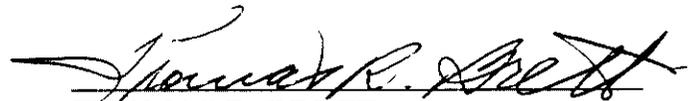
¹Response to Request for Admissions and/or Interrogatories, deposition excerpts and/or demand letters from Plaintiff's counsel would satisfy the "other paper" requirement of §1446.(b).

order for summary remand." 28 U.S.C. §1446(c)(4).

The Court concludes it is without subject matter jurisdiction to proceed in this matter. Accordingly, the case should be remanded to the District Court of Creek County, Oklahoma.

IT IS THEREFORE ORDERED that the above styled action is hereby remanded to the District Court of Creek County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay. The parties are to bear their own attorney's fees and costs.

DATED THIS 13th DAY OF APRIL, 1999, AT TULSA, OKLAHOMA.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

KTI RECYCLING OF CANADA, INC.,)
a corporation incorporated)
pursuant to the laws of the)
province of Ontario, Canada and)
KTI RECYCLING, INC.,)
a Delaware corporation,)

Plaintiffs,)

vs.)

SOUTHWEST RUBBER, INC., an)
Oklahoma corporation with a)
principal place of business in)
Bristow, Oklahoma,)

and)

JAMES KING, a citizen of)
Oklahoma,)

Defendants.)

v.)

SPIRITBANK, N.A.,)

Intervenor.)

FILED

APR 14 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-985-BU ✓

ENTERED ON DOCKET
DATE APR 14 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 before June 15,

1999 for the purpose of dismissal pursuant to the settlement and compromise, this action shall be deemed to be dismissed with prejudice.

Entered this 14th day of April, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

APR 14 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PROACTIVE SOLUTIONS, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
DONALD H. MITCHELL, et al.,)
)
Defendants.)

Case No. 98-CV-0676(H)

ENTERED ON DOCKET
DATE APR 14 1999

NOTICE OF DISMISSAL

Plaintiff, Proactive Solutions, Inc., pursuant to Fed.R.Civ.P. 41(a), hereby dismisses its claims against defendants Donald H. Mitchell and Lois Mitchell, without prejudice.

CRUMP, TOLSON & PAGE LLP

By:

Kenneth E. Crump, Jr.
Kenneth E. Crump, Jr., OBA #11803
1516 South Boston, Suite 310
Tulsa, Oklahoma 74119
(918) 583-2393

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 1999, a true and correct copy of the foregoing Notice of Dismissal was mailed and faxed to:

John M. Freese, Sr.
4510 East 31st Street, Suite 100
Tulsa, Oklahoma 74136
(Fax No. 749-9336)

Kenneth E. Crump, Jr.
Kenneth E. Crump, Jr.

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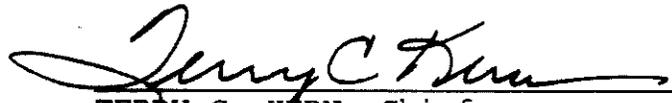
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ck

56(c) F.R.Cv.P.

It is the Order of the Court that the motion of the defendant Max Cook for summary judgment (#13) is hereby GRANTED.

ORDERED this 12 day of April, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

HARVEY CAPSTICK,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF COUNTY COMMISSIONERS)
 OF CREEK COUNTY, et al.,)
)
 Defendants.)

ENTERED ON DOCKET

DATE APR 14 1999

No. 98-CV-467-K

F I L E D

APR 13 1999 *sc*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the motion of the defendant Board of County Commissioners of Creek County, Larry Fugate, and Ed Willingham, to dismiss. The plaintiff has not responded to the motion and pursuant to Local Civil Rule 7.1(C) the motion is deemed confessed. The Court has also reviewed the record and concludes the motion should be granted on its merits as well.

Plaintiff brought this action pursuant to 42 U.S.C. §1983 and has alleged that the various defendants engaged in a conspiracy against him by encouraging third parties to file frivolous lawsuits against plaintiff. Plaintiff asserts claims for (1) violation of equal protection and (2) abuse of process.

The movants seeks dismissal with prejudice for failure to prosecute. They note that on February 23, 1999, the Court entered an order permitting attorney Jeff Nix to withdraw as plaintiff's counsel, subject to the filing of an entry of appearance by new counsel or plaintiff's request to proceed pro se. No filing has taken place. Movants further detail their inability to receive

discovery from plaintiff and general lack of cooperation in the litigation. Under the circumstances, the Court cannot determine how much blame should be attributed to plaintiff personally, as opposed to his counsel. Considering the factors in Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir.1992), the Court is persuaded dismissal without prejudice is appropriate.

It is the Order of the Court that the motion of the defendants Board of County Commissioners of Creek County, Oklahoma, Larry Fugate and Ed Willingham to dismiss (#17) is hereby GRANTED. As to these defendants, the action is dismissed without prejudice.

ORDERED this 12 day of April, 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

102

FILED

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

APR 13 1999

Ahil Lombardi, Clerk
U.S. DISTRICT COURT

BIZJET INTERNATIONAL SALES &)
SUPPORT, INC. an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
U.S. AVIATION, INC.,)
a North Carolina corporation,)
)
Defendant.)

Case No. 98-CV-949-H (E)

ENTERED ON DOCKET

DATE APR 14 1999

STIPULATION OF DISMISSAL

Plaintiff, BizJet International Sales & Support, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismisses this proceeding with prejudice to the refiling of same.

Respectfully submitted,



Thomas M. Ladner, OBA #5161
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

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

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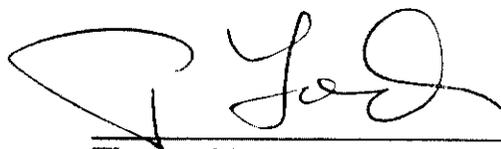
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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of April, 1999, I mailed a true and correct copy of the foregoing instrument, with proper postage thereon, to:

Timothy D. Welborn, Esq.
200 East Main Street
P. O. Box 1376
Wilkesboro, NC 28697

Franklin D. Smith, Esq.
P. O. Box 307
Elkin, NC 28621



Thomas M. Ladner

LP

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

F I L E D

APR 13 1999 *SA*

BOBBY GENE GRIGG,)
)
 Plaintiff,)
)
 vs.)
)
 TIMOTHY GEORGE DAVIS; CATHERINE E.)
 BUTLER; TRIANGLE MOVERS LTD.;)
 HUNT BUILDERS LTD.; BREADNER)
 TRAILER SALES REGINA LTD.,)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 99-CV-0148H(J) ✓

ENTERED ON DOCKET

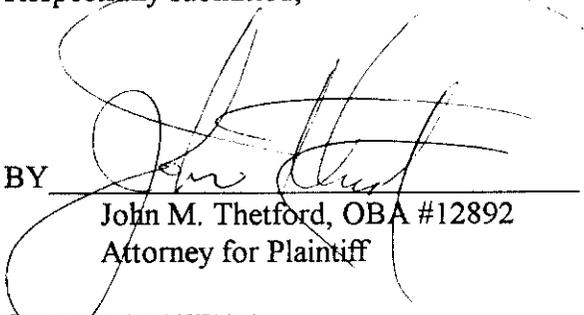
DATE APR 14 1999

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Bobby Gene Grigg, by and through his attorney, John M. Thetford of the Stipe Law Firm, and pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure dismisses without prejudice, the Defendant, Breadner Trailer Sales Regina Ltd.

Dated this 13th day of April, 1999.

Respectfully submitted,

BY 
 John M. Thetford, OBA #12892
 Attorney for Plaintiff

STIPE LAW FIRM
 P.O. Box 701110
 Tulsa, Oklahoma 74170-1110
 (918) 749-0749 telephone
 (918) 747-0751 facsimile

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DIB C/13

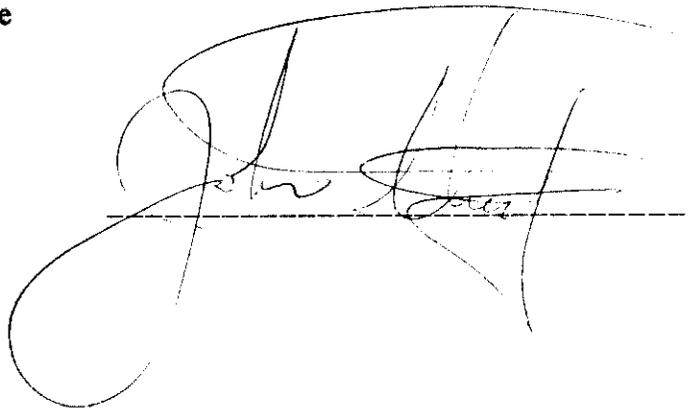
CERTIFICATE OF MAILING

I hereby certify that on the 13th day of April, 1999, a true and correct copy of the above and foregoing instrument was mailed with sufficient postage prepaid thereon to:

John R. Denny, Esq.
Holloway, Dobson, Hudson, Bachman,
Alden, Jennings & Holloway
211 North Robinson, Suite 900
Oklahoma City, Oklahoma 73102-1707

Joseph R. Farris
Feldman, Franden, Woodard & Farris
525 South Main, Suite 1000
Tulsa, Oklahoma 74103

Ann E. Allison, Esq.
Rhodes, Hieronymus, Jones, Tucker & Gable
100 West 5th Street, Suite 400
Tulsa, Oklahoma 74103-4287

A handwritten signature in black ink, appearing to read "John R. Denny", is written over a horizontal dashed line. The signature is highly stylized and cursive.

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

RHONDA MARTIN,

Plaintiff,

v.

HEINZ BAKERY PRODUCTS, INC.,
a Delaware corporation,

Defendant.

APR 12 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98 CV-476BU(J)

ENTERED ON DOCKET

DATE APR 13 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their undersigned counsel of record, that the above-entitled matter is dismissed with prejudice and without costs to any party herein.

DATED this ____ day of April, 1999.

Charles E. Jarvi #17651

Charles E. Jarvi
John M. Butler & Associates
6846 South Canton, Suite 150
Tulsa, OK 74136

ATTORNEYS FOR THE PLAINTIFF

Ronald Petrikin

J. Ronald Petrikin, OBA #7092
Nancy E. Vaughn, OBA #9214
CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, OK 74103-4344

ATTORNEYS FOR THE DEFENDANT

24

CIT

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

FILED

APR 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LISA RANSOM, an individual, and AMBER
RANSOM, a minor child, by and through her
natural mother and next friend, Lisa Ransom,

Plaintiffs,

vs.

Case No. 97-C-718-E ✓

BOARD OF COUNTY COMMISSIONERS OF
THE COUNTY OF WAGONER, STATE OF
OKLAHOMA, a political subdivision of the State
of Oklahoma, LANCE CHISUM, individually and
as an officer and employee of Wagoner County,
State of Oklahoma, ELMER SHEPHERD, an
officer and employee of Wagoner County, State of
Oklahoma, RUDY BRIGGS, as an officer and
employee of Wagoner County, State of Oklahoma,
and BRIAN SCOTT GORDON, an individual,

Defendants.

ENTERED ON DOCKET
DATE ~~APR 13 1999~~

ORDER & JUDGMENT

Now before the Court is the Motion for Entry of Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b) (Docket #41).

Plaintiffs seek entry of a final judgment, pursuant to Fed.R.Civ.P. 54(b), asserting that no just reason exists for delay. Defendant **does not object** to plaintiffs' request, but argues, erroneously, that the judgment entered is **final**. The Court notes that because of pending claims against Brian Scott Gordon, the judgment is **not final**. However, because the claims against Brian Scott Gordon are based on distinctly **different** legal theories that those against the other defendants, there is no just reason for **delay of entry** of a final judgment.

Plaintiffs Motion (Docket #41) is **Granted**. The Court expressly directs entry of a final judgment in favor of Lance Chisum, Board of County Commissioners of the County of Wagoner,

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Elmer Shepherd as a former officer and employee of Wagoner County, and Rudy Briggs as an officer and employee of Wagoner County, and against the plaintiffs, Lisa Ransom, and Amber Ransom. The Court further orders that plaintiff and the remaining defendant submit a joint status report, and request for scheduling conference, if necessary, on or before April 27, 1999.

DATED, THIS 12th DAY OF APRIL, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Law

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

ENTERED ON DOCKET
DATE APR 13 1999

ANDREA LACY,)
)
Plaintiff,)
)
vs.)
)
THE STATE OF OKLAHOMA, ex rel.,)
THE OKLAHOMA DEPARTMENT OF)
TOURISM AND RECREATION, and)
JOE B. SCOTT, Individually,)
)
Defendants.)

Case No. 98-CV-355B(J) ✓

FILE

APR 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff Andrea Lacy and Defendant The Oklahoma Department of Tourism and Recreation hereby stipulate by and through their respective attorneys that the above-captioned matter be dismissed with prejudice as to Defendant The State of Oklahoma, ex rel., The Oklahoma Department of Tourism and Recreation only, pursuant to Rule 41 of the Federal Rules of Civil Procedure with each party to bear her and its own costs and attorneys' fees of this action.

Stanley M. Ward

STANLEY M. WARD, OBA#9351
Attorney-at-Law
629 24th Avenue S.W.
Norman, Oklahoma 73069
(405) 360-9700
(405) 360-7902 (fax)
ATTORNEY FOR PLAINTIFF

James M. Robinson
W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAMES M. ROBINSON, OBA#7678
ASSISTANT ATTORNEY GENERAL
4545 North Lincoln - Suite 260
Oklahoma City, Oklahoma 73105-3498
(405) 521-4274
(405) 528-1867 (fax)
ATTORNEYS FOR DEFENDANT

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Law

FILED

APR 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 KENNETH D. SANDERS,)
)
 Defendant.)

Case No. 98CV0853C(J)

ENTERED ON DOCKET
APR 12 1999
DATE

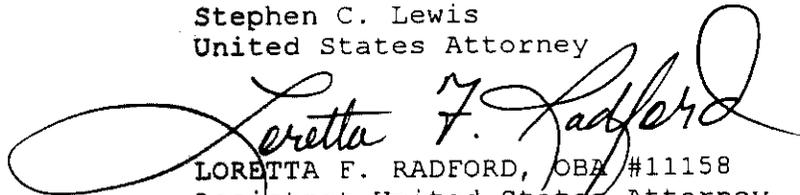
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 12th day of ~~March~~ ^{April}, 1999.

UNITED STATES OF AMERICA

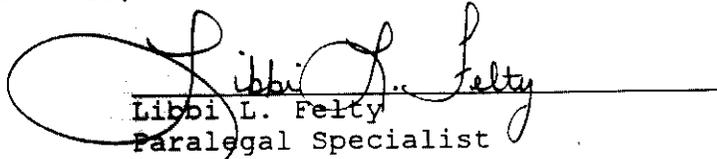
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 12th day of ~~March~~ ^{April}, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Kenneth D. Sanders, 284 E. 53rd St. N., Tulsa, OK 74126.



Libbi L. Felty
Paralegal Specialist

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 BARRY E. COLLIER,)
)
 Defendant.)

ENTERED ON DOCKET
APR 12 1999

DATE _____

No. 99CV0088K(J) ✓

FILED

APR 09 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of April, 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, Barry E. Collier, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Barry E. Collier, was served with Summons and Complaint on February 5, 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 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, Barry E. Collier, for the principal amount of \$2,678.96, plus accrued

interest of \$763.87, 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 4.584 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/jmo

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR -9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM HENRY JOHNSON, JR.,)
)
 Petitioner,)
)
 v.)
)
 L.L. YOUNG, Warden,)
)
 Respondent.)

Case No. 99-CV-0042-K (E)

ENTERED ON DOCKET

DATE ~~APR 12 1999~~

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner William Henry Johnson, Jr. filed a Petition for Writ of Habeas Corpus (Docket # 1) and a supporting brief (Docket # 2). Acting *pro se*, petitioner challenges the sentences, including a life sentence, which became final on May 17, 1996 after pleading guilty to First Degree Rape, Rape by Instrumentation, Robbery by Force, Kidnapping, Possession of a Stolen Vehicle, Assault and Battery, Attempting to Elude a Police Officer, and Defective Vehicle in Case No. CF 95-5796, Tulsa County, Oklahoma. Petitioner claims ineffective assistance of trial counsel, wrongful denial by the trial court of his motion to withdraw his guilty plea, and violations of due process. Respondent filed a Motion to Dismiss for Failure to Meet the Limitations Period (Docket # 7) with a supporting brief (Docket # 8), and petitioner responded with a document entitled a "Traverse-Reply to Motion to Dismiss Petition for Writ of Habeas Corpus" (Docket # 10). Petitioner also filed a Motion for Additional Transcripts (Docket # 9), a Motion for Appointment of Counsel (Docket # 16), a Motion for Expansion of the Record (Docket # 17), and a Motion for Production of Documents (Docket # 18).

This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and § 2254, Rules 8, 10. Based on a review of the record and the parties' briefs, the

undersigned proposes findings that petitioner failed to file his petition within the applicable limitations period, and Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed.2d 828 (May 18, 1998) does not excuse petitioner's failure. For the reasons discussed below, the undersigned recommends that the Respondent's Motion to Dismiss **GRANTED**, the Petition for Writ of Habeas Corpus be **DISMISSED**, and all other motions filed by petitioner **DENIED AS MOOT**.

BACKGROUND AND PROCEDURAL HISTORY

Seventeen days prior to the end of a year after his conviction, on April 30, 1997, petitioner filed a petition for post-conviction relief in the form of a motion to withdraw guilty plea. The trial court appointed a public defender to represent petitioner, and the trial court concluded an evidentiary hearing on October 2, 1997. The trial court's order denying petitioner's motion was signed on October 13, 1997, but it was not file-stamped until March 24, 1998.

Petitioner claims that he did not have a copy of the Order until March 24, 1998, but he mailed his petition in error to the Oklahoma Court of Criminal Appeals ("OCCA") on November 10, 1998, presumably to meet the 30-day deadline within which to file his appeal. He also sent a motion for extension of time to file his post-conviction appeal. These documents were filed by the OCCA court clerk on November 17, 1997 (Case No. PC 97-1547). Subsequently, petitioner submitted an application for post-conviction relief to the OCCA which he signed before a notary public on November 24, 1997. The OCCA court clerk filed that document on December 9, 1997 (Case No. PC 97-1664). Finding that petitioner failed to properly perfect his appeal, the OCCA dismissed his motion for extension of time and his post-conviction appeal on January 16, 1998. Petitioner filed his petition for writ of habeas corpus in this Court on January 14, 1999.

DISCUSSION AND LEGAL ANALYSIS

While the record in this matter is replete with errors that were made by the public defender, the trial court, and the OCCA, petitioner cannot escape the fact that he failed to file his petition for writ of habeas corpus within the applicable limitations period, his claim of actual innocence notwithstanding.

Statute of Limitations

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 101 (1996). The AEDPA's amendments to 28 U.S.C. § 2254 became effective on April 24, 1996. Under the AEDPA,

(d)(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 for filing by such State action;

(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.

Petitioner had ten days from the sentencing date of May 7, 1996 to file an application to withdraw his plea of guilty. Rule 4.2(a) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1997). Petitioner's state conviction became final on May 17, 1996, despite his attempts to contact his counsel, notify the trial court of his intent, and otherwise withdraw his guilty plea within that time frame. Apparently, petitioner misunderstood the instruction that he had ten days within which to file a notice of intent to appeal (Rule 2.5(A)) as an instruction that he had ten days within which to file a notice of intent to file an application to withdraw his guilty plea (Rule 4.2(A)), and his appointed attorney failed to respond to any of petitioner's requests for assistance until after the ten days had passed. (See Ex. D of Petition, Docket # 1). Under the AEDPA, petitioner thus had until May 17, 1997 to file a petition for writ of habeas corpus in federal court.

The time during which his application for post-conviction relief was pending, in the form of his motion to withdraw guilty plea, tolled the period of limitations. 28 U.S.C. § 2244(d)(2); Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir. 1998). Petitioner filed his post-conviction application on April 30, 1997, just **seventeen days** prior to his May 17, 1997 deadline for filing a petition for writ of habeas corpus. The trial court issued its decision on October 13, 1997, erroneously stating that "during the ten-day period following sentencing, petitioner made no attempts and gave no indications of wanting to contact counsel so as to discuss the possibility and/or perfect an appeal of petitioner's conviction. Nor does the record reflect any attempts by the petitioner to contact the court in an attempt to appeal petitioner's conviction." (See Ex. A. to Respondent's Brief in Support, Docket # 8).

Immediately after the October 2, 1997 evidentiary hearing, petitioner began attempts to have his appointed counsel file a notice of intent to appeal and a petition in error. On October 13, 1997,

his appointed counsel filed the notice, and the trial court permitted the appointed counsel to withdraw, thus leaving petitioner to proceed *pro se*. On the same date, the trial court signed an order denying petitioner's motion. Petitioner was kept in the county jail until October 29, 1997, when he was transported to the state penitentiary.

Petitioner apparently believed that he had thirty days from the date the order was signed within which to file his petition in error, or until November 13, 1997. In the short period of time between October 29, 1997 and November 13, 1997, he managed to prepare his petition in error without transcripts from his plea, sentencing or evidentiary hearings and without a copy of the trial court's final order. Records indicate that petitioner submitted his motion for an extension of time and his petition in error to prison officials on November 10, 1997, for mailing to the OCCA. The OCCA file-stamped these documents November 17, 1997, and, as a result, the OCCA dismissed both as untimely on January 16, 1998. (Ex. C to Respondent's Brief in Support, Docket # 8). An appeal that is untimely, and thus filed improperly, will not toll the limitations period. Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999) (citing Hoggro, 150 F.3d at 1226 n. 4.) Respondent thus argues that petitioner cannot benefit for statute of limitations purposes from the time he spent pursuing his appeal in state court. (Respondent's Brief in Support, Docket # 8, at 4-5.)

Respondent's argument is misplaced, however, because the OCCA erred in dismissing petitioner's appeal. The OCCA erred not because it failed to apply the "prison mailbox rule," but because it failed to follow its own rules. The United States Supreme Court and the Oklahoma Supreme Court have both adopted the "prison mailbox rule" which deems a petition timely filed on the date that a prisoner delivers it to prison authorities for forwarding to the court clerk. Houston v. Lack, 487 U.S. 266 (1988); Woody v. State, 833 P.2d 257, 259-60 (Okla. 1992). The prison

mailbox rule recognizes the restraints imposed on prisoners which prevents them from delivering documents directly to the court or the post office, thus forcing them to rely on prison officials to ensure timely mailing of their pleadings. The Oklahoma Supreme Court also reasoned that “Okla. Const. art. 2, § 6 mandates such a result.”¹ Id., at 259.

Nonetheless, the OCCA has ruled that the prison mailbox rule does not apply to criminal matters filed in the OCCA. Banks v. State, 953 P.2d 344, 345-47 (Okla. Crim. App. 1998); Hunnicut v. State, 952 P.2d 988, 989 (Okla. Crim. App. 1997). The OCCA prefers, instead, to require a prisoner to file a motion for appeal out of time, pursuant to Rule 2.1(E) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1997), proving that he was denied an appeal through no fault of his own. Banks, 953 P.2d at 346. Rule 2.1(E) requires the prisoner to file that motion in the trial court before proceeding, again, to the OCCA. Petitioner did not file a motion for appeal out of time pursuant to Rule 2.1(E).

He did file his petition within the time limit established by Rule 5.2(C)(2) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1997). Under Rule 5.2(C)(2), a party desiring to file a post-conviction appeal has thirty (30) days from the date the final order of the District Court is *filed* with the Clerk of the District Court.² Since the final order in this matter was not filed until March 28, 1998, petitioner had until April 27, 1998, within which to file his post-

¹ Okla. Const. art. 2, § 6 provides: “The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.”

² The Court recognizes that Okla. Stat. tit. 22, § 1087 requires a party to file a petition in error within thirty (30) days from the *entry* of a final judgment, but petitioner is entitled to the benefit of the doubt, given the conflicting or perhaps clarifying language of Rule 5.2(C)(2) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1997).

conviction appeal. Petitioner did not refile his appeal in state court after March 28, 1998 within the 30-day time limit under Oklahoma law.

Instead, he chose to challenge the OCCA's finding of January 16, 1998, by filing a petition for writ of habeas corpus in this Court on January 14, 1999. Petitioner apparently, and mistakenly, believed that the one-year statute of limitations period set forth in 28 U.S.C. § 2244(d) began to run *anew* on the date that the OCCA ruled. Unfortunately for petitioner, the statute of limitations began running *again* on that date, leaving petitioner with his remaining seventeen days within which to file his petition for writ of habeas corpus, or until January 31, 1998. Petitioner failed to file his petition within that time period. Petitioner is therefore precluded from habeas review in this Court even though the OCCA erred in dismissing his petition in error.³

Actual Innocence

In response to the Motion to Dismiss, petitioner argues that, because he is innocent, the Supreme Court's decision in Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed.2d 828 (1998), excuses his failure to file his petition for writ of habeas corpus within the limitations period. (See petitioner's "Traverse," Docket # 10). The Bousley petitioner attempted to demonstrate cause for a procedurally defaulted challenge to the validity of his guilty plea. He argued that, at the time of trial, there was no legal basis on which to argue that his activity was not criminal, but the Supreme Court rendered a decision while his appeal was pending that would have provided him with

³ The limitations period of 28 U.S.C. § 2244(d) is not jurisdictional and may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 119 S. Ct. 210, 142 L. Ed.2d 173 (1998), but petitioner has not shown that he is entitled to equitable relief. Notably, petitioner has offered no explanation for the ten-month delay between June 1996 (when his lawyer notified him that the notice of intent to withdraw his guilty plea was not effective as a motion to withdraw guilty plea) and April 1997 (when he requested post-conviction relief permitting him to withdraw his plea).

a legal basis. The Bousley court held that, although the petitioner could not demonstrate cause, he was entitled to attempt to make a showing of actual innocence. Id. at ___, 118 S. Ct. at 1607-08.

Petitioner's reliance on Bousley is flawed. Even though Bousley had not been decided by the time he filed his original post-conviction motion in 1997, Bousley does not represent the Supreme Court's recognition of a new constitutional right made retroactively applicable to cases on collateral review upon which petitioner can rely. Further, the Bousley Court addressed that petitioner's procedural default in state court, not his failure to file his petition for writ of habeas corpus within the statute of limitations. Finally, to the extent Bousley holds that a prisoner is entitled to show actual innocence to escape the consequences of his guilty plea, petitioner has failed to show actual innocence.

The actual innocence standard requires that petitioner show "it is more likely than not that no reasonable juror would have convicted him." Id. at ___, 118 S. Ct. at 1611 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)); see also United States v. Powell, 159 F.3d 500, 502 (10th Cir. 1998), cert. denied, 119 S. Ct. 1088 (1999). This requires a determination "in light of all the evidence." Id. A petitioner must at least make a "colorable showing" that he is factually innocent of the crime of which he was convicted to bring his claim within the "fundamental miscarriage of justice" exception to a finding of procedural default. Herrera v. Collins, 506 U.S. 390, 404 (1993) (citations omitted); see also Sellers v. Ward, 135 F.3d 1333, 1338 (10th Cir.), cert. denied, 119 S. Ct. 557 (1998).

Petitioner has presented ample evidence and argument regarding the treatment he received at the hands of the state trial and appellate courts, but he has not presented sufficient evidence of his factual innocence. Instead, petitioner attacks the legal sufficiency of the state's evidence. These legal insufficiency arguments pervade his post-conviction application and petition in error. Petitioner

argues as follows: (1) the trial court judges “failed to define a crime had been committed and did not reach the burden of proof under the Okla [sic] Constitution and the United States Federal Constitution”; (2) “The State of Oklahoma violated it’s [sic] own laws namely 22 O.S. §404 - In Inserting 22 O.S. §436-440 and combining them together when it’s [sic] prosecuted and convicted Appellant of Multiple Counts on a single Indictment and Information - invading Oklahoma Statute Title 21, §11”; (3) “In the case before the bar - Double Jeopardy and Double Punishment was applied at Sentencing and it is in conflict with Oklahoma Constitutional Article 2, §21 requirements and United States Federal Constitutional Fifth Amendment Rights. Multiple Prosecutions”; and (4) the trial court erred in not permitting him to withdraw a “defective” guilty plea made under duress by and as a result of ineffective counsel (Ex. F to Petitioner’s Brief in Support, Docket # 2).

These propositions reflect petitioner’s attempt to prove the legal insufficiency of the prosecution’s claims. Yet, “[a]ctual innocence’ means factual innocence, not mere legal insufficiency.” Bousley, 523 U.S. at ___, 118 S. Ct. at 1611 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)). Petitioner’s counsel may have failed to investigate defenses which might have supported his version of events, but that does not relieve petitioner from his responsibility to make a “colorable showing” that he is innocent. He has failed to do so.

CONCLUSION

A life sentence seems unduly harsh where, as here, the accused had no prior felonies and the state did not prove beyond a reasonable doubt that he committed the crimes of which he was convicted. Yet, he pleaded guilty. His pleas for assistance from the public defender’s office and the trial court both before and after he entered his plea were unavailing, as was his appeal to the OCCA. His lawyers may have been ineffective, the trial court mistaken, and the appellate court wrong, but

petitioner was dilatory in filing his petition for writ of habeas corpus, and he has not shown that he was actually innocent of the crime for which he is now serving a life sentence. That he entered a guilty plea, knowing he could be sentenced to life imprisonment for a crime he claims he did not commit, is incomprehensible. Absent a threat to seek the death penalty, no amount of duress by his own attorney or the prosecutor could have been greater.

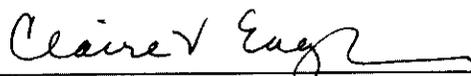
For these reasons, the undersigned proposes findings that petitioner failed to file his petition within the applicable limitations period, and Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed.2d 828 (1998) does not excuse petitioner's failure. The undersigned recommends that respondent's Motion to Dismiss for Failure to Meet the Limitations Period (Docket # 7) be **GRANTED**, the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**, and the Motion for Additional Transcripts (Docket # 9), Motion for Appointment of Counsel (Docket # 16), Motion for Expansion of the Record (Docket # 17), and Motion for Production of Documents (Docket # 18) be **DENIED as moot**.

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 § 2254, Rules 8, 10. **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).

IT IS SO ORDERED this 9th day of April, 1999.



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 12 Day of April, 1999.

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

CHARLES L. GADDY,

Plaintiff,

v.

ONEOK INC., a Delaware
Corporation, d/b/a OKLAHOMA
NATURAL GAS COMPANY, and
LONG-TERM DISABILITY
PLAN OF ONEOK, INC. &
SUBSIDIARIES,

Defendants.

ENTERED ON DOCKET

DATE APR 12 1999

Case No. 98-CV-0273-K-(J)

F I L E D

APR 09 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**AGREED ORDER OF DISMISSAL WITH PREJUDICE
WITH LIMITED RETAINED JURISDICTION**

Pursuant to Federal Rule of Civil Procedure 41(a)(2), and upon agreement of the parties, Plaintiff's action against the Defendants is hereby dismissed **with prejudice**.

It is further **ORDERED** that the terms of the parties release and settlement agreement are hereby incorporated by reference into **this order**, and that the Court will retain jurisdiction over the subject matter of this action and the parties to enforce the terms of the release and settlement agreement. Such enforcement may be had by way of contempt proceedings.



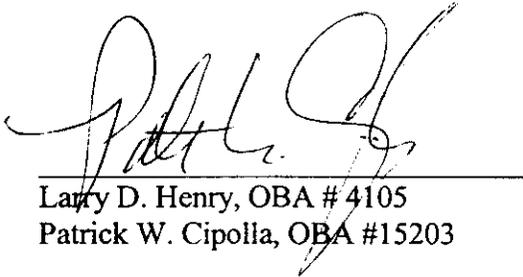
The Honorable Terry C. Kern
Chief Judge of the U.S. District Court
For the Northern District of Oklahoma

APPROVED AS TO FORM AND CONTENT:



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Attorney for Plaintiff



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Patrick W. Cipolla, OBA #15203

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Attorneys for Defendants

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

CHRISTIAN NJOKU
Plaintiff,

vs.

TULSA MOTELS, LTD., an Oklahoma
limited partnership, dba
HOLIDAY INN CENTRAL
Defendant.

§
§
§
§
§
§
§
§

CASE NO. 98 CV 19 K (J)

JURY TRIAL DEMAND

ENTERED ON DOCKET

DATE APR 12 1999

F I L E D

APR 09 1999 *A*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

On this day come on to be heard the motion of Christian Njoku, Plaintiff in the above-entitled and numbered cause, seeking dismissal of said cause with prejudice against the Defendant, Tulsa Motels, Ltd., an Oklahoma limited partnership, dba Holiday Inn Central. The Court having considered same is of the opinion that said Motion should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that the above-entitled and numbered cause be and the same is dismissed against said Defendant, Tulsa Motels, Ltd., an Oklahoma limited partnership, dba Holiday Inn Central with prejudice to the right of Plaintiff to refile any of his asserted causes of action. All costs are adjudged against the party incurring same.

SIGNED this 9 day of April, 1999.


FEDERAL DISTRICT JUDGE

FILED

APR - 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

v.)

Case No. 98-CV-561B(M)

WORLDWIDE CELLULAR, INC.,)
a Texas corporation,)
)
Defendant.)

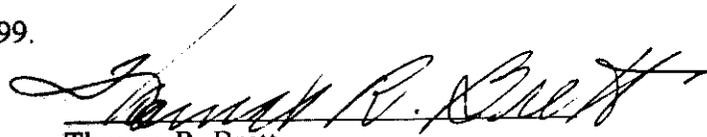
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DATE **APR 12 1999**

AGREED JUDGMENT

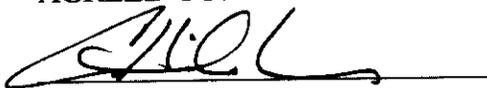
This action came on for hearing before the Honorable Thomas R. Brett, Senior District Judge, presiding, the issues having been duly heard and the Court being advised that Defendant, Worldwide Cellular, Inc., a Texas corporation, agrees to entry of a judgment in the amount of \$77,492.56 and a decision having been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff, Dollar Rent A Car Systems, Inc., recover of Defendant, Worldwide Cellular, Inc., the sum of \$77,492.56, with interest thereon at the rate of ~~8.27%~~ ^{4.732%} as provided by law. *SKB-*

Dated this 8th day of April, 1999.


Thomas R. Brett
Senior District Judge

AGREED TO:


Gerald L. Hilsher
Attorney for Plaintiff


G. Steven Stidham
Attorney for Defendant

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

FILED
APR 09 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JONNA B. BOSTIAN,

Plaintiff,

v.

Case No. 98-CV-138-B

PEPSI-COLA COMPANY and
PEPSICO, INC.,

Defendants.

ENTERED ON DOCKET

DATE APR 12 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties, through their respective counsel, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and stipulate to the dismissal of the above-styled and numbered action in its entirety, with prejudice, with each party to bear its own costs and attorneys' fees.

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F I L E D

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

APR 09 1999 *gr*

NORMA JEAN AUSMUS,)
)
Plaintiff,)
)
vs.)
)
BRISTOL-MYERS SQUIBB AND COMPANY;)
MEDICAL ENGINEERING CORPORATION;)
and SURGITEK, INC.)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-059H (M) ✓

ENTERED ON DOCKET

DATE APR 12 1999

**JOINT STIPULATION OF DISMISSAL WITH
PREJUDICE OF DEFENDANT SURGITEK, INC.**

COMES NOW the Plaintiff, Norma Jean Ausmus, and Defendant Surgitek, Inc., and hereby submit their joint stipulation of dismissal with prejudice of Defendant Surgitek, Inc. The parties stipulate to dismiss Defendant Surgitek, Inc. only and such dismissal does not affect the claims alleged against the remaining Defendants.

Respectfully submitted,

HUMPHREYS WALLACE HUMPHREYS

HOLLOWAY, DOBSON, HUDSON
BACHMAN, ALDEN, JENNINGS &
HOLLOWAY

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ATTORNEYS FOR DEFENDANT

ATTORNEYS FOR PLAINTIFF

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