

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

AVALON INTERNATIONAL, L.C. )  
an Oklahoma Limited Liability )  
Company )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PIPECO SERVICES, INC., a Texas )  
Corporation; PIPECO PARTNERS, LTD., )  
a Texas Limited Liability )  
corporation, and VOEST ALPINE )  
TUBULAR CORPORATION, )  
 )  
Defendants. )

No. 99CV0100K(J)

**FILED**

JUN 30 1999

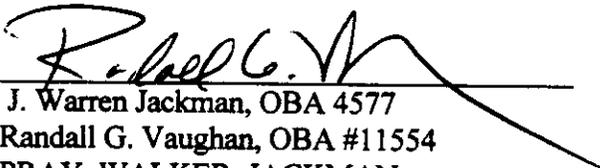
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 30 1999

**DISMISSAL WITH PREJUDICE**

Plaintiff Avalon International, L.C., pursuant to Fed. R. Civ. Pro. 41(a)(1), dismisses its claims against Defendant Pipeco Services, Inc., with prejudice to refileing.

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

**FILED**

JUN 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HOWARD/AVISTA ENERGY, L.L.C., )  
d/b/a GED ENERGY SERVICES, INC., )

Plaintiff, )

v. )

NO. 98-CV-0284K(M)

DAMMO PARTNERS, a General partnership, )  
DAMMO INC., TULSA, an Oklahoma )  
corporation, PAINLESS CORP., an Oklahoma )  
corporation, DONALD B. PETTINE, and )  
KENNETH A. PETTINE, )

Defendants. )

ENTERED ON DOCKET

DATE JUN 30 1999

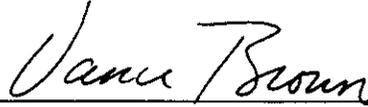
**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**  
**OF DEFENDANT KENNETH A. PETTINE,**  
**WITH RESERVATION OF CLAIMS AS TO ALL OTHER DEFENDANTS**

Howard/Avista Energy, L.L.C. d/b/a GED Energy Services, Inc., Plaintiff, and Kenneth A. Pettine, Defendant, have settled their respective disputes between these parties and hereby jointly stipulation that the claims asserted by Plaintiff against Kenneth A. Pettine are dismissed with prejudice, with each of said parties, as between them, to bear their own expenses and fees incurred in this case. The parties to this Joint Stipulation advise the Court that all issues asserted in this proceeding between Plaintiff and Kenneth A. Pettine, individually, and as former partner or partner of Dammo Partners, and/or as former stockholder or stockholder of Painless Corp., have been resolved and are dismissed. Plaintiff's claims as to other Defendants in the above-styled case have not

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been resolved or compromised or settled and this proceeding shall continue as to all other Defendants.



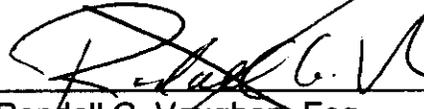
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ATTORNEYS FOR DEFENDANT  
KENNETH A. PETTINE



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ATTORNEYS FOR DEFENDANTS DONALD B.  
PETTINE, DAMMO PARTNERS, DAMMO INC.,  
TULSA, AND PAINLESS CORP.

MT

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

**FILED**

JUN 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHELL & TUBE, INC., an )  
Oklahoma corporation )

Plaintiff, )

vs. )

Case No. 98 CV 408 H (M) ✓

DANBURY SALES, INC., a )  
foreign corporation, )

Defendant and )  
Third-party Plaintiff, )

vs. )

ENTERED ON DOCKET

DATE JUN 30 1999

ACCESS MACHINERY MOVERS, )

Third-party Defendant. )

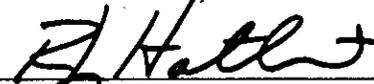
**DEFENDANT AND THIRD-PARTY PLAINTIFF, DANBURY'S NOTICE OF DISMISSAL**

Comes Now the Defendant and Third-Party Plaintiff, Danbury Sales, Inc., and, pursuant to Fed. R. Civ. P., Rule 41(a)(1)(i) and (c), dismisses its cross-claim against Third-party Defendant, Access Machinery Movers, Inc.

Respectfully submitted,

STAUFFER, RAINEY, GUDGEL &  
HATHCOAT, P.C.

By:

  
RICHARD L. HATHCOAT, OBA #14539  
ANTHONY J. JORGENSON, OBA #17074  
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(918) 592-7070

Attorneys for Danbury Sales Inc.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 30, 1999, a true and correct copy of the within and foregoing document was mailed with postage prepaid thereon, to the following:

Jack L. Brown  
C. Michael Copeland  
15 E. 5th Street, Suite 3800  
Tulsa, OK 74103

Attorneys for Plaintiff.

R. Hatlett

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

**FILED**

JUN 30 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUNE JOHNSON and VERNON JOHNSON, )  
)  
Plaintiffs, )  
)  
v. )  
)  
BAXTER HEALTHCARE CORPORATION, )  
)  
Defendant. )

Case No. 93-C-883-E

ENTERED ON DOCKET  
DATE **JUN 30 1999**

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiffs, June Johnson and Vernon Johnson, and Defendant Baxter Healthcare Corporation, by and through their attorneys of record, hereby stipulate that the above-referenced action should be and hereby is dismissed with prejudice, with the parties to bear their own respective costs.

By:   
MARK HUTTON (OBA NO. 12182)

Of the Firm:

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**ATTORNEYS FOR PLAINTIFFS**  
**LILLIAN JUNE JOHNSON and**  
**VERNON JOHNSON**

C15

By:



**CHARLES E. GEISTER III (OBA NO. 3311)**  
**PHILLIP G. WHALEY (OBA NO. 13371)**

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**ATTORNEYS FOR DEFENDANT**  
**BAXTER HEALTHCARE CORPORATION**

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

**FILED**

JUN 29 1999 *SA*

JERRY TAYLOR, )  
 )  
Plaintiff, )  
vs. )  
 )  
OSU MEDICAL COLLEGE, )  
 )  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-891-BU

ENTERED ON DOCKET

DATE JUN 30 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 29<sup>th</sup> day of June, 1999.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**JUN 30 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**BOB A. FOREMAN, JR.,** )  
SSN: 447-56-3664, )  
 )  
**Plaintiff,** )  
 )  
v. )  
 )  
**KENNETH S. APFEL, Commissioner,** )  
**Social Security Administration,<sup>1</sup>** )  
 )  
**Defendant.** )

Case No. 97-CV-0722-EA

ENTERED ON DOCKET  
DATE JUN 30 1999

**ORDER**

Claimant, Bob A. Foreman, Jr., 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.<sup>2</sup> In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

<sup>1</sup> Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the defendant in this action. No further action need 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).

<sup>2</sup> On February 13, 1995, claimant 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 (May 15, 1995), and on reconsideration (September 6, 1995). A hearing before Administrative Law Judge James D. Jordan (ALJ) was held February 29, 1996, in Tulsa, Oklahoma. A supplemental hearing was held May 2, 1996, in Tulsa, Oklahoma. By decision dated May 13, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On June 5, 1997, the Appeals Council denied review of the ALJ's findings. 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.

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 **AFFIRMS** 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 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 . . ." *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.<sup>3</sup>

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

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<sup>3</sup> Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish 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. § 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 he does not retain the residual functional capacity (RFC) to perform his 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 his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). 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 Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). 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); see also Casias, 933 F.2d at 800-01.

## **II. CLAIMANT’S BACKGROUND**

Claimant was born on February 7, 1955, and was 41 years old at the time of the administrative hearing in this matter. He has an eleventh-grade education and some vocational and military training. Claimant has worked as a truck driver, a fork-lift operator, a landscape laborer, manager of a trailer park, and a farm foreman. Claimant currently alleges an inability to work beginning November 5, 1993. The Commissioner denied prior applications filed by claimant in 1992 and 1993 for disability benefits, and claimant did not appeal from the Commissioner’s determinations. (See R. 108-13, 118-44, 211-36). In these applications, claimant alleged disability from back pain and a stab wound to his abdomen. (Id.) In his request for reconsideration of the application he filed in 1993, he also indicated that he had numbness in his legs and right arm. (R. 231)

The disability reports completed by claimant in connection with his 1995 application describe his disability as back pain, stomach pain, depression, and hallucinations. (R. 237-55) Only when he filed his statement with his request for a hearing did he mention numbness in his leg again. (R. 256) The disability determinations (initially and on reconsideration) indicate that the primary diagnosis for claimant was affective (mood) disorders; the secondary diagnosis was substance addiction disorder (alcohol). (R. 152, 165, 174, 185) The Appeals Council acknowledged initially that claimant claimed to be disabled due to problems with seizures, back, stomach, depression and hallucinations. (R. 166, 169) Claimant requested reconsideration and a hearing due to his severe *nonexertional* impairments. (R. 172, 192) On reconsideration, the Appeals Council added "other mental problems" to the list of claimant's alleged disabilities. (R. 186, 189)

In the Complaint, claimant alleged that he was disabled because of a colostomy, stomach problems, back problems, hip problems, arm problems, anxiety, limited mobility and pain. (Complaint, Docket # 1, at 2.) In his memorandum brief, he alleges that he is unable to work because of mental limitations imposed by borderline intelligence, anxiety and other emotional problems, and due to physical limitations caused by hip and back pain imposed by degenerative joint disease, by residual gastrointestinal problems from a stabbing injury and from cirrhosis of the liver, and by numbness in his hands from ulnar neuropathy. (Cl. Memo. Br., Docket # 11, at 1.)

### **III. MEDICAL HISTORY OF CLAIMANT**

A large part of the record in this matter reflects the treatment claimant received for a stab wound in 1991 (R. 258-342), and for claimant's alcohol abuse and related problems. (See R. 343-412, 436-600.) As claimant correctly notes, changes in the law in March 1996 preclude an award of benefits where alcohol abuse would be a material factor in the determination of claimant's

disability. (Cl. Br., Docket # 11, at 2.) On appeal to this Court, claimant challenges the ALJ's findings and conclusions only as they pertain to claimant's back pain and the neurological problems with his arm and hand. As respondent correctly notes, however, treatment for these problems occurred primarily prior to the alleged onset of disability, and during previously adjudicated periods.

In February 1991, claimant reported numbness in his left hand and wrist to the Veteran's Outpatient Clinic in Tulsa, Oklahoma. (R. 382) He denied any injury to his hand, and admitted that he was still drinking daily. He had normal capillary filling, equal pulses, and normal range of motion in his shoulders, elbows and wrists (Id.) He was diagnosed with ulnar neuropathy secondary to his alcohol problem. (R. 381-82) S. Singer, M.D., indicated that his ulnar neuropathy problem seemed to be improving, and he prescribed Entex (decongestant), and recommended Afrin (nasal spray) and BenGay (for claimant's back). Claimant returned again to the clinic and reported numbness to his left leg as well as his left hand. (R. 380) He was encouraged to stop smoking (a pack a day for 15 years) and, in connection with his alcohol problem, he was encouraged to go to substance abuse counseling, but he declined. (Id.)

In November 1991, claimant was treated by Glenn Lyle, M.D., at St. John Medical Center emergency room in Tulsa, Oklahoma for a stab wound. (R. 259) A partial colectomy and colostomy were performed by Dr. Lyle. The stomach wound was repaired and the gallbladder was removed. (Id.) In February 1992, claimant was readmitted to St. John Medical Center for a colostomy take-down performed by Dr. Little. An abdominal examination showed a well-healed scar and the abdomen appeared non-tender and non-distended. (R. 329) Claimant tolerated the procedure well and his hospital course was basically unremarkable. (R. 329-30) A follow-up examination indicated that claimant's wound had healed completely and he had no further need for services. (R. 342)

In June 1992, claimant presented to Veteran's Outpatient Clinic with various physical problems, (a broken nose, a growth in his chest, a rash). (R. 375-78). In July 1992, claimant also complained of pain in his right hip and lower back. (R. 372) L. Greenberg, M.D. prescribed ibuprofen and triambentyl when claimant complained of abdominal and back pain again in August 1992. (R. 369) In September, he visited the clinic for treatment to his right forearm after he injured it on a barbed wire fence. (R. 362, 364) In October 1992, he returned to the clinic complaining of hip and lumbar pain. (R. 358-59) Radiologist William L. Lavendusky, D.O., reported that x-rays of claimant's right hip failed to show evidence of fracture or dislocation (R. 361), and x-rays of claimant's lumbar spine failed to show evidence of abnormality. (R. 360) Claimant underwent physical therapy and repeatedly reported throughout the remainder of 1992 and early 1993 that his back was getting better. (R. 350-58) Claimant continued to report to the clinic in 1993 with a variety of complaints, including a cyst, a small puncture wound in his thigh, an ulcer, foot pain (a hammer fell on his foot), and bronchitis, in addition to his lower back pain. (345-50)

Throughout 1994 and 1995, claimant repeatedly reported to the clinic with seizures, hallucinations, nausea, diarrhea, and vomiting associated with his alcohol abuse. (R. 396-412, 436-53, 555-56) He was hospitalized in August 1994 (R. 410, 451), January 1995 (R. 455-506), April 1995 (R.558- 600), and December 1995 (R. 507-57) with delirium tremens, seizures, cirrhosis of the liver, and other problems associated with ethanol or alcohol dependence, abuse, and withdrawal. Two consultative psychological examinations during this period confirmed claimant's alcohol dependence. (See R. 413-20) There are few significant references in the medical record related to claimant's alleged back and arm problems during this same time period. In October 1994 the record indicates "arms better" (R. 449); in January 1995, the record reflects "intermittent" low back pain

and right leg numbness (R. 400); in April 1995, he claimed that his back hurt (R. 440); and, in November 1995, the record indicates lower back pain. (R. 438) The November 1995 report also indicates that a ladder fell on claimant, causing his elbow to swell. (Id.) The last report, dated January 3, 1996 indicates “DJD lumbar” and a prescription for Flexeril. (R. 436)

#### **IV. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a limited range of medium work of an unskilled nature with the following restrictions: being able to understand and follow only simple directions, having slightly impaired attention and concentration, having only limited ability to relate to others and tolerate stress, and having an inability to be exposed to hazards such as unprotected heights or dangerous machinery. The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

#### **V. REVIEW**

Claimant asserts as error that the ALJ: (1) failed to sufficiently develop the record to support his finding that the claimant could still perform the physical demands of medium work; (2) failed to order a physical consultative examination; (3) failed to shift the burden of proof until after making his RFC determination.

### Duty to Develop the Record

Claimant asserts that the ALJ failed to properly develop the record to support his finding that the claimant could still perform the physical demands of medium work. The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). But it is difficult to determine what entails a “complete” record, as “one may always obtain another medical examination, seek the views of one more consultant, wait six months to see whether the claimant’s condition changes, and so on.” Kendrick v. Shalala, 998 F.2d 455, 456-57 (7th Cir. 1993). How much evidence to gather is a subject on which the court generally respects the Commissioner’s reasoned judgment. Id. at 458.

The Tenth Circuit has noted that it is difficult to decide what quantum of evidence a claimant must establish of a disabling impairment or combination of impairments before the ALJ will be required to look further. Hawkins v. Chater, 113 F.3d 1162, 1166 (10th Cir. 1997).

As is usual in the law, the extreme cases are easy to decide; the cases that fit clearly within the framework of the regulations give us little pause. The difficult cases are those where there is some evidence in the record or some allegation by a claimant of a possibly disabling condition, but that evidence, by itself, is less than compelling. How much evidence must a claimant adduce in order to raise an issue requiring further investigation? Our review of the cases and the regulations leads us to conclude that the starting place must be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment.

Id. at 1167 (emphasis added and citations omitted).

At the first hearing, claimant was represented by counsel. The ALJ advised that the record contained Exhibits 1 through 53. When asked by the ALJ if there were any additional documents that should be in the file that were not there, claimant’s counsel replied that there were some updates

from the VA Outpatient Clinic that were not received in time, but there was no need to hold the record open. (R. 44-45) The ALJ had before him claimant's medical records since 1991, and there is no indication that any medical records were missing. Nor does claimant identify a "possibly disabling condition" which is evidenced by the record and which "could have a material impact on the disability decision requiring further investigation." See Hawkins, 113 F.3d at 1167. At the subsequent hearing, claimant's counsel was again present when the ALJ stated that the case file contained Exhibits 1 through 55, and that he had a packet of additional material marked Exhibit 56. When asked if there were any additional documents that should be in the record, the claimant's counsel answered "No." (R. 78) An ALJ is to explore the facts of a case, but is not under a duty to act as counsel for the claimant. Musgrave v. Sullivan, 966 F.2d 1371, 1377 (10th Cir. 1992). There is no objective evidence in the record of a condition which could have a material impact on the disability decision requiring further investigation by the ALJ.

The ALJ found that claimant's RFC for the full range of medium work is reduced by the following limitations: being able to understand and follow only simple directions, having slightly impaired attention and concentration, having only limited ability to relate to others and tolerate stress, and having an inability to be exposed to hazards such as unprotected heights or dangerous machinery. (R. 27) The ALJ correctly summarized the record as to claimant's limitations.

Claimant argues, however, that the record was not developed sufficiently to prove the claimant "had virtually no physical limitations and could still perform physical demands of full range of medium work." (Cl. Br., Docket # 11, at 3) The ALJ did not say the claimant had "virtually no physical limitations;" the ALJ specifically found that "claimant's additional nonexertional limitations do not allow him to perform the full range of medium work." (R. 28) Claimant's

arguments mischaracterize the ALJ's findings, and counsel for claimant is discouraged from doing so in the future.

Specifically with regard to claimant's alleged back pain, the ALJ found that, despite regular, routine medical treatment, claimant's complaints of back pain were only intermittent. (R. 22). He also noted that claimant's alleged back pain was diminished, in part, by physical therapy in 1992. (Id.; see R. 350-58) The only recommended treatment by claimant's treating physicians was continued use of medication. (E.g., R. 369, 372, 376) As indicated above, x-rays of claimant's lumbar spine were negative. (R. 360) Records from the period after November 5, 1993, include only passing references to claimant's alleged back pain. The record from January 1995 reflects "intermittent" low back pain and right leg numbness (R. 400); the April 1995 record indicates that claimant's back hurt (R. 440); the November 1995 record indicates lower back pain (R. 438); and the January 1996 report indicates "DJD lumbar" and a prescription for Flexeril. (R. 436) The only specific reference to any arm numbness or pain is the note "arms better" from the record in October 1994. (R. 449)

This record does not demonstrate that the neurological problems claimant experienced in February 1991 persisted after November 5, 1993, the alleged onset date of his disability. Further, claimant's physicians diagnosed his arm and hand numbness as ulnar neuropathy secondary to ethanol abuse (R. 381-82, 598) The amendments to the Social Security Act provide that for disability claims pending in court or before the Agency on March 29, 1996, benefits are not payable if "alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." See Contract With America Advancement Act, Pub. L. No. 104-121, § 105 (b)(1), 110 Stat. 847 (1996). Although the ALJ did not specifically address

claimant's arm and hand problems, he did state that, other than the problems related to the stab wound claimant sustained in 1991, claimant's problems were "of a passing, transitory nature, not contributing significantly to potential or actual limitations on the claimant's ability to perform work-like activity for the requisite durational period of 12 continuous months." (R. 21)

It is significant that claimant did not even allege disability related to arm and hand pain in the disability reports completed by claimant in connection with his 1995 application (R. 237-55), and that he did not mention the numbness in his leg until he filed his statement with a request for a hearing. (R. 256) The primary complaints in his 1995 application, as opposed to his 1992 and 1993 applications, are related to his mental problems. (R. 152, 165, 174, 185) Indeed, claimant requested reconsideration and a hearing due to his severe *nonexertional* impairments. (R. 172, 192) His current challenge to the ALJ's findings with regard to claimant's physical problems, and specifically his back, leg, arm and hand problems, appears to be an effort to have the Court revisit prior determinations from which he failed to appeal or to have the Court address issues that were not properly presented to the Appeals Council. The ALJ did not fail to sufficiently develop the record to support his finding that the claimant could still perform the physical demands of medium work.

### **Consultative Examination**

In connection with claimant's assertion that the ALJ failed to sufficiently develop the record, claimant asserts that the ALJ failed to order a physical consultative examination. When a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled, a consultative examination may be ordered. 20 C.F.R. §§ 404.1517, 416.917. Although the ALJ has a duty to fully and fairly develop the record as to material issues, Baca, 5 F.3d at 479-80, he does not have a duty to order a consultative examination in all cases. 20

C.F.R. §§ 404.1512(f), 404.1519a, 416.912(f); 416.919a. The Tenth Circuit has viewed the requirement as:

where there is direct conflict in the medical evidence requiring resolution, . . . or where the medical evidence in the record is inconclusive, . . . a consultative examination is often required for proper resolution of a disability claim. Similarly, where additional tests are required to explain a diagnosis already contained in the record, resort to a consultative examination may be necessary.

Hawkins, 113 F.3d at 1166 (citations and footnote omitted).

Under the Hawkins analysis, a consultative examination was not required for proper resolution of this claim. There was no direct conflict in the medical evidence requiring resolution, the medical evidence in the record was conclusive, and no additional tests were required to explain a diagnosis already contained in the record. In addition, the claimant had counsel at both hearings. Counsel did not indicate that the record was incomplete, request further development of the record, or request a consultative examination at that time. When a claimant is represented by counsel, “the ALJ should ordinarily be entitled to rely on the claimant’s counsel to structure and present claimant’s case.” Id. at 1167. Claimant’s counsel failed to identify any issues requiring further development by means of a consultative examination.

Finally, there was no evidence of deterioration in claimant’s condition as it related to his alleged physical impairments after November 5, 1993. Thus, a consultative examination would have served no useful purpose. Cf. 20 C.F.R. §§ 404.1519a(b)(5), 416.919a(b)(5) (stating that the ALJ should order consultative examination where “[t]here is an indication of a change in your condition that is likely to affect your ability to work.”) The Commissioner has “broad latitude” in deciding whether to order consultative examinations. Hawkins, 113 F.3d at 1166; Diaz v. Secretary of Health

and Human Servs., 898 F.2d 774, 778 (10th Cir. 1990). The ALJ did not err by failing to order a consultative examination in this instance.

### **Burden of Proof**

The burden of proof shifts to the Commissioner at step five of the five-step evaluation process. See Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988) (burden at step five is on Commissioner). Claimant contends that the ALJ erroneously failed to shift the burden of proof to the Commissioner until after he made the RFC determination. Claimant fails to acknowledge that the RFC determination is initially part of the step four evaluation and, thus, is made before the burden of proof shifts at step five. Shaffer v. Apfel, No. 97-5174, 1998 WL 314376 (10th Cir. June 4, 1998). Therefore, no error occurred.

In evaluating at step four whether claimant could perform his past relevant work, the ALJ was required to ascertain claimant's RFC, which he did. (R. 25) The ALJ then correctly stated that:

Once a claimant has established that he cannot perform his past relevant work, because of a severe impairment, the burden shifts to the Commissioner to show that there are other jobs, existing in significant numbers in the national economy which he can perform, consistent with his medically determinable impairments, functional limitations, age, education, and work experience.

Id. This excerpt from the ALJ's decision makes it clear that the ALJ correctly placed the step five burden on the Commissioner. The Commissioner met that burden.

## **VI. CONCLUSION**

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 30<sup>th</sup> day of June, 1999.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**JUN 30 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**BOB A. FOREMAN, JR.,**  
**SSN: 447-56-3664,**

**Plaintiff,**

**v.**

**KENNETH S. APFEL, Commissioner,**  
**Social Security Administration,**

**Defendant.**

**Case No. 97-CV-0722-EA**

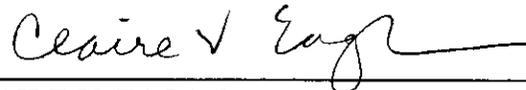
**ENTERED ON DOCKET**

**DATE JUN 30 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 30<sup>th</sup> day of June 1999.



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

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

**FILED**

JUN 29 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NATIONAL BANK OF CANADA, )  
 )  
Plaintiff, )  
vs. )  
 )  
PERFORMANCE VALVE & CONTROLS, )  
INC., et al., )  
 )  
Defendants. )

Case No. 97-CV-796-BU ✓

ENTERED ON DOCKET  
DATE JUN 30 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action against all remaining Defendants shall be deemed to be dismissed with prejudice.

Entered this 29th day of June, 1999.

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

113

**F I L E D**

JUN 29 1999

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

DERMICO DEON WRIGHT

Petitioner,

vs.

REGINALD HINES

Respondent.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-184-BU (M) ✓

**ENTERED ON DOCKET**

**DATE JUN 30 1999**

**REPORT AND RECOMMENDATION**

Respondent's MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS FOR FAILURE TO EXHAUST STATE REMEDIES [Dkt. 6] is before the undersigned United States Magistrate Judge for Report and Recommendation. Responding to the motion, Petitioner has agreed that dismissal is appropriate and has joined the request for dismissal. Accordingly, the undersigned United States Magistrate Judge recommends that the motion to dismiss be GRANTED.

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

DATED this 29<sup>th</sup> Day of June, 1999.

*Frank H. McCarthy*  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

**CERTIFICATE OF SERVICE**

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

30<sup>th</sup> Day of June, 1999.  
*C. Portillo, Deputy Clerk*

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

**FILED**

JUN 29 1999 *CP*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARPET SUPPLY CO., an Oklahoma )  
Corporation, and DONALD )  
L. BUTTERWORTH, )

Plaintiffs, )

vs. )

Case No. 99-CV-299-BU ✓

D.L. CROMWELL INVESTMENTS, INC., )  
a Florida corporation, and )  
DANIEL GALLAGHER, )

Defendants. )

ENTERED ON DOCKET  
DATE JUN 30 1999

**ORDER**

This matter comes before the Court upon Plaintiffs' Motion to Stay Proceedings Pending Arbitration. Upon review, the Court finds that a stay of the proceedings is appropriate.

Accordingly, the Court ORDERS as follows:

1. Plaintiffs' Motion to Stay Proceedings Pending Arbitration (Docket Entry #2) is GRANTED; and

2. The Clerk of the Court is DIRECTED to administratively close this matter in his records pending resolution of the arbitration proceedings. The parties are DIRECTED to notify the Court when resolution of the arbitration proceedings has occurred so that the Court may reopen these proceedings, if necessary, for final resolution of the action.

ENTERED this 29<sup>th</sup> day of June, 1999

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

JEFFERSON COLE,  
445-72-0053

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 98-CV-522-M ✓

FILED

JUN 29 1999

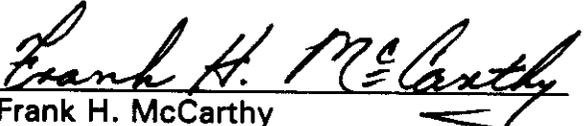
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 30 1999

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this  
29<sup>th</sup> Day of June, 1999.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

14

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

FILED

JUN 29 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JEFFERSON COLE,  
445-72-0053

Plaintiff,

vs.

Case No. 98-CV-522-M ✓

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

ENTERED ON DOCKET  
DATE JUN 30 1999

ORDER

Plaintiff, Jefferson Cole, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> In accordance with 28 U.S.C. § 636(c)(1) & (3), the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,

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<sup>1</sup> Plaintiff's August 18, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 11, 1996. By decision dated March 11, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 2, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 21, 1976, and was 19 years old at the time of the hearing. He was in the 12th grade at the time of the hearing. Aside from mowing yards and cutting weeds in a work-training program, Plaintiff has never worked. He claims to have been disabled since August 1, 1984, as a result of mental retardation, comprehension problems, and an oppositional defiant disorder. The ALJ determined that the Plaintiff's impairments limit him to work activity involving simple, repetitive tasks with routine supervision. [R. 16]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) erred in finding that Plaintiff did not satisfy the requirements of Listing 12.05C; and (2) erred in disregarding the

vocational expert's testimony. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. Listing 12.05C addresses mental retardation and autism and requires: "A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function." 20 C.F.R. Pt. 404, Subpt. P., App.1., § 1.05C. [emphasis supplied]. According to psychological testing administered on March 14, 1995, by Minor Gordon, Ph.D. Plaintiff earned a verbal IQ of 71, a performance IQ of 63, and full-scale IQ of 66. [R. 171]. In addition to these scores, the Listing requires that Plaintiff have another impairment which imposes additional and significant work related limitations. Plaintiff points to his oppositional defiant disorder to satisfy this requirement.

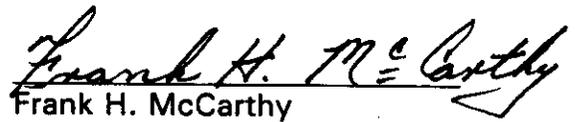
The record reflects that the ALJ considered Plaintiff's allegations that he is unable to work because he cannot control his temper. The ALJ stated that the record shows that Plaintiff comes from a dysfunctional family and that his parents display poor parenting skills. Plaintiff has had treatment and the family has undergone counseling. Although the record documents that Plaintiff appears to have poor insight into his problem and that he was not motivated to cooperate in counseling or making behavior changes, it also appears that his anger and loss of control occur only at home. On October 18, 1994, Plaintiff's teacher recorded that she had not had any

serious behavior problems from Plaintiff in two years. [R. 104]. Based on Plaintiff's reported activities, school reports and the medical evidence, the ALJ determined that Plaintiff's inability to control his temper did not constitute an additional and significant limitation on his ability to perform work. [R. 17-18]. The court finds that this conclusion is supported by substantial evidence in the record.

Plaintiff claims that the ALJ disregarded vocational expert testimony that his tendency to act out frustrations in a violent or verbally abusive manner would eliminate all jobs. That limitation was not included in the ALJ's hypothetical questioning of the ALJ, but was added by Plaintiff's counsel in cross-examination. It is well settled that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991). However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Since the record demonstrates that Plaintiff's angry outbursts were confined to his home situation, the ALJ's omission of limitations related to Plaintiff's temper outbursts was appropriate. The court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert are supported by substantial evidence.

The ALJ evaluated the record in accordance with the correct legal standards established by the Commissioner and the courts. Therefore, the denial decision is **AFFIRMED.**

SO ORDERED this 29<sup>th</sup> Day of June, 1999.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 29 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Bank of Oklahoma, )  
)  
Plaintiff, )  
)  
v. )  
)  
Brenda K Campbell, et al )  
)  
Defendants )

Case No. 99-cv-16-C

FILED ON DOCKET  
JUN 30 1999

ORDER

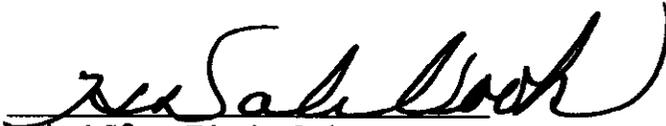
Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

*(b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.*

In the action herein, notice pursuant to Rule 41(b) was mailed to counsel of record or to the parties, at their last address of record with the Court, on . No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 28<sup>th</sup> day of June, 19 99

  
United States District Judge

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

KYLE WHITE, )  
)  
Plaintiff, )  
)  
v. )  
)  
STATE FARM MUTUAL )  
AUTOMOBILE INSURANCE )  
COMPANY, an Illinois corporation, )  
)  
Defendant. )

ENTERED ON DOCKET  
DATE JUN 30 1999

No. 98-CV-0805-K(M)

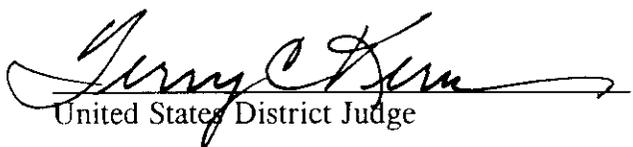
**F I L E D**

JUN 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 29 day of June, 1999, it appearing to the Court  
that this matter has been compromised and settled, this case is hereby dismissed with prejudice  
to the refiling of any future action.

  
United States District Judge

**FILED**

**JUN 29 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

**MARY LUCY DAVIS,**

Plaintiff,

vs.

**ARROW SPECIALTY COMPANY and  
MASCOTECH, INC.**

Defendants.

Case No. 98-C-423-BU(J)

**ENTERED ON DOCKET  
DATE JUN 30 1999**

**ORDER OF DISMISSAL WITH PREJUDICE**

Upon the Joint Stipulation of Dismissal, the Court finds that this entire action should be and it is hereby dismissed with prejudice. Each party shall bear its own attorneys fees, costs and expenses.

It is so ordered this 29<sup>th</sup> day of JUNE, 1999.

  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**JUN 29 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MICHAEL EUGENE JACKSON, )  
)  
Petitioner, )  
)  
v. )  
)  
STEVE KAISER, Warden )  
Davis Correctional Facility, )  
)  
Respondent(s). )

Case No. 99-CV-0142E (E)

**ENTERED ON DOCKET**  
**DATE JUN 29 1999**

**REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 2254, petitioner Michael Eugene Jackson filed a Petition for Writ of Habeas Corpus (Docket # 1). Acting *pro se*, petitioner challenges the judgment and concurrent 25-year sentences he received for first degree burglary, possession of a firearm after former conviction of a felony, feloniously pointing a weapon, and assault and battery with a dangerous weapon after former conviction of a felony. This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and 28 U.S.C. § 2254, Rules 8, 10. Based on a review of the record and the parties' briefs, the undersigned proposes findings that petitioner has not exhausted all of his claims. The undersigned recommends that the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED without prejudice** to refiling after petitioner has exhausted his claims in state court or after he has deleted the unexhausted claims from his petition.

**BACKGROUND AND PROCEDURAL HISTORY<sup>1</sup>**

Petitioner pleaded guilty in Case No. CF-94-1547, in the District Court of Tulsa County, State of Oklahoma on December 4, 1995. His judgment and sentence were entered on February 12,

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<sup>1</sup> A chart summarizing the background and procedural history of petitioner's claims is attached hereto.

1996. Petitioner filed an application to withdraw his guilty plea on February 22, 1996, but the trial court did not hold a hearing on petitioner's application or rule upon it within the thirty (30) day period provided by statute.

On February 7, 1997, petitioner filed an application for post-conviction relief, in which he asserted (1) abuse of judicial discretion and denial of due process by the trial court for taking into account petitioner's arrest in Creek County while he awaited sentencing; (2) the court's failure to follow the sentencing recommendation set forth in the plea agreement; (3) ineffective assistance of counsel William Brightmire for not objecting to the perjury of the victim (witness) and for other reasons; (4) denial of equal protection and due process because petitioner's co-defendant received a two-year suspended and deferred sentence; (5) petitioner's possession of a shotgun was not a violation of law at the time the crime was committed; and (6) denial of petitioner's right to a hearing on his application to withdraw his guilty plea.

The District Court of Tulsa County denied petitioner's application for post-conviction relief on March 12, 1997, and petitioner appealed that decision to the Oklahoma Court of Criminal Appeals ("CCA") on April 10, 1997. In his petition in error and the brief accompanying it, he claimed that (1) he was denied the effective assistance of counsel Creekmore Wallace during the ten day period after the trial court's imposition of Judgment and Sentence; (2) the trial court failed to conduct an evidentiary hearing on his application to withdraw guilty plea; (3) "cumulative errors" warrant vacation of petitioner's conviction and remand for a new trial;<sup>2</sup> and (4) his application

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<sup>2</sup> The cumulative errors are as follows:

- (a) Abuse of judicial discretion in sentencing Mr. Jackson by factoring the unsubstantiated allegation that he had committed new offenses while out on bail prior to sentencing;
- (b) Abuse of judicial discretion in ignoring the negotiated plea agreement and imposing a

should not be barred on procedural grounds. On August 19, 1997, the CCA reversed (Case No. PC-97-479) and remanded for an evidentiary hearing on the petitioner's application to withdraw his guilty plea. The District Court of Tulsa County held an evidentiary hearing on September 19, 1997, and denied petitioner's application.

On December 17, 1997, petitioner appealed the trial court's denial of his application. In this petition for writ of certiorari, petitioner advanced three propositions of error: (1) the trial court improperly added time to petitioner's plea bargain agreement because he allegedly committed another offense before sentencing; (2) the trial court abused its discretion in refusing to allow petitioner to withdraw his plea because the plea was made pursuant to a negotiated plea agreement which the judge refused to follow; and (3) the trial court abused its discretion in denying petitioner's application to withdraw his guilty plea because petitioner did not understand that entering a blind plea meant that he could not withdraw his plea if the trial court did not follow the State's

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harsher sentence;

(c) Denial of equal protection by sentencing his codefendant to a term of custody of only two (2) years, and amending the original complaint from a violent offense, First Degree Burglary, to a non-violent offense, Second Degree Burglary;

(d) Violation of Oklahoma's statutory prohibition against multiple punishments for a single offense as defined under OKLA. STAT. tit [sic] 21, sect. 22, by convicting the petitioner for multiple felony's [sic] arising out of one transaction of possessing a shotgun;

(e) Conviction of the petitioner for multiple counts of using and possessing a firearm after former conviction of a felony, when the firearm in question was not a "gun" as defined under OKLA. STAT. tit. 21, sect. 1283; [sic]

Application for Post-Conviction Relief Brief in Support, filed April 10, 1997 in Case No. PC 97-479, attached to Response to Petition for Writ of Habeas Corpus, Docket # 4 (hereinafter referenced as "Resp. Br.").

recommendation.<sup>3</sup> On May 15, 1998, the CCA denied his petition for writ of certiorari (Case No. C-97-1547) and affirmed the decision of the trial court denying petitioner's application to withdraw his guilty plea.

As grounds for his petition for writ of habeas corpus, petitioner claims that: (1) his trial counsel violated state and federal law by failing to file a notice of intent to appeal or otherwise assist with his appeal; (2) the failure of the trial court to conduct an evidentiary hearing on his timely application to withdraw his plea was a violation of state and federal law; (3) cumulative errors warrant the vacating petitioner's conviction and remanding for a new trial; and (4) his application should not be barred on procedural grounds. (Petition, Docket # 1.) Petitioner briefed these issues in a document entitled "Petitioner's Response in Opposition to the States [sic] Attorney Generals [sic] Response to Petitioner's Writ for Habeas Corpus" (Docket # 5, hereinafter referenced as "Pet. Resp.").<sup>4</sup> His brief appears to be the same or very similar to the brief in support of his application for post-conviction relief that he filed with his petition in error to the CCA on April 10, 1997.

Respondent argues that it is questionable whether petitioner's first ground for relief has been properly and fully exhausted in the state courts, but that the Court should nonetheless deny the

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<sup>3</sup> Petitioner also claimed that the charge of possession of a firearm, after former conviction of a felony, was based on the same facts which gave rise to the charges of feloniously pointing a weapon and assault and battery with a dangerous weapon, in violation of Oklahoma's "double punishment" prohibition. (Petition for Writ of Certiorari, filed December 17, 1997, attached to Resp. Br., Docket # 4, at 2.) However, petitioner did not brief this allegation of error, and the CCA did not address it.

<sup>4</sup> He also enumerates "case law concerning the singleton argument" as a "question of law" (Pet. Resp. Br., at 3), but he does not cite or brief any "singleton argument." The Court assumes petitioner is referring to United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), in which a Tenth Circuit panel reversed a conviction on the ground that the prosecuting attorney violated 18 U.S.C. § 201(c)(2) when he offered leniency to a co-defendant in exchange for truthful testimony. The en banc court vacated the panel decision, id. at 1361, and issued a subsequent opinion rejecting the principal ruling of the panel decision. United States v. Singleton, 165 F.3d 1297, 1298 (10th Cir. 1999) (en banc).

petition on the merits because petitioner has already received his requested relief, *i.e.*, an appeal. Respondent argues, with respect to petitioner's second ground for relief, that no evidentiary hearing is required because there are no issues of fact necessitating a hearing. Respondent does not address petitioner's third or fourth grounds for relief.

## **DISCUSSION AND LEGAL ANALYSIS**

### **Exhaustion of Remedies**

Federal courts are prohibited from issuing writs of habeas corpus on behalf of a prisoner in state custody unless the prisoner has exhausted available state court remedies if "state corrective process" is available and if circumstances do not exist that render the process "ineffective" to protect the prisoner's rights. 28 U.S.C. § 2254(b)(1); Demarest v. Price, 130 F.3d 922, 932 (10th Cir. 1997). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir.), *cert. denied*, 506 U.S. 924 (1992). To exhaust a claim, petitioner must have "fairly presented" the facts and legal theory supporting a specific claim to the highest state court. *See* Picard v. Conner, 404 U.S. 270, 275-76 (1971); Demarest, 130 F.3d at 932. In Oklahoma, the highest state court for criminal matters is the CCA. The doctrine of exhaustion reflects the policies of comity and federalism. Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981); *see also* Coleman v. Thompson, 501 U.S. 722, 730 (1991); Demarest, 130 F.3d at 932.

If a petitioner submits a petition containing both exhausted and unexhausted claims, the petition is deemed a "mixed petition" that the District Court may dismiss, leaving petitioner with an

opportunity to return to state court or to amend his petition to withdraw the unexhausted claims, Rose v. Lundy, 455 U.S. 509, 510 (1982).<sup>5</sup> Alternatively, the District Court could (a) deny the petition on the merits, 28 U.S.C. § 2254(b)(2); Hoxsie v. Kerby, 108 F.3d 1239, 1242-43 (10th Cir.), cert. denied, 118 S. Ct. 126, 139 L. Ed.2d 77 (1997); (b) hold the unexhausted claim procedurally barred if "it is obvious that the unexhausted claim would be procedurally barred in state court," Steele v. Young, 11 F.3d 1518, 1523 (10th Cir. 1993) (citations omitted); or (c) permit petitioner to amend his petition to withdraw the unexhausted claims, but hold the amended petition in abeyance pending exhaustion in state court of his unexhausted claim, Calderon v. United States District Court for the Northern District of California, 134 F.3d 981 (9th Cir. 1998). Petitioner in this matter has submitted a "mixed" petition: his first claim (ineffective assistance of counsel), and part of his third claim ("cumulative errors"), have not been fairly presented to the CCA.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). There is an exception to 28 U.S.C. § 2254(c), however, where the claim has been presented but ignored by the state's highest court." Smith v. Digmon, 434 U.S. 332, 333 (1978). Petitioner presented all four of his claims to the CCA when he filed his petition in error, but the CCA did not address any claim except the second (remanding the matter for an evidentiary hearing on petitioner's motion to withdraw his guilty plea).

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<sup>5</sup> To the extent Rose v. Lundy mandated that "mixed" petitions containing both exhausted and unexhausted claims be dismissed, it has been superseded by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). See, e.g., Loving v. O'Keefe, 960 F. Supp. 46 (S.D.N.Y. 1997); Duarte v. Hershberger, 947 F. Supp. 146 (D.N.J. 1996). The AEDPA provides: "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254 (b)(2).

In Smith v. Digmon, the Supreme Court stated that “whether the exhaustion requirement of 28 U.S.C. § 2254 (b) has been satisfied cannot turn upon whether the state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner’s brief in the state court.” 434 U.S. at 333. The exception does not apply, however, “where the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless, ‘there are special and important reasons therefor.’” Castille v. Peoples, 489 U.S. 346, 351 (1989) (construing Rule 1114 of Pennsylvania’s Rules of Appellate Procedure). The context in which petitioner presented his claims was the denial of an evidentiary hearing on his application to withdraw petitioner’s guilty plea. The CCA reversed and remanded for an evidentiary hearing. “The relevant inquiry in each case is whether the factual issue was presented to the state courts in a posture allowing full and fair consideration.” Smith v. Atkins, 678 F.2d 883, 885 (10th Cir. 1982). In light of the trial court’s error, there was no reason for the CCA to consider the merits of petitioner’s other claims at that time. The factual issues regarding petitioner’s ineffective assistance of counsel and “cumulative error” claims were not presented to the CCA in a posture allowing full and fair consideration.

#### **Ground One - Ineffective Assistance of Counsel**

Petitioner’s first claim, that his trial counsel failed to protect his due process rights by failing to file a notice of intent to appeal, was phrased by petitioner as “Was the petitioner denied the effective assistance of counsel during the ten (10) day period after trial court’s imposition of Judgment and Sentence in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the Laws and Constitution of the State of Oklahoma?” (See Application for Post Conviction Relief Brief in Support, filed April 10, 1997, attached to the Resp. Br., Docket # 4, at 5.)

The brief he submitted in opposition to respondent's brief is almost identical to the brief submitted with his petition in error to the CCA on April 10, 1997, and it sufficiently covers the ineffective assistance of counsel issue regardless of the alternative phrasing by petitioner.

The issue differs from the way in which petitioner originally presented it to the trial court in his application for post-conviction relief, filed February 7, 1997. In that application, petitioner claimed that "Attorney William Brightmeyer was guilty of ineffective assistance of counsel for not objecting to the perjury of the victim (witness) and for other reasons set forth in the brief." (See Application for Post-Conviction Relief, filed February 7, 1997, attached to Resp. Br., Docket # 4, Part B.) The trial court ruled, at the September 19, 1997 hearing on petitioner's application to withdraw guilty plea, that Creekmore Wallace -- not William Brightmire -- represented petitioner when he pleaded guilty. (See Transcript of Hearing Defendant's Application to Withdraw Plea, filed October 20, 1997, attached to Resp. Br., Docket # 4, at 51.) The trial court stated "I think the plea form . . . and the transcripts speak for itself [sic] as to the assistance that Mr. Jackson was given and to his knowing and voluntariness at the time that he made the particular plea in this particular case." Id. Petitioner did not raise this issue in his petition for writ of certiorari, but he did present it to the CCA in his petition in error as ineffective assistance of counsel by Creekmore Wallace. The CCA did not address it because of the pivotal issue: the trial court's failure to hold an evidentiary hearing.

#### **Ground Two - Evidentiary Hearing**

Petitioner's second claim, the failure of the trial court to conduct an evidentiary hearing on his timely application to withdraw his plea, is clearly exhausted; indeed, it is moot. It is true that the trial court did not conduct an evidentiary hearing within the 30 days required by Rule 4.2 (B) of the Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. Nor did the trial

court issue a decision denying petitioner's application to withdraw on March 21, 1996, as respondent represented and the trial court found during the proceedings on petitioner's application for post-conviction relief. However, the CCA remedied these errors in its August 19, 1997 decision. The trial court conducted an evidentiary hearing a month later and denied petitioner's application.

### **Ground Three - Cumulative Errors**

Petitioner's third claim is more complicated. He alleges that the cumulative errors described warrant vacating petitioner's conviction. (Petition, Docket # 1, at 11.) The first two of the cumulative errors listed by petitioner were presented to the CCA in petitioner's second petition in error: "a. Abuse of judicial discretion in sentencing Mr. Jackson by factoring the unsubstantiated allegation that he had committed new offenses while out on bail prior to sentencing; [and] b. Abuse of judicial discretion in ignoring the negotiated plea agreement and imposing a harsher sentence" (Petitioner's Response, Docket # 5 at 20-21) when he alleged that "(1) the trial court improperly added time to petitioner's plea bargain agreement because he allegedly committed another offense before sentencing; (2) the trial court abused its discretion in refusing to allow petitioner to withdraw his plea because the plea was made pursuant to a negotiated plea agreement which the judge refused to follow; . . ." (Brief of Appellant, filed February 6, 1998, attached to Resp. Br., Docket # 4, at 8-9.) The third claim in his appellate brief, "Petitioner did not understand that entering a blind plea meant that he could not withdraw his plea if the trial court did not follow the State's recommendation," does not appear to be a separate claim, but additional argument for the first and second claims. (Id., at 13-15.)

Petitioner also presented his "multiple punishment" claim in his petition for writ of certiorari (Petition for Writ of Certiorari, filed December 17, 1997, attached to Resp. Br., Docket # 4, at 2).

He alleged that “the charge of Possession of a Firearm, AFCF, was based on the same facts which gave rise to the charges of Feloniously Pointing and Assault and Battery with a Dangerous Weapon, in violation of Oklahoma’s “double punishment” prohibition,” *id.*, but he did not brief this issue. (See Brief of Appellant, filed February 6, 1998, attached to Resp. Br., Docket # 4.) The issue is stated as “d. Violation of Oklahoma’s statutory prohibition against multiple punishments for a single offense as defined under OKLA. STAT. tit. 21, sect. 11, by convicting the petitioner for multiple felonies arising out of one transaction of possessing a shotgun” in petitioner’s brief in support of his habeas petition. (Pet. Resp., Docket # 5, at 21) and in petitioner’s brief in support of his petition in error to the state court. (Application for Post-Conviction Relief Brief in Support, attached to Resp. Br., Docket # 4, at 23.)

It is not clear, from the mere listing of this issue, that petitioner has stated a federal constitutional claim cognizable in federal habeas corpus proceedings. See 28 U.S.C. § 2254(a). “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*) Petitioner’s statement of the issue, without argument or reference to the constitutional implications, if any, of his claim, does not constitute a “fair presentation” of the claim to the CCA such that the CCA would have the opportunity to correct the alleged violation of petitioner’s federal rights.

Similarly, petitioner asserts that “e. Conviction of the petitioner for multiple counts of using and possessing a firearm after former conviction of a felony, when the firearm in question was not a “gun” as defined under OKLA. STAT. tit. 21, sect. 1283” constitutes an error appropriate for federal habeas review. Arguably, petitioner presented this claim in his Application for Post-

Conviction Relief when he alleged that his possession of a shotgun was not a violation of law at the time the crime was committed. (Application for Post-Conviction Relief, filed February 7, 1997, attached to Resp. Br., Docket # 4, at "Part B.") He also presented it with the brief accompanying his petition in error, filed April 10, 1997 (see Application for Post-Conviction Relief Brief in Support, attached to Resp. Br., Docket # 4, at 23.) Petitioner states that this error, like all of the listed errors, "deprived him of his statutory and constitutional right to be free from unlawful restraint." (*Id.*; Pet. Resp., Docket # 5, at 20.) However, his statement of the issue and reference to Oklahoma statutory law do not implicate a violation of the federal Constitution, laws or treaties. See 28 U.S.C. § 2254(a). His failure to brief the issue further undermines a determination that he has fairly presented his claim.

Petitioner attempts to state a constitutional claim when he alleges "c. Denial of equal protection by sentencing his codefendant to a term of custody of only two (2) years, and amending the original complaint from a violent offense, First Degree Burglary, to a non-violent offense, Second Degree Burglary" (Pet. Resp., at 21), but, again, he failed to brief the issue. Moreover, it is the same issue he presented with his petition in error (Application for Post-Conviction Relief Brief in Support, attached to Resp. Br., Docket # 4, at 23), and is subject to the same exhaustion problem as his ineffective assistance of counsel claim. That problem, as discussed above, involves the procedural context or posture of the case when it was presented to the CCA. At that time, the CCA did not reach the merits because the trial court failed to hold an evidentiary hearing on petitioner's application to withdraw his guilty plea.

Accordingly, the factual issues regarding petitioner's ineffective assistance of counsel and "cumulative error" claims were not presented to the CCA in a posture allowing full and fair

consideration. His evidentiary hearing claim is moot. His fourth claim, as discussed below, is not truly a ground for relief, but an argument: "Petitioner's Application should not now be barred on procedural grounds where the petitioner has satisfied the requirements of 22 O.S. sect. 1080." (Petition, Docket # 1, at 11 (reverse side).)

#### **Ground Four - Procedural Bar**

Petitioner argues that the Court should refrain from applying a procedural bar because his counsel was ineffective in handling his appeal. (Pet. Resp., Docket # 5, at 22-24; Application for Post-Conviction Relief Brief in Support, attached to Resp. Br., Docket # 4, at 25-26). It is true that the Court could hold that any of petitioner's unexhausted claims are procedurally barred if "it is obvious that the unexhausted claim would be procedurally barred in state court," Steele v. Young, 11 F.3d 1518, 1523 (10th Cir. 1993) (citations omitted), without dismissing the habeas petition. To do so the Court would have to assume that the CCA would hold petitioner procedurally barred from raising his ineffective assistance of counsel claim because he failed to raise it in his petition for writ of certiorari.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). Petitioner can rebut a claim of procedural default if he is able to show cause for the default and actual prejudice as a result, or demonstrate that a fundamental miscarriage of justice would result if the merits of his claims are not considered. See, e.g., Coleman, 510 U.S. at 750.

Constitutionally ineffective assistance of counsel may constitute cause for procedural default, id., at 753-55, but ineffective assistance of counsel claims are not treated the same as other habeas claims for purposes of applying Oklahoma's procedural bar. The Tenth Circuit has consistently held that the Oklahoma procedural bar on ineffective assistance of trial counsel claims not raised on direct appeal is inadequate because it denies defendants meaningful review of their ineffective assistance claims. English v. Cody, 146 F.3d 1257 (10th Cir. 1998); Brewer v. Reynolds, 51 F.3d 1519 (10th Cir. 1995), Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994). Given the special treatment accorded ineffective assistance of counsel claims, the presence of other unexhausted claims in this matter, and the questionable presentation of federal constitutional claims cognizable in federal habeas corpus proceedings, the undersigned recommends that the Court dismiss the petition rather than to hold it procedurally barred and reach the issues on the merits at this procedural juncture.

#### **CONCLUSION**

For the reasons cited herein, the undersigned recommends that the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED without prejudice** to refiling after petitioner has exhausted his claims in state court or after he has deleted the unexhausted claims from his petition. Petitioner is forewarned that his election to forego obtaining an adjudication of any unexhausted claim by the state court, before proceeding further here, may well cost him the opportunity to have that claim ever considered on its merits by a federal court, since its piecemeal presentation in a later petition may be dismissed as an abuse of the writ. Rose v. Lundy, 455 U.S. 509, 520 (1982).

#### **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 file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Haney v. Addison*, 1999 WL 288295 (10th Cir. May 19, 1999).

Dated this 29<sup>th</sup> day of June, 1999.

Claire V Eagan  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

**CERTIFICATE OF SERVICE**

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

29<sup>th</sup> Day of June, 1999.  
C. Petello, Deputy Clerk

**Jackson v. Kaiser**  
**Case No. 99-CV-0142-E (E)**  
**(N.D. Okla.)**

**SUMMARY OF CLAIMS**

Abuse of judicial discretion and denial of due process by the trial court for taking into account petitioner's arrest in Creek County while he awaited sentencing	Abuse of judicial discretion in sentencing Mr. Jackson by factoring the unsubstantiated allegation that he had committed new offenses while out on bail prior to sentencing (Cumulative Error "(a)")	Trial court improperly added time to petitioner's plea bargain agreement because he allegedly committed another offense before sentencing	Abuse of judicial discretion in sentencing Mr. Jackson by factoring the unsubstantiated allegation that he had committed new offenses while out on bail prior to sentencing (Cumulative Error "(a)")
Trial court's failure to follow the sentencing recommendation set forth in the plea agreement	Abuse of judicial discretion in ignoring the negotiated plea agreement and imposing a harsher sentence (Cumulative Error "(b)")	Trial court abused its discretion in refusing to allow petitioner to withdraw his plea because the plea was made pursuant to a negotiated plea agreement which the judge refused to allow	Abuse of judicial discretion in ignoring the negotiated plea agreement and imposing a harsher sentence (Cumulative Error "(b)")
Ineffective assistance of counsel William Brightmire for not objecting to the perjury of the victim (witness) and for other reasons set forth in the brief	Ineffective assistance of counsel Creekmore Wallace during the ten day period after the trial court's imposition of Judgment and Sentence		Trial counsel violated state and federal law by failing to file a notice of intent or otherwise assist with his appeal

<p>Denial of equal protection and due process because petitioner's co-defendant received a two-year suspended and deferred sentence</p>	<p>Denial of equal protection by sentencing his co-defendant to a term of custody of only two (2) years, and amending the original complaint from a violent offense, First Degree Burglary, to a non-violent offense, Second Degree Burglary (Cumulative Error "c")</p>		<p>Denial of equal protection by sentencing his co-defendant to a term of custody of only two (2) years, and amending the original complaint from a violent offense, First Degree Burglary, to a non-violent offense, Second Degree Burglary (Cumulative Error "c")</p>
<p>Petitioner's possession of a shotgun was not a violation of law at the time the crime was committed</p>	<p>Conviction of petitioner for multiple counts of using and possessing a firearm after former conviction of a felony, when the firearm in question was not a "gun" as defined under Okla. Stat. tit. 21, § 1283 (Cumulative Error "(e)")</p>		<p>Conviction of petitioner for multiple counts of using and possessing a firearm after former conviction of a felony, when the firearm in question was not a "gun" as defined under Okla. Stat. tit. 21, § 1283 (Cumulative Error "(e)")</p>
<p>Denial of petitioner's right to a hearing on his application to withdraw his guilty plea</p>	<p>Trial Court failed to conduct an evidentiary hearing on his application to withdraw guilty plea</p>		<p>Trial Court failed to conduct an evidentiary hearing on his application to withdraw guilty plea</p>

	Violation of Oklahoma's statutory prohibition against multiple punishments for a single offense as defined under Okla. Stat. tit. 21, § 22, by convicting the petitioner for multiple felonies arising out of one transaction of possessing a shotgun (Cumulative Error "d")	Charge of possession of a firearm, after former conviction of a felony, was based on the same facts which gave rise to the charges of feloniously pointing a weapon and assault and battery with a dangerous weapon, in violation of Oklahoma's "double punishment" prohibition	Violation of Oklahoma's statutory prohibition against multiple punishments for a single offense as defined under Okla. Stat. tit. 21, § 22, by convicting the petitioner for multiple felonies arising out of one transaction of possessing a shotgun (Cumulative Error "d")
	Application should not be barred on procedural grounds		Application should not be barred on procedural grounds
		Petitioner did not understand that entering a blind plea meant that he could not withdraw his plea if the trial court did not follow the State's recommendation	



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

**FILED**

JUN 29 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEARDRA BRODERICK and  
AMANDA RASBERRY,

Plaintiffs,

v.

NPC INTERNATIONAL, INC.,

Defendant.

No. 99CV0122C(J)

ENTERED ON DOCKET

DATE ~~JUN 29 1999~~

---

**ORDER ON  
STIPULATION OF DISMISSAL WITH PREJUDICE**

---

The parties, by counsel, have filed with the Court their Stipulation of Dismissal with Prejudice. The Court, having examined the parties' Stipulation of Dismissal, now ORDERS that the above-captioned cause of action is in all respects DISMISSED, WITH PREJUDICE, each party to bear its own costs.

SO ORDERED this <sup>28</sup>~~29~~ day of June, 1999.

  
United States District Court Judge

This document entered on docket sheet in compliance with Fed. R. Civ. P. 58 and/or Rule 79(a) on JUN 29 1999

MT

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

**F I L E D**

JUN 29 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UTILITY MANAGEMENT CORPORATION, )  
a Delaware corporation; and WILLIAMS )  
HOLDINGS OF DELAWARE, INC., a )  
Delaware corporation, )

Plaintiffs, )

vs. )

UTILITY MANAGEMENT CORPORATION, )  
a Mississippi corporation, now known as )  
FAIRWAY ENERGY CORPORATION, )  
a Mississippi corporation, )

Defendant. )

ENTERED ON DOCKET

DATE JUN 29 1999

Case No. 99-CV-0351 BU (J) ✓

**DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiffs Utility Management Corporation and Williams Holdings of Delaware, Inc., hereby dismiss this action with prejudice.

Respectfully submitted,

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

By: \_\_\_\_\_

*[Signature]*  
Donald L. Kahl, OBA #4855  
Heather L. Drake, OBA #17609  
320 South Boston, Suite 400  
Tulsa, Oklahoma 74103-3708  
Telephone: (918) 594-0400  
Facsimile: (918) 594-0505

**ATTORNEYS FOR PLAINTIFFS, UTILITY  
MANAGEMENT CORPORATION and  
WILLIAMS HOLDINGS OF DELAWARE, INC.**

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*c/s*

MT

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

**FILED**

**JUN 28 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PAULA RAE POWERS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MICHAUD, HUTTON, FISHER, and )  
ANDERSEN; MARK HUTTON, )  
Individually, ANDREW HUTTON, )  
Individually, RANDALL FISHER, )  
Individually, DONALD ANDERSEN, )  
Individually, and GERALD MICHAUD, )  
Individually, )  
 )  
Defendants. )

No. 98-CV-192 H (E)

**ENTERED ON DOCKET**  
**JUN 28 1999**  
DATE \_\_\_\_\_

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, her attorney of record, and Defendants' counsel, and would show the Court that this matter has been resolved and, therefore, moves the Court for an Order Of Dismissal With Prejudice.

*Lannis Temple*

\_\_\_\_\_  
Lannis Temple  
Attorney for Plaintiff

*Mark Collmer*

\_\_\_\_\_  
Mark Collmer  
Attorney for Plaintiff

*John S. Gladd*

\_\_\_\_\_  
John S. Gladd  
Attorney for Defendants

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KW

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

KYLE WHITE, )  
)  
Plaintiff, )  
)  
v. )  
)  
STATE FARM MUTUAL )  
AUTOMOBILE INSURANCE )  
COMPANY, an Illinois corporation, )  
)  
Defendant. )

No. 98-CV-0805-K(M)

FILED

JUN 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

~~JUN 9 1999~~  
DATE JUN 28 1999

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, his attorney of record, and Defendant's counsel, and advise the Court that this matter has been compromised and settled, and move the Court for an Order Of Dismissal With Prejudice.

  
\_\_\_\_\_  
Kyle White, Plaintiff

  
\_\_\_\_\_  
Richard Carpenter  
Attorney for Plaintiff

  
\_\_\_\_\_  
Paul T. Boudreaux  
Attorney for Defendant

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OJ

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

**FILED**

JUN 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JESSICA A. MOORE,  
Plaintiff,

vs.

BARRETT RESOURCES CORPORATION,  
ASSOCIATED RESOURCES, INC., and  
BRIAN L. RICE,  
Defendants.

Case No. 99-CV-0017 H (J)

ENTERED ON DOCKET

DATE JUN 28 1999

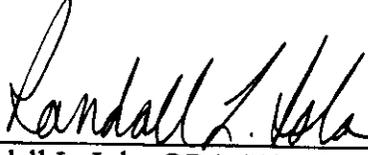
***STIPULATION OF DISMISSAL WITH PREJUDICE OF ALL CLAIMS BY AND  
BETWEEN PLAINTIFF AND BARRETT RESOURCES CORPORATION***

It is hereby stipulated and agreed by and between Plaintiff, Jessica A.A. Moore, and the Defendant, Barrett Resources Corporation, through their respective legal counsel, that all claims and causes of action by and between Plaintiff, Jessica A.A. Moore, and Defendant, Barrett Resources Corporation, in this action be fully and finally dismissed with prejudice, because all matters in controversy for which said claims and causes of action were brought have been fully compromised and settled. Plaintiff and Defendant, Barrett Resources Corporation shall each bear their own costs and attorney fees incurred in this action.

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Respectfully submitted,

By 

Randall L. Iola, OBA #13085  
Law Office of Randall L. Iola, P.L.L.C.  
First Place Tower  
15 East Fifth Street, Ste. 2750  
Tulsa, Oklahoma 74103-4334

- and -

R. Tom Hillis, OBA #12338  
Titus, Hillis and Reynolds  
First Place Tower  
15 East Fifth Street, Ste. 2750  
Tulsa, Oklahoma 74103-4334

Counsel for the Plaintiff,  
Jessica A.A. Moore

By 

Randall J. Snapp, OBA #11169  
Crowe & Dunlevy  
321 S. Boston, Ste. 500  
Tulsa, Oklahoma 74103

Counsel for the Defendant, Barrett  
Resources Corporation

## CERTIFICATE OF MAILING

This is to certify that on the 28th day of June, 1999, a true and correct copy of the above and foregoing was mailed, via U.S. Postal Service, postage prepaid, to:

Randall L. Iola  
Law Office of Randall L. Iola, P.L.L.C.  
First Place Tower  
15 East Fifth Street, Ste. 2750  
Tulsa, Oklahoma 74103-4334

(Via Hand Delivery)

R. Tom Hillis  
Titus, Hillis & Reynolds  
15 East Fifth Street, Ste. 2750  
Tulsa, Oklahoma 74103-4334

(Via Hand Delivery)

Mr. James K. Deuschle  
525 South Main Street, Ste. 209  
Tulsa, Oklahoma 74103-4503

(Via U.S. Mail)

Mr. Danny P. Richey  
320 S. Boston, Ste. 1119  
Tulsa, Oklahoma 74103

(Via U.S. Mail)



---

Randall J. Snapp

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

PATRICIA HURST, )  
)  
Plaintiff, )  
)  
vs. )  
)  
COMMERICAL FINANCIAL SERVICES )  
)  
Defendant. )

ENTERED ON DOCKET  
JUN 28 1999  
DATE \_\_\_\_\_

No. 98-CV-515-K ✓

**FILED**  
JUN 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

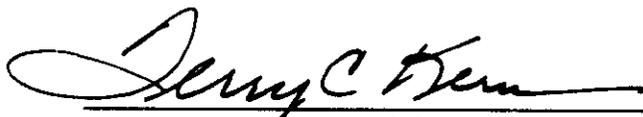
ADMINISTRATIVE CLOSING ORDER

The Court has been advised that the defendant in this action has filed for bankruptcy. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records without prejudice pending the bankruptcy proceedings involving defendant, Commercial Financial Services, Inc.

The parties are directed to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may re-open this matter, if necessary, to obtain a final determination of this litigation.

ORDERED this 28 day of June, 1999.



TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

AMERICAN STATES INSURANCE COMPANY, )  
)  
)  
)  
Plaintiffs, )  
)  
v. )  
)  
WAECHTER HAY & GRAIN, INC., and )  
RICKY T. DAVIS, )  
)  
Defendants. )

ENTERED ON DOCKET

DATE JUN 28 1999

Case No. 98-C-655-K ✓

**FILED**

JUN 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Pursuant to the stipulation of the parties, this action is hereby dismissed in its entirety without prejudice.

IT IS SO ORDERED this 28 day of June, 1999.

  
TERRY C. KERN, Chief  
United States District Judge

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

CHEYENNE-ARAPAHO TRIBE  
OF OKLAHOMA, et al.,

Plaintiffs,

vs.

DEPARTMENT OF JUSTICE,

Defendant.

ENTERED ON DOCKET

DATE JUN 28 1999

No. 98-CV-862-K ✓

**FILED**

JUN 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that the parties in this case have reached a settlement. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records without prejudice pending the outcome of the appeal of this case to the Tenth Circuit Court of Appeals.

The parties are directed to notify the Court of the resolution of this case on appeal, within ten (10) days thereafter, so that the Court may re-open this matter, if necessary, to obtain a final determination of this litigation.

ORDERED this 28 day of June, 1999.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

RANDY BUSSEY, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
HENSON TRANSPORT, INC., et al.)  
 )  
Defendants. )

ENTERED ON DOCKET

DATE JUN 28 1999

No. 98-CV-941-K ✓

**FILED**

JUN 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 28 day of June, 1999.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

23

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

DOREEN JANICE CURRY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
COMMERICAL FINANCIAL SERVICES )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE JUN 28 1999

No. 98-CV-580-K

**FILED**

JUN 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

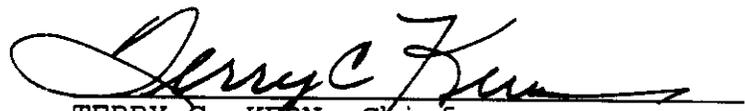
ADMINISTRATIVE CLOSING ORDER

The Court has been advised that the defendant in this action has filed for bankruptcy. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records without prejudice pending the bankruptcy proceedings involving defendant, Commercial Financial Services, Inc.

The parties are directed to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may re-open this matter, if necessary, to obtain a final determination of this litigation.

ORDERED this 28 day of June, 1999.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

DEAN L. BLANTON,  
SSN: 513-66-6517,

PLAINTIFF,

vs.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

DEFENDANT.

JUN 25 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 98-CV-318-K (M)

ENTERED ON DOCKET

DATE JUN 28 1999

**REPORT AND RECOMMENDATION**

Plaintiff, Dean L. Blanton, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

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<sup>1</sup> Plaintiff's February 8, 1995 application for disability benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held April 16, 1996. By decision dated June 6, 1996, the ALJ entered the findings which are the subject this appeal. The Appeals Council affirmed the findings of the ALJ on March 5, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born June 14, 1961, and was 34 years old at the time of the administrative hearing. [R. 57, 424-425]. He has completed high school and four years of college and formerly worked as a poultry plant worker and battery assembler. [R. 79-82]. Plaintiff claims to be disabled due to manic depression and bipolar disorder. [R. 70, 115]. The ALJ determined that Plaintiff has a bipolar disorder which limits him to work activity with no more than moderate stress and with minimal contact with his co-workers and supervisors. [R. 18]. He found that Plaintiff was precluded from returning to his past relevant work (PRW) due to the limitations imposed by his impairment. [R. 21]. Based upon the testimony of a vocational expert (VE), the ALJ found that work exists in significant numbers in the economy which Plaintiff can perform with those restrictions. [R. 21-23]. He found, therefore, that Plaintiff is not disabled under the Social Security Act. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is

disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff broadly asserts that the ALJ's determination is not supported by substantial evidence. In several specific complaints about the ALJ's determination, Plaintiff contends the ALJ's assessment of Plaintiff's residual functional capacity (RFC) is contrary to the evidence in the record. He also attacks the ALJ's credibility determination, alleging that the ALJ's conclusion that Plaintiff had a secondary gain motive in filing his claim was arbitrary and in error. For the following reasons, the court recommends the decision of the ALJ and the denial of benefits by the Commissioner be affirmed.

#### **Medical Background**

According to the record, Plaintiff began experiencing behavioral problems in his teen years. [R. 203, 338]. In 1986 he was treated and released at Eastern State Hospital, Vinita, Oklahoma, with a diagnosis of brief reactive psychosis. [R. 126, 131]. He was again admitted to Eastern State Hospital in November 1991 for acute symptoms of psychosis. [R. 124-127]. Plaintiff was treated by Twilah A. Fox, M.D., May 1993 to July 1993. [R. 338-340]. She prescribed Lithium<sup>2</sup> during that time period. [R. 341]. A letter dated May 9, 1994 from Dr. Fox indicated that, as of that date, Plaintiff was being prescribed Prolixin.<sup>3</sup>

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<sup>2</sup> Lithium is indicated in the treatment of manic episodes of manic-depressive illness. *Physician's Desk Reference*, 49th Ed. 1995, p. 2373

<sup>3</sup> Prolixin is indicated in the management of manifestations of psychotic disorders. *Physician's*  
(continued...)

Plaintiff commenced treatment at Grand Lake Mental Health Center (GLMHC) on July 27, 1995. [R. 158]. He attended case management group meetings on a monthly basis and was noted to be stable, happy, appropriate and conversing well. [R. 146, 150]. On December 29, 1995, Plaintiff was recorded as stating he "doesn't want to work but wife wants him to if SSDI not approved, yet his plan is to try for vet disability if not approved for SSDI. When asked why he is disabled he states he doesn't handle stress well, but feels no need to work on improving this. Refuses individual therapy." [R. 143]. On January 26, 1996, Plaintiff was reported to be seeking medication and minimal contact treatment. [R. 190]. He refused psychological testing and therapy until advised to either participate in recommended treatment or get services elsewhere. *Id.* He was evaluated by Jim Hulse, MHR, and Randy Jarman, Ph.D., on February 29, 1996, and was diagnosed with bipolar disorder, personality disorder, and:

Problems related to the social environment: general inability to conform with regard to others expectations. Educational problems: in need of possible career counseling or placement as well as possible vocational rehabilitation. Occupational problems: inability to maintain gainful employment for a significant period of time. Economic problems: economic hardship. Problems with access to health care services: unable to secure independent transportation to and from health care facilities.

[R. 205]. Treatment at Grand Lake Mental Health Center was recommended as well as possible referral to vocational rehabilitation for retraining or career counseling. *Id.*

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<sup>3</sup> (...continued)  
*Desk Reference*, 49th Ed. 1995, p. 526.

After Plaintiff missed his March 7, 1996 appointment, a GLMHC counselor's note indicated that Plaintiff was asked to bring in his list of expenses and talk with the manager regarding payment for his treatment. [R. 136]. He appeared at his rescheduled appointment on March 12, 1996 without the list and was again told what he was responsible for and given options. *Id.* Plaintiff stated at that time that he wanted to keep coming to the agency because he got his meds. cheaper there but was told by the counselor that he was not seen as disabled. Plaintiff's counselor commented that "often work is very beneficial." Plaintiff stated he couldn't work because "it would mess up chances to get SSDI." *Id.* The counselor noted also, Plaintiff's contradictory statement that he would be willing to work (maybe just part-time) if "they didn't pressure him and let him do what he wanted." *Id.* This was the last time Plaintiff was seen at GLMHC and, on April 2, 1996, Plaintiff was discharged and "referred to Dr. Bland (his choice)." [R. 132-133].

A one page letter signed by F. Rollin Bland, M.D., on January 26, 1998, indicates that Plaintiff was seen on May 24, 1996, for a refill prescription of his antidepressant medication; that he was next seen on May 21, 1997, again for renewal of the medication and then again on July 8, 1997, for a disability statement to defer payment of a student loan. [R. 411]. Dr. Blanton wrote that Plaintiff's condition overall is moderately controlled with medication and a low stress lifestyle and that he should be considered totally unemployable. *Id.*

### Residual Functional Capacity (RFC)

The first three parts of the complaint raised by Plaintiff against the Commissioner's decision essentially address the ALJ's assessment of Plaintiff's residual functional capacity (RFC).<sup>4</sup> In the first sentence, Plaintiff alleges that the ALJ reached his determination "arbitrarily" and that the RFC is "contrary to the evidence in the record." The only support he offers for this contention is his testimony that, in the past, requests from supervisors had caused him stress and created animosity between him and his supervisors. [Plaintiff's Brief at p. 2, R. 442]. However, as noted by the ALJ, none of Plaintiff's treating sources placed limitations on his activities that would preclude any and all work activity. [R. 20]. In fact, as the ALJ pointed out, Plaintiff had been encouraged "to consider at least a trial work period" during his treatment period at GLMHC. [R. 143]. There is ample evidence in the record that Plaintiff disregarded the advice of his counselors on methods of treatment designed to overcome or compensate for his bipolar disorder and elected to stay unemployed. The ALJ discussed the evidence which he relied upon in assessing Plaintiff's RFC, including the medical evidence. Contrary to Plaintiff's contention, the court finds the ALJ's assessment of Plaintiff's RFC was not arbitrary but was based upon sufficient evidence in the record.

Plaintiff next complains that the jobs identified by the vocational expert (VE) require some superficial interaction with supervisors and coworkers. He implies that

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<sup>4</sup> Residual functional capacity is an assessment, based upon all of the relevant evidence, of what the claimant can still do despite his/her limitations. 20 C.F.R. § 404.1545.

his limitations would eliminate these jobs on that basis. Plaintiff points to no evidence that he was precluded from any work that requires no more than a superficial interaction with coworkers or supervisors, and the court finds none in the record. On the other hand, there is ample evidence in the record to support the ALJ's finding that Plaintiff is able to perform the jobs identified by the VE as available for a person with Plaintiff's RFC.

Plaintiff also contends the ALJ's conclusion that Plaintiff could remain attentive and responsive in a work setting and could carry out work assignments satisfactorily with the limitations indicated was "incorrect." For support, he points to his testimony that he was terminated from employment "for his inability to cope with the stress of the line work or accept the demands placed on him by supervisors." [Plaintiff's brief, p. 3]. Again, Plaintiff points to no other evidence in the record, and the court could find none, that supports this contention. Although Plaintiff refers to his discharge from the National Guard as evidence of a "failed work attempt" the record reveals the official reason given for Plaintiff's discharge was: "Failure to Meet Retention Standards." [R. 221]. The court acknowledges this phrase could be interpreted to mean anything from failure to meet training requirements to failure to meet physical standards. Yet, Plaintiff testified that he had never been demoted in the military. [R. 453-454]. Nor is there is any indication from the voluminous military records produced by Plaintiff that his conduct was ever a concern to his superiors or that he ever received any disciplinary action for failure to accept or perform work demands placed upon him by supervisors in the military.

It appears, from the record, that Plaintiff was discharged from the National Guard after reporting that he had been diagnosed with bi-polar disorder and was receiving treatment for that condition. [R. 225]. Even if this is so, the action of the National Guard does not mandate a finding of disability by the Commissioner. See *Baca v. Department of Health & Human Servs.*, 5 F.3d 476, 480 (10th Cir.1993) (findings by other agencies are entitled to weight and must be considered, but are not binding on the Commissioner); 20 C.F.R. § 404.1504 (another agency's determination is based on different rules, and is not binding on the Society Security Administration). The court finds no merit to Plaintiff's contention that the ALJ's conclusions are "incorrect."

The third part of Plaintiff's disagreement with the ALJ's assessment of his RFC consists of his complaint that the ALJ had no "credible evidence in the medical records to indicate that [Plaintiff's] bi-polar disorder is in remission." [Plaintiff's brief, p. 3]. While this term was not specifically used by the ALJ in the body of his decision, the Psychiatric Review Technique Form (PRT)<sup>5</sup> filled out by the ALJ, contains a category for assessment of affective disorders where the ALJ marked as present: "Other:

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<sup>5</sup> The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. § 1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. § 1520a(d).

Diagnosed with Bi-polar disorder, in remission with treatment."<sup>6</sup> Careful review of the decision of the ALJ, however, reveals that the ALJ actually found that Plaintiff's bipolar disorder was severe enough to interfere more than minimally with his ability to perform work-related activities. [R. 17]. And, in discussing his conclusions regarding Plaintiff's bipolar disorder, the ALJ said: "the claimant has experienced slight limitations in activities of daily living and moderate difficulties in maintaining social functioning. The claimant seldom experiences deficiencies of concentration, persistence, or pace, and has had one or two episodes of deterioration or decompensation." [R. 20].<sup>7</sup> The ALJ also noted that Plaintiff "takes medication to relieve his symptoms, and the Administrative Law Judge is persuaded that the claimant would remain reasonably alert in a work setting." [R. 20]. Although the term "remission with treatment" appears in the PRT form, it is more accurate to say that the ALJ found Plaintiff's bi-polar disorder was "controlled with medication." See *Pacheco v. Sullivan*, 931 F.2d 695, 698 (10th Cir. 1991)(When an impairment can be reasonably controlled with medication or is reasonably amenable to treatment, it cannot serve as a basis for a finding of disability); *Teter v. Heckler*, 775 F.2d 1104, 1107 (10th Cir. 1985); 20 C.F.R. § 404.1530. The ALJ's finding is supported by the

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<sup>6</sup> A PRT was filled out and signed by Dr. Smallwood, a DDS physician on April 24, 1995 with the same comment handwritten in the "other" section. [R. 103].

<sup>7</sup> The Tenth Circuit has ruled that "there must be competent evidence in the record to support the conclusion recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994) (quoting *Woody v. Secretary of Health & Human Servs.*, 859 F.2d 1156, 1159 (3rd Cir. 1988)).

record. The treatment notes reveal that the medication was reported to have considerable benefit [R. 113] and that, with medication, Plaintiff's bipolar disorder was reported to be stabilized [R. 189], to be much better [R. 339], or at the very least, to be moderately controlled [R. 411]. Plaintiff himself testified that, with the medication, his problems with "wild thoughts" are in remission but "it's not helping me to handle the, you know the stress that's related to my condition." [R. 436]. The ALJ made allowances for Plaintiff's problems with stress in assessing his RFC and in his hypothetical to the VE. The Court finds no error by the ALJ in assessing the status of Plaintiff's bi-polar disorder.

#### **Credibility Analysis**

Plaintiff contends the ALJ arbitrarily concluded that Plaintiff has a strong element of secondary gain to his claim. [Plaintiff's Brief, p. 3]. He contends the ALJ was persuaded to accept the evidence provided by GLMHC in reaching his conclusion. He cites his "history of emotional problems dating from 1986" as evidence to the contrary. That Plaintiff has a history of bipolar disorder is not dispositive of this question. And, as stated above, there is no dispute that Plaintiff has a bipolar disorder. At issue is the degree to which the disorder prevents Plaintiff from engaging in any gainful activity. The court agrees the ALJ was persuaded by the abundance of evidence in the record that Plaintiff refused to engage in therapy designed to treat those symptoms which he claimed prevented him from maintaining employment. See Record at 132, (has no treatment goals); R. 136, (states he can't work as it would mess up chances to get SSDI); R. 143, (feels no need to work on improving); R. 190,

(refused psychological testing and therapy); and R. 199, (does not want to become employed at present). The court finds no error on the part of the ALJ in being so persuaded. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in his determination whether the claimant suffers from a disabling impairment. See *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986).

Plaintiff implies he was unable to continue treatment at GLMHC because he was unable to pay for treatment. However, the GLMHC counselor's note indicated that Plaintiff did not follow through with the counselor's attempts to work out payment options. [R. 136]. And, as revealed by the record and Plaintiff's testimony, Plaintiff continued treatment under Dr. Bland after he was discharged from GLMHC. [R. 133, 427]. There is no indication that treatment by Dr. Bland has been restricted to annual reports due to Plaintiff's inability to pay for his services. There is substantial evidence to support the ALJ's finding that Plaintiff elected to forego treatment that was designed to enable him to return to work. The regulations provide that a claimant will not be found disabled if he or she, without good reason, fails to follow prescribed treatment that can restore the ability to work. 20 C.F.R. 416.930(a), (b).

Because the court concludes that there is sufficient evidence in the record to support the ALJ's credibility findings and that the ALJ properly linked his credibility findings to the record, there is no reason to deviate from the general rule to accord deference to the ALJ's credibility determination, see *James v. Chater*, 96F.3d 1341, 1342 (10th Cir. 1996)(witness credibility is province of Commissioner whose judgment is entitled to considerable deference).

Conclusion

The court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that the decision of the Commissioner finding Plaintiff not disabled be AFFIRMED.

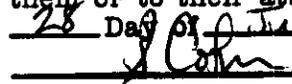
In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from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

DATED this 25<sup>th</sup> Day of JUNE, 1999.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

25 Day of June, 1999.  


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

DEAN L. WINTER, )  
)  
Plaintiff, )  
)  
vs. )  
)  
CHARLES DOWNUM, WAYNE )  
STINNETT, and MICHAEL MUNDAY, )  
)  
Defendants. )

ENTERED ON DOCKET  
DATE JUN 28 1999

No. 98-CV-898-K ✓

FILED  
JUN 28 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Now before the Court is Defendant Munday's Motion to Dismiss (#4) pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE, on the grounds that Plaintiff's Complaint fails to state a claim upon which relief can be granted pursuant to 42 U.S.C. §1983.

**I. Statement of the Case:**

Plaintiff filed her Complaint on November 25, 1998, against the Defendants, alleging jurisdiction pursuant to 42 U.S.C. §1983. Plaintiff's Complaint alleges that Defendants Downum and Stinnett, police officers employed with the City of Claremore, Oklahoma, and the Defendant Michael Munday, a citizen of the State of Oklahoma, violated her constitutionally protected rights, acting under the color of state law.

Plaintiff alleges her minor son was involved in a juvenile delinquency action, and that on or about July 29, 1997, she was arrested by Defendants Downum and Stinnett, and charged with

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intimidating witness Defendant Munday. Plaintiff further claims that Defendant Munday was not endorsed as a witness in her son's juvenile case, but Defendants Downum and Stinnett prepared a report and signed an affidavit stating that Munday was an endorsed witness. Plaintiff asserts she was arrested by the Defendant police officers and subsequently, the criminal complaint against her for intimidating a witness was dismissed by the State of Oklahoma. Plaintiff alleges the actions of the Defendants violated her civil rights, and brings this suit pursuant to 42 U.S.C. §1983.

## **II. 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 (1957); Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 586 (10<sup>th</sup> 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." Ramirez, 41 F.3d at 586; Meade v. Grubbs, 926 F.2d 994, 997 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 1986).

## **III. Discussion:**

Defendant Munday seeks dismissal of this case on the grounds that Defendant Munday's acts or omissions, as alleged, did not occur under color of state law, thus precluding a cause of action

against him pursuant to 42 U.S.C. §1983.<sup>1</sup>

To be liable under §1983, it is fundamental and essential that a defendant must have acted under the color of state law to cause the denial of a federally protected right. Beard v. Boren, 413 F. Supp. 41 (W.D. Okla. 1976); Espinoza v. Rogers, 470 F.2d 1174 (10<sup>th</sup> Cir. 1972). The "under color of state law" requirement is "a jurisdictional requisite for a § 1983 action," Polk County v. Dodson, 454 U.S. 312, 315, 102 S.Ct. 445, 448 (1981). While §1983 creates a federal cause of action, it creates no independently existing substantive civil rights. Rather, the statute is intended to provide only a procedural mechanism through which a plaintiff may recover for violations of federal law by those who were acting under "color of state law." Jojoba v. Chavez, 55 F.3d 488 (10<sup>th</sup> Cir. 1995). The statute is designed to provide protection by those wronged by a misuse of power. Owen v. City of Independence, 445 U.S. 622, 650, 100 S.Ct. 1398, 1415 (1980). Therefore, "the only proper defendants in a Section 1983 claim are those who 'represent [the state] in some capacity, whether they act in accordance with their authority or misuse it.' " Gallagher v. "Neil Young Freedom Concert", 49 F.3d 1442, 1447 (10<sup>th</sup> Cir.1995) (quoting National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191, 109 S.Ct. 454, 461- 62 (1988)).

The Plaintiff's Complaint asserts that Defendant Munday is a "citizen of the State of Oklahoma." Unlike the other named Defendants in this action, Plaintiff has not claimed that Munday is an employee of a government agency, or that he was acting under the color of state law when he allegedly encouraged criminal charges to be filed against the Plaintiff. Plaintiff's only factual basis for the inclusion of Defendant Munday in this lawsuit, in fact, is her belief that he

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<sup>1</sup>Although Defendant has presented several theories in support of his Motion to Dismiss, the Court finds the lack of facts alleged to support a §1983 claim to be dispositive of the issue. Therefore, the Court will not reach the alternative theories for dismissal.

"caused a complaint to be filed in District Court." Plaintiff makes no claim or further allegations in support of the proposition that Defendant Munday's actions were performed under the color of state law, and thus, in violation of 42 U.S.C. §1983.

Plaintiff's only response to Defendant Munday's Motion to Dismiss focuses on the Court's discretion to hear state law claims in Federal Court when they arise out of the same core set of facts which give rise to the federal cause of action. The Plaintiff contends that the Court can hear her case against Defendant Munday pursuant to the doctrine of pendent jurisdiction.

The Plaintiff has failed to plead facts which demonstrate the violation of any right guaranteed by state law which would be concurrent with the federal claim before this Court. Pendent jurisdiction is only applicable where there is alleged a violation of state law arising out of the same body of facts which gave rise to the federal cause of action. United Mine Workers v. Gibbs, 383 U.S. 715, 725-26, 86 S.Ct. 1130 (1966). Plaintiff has alleged no state law claim in this case. Her sole stated cause of action is asserted pursuant to 42 U.S.C. §1983. Her Response to the Defendant's Motion to Dismiss all but concedes in plain language that Defendant Munday was not acting under the color of state law. Thus Plaintiff introduces the doctrine of pendent jurisdiction in hopes of convincing the Court to keep Munday in this case. The Plaintiff's theory of pendent jurisdiction is misplaced, and Plaintiff has not plead facts or claims sufficient to name Michael Munday as a defendant in this action.

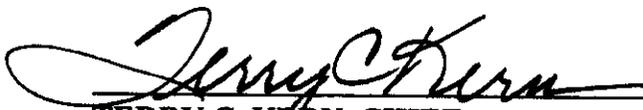
The Court finds that Defendant Munday is not a viable party to this lawsuit. He is not a government official, but a private citizen of the State of Oklahoma. He committed no acts or omissions under the "color of state law," and no cause of action pursuant to 42 U.S.C. §1983 may be maintained against him. Furthermore, no state cause of action has been alleged which would

allow the Court to exercise pendent jurisdiction, and thus require Defendant Munday to remain a party to this lawsuit. See Lancaster v. Independent School Dist. No. 5, 149 F.3d 1228, 1236 (10<sup>th</sup> Cir. 1998).

**IV. Conclusion:**

The Defendant Munday's Motion to Dismiss (#4) is hereby GRANTED.

ORDERED this 28 day of JUNE, 1999.

A handwritten signature in black ink, appearing to read "Terry C. Kern", is written over a horizontal line.

TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

WILLIAM MICHAEL GREEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CITY OF TULSA, T.P.D. CAPT. GARY )  
 RUDIK, SGT. LES YOUNG, )  
 DET. ALAN PANKE, OFCR. KENT )  
 SCRIBNER, JAMES MOORE, )  
 )  
 Defendants. )

ENTERED ON DOCKET

DATE JUN 28 1999

No. 98-CV-914-K ✓

**F I L E D**

JUN 28 1999

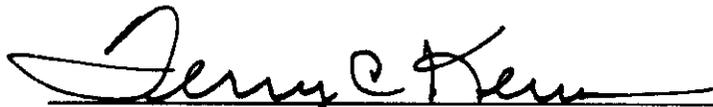
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Before the Court is the Defendants' Motion for Qualified Immunity Defense (#7-1) and Motion to Dismiss (#7-2). This action was filed by the Plaintiff on December 4, 1998, alleging violations of Plaintiff's constitutionally protected rights by the Tulsa Police Department and individual officers. The Defendants (collectively "Officers") filed the currently pending motion to dismiss or for qualified immunity on March 10, 1999. Pursuant to the applicable rule, Plaintiff was due to file a response by March 29, 1999. As of the date of this Order, the Plaintiff has yet to respond to the Defendants' motion, and has not requested leave of this Court for additional time to respond. According to *Local Rule 7.1.C*, the Court has the discretion to deem the matter confessed and enter the relief requested. The Court has nevertheless conducted an independent inquiry, and finds the Defendants' Motion for Qualified Immunity Defense and Motion to Dismiss to be meritorious.

It is hereby ORDERED, the Defendants' Motion for Qualified Immunity Defense (#7-1) and Motion to Dismiss (#7-2) is GRANTED. This case is hereby DISMISSED WITHOUT PREJUDICE.

ORDERED this 28 day of June, 1999.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE JUN 28 1999

NATIONAL OILWELL, L.P., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
INTERFAB, INC., )  
 )  
Defendant. )

No. 98-CV-425-K ✓

**FILED**

JUN 28 1999

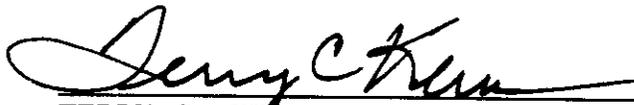
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 28 day of June, 1999.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

dd

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

COY WHITE, )  
)  
Plaintiff, )  
)  
vs. )  
)  
STATE FARM FIRE AND )  
CASUALTY COMPANY, )  
)  
Defendant. )

Case No. 98-CV-711-K (J)

ENTERED ON DOCKET

DATE JUN 28 1999

**F I L E D**

JUN 28 1999 SA

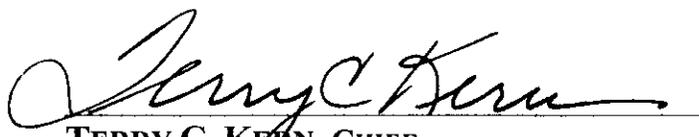
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before the Court on the parties' Joint Stipulation of Dismissal with Prejudice. Upon due consideration, it is hereby

**ORDERED, ADJUDGED, AND DECREED** that the above entitled action is hereby dismissed with **prejudice** to refiling.

Dated this 28 day of June, 1999.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

KR

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

**FILED**

JUN 25 1999

RUFORD HENDERSON, et al.,

Plaintiffs,

vs.

AMR CORPORATION, AMERICAN  
AIRLINES, INC. and THE SABRE  
GROUP, INC.,

Defendants.

ENTERED ON DOCKET Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DATE JUN 25 1999

Case No. 97-CV-457-K (E)

DATE \_\_\_\_\_  
ENTERED ON DOCKET

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff G. A. (Ann ) Nero and Defendants  
The SABRE Group, Inc., American Airlines, Inc. and AMR Corporation (collectively  
"Defendants") by and through their attorneys of record, hereby jointly stipulate to the  
dismissal of the above-styled action, with prejudice, each party to bear their own costs  
and attorneys' fees incurred herein.

MARTIN & ASSOCIATES

By: \_\_\_\_\_

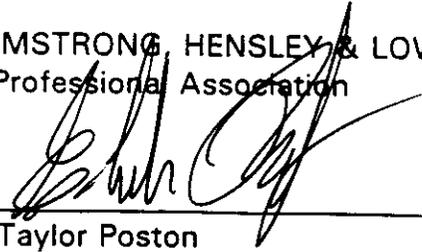
Charles M. Fox  
MARTIN & ASSOCIATES  
403 S. Cheyenne Avenue  
Tulsa, Oklahoma 74103  
(918) 587-9000

Attorneys for Plaintiffs

CT5

105

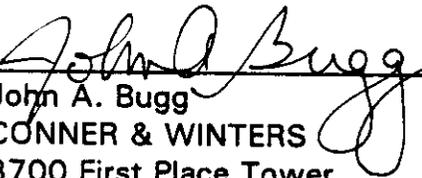
ARMSTRONG, HENSLEY & LOWE,  
A Professional Association

By: 

E. Taylor Poston  
ARMSTRONG, HENSLEY & LOWE  
1401 South Cheyenne  
Tulsa, Oklahoma 74119-3440  
(918) 582-2500

Attorneys for Plaintiff Ann Nero

DAVID R. CORDELL, OBA #11272  
JOHN A. BUGG, OBA #13665

By: 

John A. Bugg  
CONNER & WINTERS  
3700 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4344  
(918) 586-5711  
(918) 586-8547 (facsimile)

Attorneys for Defendants,  
AMERICAN AIRLINES, INC.,  
THE SABRE GROUP, INC. and  
AMR CORPORATION

OF COUNSEL:

CONNER & WINTERS  
3700 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4344

KR

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

**FILED**

JUN 25 1999

RUFORD HENDERSON, et al.,

Plaintiffs,

vs.

AMR CORPORATION, AMERICAN  
AIRLINES, INC. and THE SABRE  
GROUP, INC.,

Defendants.

ENTERED ON DOCKET Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DATE JUN 25 1999

Case No. 97-CV-457-K (E)

DATE \_\_\_\_\_  
ENTERED ON DOCKET

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff G. A. (Ann ) Nero and Defendants The SABRE Group, Inc., American Airlines, Inc. and AMR Corporation (collectively "Defendants") by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

MARTIN & ASSOCIATES

By: \_\_\_\_\_

Charles M. Fox  
MARTIN & ASSOCIATES  
403 S. Cheyenne Avenue  
Tulsa, Oklahoma 74103  
(918) 587-9000

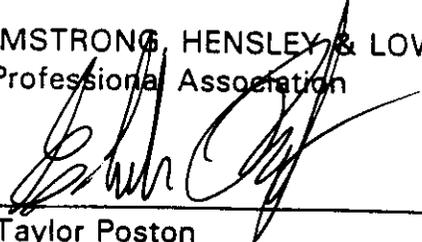
Attorneys for Plaintiffs

C15

*[Handwritten mark]*

ARMSTRONG, HENSLEY & LOWE,  
A Professional Association

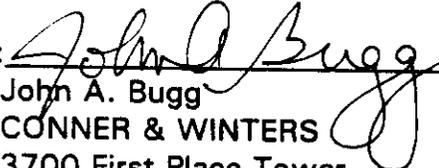
By: \_\_\_\_\_

  
E. Taylor Poston  
ARMSTRONG, HENSLEY & LOWE  
1401 South Cheyenne  
Tulsa, Oklahoma 74119-3440  
(918) 582-2500

Attorneys for Plaintiff Ann Nero

DAVID R. CORDELL, OBA #11272  
JOHN A. BUGG, OBA #13665

By: \_\_\_\_\_

  
John A. Bugg  
CONNER & WINTERS  
3700 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4344  
(918) 586-5711  
(918) 586-8547 (facsimile)

OF COUNSEL:

CONNER & WINTERS  
3700 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4344

Attorneys for Defendants,  
AMERICAN AIRLINES, INC.,  
THE SABRE GROUP, INC. and  
AMR CORPORATION

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

JULIA WHITETREE,  
SSN: 447-48-0528,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE JUN 25 1999

Case No. 98-CV-461-H(M)

**F I L E D**

JUN 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 9) recommending that this Court affirm the decision of the Commissioner denying Plaintiff's application for Social Security benefits. Plaintiff has filed an objection to the Report and Recommendation and the Defendant has responded to Plaintiff's objection.

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

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

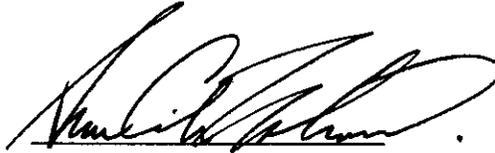
Fed. R. Civ. P. 72(b).

The Magistrate Judge recommended that the Court affirm the Commissioner's determination that Plaintiff is not disabled. Plaintiff objects, asserting that the Administrative Law Judge's findings are not supported by the evidence adduced at the hearing.

Based upon a careful review of the Report and Recommendation of the Magistrate Judge, Plaintiff's objection, Defendant's response, and the record in this matter, the Court finds that the Report and Recommendation affirming the Commissioner's decision to deny benefits (Docket # 9) should be adopted.

IT IS SO ORDERED.

This 24<sup>TH</sup> day of June, 1999.



Sven Erik Holmes  
United States District Judge

MS

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NIKITA McELWEE, )  
Plaintiff, )  
vs. )  
REDLEE, INC. )  
a Texas Corporation, )  
and )  
WILLIAMS HEADQUARTERS )  
BUILDING COMPANY )  
a Delaware Corporation, )  
Defendants. )

Case No. 98-CV-951 B (E) ✓

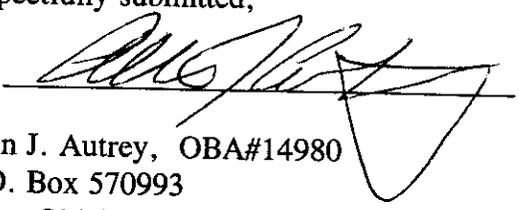
ENTERED ON DOCKET

DATE JUN 25 1999

JOINT STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Nikita McElwee, and Defendant, Williams  
Headquarters Building Company, by and through their undersigned attorneys and  
pursuant to Fed. R. Civ. P. 41(a)(1)(ii) hereby jointly advise the Court that the Plaintiff  
dismisses his claims, with prejudice, contained in the above-captioned lawsuit, against  
the Defendant Williams Headquarters Building Company with each party to bear their  
own costs and attorneys' fees.

Respectfully submitted,

By: 

Allen J. Autrey, OBA#14980  
P. O. Box 570993  
Tulsa, Oklahoma 74157  
(918) 582-0101

Attorney for Plaintiff

9/5

*Connie Lee Kirkland*

Connie Lee Kirkland - OBA 14262

Mark A. Waller, - OBA 14831

One Williams Center, Suite 4100

Tulsa, Oklahoma 74172

915-573-3556

Attorneys for Defendant Williams  
Headquarters Building Company

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 25<sup>th</sup> day of June, 1999, a true and correct copy of the above and foregoing document was sent U.S. Mail, postage pre-paid, to:

REDLEE, Inc.  
5882 S. 129<sup>th</sup> E. Ave.  
Tulsa, Oklahoma 74104

Connie Lee Kirkland  
Connie Lee Kirkland

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

**FILED**

JUN 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STEVEN DOUGLAS OWEN, )

Petitioner, )

vs. )

MARTY SIRMONS, Warden, )

Respondent. )

Case No. 97-CV-1044-E

ENTERED ON DOCKET  
DATE JUN 25 1999

**JUDGMENT**

This matter came before the Court upon the Application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (Docket #1) of the Petitioner, Steven Douglas Owen. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED THIS 23<sup>d</sup> DAY OF JUNE, 1999.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**FILED**  
JUN 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STEVEN DOUGLAS OWEN, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 MARTY SIRMONS, Warden, )  
 )  
 Respondent. )

Case No. 97-CV-1044-E

ENTERED ON DOCKET  
DATE JUN 25 1999

ORDER

Now before the Court is the application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (Docket #1) of the Petitioner, Steven Douglas Owen.

Factual Background

On September 17, 1990, Petitioner entered a plea of guilty and was convicted of Second Degree Burglary in Creek County District Court, Case No. CRF-90-84. He was sentenced to ten years imprisonment, to serve two years in the custody of the Oklahoma Department of Corrections and eight years on probation. On January 6, 1995, the DOC filed an offense report charging Petitioner with escape. The DOC disciplinary committee revoked all of petitioner's earned credits after finding him guilty of escape.

On December 4, 1996, Petitioner submitted his Request to Staff Member, asking that Dianne McGee, his Unit Manager, recommend restoration of his previously revoked earned credits. On December 11, 1996, Mrs. McGee responded and advised Petitioner that he was "not eligible for restoration in accordance with 060211-03, Addendum 03, Inmate Sentence Administration." Petitioner appealed the decision to the Warden and to the Director of the DOC, arguing that the

14

refusal to restore his revoked earned credits constituted an *ex post facto* violation. The decision was affirmed by the Action Warden and the Deputy Director.

After having had relief denied in state court, Petitioner filed this habeas corpus petition on November 13, 1997, arguing that (1) "the Oklahoma State courts have not been open to this Petitioner on equal terms as other citizens of the state to vindicate basic fundamental rights" in violation of the 1<sup>st</sup> and 14<sup>th</sup> Amendments, (2) "the Petitioner . . . was denied Due Process and Equal Protection of the Law when he was denied the benefit of State Rules that have been allowed to benefit other similarly situated inmates," and (3) his incarceration is in violation of the Eight and Fourteenth Amendments to the Constitution.

#### Legal Analysis

In his first allegation of error, Petitioner argues that he was deprived of due process because his Unit Manager found that he was not eligible for restoration of lost earned credits without allowing the issue to be considered by the unit classification committee. In making this argument, Petitioner relies on the language of OP-060211, which provides: "Upon recommendation by the unit treatment team facility classification committee, the facility/district head may grant restoration of last earned credit under the following conditions."

Petitioner's argument has no merit. He provides no authority, and the Court is not aware of any, for his assertion that he is entitled to consideration by a committee. Specifically, the statute allowing restoration of earned credits does not require committee review of every request. Okla.Stat.tit. 57, §138 provides: "Lost credits may be restored by the warden or superintendent upon approval of the classification committee." Moreover, Petitioner does not deny that a policy is in place, and was relied on by Mrs. McGee, which provides there will be no restoration for lost earned credits due

to escape.

Petitioner's second and third allegation of error are premised on his allegation that the regulations regarding restoration of lost earned credits are not being applied evenhandedly, and that, in fact, black inmates are being given restoration of lost earned credits, while he, a white inmate is not. He claims that he is being denied equal protection and due process and that his sentence is excessive because of the failure to restore the lost earned credits. With respect to his due process claim, the Court finds that it must fail because no liberty interest is implicated due to the discretionary nature of the decision to restore lost earned credits. See Okla. Stat. tit. 57, §138., Templeman v. Gunter, 16 F.3d 367 (1994). Moreover, under the policies of the DOC, Owen is not entitled to restoration of lost earned credits because he was found guilty of escape.

With respect to equal protection and excessiveness of sentence, Petitioner argues that "similarly situated" inmates who are black have had lost earned credits restored. As with the due process claim, the analysis of Templeman v. Gunter is dispositive. The burden is on Petitioner to "prove that the distinction between himself and other inmates was not reasonably related to some legitimate penological purpose." Templeman, 16 F.3d at p. 371 (citing Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987)). In the context of a discretionary decision, such as restoration of earned credits, it is baseless to claim that other inmates are similar in every relevant respect. Id.

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (Docket #1) is denied.

IT IS SO ORDERED THIS 23<sup>RD</sup> DAY OF JUNE, 1999.

*James O. Ellison*

---

JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**FILED**

JUN 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RHONDA OLSEN, )  
)  
Plaintiff, )  
)  
vs. )  
)  
BW/IP INTERNATIONAL and )  
FLOWSERVE, INC., )  
)  
Defendants. )

Case No. 98-CV-631-H(J)

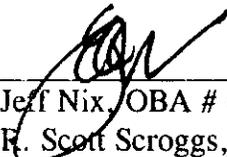
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DATE JUN 25 1999

**JOINT STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE**

The parties, pursuant to Fed. R. Civ. P. 41(a)(1)(ii) agree that the above-styled case may be dismissed with prejudice and that each party will bear its own costs and attorneys fees.

NIX & SCROGGS  
Attorneys for Plaintiff  
RHONDA OLSEN  
601 South Boulder, Suite 610  
Tulsa, Oklahoma 74119  
(918) 587-3193

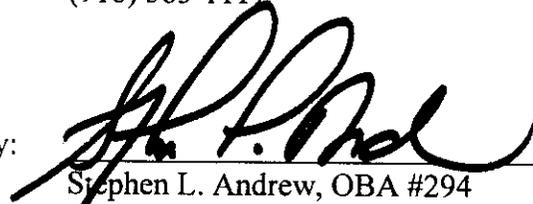
By:

  
\_\_\_\_\_  
Jeff Nix, OBA # 6688  
R. Scott Scroggs, OBA #16889

-and-

STEPHEN L. ANDREW & ASSOCIATES  
A Professional Corporation  
Attorneys for Defendants  
BW/IP INTERNATIONAL, INC. And  
FLOWSERVE CORPORATION  
125 West Third Street  
Tulsa, Oklahoma 74103  
(918) 583-1111

By:

A handwritten signature in black ink, appearing to read "S.L. Andrew", written over a horizontal line.

Stephen L. Andrew, OBA #294  
D. Kevin Ikenberry, OBA #10354

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

DANIEL W. STIERWALT,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, an Illinois  
corporation doing business in the State of  
Oklahoma,

Defendant.

**FILED**

JUN 25 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-320-J ✓

ENTERED ON DOCKET

DATE JUN 25 1999

**ORDER OF DISMISSAL**

THIS MATTER comes before the Court on the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 24 day of June, 1999.



SAM A. JOYNER  
UNITED STATES MAGISTRATE JUDGE

Prepared by:

JOHN A. GLADD OBA #3398  
Attorney for Defendant  
2642 East 21<sup>st</sup> Street, Suite 150  
Tulsa, Oklahoma 74114-1739  
Phone: 918-744-5657 \* Fax: 918-742-1753

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

FILED

JUN 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

COY WHITE, )  
)  
Plaintiff, )  
)  
vs. )  
)  
STATE FARM FIRE AND )  
CASUALTY COMPANY, )  
)  
Defendant. )

Case No. 98-CV-711-K (J)

ENTERED ON DOCKET

DATE JUN 24 1999

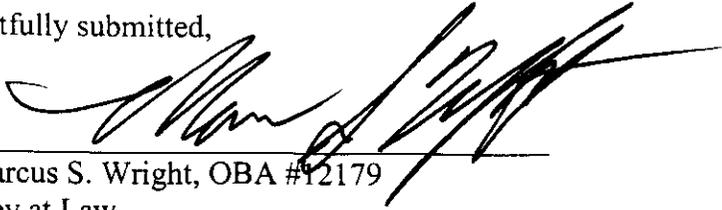
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the parties, plaintiff Coy White and defendant State Farm Fire and Casualty Company, and pursuant to FED. R. CIV. P. 41(a)(1)(ii) hereby stipulate to dismiss the above-entitled action, and any and all causes of action arising therefrom, **with prejudice** to refiling, and with each party to bear their own costs and attorney fees.

20

015

Respectfully submitted,

BY: 

Marcus S. Wright, OBA #12179

Attorney at Law  
4815 South Harvard, Suite 447  
Tulsa, OK 74135  
(918) 749-5136

Attorneys for Plaintiff, Coy White

**STAUFFER, RAINEY, GUDGEL  
& HATHCOAT, P.C.**

BY: 

NEAL E. STAUFFER, OBA #13168  
KENT B. RAINEY, OBA #14619

1100 Petroleum Club Building  
601 S. Boulder  
Tulsa, Oklahoma 74119  
(918) 592-7070

Attorneys for Defendant,  
State Farm Fire and Casualty Company.

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 24<sup>th</sup> day of June, 1999, a true and correct copy of the above and foregoing instrument was mailed with postage prepaid thereon, to the following:

Marcus S. Wright, Esq.  
Attorney at Law  
4815 South Harvard, Suite 447  
Tulsa, Oklahoma 74135  
(918) 749-5136

Attorney for Plaintiff, Coy White.



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

**FILED**  
JUN 24 1999

JESSICA A.A. MOORE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BARRETT RESOURCES CORP., )  
 ASSOCIATED RESOURCES, INC., and )  
 BRIAN L. RICE, )  
 )  
 Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-17-H ✓

ENTERED ON DOCKET  
DATE JUN 24 1999

ADMINISTRATIVE CLOSING ORDER

The parties having entered into settlement negotiations, 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.

The parties are ordered to notify the Court within sixty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that sixty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.  
This 23<sup>RD</sup> day of June, 1999.

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

29

**FILED**  
JUN 23 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

RODERICK LEE BRYANT, )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 BUDDY'S PRODUCE OF TULSA, )  
 L.L.C., an Oklahoma Limited )  
 Liability Company, )  
 Defendant. )

ENTERED ON DOCKET  
DATE JUN 24 1999

Case No. 98-CV-0322 B (J) ✓

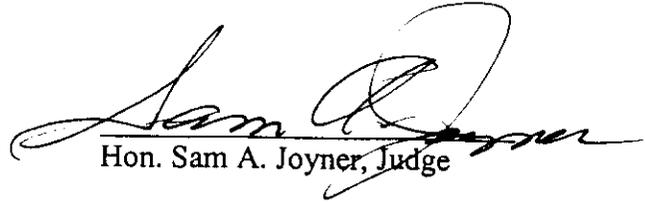
ORDER OF JUDGMENT

Now on this 23 day of June, 1999, plaintiff appearing by his attorney, H. I. Aston and the defendant appearing not but having consented to this Order of Judgment being entered as evidenced by the signature of defendant's attorney, Kenneth Dewbre, Whereupon it was announced to the Court that the defendant, Buddy's Produce of Tulsa, L. L. C., an Oklahoma Limited Liability Company has consented to this judgment being entered and after examination of the file and being advised in the premises finds that the Plaintiff, Roderick Lee Bryant is entitled to judgment against the defendant, Buddy's Produce of Tulsa, L. L. C., an Oklahoma Limited Liability Company , in the amount of \$2,005.08 plus Cost expended in the amount of \$161.04 and reasonable attorney fee in the amount of \$2,500.00.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Roderick Lee Bryant, is granted judgment against the defendant, Buddy's Produce of Tulsa, L. L. C., an Oklahoma Limited Liability Company in the

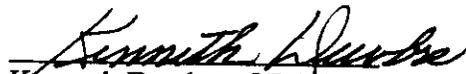
7

amount of \$2005.08 plus Cost of \$161.04 and Attorney Fees of \$2,500.00 for all of which let execution be issued.

  
Hon. Sam A. Joyner, Judge

Approved as to substance and form:

  
H. I. Aston OBA #362  
Attorney for Plaintiff  
3242 East 30<sup>th</sup> Place  
Tulsa, Oklahoma 74114-5831  
(918) 749-8523

  
Kenneth Dewbre, OBA #2331  
Attorney for Defendant  
2220 Shadowlake Drive  
Oklahoma City, Oklahoma 73154  
(405) 691-5665

CERTIFICATE OF MAILING

I hereby certify that on the \_\_\_\_\_ day of June, 1999, I mailed a true and correct copy of the above and foregoing Order of Judgment to BUDDY'S PRODUCE OF TULSA, L.L.C., an Oklahoma Limited Liability Company, c/o Ms. Anita Stover, 1307 S.W. Second Street, Oklahoma City, Oklahoma 73108, with sufficient postage thereon fully prepaid.

---

KP

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

FILED

JUN 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SUSAN J. LONG,

Plaintiff,

v.

MAPCO, INC.,

Defendant.

CASE NO.

98-CV-0520K(M)

ENTERED ON DOCKET

DATE JUN 24 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, have reached a mutually satisfactory settlement regarding Plaintiff's claims herein. Therefore, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties stipulate that this action should be dismissed with prejudice with each of the parties to bear their own costs and attorneys' fees.

Dated this 20<sup>th</sup> day of May, 1999

Respectfully submitted,

MALLOY & MALLOY, INC.

By:   
Patrick J. Malloy, III  
James R. Huber  
1924 South Utica, Suite 810  
Tulsa, OK 74104

- and -

CIT

22

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

By:   
J. Patrick Cremin, OBA#2013  
William D. Fisher, OBA#17621  
320 South Boston, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0594 - telephone  
(918) 594-0505 - telecopy

-- and --

Connie Lee Kirkland, OBA#14262  
Mark A. Waller, OBA# 14831  
The Williams Companies, Inc.  
One Williams Center, Suite 4100  
Tulsa, Oklahoma 74172  
(918) 588-3556 - telephone  
(1-800) 479-6703 - telecopy

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

**FILED**

JUN 24 1999 *AR*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHET BAKER ENTERPRISES, L.L.C., )  
an Oklahoma limited liability company, )  
CAROL A. BAKER, DEAN BAKER, )  
PAUL BAKER and MELISSA BAKER, )  
individual Oklahoma citizens, )

Plaintiffs, )

vs. )

PARAMOUNT PICTURES CORPORATION, )  
a Delaware corporation, )

Defendant. )

Case No. 99CV-0241-BU(J) ✓

ENTERED ON DOCKET

DATE JUN 24 1999

**DISMISSAL WITHOUT PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiffs Chet Baker Enterprises, L.L.C., Carol A. Baker, Dean Baker, Paul Baker and Melissa Baker hereby dismiss this action without prejudice.

Respectfully submitted,

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

By: *Heather Drake*

J. Patrick Cremin, OBA #2013  
Donald L. Kahl, OBA #4855  
Heather L. Drake, OBA #17609  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

**ATTORNEYS FOR PLAINTIFFS  
CHET BAKER ENTERPRISES, L.L.C.,  
CAROL A. BAKER, DEAN BAKER, PAUL  
BAKER and MELISSA BAKER**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

J & H INDUSTRIES, INC., an Oklahoma )  
corporation, )

Plaintiff, )

v. )

NAVAJO REFINING COMPANY, a )  
Delaware corporation, and JAMES )  
HALLOCK, an individual, )

Defendants. )

ENTERED ON DOCKET  
DATE JUN 23 1999

Case No. 98 CV 948 K(J) ✓  
Judge Terry C. Kern

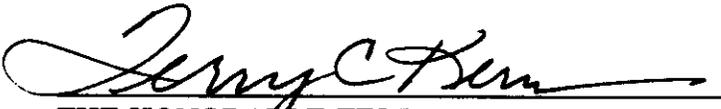
**FILED**

JUN 22 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Upon consideration of the Joint Motion to Dismiss all Claims and Counterclaims, it is hereby ORDERED, ADJUDGED and DECREED that all pending claims and counterclaims in this litigation are hereby dismissed with prejudice. It is further ORDERED that each side shall bear its own costs and attorney fees.

  
THE HONORABLE TERRY C. KERN  
JUDGE OF THE UNITED STATES DISTRICT  
COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA for the )  
use and benefit of Dan E. Tanner, P.E., )  
P.L.S., d/b/a Tanner Consulting; and )  
DAN E. TANNER, P.E., P.L.S., )  
d/b/a TANNER CONSULTING, )

Plaintiffs, )

v. )

DACO CONSTRUCTION, INC., an )  
Oklahoma corporation; and THE OHIO )  
CASUALTY INSURANCE COMPANY, )  
an Ohio corporation, )

Defendants. )

**FILED**  
JUN 22 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-0735-EA

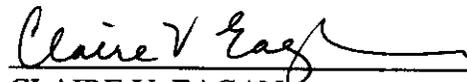
ENTERED ON DOCKET  
DATE JUN 23 1999

**ORDER OF DISMISSAL**

On June 21, 1999, plaintiffs filed their dismissal with prejudice (Docket #22). The stay entered by Order of March 9, 1999 (Docket #16-2) is hereby stricken as moot based upon settlement of the entire case.

IT IS THEREFORE ORDERED that this action be **DISMISSED** with prejudice.

Dated this 22<sup>nd</sup> day of June, 1999.

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

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

**F I L E D**

JUN 21 1999

PENNWELL PUBLISHING CO., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PATRICK MURPHY, et al, )  
 )  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-C-939-B

**ENTERED ON DOCKET**

**DATE JUN 22 1999**

**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 8-27-99, 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 21<sup>st</sup> day of June, 1999.

for James Delvin  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

NATIONAL ENVIRONMENTAL  
SERVICE COMPANY, an Oklahoma  
Corporation,

Plaintiff,

v.

RONAN ENGINEERING COMPANY,  
a California Corporation,

Defendants.

ENTERED ON DOCKET

DATE JUN 22 1999

Case No. 97-CV-860-H ✓

**F I L E D**

JUN 21 1999 *AE*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

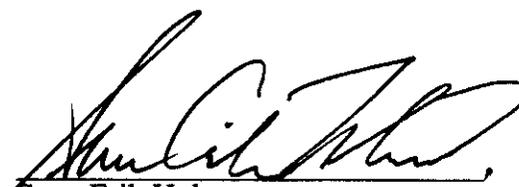
**J U D G M E N T**

This matter came before the Court for a trial by jury on June 14-17, 1999. On June 18, 1999, the jury returned its verdict finding Defendant Ronan Engineering Company not liable on Plaintiff National Environmental Service Company's claims of breach of contract and negligence.

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

IT IS SO ORDERED.

This 21<sup>st</sup> day of June, 1999.

  
Sven Erik Holmes  
United States District Judge

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

NATIONAL ENVIRONMENTAL )  
SERVICE COMPANY, an Oklahoma )  
Corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RONAN ENGINEERING COMPANY, )  
a California Corporation, )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE JUN 22 1999

Case No. 97-CV-860-H ✓

**F I L E D**

JUN 21 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**J U D G M E N T**

This matter came before the Court on a Motion for Summary Judgment by Defendant Motorola, Inc. ("Motorola"). The Court duly considered the issues and rendered a decision in accordance with the orders filed on March 26, 1999, and on May 18, 1999.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant Motorola and against Plaintiff National Environmental Service Company, and Defendant Ronan Engineering Company.

IT IS SO ORDERED.

This 21<sup>st</sup> day of June, 1999.



Sven Erik Holmes  
United States District Judge

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

**F I L E D**

JUN 21 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STATE BANK & TRUST, N.A., )  
a national banking association, )

Plaintiff, )

vs. )

FIRST STATE BANK OF TEXAS, )  
a state bank organized under the laws )  
of the State of Texas and headquartered )  
in Denton, Texas, )

Defendant. )

Case No. 97-CV-277-B

ENTERED ON DOCKET

DATE JUN 22 1999

J U D G M E N T

In keeping with the Order entered on June 21, 1999:

IT IS ORDERED AND ADJUDGED that Plaintiff, STATE BANK & TRUST, N.A., recover judgment for attorney's fees of the Defendant, FIRST STATE BANK OF TEXAS, in the sum of \$77,335.76 plus interest at the rate of 4.879% per annum.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff, STATE BANK & TRUST, N.A., recover judgment for costs of the Defendant, FIRST STATE BANK

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OF TEXAS, in the total sum of \$14,250.24 plus interest at the rate of 4.879% per annum.

DATED at Tulsa, Oklahoma this 21<sup>st</sup> day of June, 1999.

*James O. Brett*  
\_\_\_\_\_  
By: THE HONORABLE THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

JAMES R. BLISSIT, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner, )  
 Social Security Administration, )  
 )  
 Defendant. )

JUN 21 1999 *SA*  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 98-CV-839-J /

ENTERED ON DOCKET

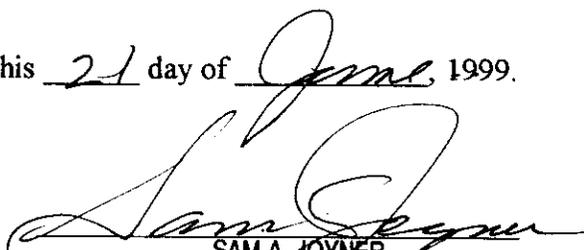
DATE JUN 22 1999

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon an Agreed Motion to Remand for Payment of Title II and Title XVI Benefits. An Order remanding the case to the Commissioner for the issuance of a fully favorable decision has been entered.

The Court enters this Final Judgment under Fed. R. Civ. P. 58 remanding this case to the Commissioner for further administrative action.

THUS DONE AND SIGNED on this 21 day of June, 1999.

  
SAM A. JOYNER  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

JUN 21 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES R. BLISSIT,

Plaintiff,

v.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

CASE NO. 98-CV-839-J

ENTERED ON DOCKET  
DATE JUN 22 1999

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of §205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89 (1991). Based on Plaintiff's Title II and Title XVI applications protectively filed on May 19, 1993, the Commissioner shall issue a fully favorable decision finding Plaintiff disabled as of January 1, 1993, his alleged onset date, and that such disability is continuing.

THUS DONE AND SIGNED on this 21 day of JUNE, 1999.



SAM A. JOYNER  
UNITED STATES MAGISTRATE JUDGE

KR

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

**FILED**

JUN 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DOLORES HOLLAND LANDRY, )  
)  
Plaintiff, )  
)  
vs. )  
)  
TULSA COMMUNITY COLLEGE, )  
and STATE OF OKLAHOMA ex rel )  
TULSA COMMUNITY COLLEGE, )  
)  
Defendants. )

Case no. 98-CV-863 K (E) ✓

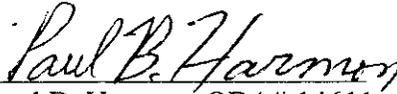
ENTERED ON DOCKET

DATE JUN 21 1999

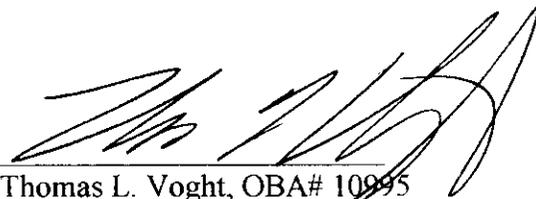
JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiff and the Defendants, and hereby stipulate that this  
action be dismissed without prejudice.

Respectfully Submitted,

  
Paul B. Harmon, OBA# 14611  
406 South Boulder, Suite 400  
Tulsa, OK 74103-3821  
(918) 747-2082

ATTORNEY FOR PLAINTIFF

  
Thomas L. Voght, OBA# 10995  
Jones, Givens, Gotcher & Bogan  
3800 First National Tower  
Tulsa, OK 74103-4309

ATTORNEY FOR DEFENDANTS

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

COY WHITE, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STATE FARM FIRE AND CASUALTY, )  
 )  
Defendant. )

No. 98-CV-711-K

ENTERED ON DOCKET  
DATE JUN 21 1999

**FILED**

JUN 21 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 21 day of June, 1999.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEARDRA BRODERICK and )  
AMANDA RASBERRY, )

Plaintiffs, )

v. )

NPC INTERNATIONAL, INC., )

Defendant. )

No. 99CV0122C(J)

ENTERED ON DOCKET  
DATE JUN 21 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Having settled this action, and pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the parties to the above-captioned action hereby stipulate and agree that said action shall be DISMISSED WITH PREJUDICE, each party to bear its own costs.

By: Thomas Bright  
Thomas Bright  
406 South Boulder  
Suite 411  
Tulsa, OK 74103-3825

By: Kelly S. Gooch  
Frederick J. Lewis  
Kelly S. Gooch  
LEWIS FISHER HENDERSON  
& CLAXTON, LLP  
5050 Poplar Avenue, Suite 1717  
Memphis, TN 38157

ATTORNEY FOR PLAINTIFF

10

mail  
copy ret'd  
OIJ

OF COUNSEL:

Ted Sherwood  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS, P.C.  
502 West Sixth Street  
Tulsa, Oklahoma 74119-1010

ATTORNEYS FOR DEFENDANT

**SO ORDERED** this \_\_\_ day of June, 1999.

---

United States District Court Judge

**FILED**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JUN 18 1999

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 DOROTHY RABY, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 99CV0046C(E) ✓

ENTERED ON DOCKET  
JUN 21 1999

ORDER

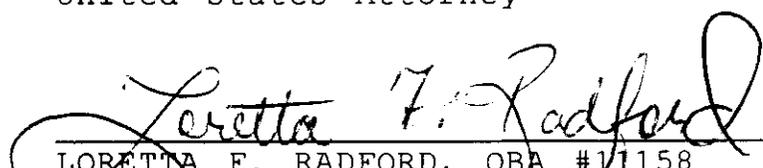
Upon the motion of the plaintiff, United States of America, to which there is no objection, it is hereby **ORDERED** that all claims against defendant **Dorothy Raby**, be dismissed without prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 17<sup>th</sup> day of June, 1999.

  
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

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

LFR/11f

**FILED**  
JUN 18 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

JOHN BUDZINSKY )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ELEMENTARY SCHOOL DISTRICT )  
 NO. 10, OTTAWA COUNTY, OKLAHOMA )  
 SCOTT SOUTH, TIM POTTS individually. )  
 )  
 Defendants. )

Case No. 99-CV-0328-E(J) ✓

**ENTERED ON DOCKET  
DATE JUN 21 1999**

**ORDER**

Now before the court is the Motion to Dismiss (Docket #2) of the defendants Elementary School District No. 10, Ottawa County, Oklahoma, and Scott South and Tim Potts individually.

**BACKGROUND**

Plaintiff, John Budzinsky, was employed as Elementary Superintendent under contract with the defendant, Elementary School District No. 10 of Ottawa County, for the 1995-96 school year. Defendants Scott South and Tim Potts were members of the Board of Education for said School District during Budzinsky's employment. On July 1, 1997, Plaintiff was discharged from his position as Elementary Superintendent. Subsequently, Plaintiff Budzinsky brought this action against Elementary School District No. 10 of Ottawa County, and Scott South and Tim Potts individually for wrongful discharge, breach of contract, violation of the Due Process Clause, and deprivation of his Civil and Property Rights. Defendants seek dismissal of Plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6). The grounds for this motion are that Plaintiff failed to name the proper entity in his original complaint, and that Board Members Scott South and Tim Potts

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are immune from tort liability through the Oklahoma Governmental Tort Claims Act ("GTCA" or "Act"). Plaintiff Budzinsky subsequently filed an amended pleading, pursuant to Fed.R.Civ.P. 15, wherein the Defendant Elementary School District No. 10 of Ottawa County was properly named and the issue of Defendants South and Potts malicious intent was raised.

### ANALYSIS

Plaintiff's amended complaint correctly names the Elementary School District No. 10, Ottawa County, Oklahoma as the proper Defendant, as provided by Okla. Stat. tit. 70 § 5-105 (1988). As a result of this amended pleading, the Defendants' first cause for dismissal is denied as moot.

The Governmental Tort Claims Act, Okla. Stat. tit. 51, § 151, holds employees and agents of the state authorized to act in behalf of a political subdivision immune from tort liability, absent any allegation that they acted outside the scope of their employment. Lowe v. Champion, 976 P.2d 562 (Okla. Ct. App. 1998). Defendants contend that Scott South and Tim Potts, as Board Members, are employees covered by the Act. Absent a petition from Plaintiff demonstrating a cause of action in tort against South and Potts arising outside the scope of their employment, they will be deemed immune from liability.

In Plaintiff's first amended complaint, he states "Defendants, Scott South and Tim Potts, conspired with each other by maliciously (sic) accusing Plaintiff of improper actions. . . ." It is true that willful and wanton conduct can place an Defendant outside the scope of his employment. Holman v. Wheeler, 677 P.2d 645 (Okla. 1983). However, in the case at bar there has not been any pleading sufficiently alleging facts to demonstrate that the actions taken by South and Potts were outside the scope of their employment. Even presuming all well pleaded allegations by the

the non-movant are true, the complaint is not sufficient to pierce South and Potts' immunity from tort liability pursuant to the GTCA.

The Defendants' Motion to Dismiss (Docket #2) is GRANTED in part and DENIED in part. Because the court finds that South and Potts are immune from tort liability under the GTCA, their motion to Dismiss (Docket #8) is denied as moot.

IT IS SO ORDERED THIS 18<sup>th</sup> DAY OF JUNE, 1999.

A handwritten signature in cursive script, reading "James O. Ellison", written over a horizontal line.

JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**FILED**

JUN 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DAVID MAULE and )  
TRACI MAULE, )  
Plaintiffs, )  
vs. )  
SOONER EQUIPMENT & LEASING, )  
INC., an Oklahoma corporation, )  
and GEORGE CORNELISON, )  
d/b/a SOONER TRUCK SALES, )  
and JASON LEONARD, an individual, )  
Defendants. )

CASE NO. 98-CV-84-C (M)

ENTERED ON DOCKET

DATE JUN 21 1999

**JUDGMENT**

This matter came before the Court on April 2, 1999, upon Plaintiffs' Application and Affidavit for Judgment by Default against the Defendant, JASON LEONARD, on the Plaintiffs' claim of fraud. It appears that the Defendant, JASON LEONARD, is in default and that the Clerk of the United States District Court has searched the records and entered the default of the Defendant, JASON LEONARD.

The Court finds that the Defendant, JASON LEONARD, made a material representation when he represented to the Plaintiffs that the dump truck had been driven approximately 330,000 miles; that the representation was false because the dump truck had been driven more than 1,000,000 miles; that the Defendant made the representation when he knew it was false; that the Defendant made the representation with the intention that it should

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be acted upon by the Plaintiffs; that the Plaintiffs acted in reliance upon the representation; and that the Plaintiffs suffered injuries and damages.

The Court finds that the Plaintiffs have introduced evidence of damages in the amount of \$15,000 for the difference in the value of the vehicle; \$18,413 for the cost of repairs to the vehicle; \$9,430 for lost profits; and \$75,000 for emotional distress, which total \$117,843 in actual damages for fraud. The Court also finds, by clear and convincing evidence, that the Defendant showed a reckless disregard for the rights of others and that punitive damages in the amount of \$117,843 should be awarded against the Defendant, JASON LEONARD.

It also appears that the Defendant, JASON LEONARD, is not an infant or incompetent person, and is not in the military service of the United States. The Court, having heard the argument of counsel and being fully advised, finds that judgment should be entered for the Plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiffs, DAVID and TRACI MAULE, recover on their claim of fraud against the Defendant, JASON LEONARD, the sum of One Hundred Seventeen Thousand Eight Hundred Forty-three Dollars (\$117,843.00) in actual damages and the sum of One Hundred Seventeen Thousand Eight Hundred Forty-three Dollars (\$117,843.00) in punitive damages, for a total judgment of Two Hundred Thirty Five Thousand Six Hundred Eighty-six Dollars (\$235,686.00) against the Defendant, JASON LEONARD, plus post-judgment interest at the annual rate of 4.879 % until paid, for all of which let execution issue.

Dated this 17<sup>th</sup> day of June, 1999.

  
THE HONORABLE H. DALE COOK  
UNITED STATES DISTRICT JUDGE

Mark D. Lyons, OBA #5590  
Kevin Danielson, OBA #12258  
LYONS & CLARK  
616 S. Main, Suite 201  
Tulsa, OK 74119-1260  
(918) 599-8844  
ATTORNEYS FOR PLAINTIFFS

**FILED**

JUN 21 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

STATE BANK & TRUST, N.A., )  
a national banking association, )

Plaintiff, )

vs. )

FIRST STATE BANK OF TEXAS, )  
a state bank organized under the laws )  
of the State of Texas and headquartered )  
in Denton, Texas, )

Defendant. )

Case No. 97-CV-277-B

ENTERED ON DOCKET  
JUN 21 1999  
DATE \_\_\_\_\_

ORDER

The Court has for decision State Bank & Trust, N.A.'s Motion to Review Taxation of Costs (Docket # 78), First State Bank of Texas' Motion to Review Taxation of Costs (Docket # 81), and Second Amended and Restated Application for Attorneys' Fees of State Bank & Trust, N.A. (Docket #97), and the Court finds as follows:

LITIGATION HISTORY

State Bank & Trust, N.A. ("State Bank") filed this action which arises out of certain business transactions which took place between customers of the two financial

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institutions. State Bank's customer, Ventura Classics, ("Ventura") was a corporation in the business of buying and selling used automobiles. Ventura was owned by Brian Goss ("Goss"). First State Bank of Texas' ("Bank of Texas") customer was B. Speer & Associates ("Speer"), whose principal was Buzz Speer. Speer was also in the business of buying and selling used automobiles. Ventura and Speer established a business relationship in which they purchased automobiles from and sold automobiles to each other.

The parties had a course of dealing out of which payment for the sale of automobiles between them was usually accomplished by means of a documentary draft. Typically, the buyer would originate a documentary draft which would be comprised of an envelope containing payment information and appropriate authorizations on the front of the envelope. Seller would place the corresponding title documents for the automobile which was being purchased inside the envelope and deposit the documentary draft ("draft") with his own bank. Seller's bank would then forward the title documents and draft to the buyer's bank for payment or collection. After payment was made to seller, the title documents would be released to the buyer, who would receive the automobiles at approximately the same time. This arrangement worked well until Speer developed financial difficulties from which he attempted to extricate himself by fraudulent creation of documentary drafts and/or manipulation of his bank, the Bank of Texas.

State Bank's initial claim was brought against Bank of Texas and was based upon five Bank of Texas documentary drafts which Speer had delivered to Ventura representing five automobiles Ventura sold and physically delivered to Speer in November and December of 1996. Ventura deposited the documentary drafts with the corresponding title documents with State Bank which then sent them to Bank of Texas. However, instead of holding the drafts and title documents until Speer paid the amounts represented by the drafts, Bank of Texas released the documentary drafts and title documents to Speer under an arrangement unknown to and unauthorized by Ventura or State Bank. Speer eventually, although belatedly, purchased a cashier's check to cover the first three drafts in the amount of \$83,450.00. When State Bank never received the cashier's check and made inquiry, Bank of Texas indicated it must have been lost and issued another cashier's check on which it then stopped payment as an "offset" to a claim Bank of Texas asserted against State Bank which forms the counterclaim in this matter.

The counterclaim also involves documentary drafts and a dishonored cashier's check. The basic facts are that beginning December 5, 1996, State Bank received 7 documentary drafts from Bank of Texas drawn on Ventura. These drafts were presented in an initial group of 5 presented within a weeks' time, with 2 drafts following later, for the purported sale of 7 automobiles by Speer to Ventura.. Bank of Texas advanced funds to Speer on these drafts prior to receiving payment from Ventura through State Bank. When Goss was advised of the arrival of the drafts, he responded that he did not order

any cars and verified this initial response upon inspecting the documentary drafts. Goss ordered the drafts returned. When the drafts were returned, Bank of Texas sent them back to State Bank with a notation that they were late returned, beyond the "three-day sight" period, meaning State Bank was responsible for their payment. These arrived back at State Bank on Christmas Eve and a State Bank employee, accepting on its face Bank of Texas' contention that the items must be paid by State Bank, issued a cashier's check covering the items to Bank of Texas in the amount of \$87,750.00. When a vice-president of State Bank realized what had occurred, attempts were made to retrieve the check and ultimately a stop payment was successfully ordered. In fact, the seven automobiles were fictitious and the fraudulent drafts were sent by Speer to get cash advances on them from Bank of Texas in an unsuccessful attempt to keep his financial jugglings going.

The Court awarded summary judgment to State Bank on its primary claim but denied Bank of Texas' motion for summary judgment on the counterclaim and tried the counterclaim in a non-jury proceeding, along with the issue of the amount of damages to which State Bank was entitled on the primary claim. The Court entered findings of fact and conclusions of law finding in favor of State Bank as to the counterclaim.

#### ATTORNEYS' FEES

The parties agree Texas law applies to State Bank's primary claim and Oklahoma law applies to Bank of Texas' counterclaim. UCC provisions adopted by the two states

are similar if not identical in many instances. The parties concede that State Bank is entitled to attorneys' fees as to its successful defense of the cashier's check involved in the counterclaim pursuant to Okla. Stat. tit.12 §936 (1991). There is no corresponding Texas statute to §936 which would allow attorneys' fees on the primary claim.

State Bank filed a Second Amended and Restated Application for Attorneys' Fees correcting by reduction its earlier applications and seeking \$121,922.00 in fees billed to its client through October 31, 1998 along with \$2,201.00 in fees in connection with a substantially related action brought in the Eastern District of Texas. State Bank also seeks an additional \$23,231.00 in fees from November 1, 1998 through the present, exclusive of appeal-related fees. This amount includes fees for hiring local counsel in Texas to compel production of records from opposing counsel as well as \$4,280.00 for retention of an expert witness in connection with the fee application. At hearing on application for attorneys' fees, State Bank moved the Court to consider expert witness fees as costs should the Court determine this to be more appropriate. The Court finds this expense falls more properly under costs and will consider it in that category, thereby reducing the fee request of State Bank to \$143,074.00.

State Bank seeks attorneys' fees as prevailing party on its primary claim under Texas law pursuant to Tex.Civ.Prac.& Rem. Code, §38.001 and UCC §3-411(b) on its claims relating to the cashier's check and under Tex.Civ.Prac.And Rem. Code, §38.001 and UCC § 4-103(e) on its claims on the five documentary drafts. State Bank seeks

attorneys' fees as prevailing party on the counterclaim pursuant to Okla. Stat. tit.12 §936 (1991) as to the cashier's check and under Okla. Stat. tit.12 §936 (1991) and Okla. Stat. tit.12A 4-207(c) (1991) as to the seven documentary drafts.

State Bank asserts it is entitled to recover all attorneys' fees whether under the primary claim or the defense of the counterclaim because the claims are "inextricably intertwined" and involve a common core of facts or are based upon related legal theories.

Bank of Texas submits State Bank would, at most, only be entitled to fees on its successful defense of the cashier's check counterclaim. Bank of Texas also argues State Bank is entitled to no fee because it failed to segregate billings to account for the time spent on the various claims and theories. But in Bank of Texas' response brief, at page 9, Bank of Texas acknowledges:

"Therefore, in this case, the Court should apportion State Bank's attorneys' fees to eliminate those fees for which State Bank is not entitled to recover attorneys' fees."

Bank of Texas offered no expert testimony taking issue with State Bank's attorney fee claim.

The Court finds State Bank is not entitled to an award of attorneys' fees on its primary claim under Texas law. Tex.Civ.Prac.& Rem. Code, §38.001 does not apply to actions for conversion. *First Nat'l Bank v. Gittelman*, 788 S.W.2d 165 (Tex. App.-Houston [14th Dist.] 1990). The Court finds no merit in State Bank's claim that the five documentary drafts represent contracts, thereby bringing them under this

provision. The contracting parties were Speer and Ventura and not the banks herein.

The Court further concludes that UCC §3-411(b) does not entitle State Bank to recover attorneys' fees on its defense relating to the cashier's check on Bank of Texas' counterclaim. This provision of the Texas code authorizes recovery as "expenses and consequential damages" if it is determined that a bank "wrongfully refused" to pay a cashier's check. Expenses and consequential damages "are not recoverable if the refusal of the obligated bank to pay occurs because . . . (ii) the obligated bank asserts a claim or defense of that bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument. . . ." Although ultimately determined to be unsupported, particularly in light of the fact that the cashier's check represented funds provided by Speer and not the Bank of Texas, the Court did not and cannot conclude that Bank of Texas had no reasonable basis for asserting the positions taken.<sup>1</sup>

Next, State Bank urges UCC § 4-103(e) applies to its claims on the five documentary drafts, thereby entitling it to attorneys' fees. This provision applies only if the Court finds Bank of Texas acted in bad faith. No such finding was entered in this case.

Turning to the counterclaim, the Court addresses State Bank's claim that attorneys' fees are recoverable under Okla. Stat. Ann. tit. 12A 4-207(c)(1991) as

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<sup>1</sup>The Court agrees with Bank of Texas that attorneys' fees under this provision would in any event be limited to those incurred after February 13, 1998, the date the Court authorized amendment of the Complaint to include this claim.

expenses, which provides, in pertinent part:

(c) A person to whom the warranties under subsection (a) of this section are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses. . . .

The Oklahoma Supreme Court has never interpreted this provision in a published opinion. An unpublished opinion, *Security Bank & Trust Co. v. Nat'l Bank of Commerce of Tulsa*, 9 UCC Rep. Serv.291 (Okla. 1971), interpreting a 1962 version of the statute, held attorney's fees are not recoverable. The Comments contained in the 1962 Official Text of the UCC are referenced by the Court as stating that the "expenses" referred to may be ordinary collection expenses and in appropriate cases could also include such expenses as attorney's fees. Nevertheless, the Court found Oklahoma's adherence to the common law would not recognize an allowance of attorney's fees "in the absence of statute or specific contractual authority."

In 1977, the Honorable Ralph Thompson, sitting on the United States District Court for the Western District of Oklahoma, interpreted a later version of the same statute, to reach the opposite result and found an award of attorney's fees appropriate in *Guaranty Bank & Trust Co., v. Federal Reserve Bank of Kansas*, 454 F. Supp. 488 (W.D. Okla. 1977). The Court cited the same language from the Comments as had been cited in the *Security Bank & Trust* case.

The current version of the statute is no longer followed by the Comments

quoted/referenced by the above-cited cases. The current Comments, however, refer the reader to the Oklahoma and Official Comments to §3-416 which state: "There is no express provision for attorney's fees, but attorney's fees are not meant to be necessarily excluded. They could be granted because they fit within the phrase "expenses \* \* \* incurred as a result of the breach. *The intention is to leave to other state law the issue as to when attorney's fees are recoverable.*" (Emphasis added.)

Comments following §4-207 are cautionary, discussing the affinity Oklahoma has for the American Rule that "probably will not be overcome simply by the use of the word 'expenses.'"<sup>2</sup>

The Court concludes that the changes to the Comments following the decision in *Guaranty Bank* lead to the conclusion that the Oklahoma Supreme Court would not find attorney's fees awardable under §4-207. The distinction arises from the removal of the language authorizing the Court's discretion in awarding attorney's fees as expenses "in an appropriate case." Coupled with the removal of that language is the portion of §3-416 (emphasized above), indicating the intent to allow other state law to be the Court's guide. There is no question in this Court's mind that attorney's fees are not recoverable under Okla. Stat. tit.12 §936 (1991) on the documentary drafts and in view of the

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<sup>2</sup>Additionally, Bank of Texas urges in its response brief that State Bank did not seek affirmative relief for breach of warranties. State Bank raised the issue as an affirmative defense to excuse the stop payment on the cashier's check. No authority was presented which would allow the Court to find a meaningful distinction in awarding attorney's fees and the Court finds this to be a non-issue.

reluctance of the Oklahoma court's to liberally interpret Oklahoma law to expand the award of attorney's fees to prevailing parties, this Court finds it unlikely that such extension will be granted under §4-207. Nevertheless, the Court finds the issues surrounding the cashier's check could not be adequately addressed without a thorough understanding of the transactions involving the documentary drafts which led to the issuance of the cashier's check and the stop payment.

The Court observes that this was a complex case in which the similarity of the claims, defenses, amount of the cashier's checks and the underlying transactions required considerable concentration in order to keep the primary claims and the counterclaims straight. The legal research necessarily overlapped so that a finding that the claims and defenses and underlying facts are, to an extent, "inextricably intertwined" is supportable by the record. Nevertheless the Court must take into account the fact that the actual claim giving rise to an award of attorney's fees was not State Bank's principal claim.

The Court finds the attorneys' fees awarded pursuant to this Order should be reduced to eliminate trial time charged for attorney Gentra Sorem as being duplicitous. Further, time spent on preparation of trial brief merits a reduction by half to reflect excessive attorney time and duplication of summary judgment briefing. These two items reduce the fee by \$2573.00 and \$5650.00 respectively. No attorneys' fees shall be awarded for the time spent in attempting to enforce unsuccessful subpoenas in this District and the Northern District of Texas which were determined by the magistrate

judges of those districts to be invalid, which amounts to a reduction of \$4,631,25.00 for Dallas counsel and \$2,587.20, \$6854.41, and \$4774.48 for Tulsa counsel.<sup>3</sup>

In conclusion, the total attorneys' fees claimed is \$143,074.00. The attorneys' fees disallowed for Gentra Sorem, excessive briefing time, and unsuccessful enforcement of subpoenas totals \$27,070.34, leaving a subtotal of \$116,003.66. Additionally, the Court concludes this subtotal should be reduced by 1/3rd due to the Texas law phase of the case that does not support an award of attorneys' fees as aforesaid. Thus, the total allowable attorneys' fee is \$77,335.76 and judgment is hereby awarded in said amount to State Bank, plus interest at the rate of 4.879% per annum from the date of this Order.

#### COSTS

State Bank appeals the award of \$3,401.71 in costs by the Court Clerk on 12/2/98 pursuant to 28 U.S.C. §1920. State Bank also sought an additional \$7,137.31 in costs pursuant to three provisions of the Uniform Commercial Code ("UCC"), Okla. Stat. tit.12A §§3-411, 4-207, and 4-103(e) (1991), however the Court Clerk stated he was without jurisdiction to consider costs under the state UCC. State Bank now asks this Court to award those additional costs as statutory elements of damage plus an additional \$4280.00 in expert witness fees for the testimony of attorney Steve Balman in connection

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<sup>3</sup>The Court concludes that attorneys' fees for the action originally filed in Texas which was refiled as the counterclaim in this action should be part of the fees awarded in this case.

with the attorneys' fee application, for a total additional request of \$11,417.31.<sup>4</sup> Bank of Texas asserts an award of costs in a diversity action are governed solely by 28 U.S.C. §1920 and only those items specifically referenced by that statute may be awarded. Additionally, Bank of Texas specifically lists several items which it urges the Court to find should not be reimbursable. These include expenses for telephone, computer research, fax, postage, federal express, binding, private investigator, courier service, mileage, staff overtime, and meals. Even though Bank of Texas urges their exclusion under §1920, the Court finds one such listed item, meals, should be excluded under any theory, reducing the maximum potential cost award to State Bank to \$10,848.53.

State Bank cited no authority for its position that costs are recoverable under the referenced statutes other than the express language of the statutes. It relies upon the same arguments raised in support of its application for attorneys' fees. The Court concludes State Bank is not entitled to costs pursuant to §3-411 or §4-103 for the reasons set forth herein regarding attorneys' fees.

The Court finds State Bank is entitled to costs as a element of damages in connection with the breach of transfer warranties pursuant to §4-207(c) which requires only a finding that State Bank took the item in good faith in order to be entitled to recover its expenses.

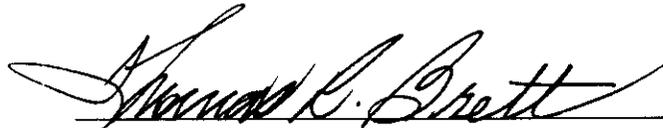
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<sup>4</sup>At hearing on application for attorneys' fees, State Bank made an oral request of the Court to include expert witness fee as costs for the hearing.

Bank of Texas also appeals the award of costs by the Court Clerk, urging the award should be reduced by \$1,741.88 for copying costs and \$157.83 for demonstrative evidence based upon State Bank's having failed to show the copies and demonstrative exhibits were reasonable and necessary. Bank of Texas urges 8 to 10 cents a page as reasonable copy expense as opposed to 15 cents a page sought by State Bank, but offers no evidence in support. State Bank counters that inquiry as to the reasonableness and necessity was made by the Court Clerk and established through evidence presented to the Court Clerk.

The Court finds the Court Clerk's findings as to the award of costs should be affirmed. Additionally, State Bank is awarded an additional \$10,848.53 in costs as damages under the provisions of §4-207, making a total of \$14,250.24 in costs awarded by the Court Clerk and this Order. Judgment is therefore entered in the amount of \$14,250.24 in costs to State Bank plus interest at the rate of 4.879% per annum from the date of this Order.

IT IS SO ORDERED THIS 21<sup>st</sup> DAY OF JUNE, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUN 21 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BOYD ROSENE AND ASSOCIATES, INC., )

Plaintiff, )

vs. )

No. 95-C-674-B

KANSAS MUNICIPAL GAS AGENCY, )

an interlocal municipal agency; )

CITY OF WINFIELD, KANSAS, a )

municipality, )

Defendants. )

ENTERED ON DOCKET

DATE JUN 21 1999

AMENDED JUDGMENT

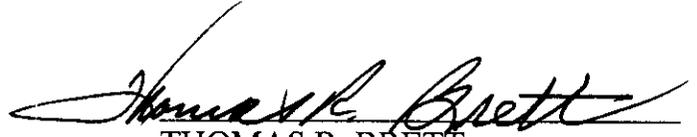
In keeping with the Tenth Circuit Court of Appeals Opinion filed April 13, 1999, the Court's prior judgment filed herein on October 28, 1997, awarding Kansas Municipal Gas Agency ("KMGA") \$100,365.88 and City of Winfield, Kansas ("Winfield") \$33,727.26 in attorneys' fees against Boyd Rosene and Associates, Inc., ("Boyd Rosene"), is hereby set aside and rendered a nullity.

In keeping with this Court's previous judgment filed August 14, 1996, all parties are to pay their own respective attorneys' fees and KMGA and Winfield are to take

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nothing on their respective attorneys' fees claims against Boyd Rosene.

Dated this 21<sup>st</sup> day of June, 1999.

A handwritten signature in black ink, appearing to read "Thomas R. Brett". The signature is fluid and cursive, with a long horizontal stroke at the end.

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE