

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE E. CAMPBELL,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social
Security Administration,

Defendant.

Case No. 97-CV-640-EA ✓

ENTERED ON DOCKET

DATE SEP 30 1999

ORDER

This Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for further action. No appeal was taken from this Judgment and the same is now final.

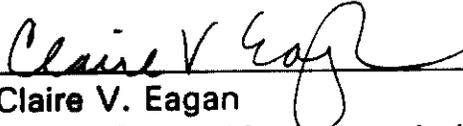
Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on September 13, 1999, the parties have agreed that an award in the amount of \$2,510.25 for attorney fees (no costs) for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees under the Equal Access To Justice Act in the amount of \$2,510.25. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social

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Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

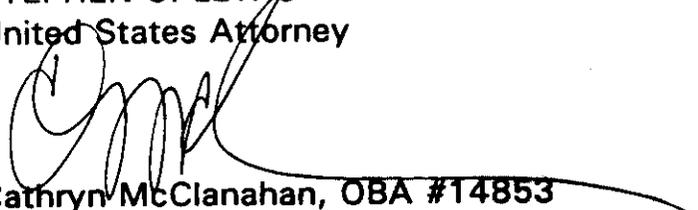
It is so ORDERED this 29th day of September 1999.



Claire V. Eagan
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


Cathryn McClanahan, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAMES E. CURTIS,)
)
Defendant.)

Case No. 99CV0596BU(J)

ENTERED ON DOCKET

DATE SEP 30 1999

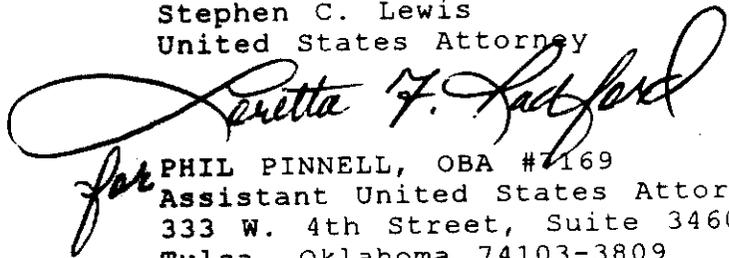
NOTICE OF DISMISSAL

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

Dated this 29th day of September, 1999.

UNITED STATES OF AMERICA

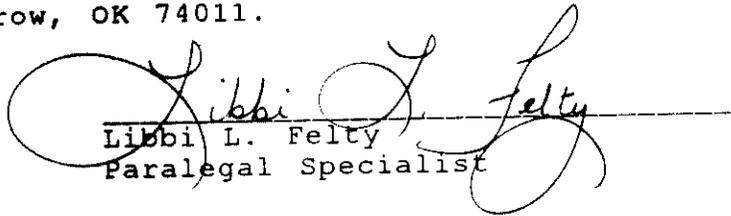
Stephen C. Lewis
United States Attorney



for PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of September, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: James E. Curtis, 5409 S. Redbud Ave., Broken Arrow, OK 74011.



Libbi L. Felty
Paralegal Specialist

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

F I L E D

SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHEILA BARNES,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social Security
Administration,

Defendant.

NO. 97-CV-514-M ✓

ENTERED ON DOCKET
DATE SEP 30 1999

ORDER

This case is hereby reversed and remanded in accordance with the 10th Circuit Court of Appeals' ORDER AND JUDGMENT dated August 2, 1999 and filed in this Court on September 28, 1999.

SO ORDERED this 28th day of September, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

GLOBAL TECHNOLOGIES
INTERNATIONAL, INC.,

Plaintiff,

v.

ELECTRONIC DATA SYSTEMS
CORPORATION,

Defendant.

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-529-K (E)

ENTERED ON DOCKET

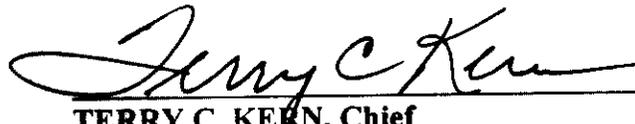
DATE SEP 30 1999

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Magistrate Judge on September 23, 1999, that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to *N.D. LR 41.0*.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. 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 27 day of September, 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

SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, et al.,)

Plaintiff,)

vs.)

AMR CORPORATION, AMERICAN)

AIRLINES, INC., AND THE SABRE)

GROUP, INC.,)

Defendants.)

No. 97-CV-457-K

ENTERED ON DOCKET

DATE SEP 30 1999

ORDER

Before the Court is the motion of the defendant American Airlines, Inc. ("American") for summary judgment against plaintiff Helen Perkins ("Perkins"). Perkins brings this action asserting the following claims: (1) discrimination because of race and sex in violation of Title VII of the Civil Rights Act of 1964; (2) the Americans with Disabilities Act ("ADA"), and (3) retaliation; (4) what is referred to in plaintiff's response brief as "illegal disparate impact". Perkins brought her claims against three defendants but has dismissed the Sabre Group, Inc. and AMR Corporation.

The Court construes the factual record and the reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See Byers v. City of Albuquerque, 150 F.3d 1271, 1274 (10th Cir.1998). Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. An issue of material fact is genuine only if a party presents facts sufficient to show that a reasonable jury could find in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

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The record is not clear, but apparently Perkins was employed by American at least in the late 1980s and early 1990s. She complains of being moved from a Level 1 position to lower level position in January 1990. She concedes that this was at her request to avoid exposure to chemicals while she was pregnant. She further concedes that in a couple of months she was reinstated to the Level 1 position with back pay and all other benefits. She complains of a similar transfer in the summer of 1991, which again was at her request. She complains of receiving a poor performance review and a lower raise in 1989 or 1990. She also complains of being denied a transfer in February, 1994 as an accommodation for her asthmatic condition. On July 12, 1993, Perkins filed a complaint with the U.S. Department of Labor ("DOL"), alleging race and sex discrimination. The complaint variously alleges that Harris and "other similarly situated African-American employees" of American receive different and adverse treatment than whites in connection with in-house training, evaluations, promotions and other matters. The DOL complaint did not include any assertion of disability discrimination. On July 26, 1994, Perkins filed a charge of discrimination against American with the Equal Employment Opportunity Commission ("EEOC"). The EEOC charge did not include any of the allegations recited above.

American first argues that certain of Perkins' claims are time-barred. Title VII and the ADA require that a claimant file a charge of discrimination within 180 days after the alleged unlawful employment practice. This filing period may be extended to 300 days where the claimant has initially instituted proceedings with a state or local agency. See 42 U.S.C. §2000e-5(e)(1) and 42 U.S.C. §12117(a). Federal courts lack jurisdiction to entertain an action unless the claims are previously filed with the EEOC. Thus, Perkins failed to file a timely charge of discrimination with respect to any conduct occurring before January 13, 1993.

Perkins responds that no claims are barred because American's violation is a continuing one. She argues that because performance evaluations are given yearly, her injury is continuous and may be addressed by the present action. Under the present record, the Court disagrees. The "continuing violation" doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated. If an event or a series of events should have alerted a reasonable person to act to assert his or her rights at the time of violation, the victim cannot later rely on the doctrine. Martin v. Nannie & the Newborns, 3 F.3d 1410, 1415 n.6 (10th Cir.1993). Here, if Perkins was illegally discriminated against in performance reviews on positions before 1992, she was sufficiently alerted that she should have asserted her rights at that time. See also Mascheroni v. Board of Regents of Univ. of Calif., 28 F.3d 1554, 1561 (10th Cir.1994)(plaintiff cannot simply assert that acts occurring outside the required time limit had a continuing effect within the statutory time allowed for suit). Perkins has not filed an EEOC charge regarding any more current allegations of discrimination. The Court concludes American's position is correct¹.

A prima facie case for disparate treatment requires evidence that (1) plaintiff is a member of a racial minority; (2) she suffered an adverse employment action; and (3) similarly situated employees were treated differently. Trujillo v. University of Colo. Health Sciences Ctr., 157 F.3d 1211, 1215 (10th Cir.1998). Perkins has failed to present any evidence regarding the third prong. A motion to compel by Perkins seeking statistical information was deemed abandoned by Magistrate

¹The complaint in this case states that Perkins complains of "unfair undeserved performance evaluations and lower pay raises, the most recent being in July 1993." (Complaint at ¶27). However, during her deposition, she stated she had no problems with the evaluations for those years and this actually occurred in 1989 or 1990. See Defendant's Statement of Facts, ¶4.

Judge Eagan at a hearing held May 19, 1999. Because of change of counsel, this Court effectively granted Perkins over five months to respond to American's motion. This was adequate time to produce evidence, if such existed.

Perkins's next contention is that she was discriminated against under the ADA because American failed to accommodate her asthmatic condition. The Tenth Circuit has recently provided an extensive discussion of such a claim. Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir.1999). This Court need not tarry long in its discussion, however. The first element of a prima facie case requires that plaintiff be a "disabled person" under the ADA. Id. at 1179. Perkins has testified that her asthmatic condition is controlled by medication. (Defendant's Statement of Facts, ¶5). In light of recent Supreme Court decisions, the Court finds plaintiff is not "disabled" in this context. See Murphy v. United Postal Service, 119 S.Ct. 2133 (1999) (holding that an employee whose high blood pressure was controlled by medication was not disabled under the ADA); Sutton v. United Airlines, 119 S.Ct. 2139 (1999) (holding that nearsighted pilots whose vision was correctable were not disabled under the ADA).

In her response brief, Perkins confesses American's motion regarding her retaliation claim, and therefore the motion is granted in this respect as well.

Finally, American moves for judgment as to Harris' retaliation claim. The elements of a prima facie case are (1) protected employee action; (2) adverse action by an employer either after or contemporaneous with the employee's protected action; and (3) a causal connection between the employee's action and the employer's adverse action. Morgan v. Hilti, Inc., 108 F.3d 1319, 1324 (10th Cir.1997). Whether Harris can establish a prima facie case depends upon whether her

retirement was an "adverse action" by American. The Court has already concluded that Harris' decision in this regard was completely voluntary; therefore, the Court finds it does not constitute an adverse employment action. Even if it were so considered, and the third element inferred because of the timing of the offer, Harris has once again failed to raise a genuine issue of material fact regarding pretext. The Court sees no evidence that the reduction in force was conducted pretextually, for the purpose of masking unlawful discrimination.

It is the Order of the Court that the motion of the defendant American Airlines, Inc. for summary judgment (#75) against plaintiff Helen Perkins is hereby GRANTED.

SO ORDERED THIS 29 DAY OF SEPTEMBER, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

IN RE:
MICHAEL R. READ, a/k/a MIKE
READ, a/k/a MICHAEL RAY READ,

Debtor,

MICHAEL R. READ,

Appellant,

vs.

SHAWNA K. READ, now Dunn, and
SHANNON DAVIS,

Appellees.

FILED

SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-887-BU(J)

ENTERED ON DOCKET

DATE SEP 30 1999

ORDER

United States Magistrate Judge Sam A. Joyner issued a Report and Recommendation, wherein he recommended that the decision of the United States Bankruptcy Court ("Bankruptcy Court") granting judgment in favor of Appellee, Shawna K. Read, now Dunn, be affirmed. In the Report and Recommendation, Magistrate Judge Joyner also recommended that Appellee's Motion for Damages and Costs be denied and that no action be taken on Appellee's Motion to Dismiss in light of the recommendation that the Bankruptcy Court's decision be affirmed.

This matter now comes before the Court upon the timely objections of Appellant, Michael R. Read, to the Report and Recommendation.¹ Appellant specifically objects to Magistrate

¹ After the filing of his original objections to the Report and Recommendation of Magistrate Judge Joyner, Appellant requested and was permitted by this Court to file corrected objections to the Report and Recommendation.

Judge Joyner's finding in the Report and Recommendation that the Tulsa County District Court's decision denying Appellant's petition to vacate the divorce decree, which was affirmed by the Oklahoma Court of Civil Appeals, must be given full faith and credit, thereby barring Appellant's collateral attack of the divorce decree in the adversary proceeding before the Bankruptcy Court. Although not argued to either Magistrate Judge Joyner or to the Bankruptcy Court, Appellant now contends that the divorce decree, being void for insufficient service of process and for adjudicating an issue outside the case, could not have been validated by the state court by denying Appellant's petition to vacate the divorce decree or by the Oklahoma Court of Civil Appeals affirming the order and therefore, the order denying Appellant's petition to vacate the divorce decree could not operate to preclude the collateral attack of the divorce decree under the doctrine of res judicata. In addition, Appellant objects to Magistrate Judge Joyner's Report and Recommendation on the basis that in reaching his recommendation to affirm the Bankruptcy Court's judgment, he erred in giving credit to an unpublished decision of the Oklahoma Court of Civil Appeals over decisions of the United States Supreme Court. Appellant also objects to Magistrate Judge Joyner's Report and Recommendation inasmuch as Appellant contends that he did not receive a full and fair opportunity to litigate his claims prior to the entry of the divorce decree. Appellant further objects to Magistrate Judge Joyner's Report and Recommendation on the basis that the ruling does not give him equal protection under the law or enforce his due

process rights under the Fourteenth Amendment.

Appellee has not responded to any of Appellant's objections. Instead, Appellee has filed a second motion to dismiss Appellant's appeal. In her motion, Appellee contends that Appellant has waived his challenge of personal jurisdiction because he recently entered a general appearance in the state court action by filing an application for a paternity test. Appellant denies that the filing of the application for a paternity test waives his challenge of personal jurisdiction.

The pertinent undisputed facts to this case are as follows. Appellee filed a divorce petition on February 26, 1990 in the Tulsa County District Court. In the divorce petition, Appellee alleged that she and Appellant had been married in May of 1987, and that they had one child during their marriage. She also alleged that Appellee had had no contact with Appellant since June, 1988 and, notwithstanding the exercise of due diligence, she had been unable to determine the current whereabouts of the Appellant. She, however, alleged that his last known address was 320 West Redbud Court, Catoosa, Oklahoma. Because the action was one where service by publication was proper and authorized, Plaintiff requested service by publication upon Appellant.

Appellee served the divorce petition upon Appellant by publication. Appellant failed to answer the divorce petition. A divorce decree was entered by the state court on April 30, 1990 and filed of record on May 2, 1990. The divorce decree provided that Appellant's current whereabouts were unknown and that Appellee had

unsuccessfully attempted service of summons of this cause more than twenty days prior to the date of the divorce decree, and had executed service by publication pursuant to Okla. Stat. tit. 12, § 2004(3)(a) where service by publication was proper and authorized. The divorce decree granted custody of the child to Appellee and ordered Appellant to pay child support in the amount of \$403.20 per month during the life of the child, until the child reached 18 years of age.

On December 6, 1996, Appellee filed an application seeking a contempt citation against Appellant for child support arrearage. On January 7, 1997, Appellant entered a special appearance for the purpose of objecting to the jurisdiction of the state court and moving for dismissal of the contempt proceedings.

Thereafter, on February 25, 1997, Appellant filed a petition seeking to vacate the divorce decree on the basis that the divorce decree was a void judgment because of insufficient service of process. The state court denied Appellant's petition and did not vacate the divorce decree. The state court entered judgment against Appellant in the amount of \$32,659.20 for unpaid child support and \$4,000.00 for attorney fees.

Appellant appealed the state court's decision to the Oklahoma Court of Civil Appeals and obtained a writ of prohibition, prohibiting the state court from proceeding with the contempt application. In an unpublished opinion, the Oklahoma Court of Civil Appeals affirmed the decision of the trial court. Appellant petitioned the appellate court for rehearing which was denied.

Appellant thereafter filed a petition for writ of certiorari to the Supreme Court of Oklahoma. The petition was subsequently denied.

The denial of Appellant's petition for writ of certiorari lifted the stay imposed on the contempt proceedings. Thereafter, Appellant filed for Chapter 13 relief in the Bankruptcy Court. Appellant then commenced an adversary proceeding against Appellee in the Bankruptcy Court, seeking to vacate the divorce decree on the ground that it was a void judgment due to insufficient service of process. Appellant filed a motion for summary judgment and Appellee later filed a cross-motion for summary judgment. The Bankruptcy Court granted Appellee's motion. The Bankruptcy Court found that Appellant was collaterally estopped from re-litigating the issue of the adequacy of service by publication. The Bankruptcy Court determined that Appellant had a full and fair opportunity to litigate this issue during the state court proceedings. Therefore, the Bankruptcy Court found that Appellant was barred from collaterally attacking the divorce decree. Thereafter, Appellant filed an appeal of the Bankruptcy Court to this Court and the matter was referred to Magistrate Judge Joyner for issuance of a report and recommendation.

In his objections to Magistrate Judge Joyner's Report and Recommendation, Appellant, for the first time, citing to Hinkle v. Jones, 180 Okl. 17, 66 P.2d 1073 (1937) and Southwestern Surety Ins. Co. v. Farriss, 118 Okl. 188, 247 P. 392 (1926), contends that the state court's order denying the petition to vacate the divorce could not preclude the collateral attack of the divorce decree in

the Bankruptcy Court. In Southwestern Surety Ins. Co., which was cited and relied upon in Hinkle, the Oklahoma Supreme Court ruled that an order denying a petition to vacate a void judgment due to lack of subject matter jurisdiction was not res judicata in a subsequent proceeding between the parties. In its opinion, the Court found that a motion or petition to vacate was a statutory method of direct attack just as were appeals or proceedings in error and that it could have no greater force or effect as res judicata. Southwestern Surety Ins. Co., 247 P. at 396. Citing to 15 R.C.L. 845, § 317, the Court explained that the affirmance of void judgment was also void and where a judgment is void because the court has no jurisdiction, an affirmance of the judgment on appeal will not cure the defect or give life to the invalid judgment. Id. at 397. The Court further explained that the lack of judicial power inhered in every stage of the proceedings by which color of authority was sought to be imparted by the void judgment and that a subsequent order by the same court denying a motion to vacate such void judgment was likewise void for the same reasons. Id.

The Court finds it unnecessary to address the authorities of Southwestern Surety Ins. Co. and Hinkle. The Court concludes that the divorce decree is not void on its face, and therefore, not being a void judgment, the divorce decree cannot be collaterally attacked in the Bankruptcy Court proceedings.

In considering Appellant's collateral attack on the state court judgment, the Court's inquiry is limited to an examination of

the judgment roll in the action. Bomford v. Socony Mobil Oil Co., 440 P.2d 713, 716 (Okla. 1968). Unless the judgment roll affirmatively discloses a lack of jurisdiction, the judgment is not void on its face. Farmers' Union Co-operative Royalty Co. v. Woodward, 515 P.2d 1381, 1384 (Okla. 1973). Every jurisdictional fact not negated on the face of the record must be presumed to be true. Bomford, 440 P.2d at 716.

In examining the judgment roll, the Court notes that the divorce petition provided that Appellee had had no contact with Appellant since June, 1988 and, "notwithstanding the exercise of due diligence [had] been unable to determine the current whereabouts of [Appellant], his last known address was 320 West Redbud Court, Catoosa, Oklahoma." There is nothing on the face of the record that negatives the statement of Appellee's due diligence. Appellant contends that the testimony of Appellee in the state court proceedings revealed that she had the addresses of Appellant's parents and brother and gave them to her attorney. However, this evidence is not on the face of the judgment roll. Appellant is requesting the Court to examine extrinsic evidence to determine a lack of due diligence and to find publication service was improper. As previously stated, however, the Court's examination of the validity of the judgment is limited to the judgment roll. Bomford, 440 P.2d at 716; see also, Dana v. State, 656 P.2d 253, 256 (Okla. 1982). Extrinsic evidence may not be used to establish the judgment's invalidity. Capital Federal Savings Bank v. Bewley, 795 P.2d 1051, 1054 (Okla. 1990); Wooten v. Askew,

668 P.2d 1123, 1125 (Okla. 1983).

In addition, the divorce decree recited that Appellant's current whereabouts were unknown and that Appellee had executed service by publication pursuant to Okla. Stat. tit. 2004(3)(a) "where service by publication is proper and authorized." As stated by the Oklahoma Supreme Court, where service is obtained by publication and the journal entry of judgment recites that publication is proper, the judgment is not void on its face. Barton v. Alpine Investments, Inc., 596 P.2d 532, 534 (Okla. 1979). Because the divorce decree entered by the state court recited that publication service is proper and authorized, the Court finds that the divorce decree is not void on its face and may not be collaterally attacked.

In reaching its decision, the Court recognizes that actual notice is the preferred method of satisfying the due process requirements of the Fourteenth Amendment. However, the Supreme Court has acknowledged that actual notice is not always feasible. As stated by the Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317, 70 S.Ct. 652, 94 L.Ed. 865 (1950),

This Court has not hesitated to approve of resort to publication as a customary substitute . . . where it is not reasonably possible or practicable to give more adequate warning. Thus, it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Therefore, notice by publication is not, per se, a denial of due process. Under Mullane, notice by publication is only insufficient

where the name and address of a defendant is known or readily ascertainable from sources at hand. Bomford, 440 P.2d at 718. Requirements of due process are not satisfied unless due diligence has been exercised to find the whereabouts of a defendant. Id.

The record in the instant case does not show that the whereabouts of Appellant were known or reasonably ascertainable from sources at hand to Appellee. Moreover, there is nothing in the record to disclose a failure on the part of Appellee to diligently pursue all available sources at hand in order to ascertain Appellant's whereabouts. The record only shows a statement of the exercise of due diligence by Appellee and her inability to determine the whereabouts of Appellant. As stated, there is nothing on the face of the record which negatives that statement. The Court therefore concludes that the divorce decree is not void for lack of personal jurisdiction.

Appellant has also argued in his objections that the divorce decree is void because it decided issues outside the case. See, Hinkle, 66 P.2d at 1075 (judgment, which is entirely outside of the issues in the case and upon a matter not submitted to the court for its determination, is a nullity). Specifically, he contends that the divorce decree ordered Appellant to pay child support in the amount of \$430.20 even though Appellee had requested only \$181.20 as child support in the divorce petition. Appellant never sought to vacate the divorce decree in the state court proceedings or in the Bankruptcy Court on this basis. Nonetheless, the Court finds that the divorce decree is not void as argued by Appellant. The

issue of child support was not outside the divorce proceedings. The divorce petition requested child support. Although Appellee only sought the base child support obligation of \$181.20, the state court, following the applicable Oklahoma statute, Okla. Stat. tit. 12, § 1277.7, included the required medical insurance obligation and the actual child care expense obligation, which combined with the base support obligation amounted to \$430.20. The Court therefore concludes that the divorce decree is not void for deciding an issue not before the state court.

In conclusion, the Court finds that the divorce decree entered by the state court is not void on the face of the judgment roll. Accordingly, Appellant cannot collaterally attack the divorce decree in the Bankruptcy Court proceedings.

Based upon the foregoing, the Report and Recommendation of United States Magistrate Judge Sam A. Joyner (Docket Entry #11) is **AFFIRMED**. The Bankruptcy Court decision granting judgment in favor of Appellee, Shawna K. Dunn, is also **AFFIRMED**. Appellee's Motion for Damages and Costs (Docket Entry #6) is **DENIED**. In light of the Court's rulings, Appellee's first Motion to Dismiss (Docket Entry #5) and second Motion to Dismiss (Docket Entry #10) are **DECLARED MOOT**.

ENTERED this 29th day of September, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

MT
9-27-99

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

FILED

SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AEGIS MORTGAGE CORPORATION,)

Plaintiff,)

vs.)

DENNIS RETTIG, GREG AUEN, MONTE S.)

COX, JAMES COATS, LANCE WALKER,)

ANTHONY POUND, LANNY PEREZ, and)

CHRISTI HEELAN, and FIELDSTONE)

MORTGAGE COMPANY,)

Defendants.)

ENTERED ON DOCKET

DATE SEP 30 1999

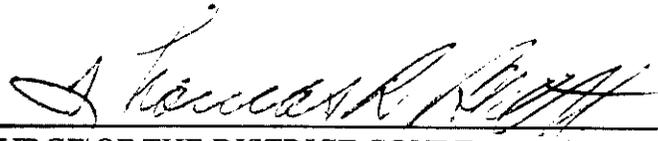
Case No. 99-C-0619-B (M)

ORDER

On the Joint Dismissal with Prejudice of AEGIS Mortgage Corporation ("Plaintiff"), Dennis Rettig, Greg Auen, Monte S. Cox, James Coats, Lance Walker, Anthony Pound, Lanny Perez, and Christi Heelan, and Fieldstone Mortgage Company ("Defendants"), and good cause having been shown,

IT IS HEREBY ORDERED, that all claims asserted by Plaintiff against Defendants in the above-captioned action are dismissed with prejudice.

ENTERED this 29 day of Sept, 1999.



JUDGE OF THE DISTRICT COURT

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

FILED

SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NCMIC INSURANCE CO.,)
)
Plaintiff(s),)
)
vs.)
)
JAY P. CRAIG, D.C., et al,)
)
Defendant(s).)

Case No. 99-C-253-B

ENTERED ON DOCKET
SEP 30 1999
DATE _____

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 11-30-99, 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 29th day of September, 1999.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED

SEP 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
THE SUM OF FORTY-THREE)
THOUSAND FOUR HUNDRED)
TEN DOLLARS (\$43,410.00) IN)
UNITED STATES CURRENCY, et al.,)
)
Defendant.)

Case No. 98-CV-388-B

ENTERED ON DOCKET
SEP 30 1999

Findings of Fact and Conclusions of Law

Having considered the evidence presented at trial to the Court on August 30 and August 31, 1999, and all of the pleadings submitted by the parties, including the amended pretrial order and the facts not admitted but not contested contained therein, the stipulations, the arguments of counsel and applicable legal authority, the Court enters the following findings of fact and conclusions of law:

Findings of Fact

1. United States of America ("Plaintiff"), seeks forfeiture of the Defendant Currency, \$43,410.00 ("Defendant Currency") and the Defendant 1993 Harley Davidson

3d

motorcycle, Vin 1HD1GEL16PY311203 ("Defendant Motorcycle").

2. Duane W. Murphy, ("Claimant Murphy"), asserting ownership of the currency and motorcycle, filed his claim to the Defendant Currency and Defendant Motorcycle on June 4, 1998, and his answer to the original complaint on June 17, 1998. Thereafter, Claimant Murphy filed his amended claim and answer to the amended complaint for forfeiture.

3. On January 8, 1998, Claimant Murphy was driving a U-Haul truck southbound on U.S. Highway 69, Pryor, Oklahoma.¹

4. Officer Humphrey of the Pryor Police Department stopped the U-Haul after radar twice confirmed Claimant Murphy was traveling at approximately 80 miles per hour in a 55 mile per hour zone. The initial stop was solely for a traffic violation of excessive speed and was recorded by a video camera from the officer's vehicle.

5. Claimant Murphy had no driver's license with him and a computer check advised he did not have a current valid driver's license. The rental agreement for the vehicle was made out to Claimant Murphy's father. Claimant Murphy advised the officer that the Butler, Missouri, Police Department had checked his license the night before and that it was current. Ultimately, the record revealed that he had not had a valid, current driver's license since 1995, when it was suspended. He also volunteered that he had no weapons

¹All or substantial portions of findings of fact numbers 3-5, 7-14, 18, 21, 23-26, 29, and 44-46 are taken from the Amended Pretrial Order, "facts, though not admitted, are not to be contested at the trial by evidence to the contrary."

with him and that he was a convicted felon.

6. Officer Humphrey attempted to contact a supervisor regarding whether he was required to take Claimant Murphy to the police station for the purpose of requiring him to post a cash bond but was unable to obtain a response. The officer therefore decided not to take Claimant Murphy to the station. During this time, a second officer arrived on the scene as back up, Officer James Blower. Officer Blower had heard the physical description of Claimant Murphy over the police radio and came to assist based upon the height and size of Claimant Murphy, who was over six feet four inches tall and weighed between two hundred and twenty and two hundred and thirty pounds.

7. After issuing two traffic citations and returning Murphy's identification card and U-Haul rental agreement, Officer Humphrey asked Claimant Murphy if he could search the vehicle and Claimant Murphy voluntarily gave the officers oral permission to search the vehicle. Claimant Murphy answered "no" to the question, "Do you care if we look inside your U-Haul, there?" By this response, Claimant Murphy permitted an unqualified search. He then answered, "Yeah, I'll have to get the key and unlock it." to the question, "Can we go ahead and look in the back, there?" Claimant Murphy unlocked a padlock on the rear of the vehicle, allowing the officers access. The follow-up question was not intended to qualify or limit the requested search, but resulted from the obvious fact that the back of the U-Haul was locked and without Claimant Murphy's cooperation in unlocking it, no agreed search could proceed.

8. During the search of the rear compartment of the U-Haul, Officer Humphrey found one package of zig-zag rolling papers and an amber pill bottle with eleven tablets of "Darvon," a schedule IV controlled substance, and 39 other pills in a shaving kit. Claimant Murphy advised officers the pills were all his.

9. During the search of the front cab of the vehicle, Officer Blower found an opened container of beer. Officer Blower went to the rear compartment of the truck to inform Officer Humphrey of the open container however Officer Humphrey was already aware of it and had determined no citation would be issued for this. Claimant Murphy, who was sitting in the front passenger seat of the patrol car, jumped out and stated "it's forty thousand." Claimant Murphy further stated "did you find the money in my bag?" Officer Blower returned to the cab of the U-Haul and found a zipped-up black Harley Davidson bag sitting on the front passenger seat. Officer Blower unzipped the bag and found two packages of currency. One package was open with some currency protruding from it. This package of currency was bundled in black plastic with some duct tape around it. The other package was a clear plastic baggie wrapped in duct tape with United States currency inside. Claimant Murphy's volunteered exclamation should be treated no differently than if he had answered "yes" to questions from the officers of whether he was carrying large sums of cash, narcotics or weapons.

10. Claimant Murphy advised the officers that he was a "master craftsman" and had been saving the money from odds and end jobs for the past 16 months. He stated he had

been burying the money in glass jars in his back yard. Claimant Murphy further advised the officers that he made a little more than \$40,000 in the last sixteen months. Claimant Murphy testified in his deposition that he transported \$67,000 in bundled United States Currency from Alaska to Kansas City, Missouri at the end of December, 1997, which included the Defendant Currency and the money used to purchase the motorcycle.

11. Claimant Murphy testified at his deposition that shortly before Christmas, 1997, he and his girlfriend went to Las Vegas, Nevada from Alaska, with \$10,000 in cash where they spent all of it except perhaps a couple of thousand dollars.

12. Claimant Murphy told the officers that on January 3, 1998, he purchased the Harley Davidson motorcycle from Thomas Aydukovich for the asking purchase price of \$15,000 and that he paid the entire amount in cash. At Claimant Murphy's request, two receipts were prepared at the time of the purchase of the motorcycle, one for \$15,000 and one for \$8,000 for the purpose of avoiding paying taxes. The handwritten entry on the Assignment of Title portion of the motorcycle's Certificate of Title, signed by both Claimant Murphy and the seller, reflects that the purchase price was \$8,000.

13. Prior to the traffic stop, Claimant Murphy had removed \$15,000 in currency from the seized package of currency wrapped in black plastic and duct tape and used it to purchase the motorcycle.

14. Claimant Murphy advised the officers that he was going to Plano Texas, that he was planning to sell a van that he owned, pick up another Harley Davidson Sportster that

he also owned, and that he and a friend, Jimmy O, were then heading to Mexico.

15. Jimmy O is the nickname of Jimmy Ollice, a long-time close friend and cocaine associate of Claimant Murphy who has a conviction for trafficking in cocaine.

16. Jimmy O is well known to Fairbanks and North Pole, Alaska law enforcement as a cocaine trafficker.

17. Claimant Murphy advised the officers that he was dying of pancreatic cancer and had less than a year to live, when in fact he was in good health.

18. During the consensual search of the U-Haul, Claimant Murphy was never restrained and was free to move about. He never objected to the search or the extent of the search nor was there anything in his demeanor which indicated he had an objection to the search or the extent or scope of the search. Claimant Murphy never revoked his consent to search or requested the search be stopped. In the amended pretrial order and in his deposition (p. 120, l. 14), Claimant Murphy affirmatively stated that he consented to the search.

19. Deputy Thompson arrived on the scene and explained to Claimant Murphy that he was going to run his trained narcotics K-9 dog "Buck" over the money. In response, Claimant Murphy inquired, "Now how long does narcotics stay on money?" Shortly thereafter, Murphy stated "there is no fresh narcotics scent on anything."

20. Deputy Thompson asked Claimant Murphy if there were any narcotics in the U-Haul and Claimant Murphy stated: "Not to my knowledge." "My Dad rented the van and

it's been in my possession ever since then. If there is anything in the van, it'd have to be mine."

21. Claimant Murphy also consented to the K-9 search of the vehicle.

22. "Buck" alerted to the Harley Davidson bag in the cab of the vehicle and the shaving kit and a red Marlboro duffle bag in the rear compartment.

23. The following items were recovered from the U-Haul and the black Harley Davidson bag that "Buck" gave a positive alert to:

- a. one bundle of currency, wrapped in black plastic and duct tape, in the amount of \$30,010.00 in U.S. Currency. The currency was all separated in bundles of \$1,000 and then an extra \$10.00 bill;
- b. one bundle of currency, wrapped in clear plastic and duct tape, in the amount of \$10,000, all wrapped in bundles of \$1,000; and
- c. a clear plastic baggie containing residue of a white powdery substance which tested positive for cocaine.

24. From the red Marlboro gym bag on which "Buck" alerted, officers recovered one package of orange zig-zag rolling papers and two Tanita Model #1479 digital scales.

25. Officers recovered a clear plastic zip-lock baggie containing a white powdery residue which tested positive for trace amounts of cocaine and numerous miscellaneous papers, including ticket stubs, business cards and handwritten itinerary, from a multi-colored backpack on which the red Marlboro bag was sitting.

26. Officers recovered \$3,400.00 from an inside pocket of Claimant Murphy's leather jacket, which was in bundles of \$1,000, with an additional \$400 cash and a sky pager.

Expert testimony at trial established that pagers are known to be used to make drug transactions easier and more convenient to the seller. The seller can arrange transactions at his/her convenience and be more in control of the sale. Claimant Murphy's 1-800 pager can be utilized everywhere in the United States versus a local or state pager.

27. Following the search at the scene, Officer Humphrey arrested Claimant Murphy on several charges, including possession of controlled substances, but hours later, the Pryor Police Chief dismissed this charge.

28. Claimant Murphy's history included an arrest in Texas on January 19, 1998 for possession of methamphetamine and marijuana to which he plead no contest and is serving five years probation.

29. Prior to that, Claimant Murphy plead guilty and was incarcerated for seven years in Alaska for attempted murder from May, 1985 through September, 1991.

30. Five (5) confidential informants have provided information that Claimant Murphy is involved in the purchase and sale of cocaine.

31. Investigation by the Drug Enforcement Administration ("DEA") and other law enforcement entities has shown that Claimant Murphy is a cocaine trafficker who associates with other known cocaine traffickers.

32. On October 20, 1997, the Alaska Highway Patrol received information through a drug hotline from a manager of the Wedgewood Resort that Claimant Murphy and Timothy Coger appeared to be trafficking in illegal drugs from their hotel room. The

Wedgewood Manager stated that Claimant Murphy and Timothy Coger were paying for their room daily in cash, and there was heavy traffic to their room at all hours of the day and night with visitors staying only minutes.

33. Timothy Coger is a convicted and well-known cocaine trafficker in Fairbanks and North Pole, Alaska.

34. Timothy Coger's brother, Terrell Coger, is known to DEA and Alaska law enforcement as an international cocaine trafficker.

35. Thirteen days prior to Claimant Murphy's and Coger's alleged drug trafficking activities at the Wedgewood resort, Claimant Murphy mailed Jimmy Ollice a package on October 7, 1998, via Alaska Airlines Goldstreak Package Express.

36. Claimant Murphy and Jimmy Ollice are both known associates of the Fairbanks Chapter of the Hells Angels.

37. On July 25, 1999, the Fairbanks Police Department executed a state search warrant on the residence of Russell Benzell, a known member of the Hells Angels.

During the search warrant, officers found and seized an address/telephone book which contained the names of the members of the Fairbanks Chapter of the Hells Angels, which included the names of Claimant Murphy and his sky pager, as well as Jimmy O [Ollice], John Meece and Randy Rocheleau, who is known to DEA as an international cocaine trafficker.

38. Drug expert DEA Agent Jim Delaney testified that the Hells Angels traffic in

cocaine.

39. Agent Delaney testified that the illegal drug most commonly transported from Mexico to Alaska is cocaine.

40. During at least the six months prior to seizure, Claimant Murphy received substantial profits from his sale of cocaine.

41. Claimant's recitations as to the source of the currency are not credible. A financial investigation revealed nominal legitimate income from Claimant Murphy's work as a "master craftsman." From 1991 through 1997, his income from various jobs, including carpentry work, produced an average annual income of approximately \$9,939.43 per annum. In a petition for divorce, he claimed 1997 income of \$11,234 with monthly expenditures of \$1600. He reported only \$2,252. during 1997 to the IRS. In his Declaration in Support of Request to Proceed in Forma Pauperis, Claimant Murphy stated he earned \$30,000. from March of 1997 through March of 1998. Further, during the time he claims to have buried the money in glass jars in the back yard. he was not present at the residence.

42. Financial investigation has established that while Claimant Murphy has had minimal legitimate income, he had expenditures in excess of \$34,000 during the five weeks prior to the seizure of the Defendant Currency.

43. Claimant Murphy did not report to the federal taxing authorities his entire income in 1994, failing to report \$7,156.00 from Texture Plus and, from 1995 to present, his

income from his illicit drug business. Claimant Murphy has not filed federal income tax returns from 1995 to 1998, inclusive.

44. Claimant Murphy testified he could not afford medical attention or prescriptions he was required to have as a result of a fractured skull and stroke suffered around October of 1996.

45. Claimant Murphy was unable to work for a period of approximately three or four months, and was without insurance following the head injury suffered around October of 1996.

46. Claimant Murphy could not afford medications for pain he suffered from broken bones, or from shooting, stabbing, car, skiing, snow machine and motorcycle accidents.

47. Oklahoma Highway Patrol Officers Mike Plunkett and Branson Perry testified at trial as drug interdiction witnesses. During their testimony they stated that U.S. Highway 69 is a major north-south route through the state of Oklahoma used by drug couriers.

48. DEA Agent Jim Delaney testified at trial as a drug expert witness that drug traffickers carry large sums of cash, bundle the currency in the manner in which the seized currency was bundled, make major purchases with cash to conceal purchases, do not utilize financial institutions in order to conceal their illicit wealth, and do not report their income to the Internal Revenue Service.

49. Three experts testified at trial in reference to particularized and objective factors and characteristics leading law enforcement officers to build reasonable suspicion and to

establish probable cause in this case to seize the Defendant Currency and the Defendant Motorcycle because they were furnished, or intended to be furnished in exchange for a controlled substance, or are proceeds traceable to such an exchange, or because the currency is money used or which was intended to be used to facilitate a violation of the drug prevention and control laws of the United States. The reasonable suspicion and probable cause led officers to believe that Claimant Murphy, the U-Haul and its contents were involved in violations of local, state, and federal drug laws. The following factors and characteristics were observed:

1. Inconsistent stories, admissions and statements by Claimant Murphy, including his story that he had flown from Alaska to Missouri for a funeral with \$60,000 in bundled United States currency and then suddenly purchased a motorcycle for \$15,000 cash and was going to ride it on down to Mexico;
2. Increasing nervousness on the part of Claimant Murphy;
3. The U-Haul was driven by Claimant Murphy without a driver's license and was rented in the name of another person. The motorcycle had no tag, a new title showing that Murphy had falsified information on the notarized title, and two separate receipts of sale showing different amounts of purchase;
4. Claimant Murphy's stated destination: the U-Haul was headed South on U.S. Highway 69 from Kansas to Texas and then Claimant Murphy was going to Mexico. U.S. Highway 69 is known to law enforcement agencies as a drug pipeline or drug courier route;
5. Mexico is a known transit zone for drugs headed to the United States from Central and South American countries and for drug proceeds headed to Central and South American countries from the United States;
6. Claimant Murphy has a criminal history including drug related arrests;

7. The large amount of currency involved;
 8. The fact that Deputy Thompson's drug-sniffing canine alerted to the bag containing the currency and cocaine residue in the cab of the U-Haul and to the bags containing the scales and other drug paraphernalia in the rear of the U-Haul;
 9. The unique packaging of the currency: double wrapped in plastic and duct-tape bound with hair ties in bundles of \$1,000 in various denominations from 10's to 100 dollar bills; and
 10. The motorcycle was purchased with \$15,000 cash of the currency taken directly from the packaged and bundled currency which was seized however, there was a receipt and registration reflecting a purchase price of \$8,000.
47. The Defendant Motorcycle was purchased in a financial transaction with drug proceeds in an amount in excess of \$10,000 and with the intent to evade taxes and in a knowing transaction designed to avoid reporting requirements, specifically sales taxes.
48. Claimant Murphy admitted that the reason he had been burying his money was to cheat the IRS by not paying taxes on his money and not putting it in banks.
49. The defendant \$43,410 was secreted by Murphy and maintained in cash to evade reporting and disclosure of same to the United States federal income taxing authorities.

Conclusions Of Law

1. The Court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§ 1345, 1355, 1356 and 1395, 21 U.S.C. § 881, and 26 U.S.C. § 7323.
2. Any Finding of Fact which might be properly characterized a Conclusion of Law should be considered as such, and vice versa.

3. A forfeiture proceedings is an *in rem* action brought against seized property pursuant to the fiction that the property itself is guilty of facilitating crime or is proceeds of crime. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974).
4. To contest a forfeiture action, claimant must establish a defense to the forfeiture by a preponderance of the evidence.
5. Claimant Murphy failed to establish a defense to the forfeiture by a preponderance of the evidence.
6. In a forfeiture proceeding the Government bears the initial burden of proof, as it must show probable cause for the institution of the suit. 21 U.S.C. § 881(d). Section 881(d) makes the probable cause standard of 19 U.S.C. § 1615 applicable to forfeiture suits under § 881(a)(6). *United States v. one 1971 Chevrolet Corvette Automobile*, 496 F.2d 210, 212 (5th Cir. 1974).
7. The test for determining probable cause for forfeiture is the same as that which applies to arrests, searches, and seizures. The United States must show reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion. *United States v. \$149,442.43 in U.S. Currency*, 965 F.2d 868 876 (10th Cir. 1992); *See also United States v. one 1978 Chevrolet Impala*, 614 F.2d 983 (5th Cir. 1980), *United States v. one 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 756 (5th Cir. 1977); *United States v. One 1971 Chevrolet Corvette Automobile*, 496 F.2d 210, 212 95th

Cir. 1974).

8. Hearsay evidence is admissible in a forfeiture proceeding to the same extent that it is admissible in any other “probable cause” hearing. *United States v. \$250,000*, 808 F.2d 895, 899 (1st Cir. 1987); *United States v. 1964 Beechcraft*, 691 F.2d 725, 728 (5th Cir. 1982) *rehg. Denied* 969 F.2d 996, *cert. denied* 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283.

9. The Government had probable cause to seize the Defendant Currency and the Defendant Motorcycle and institute this forfeiture suit. Probable cause was predicated on the Defendant Currency and Defendant Motorcycle having been furnished or intended to be furnished in exchange for a controlled substance in violation of the drug control laws or was proceeds traceable to such an exchange, and/or the currency was money used or intended to be used to facilitate any violation of the drug control laws of the United States.

10. The government had probable cause to seize the defendant motorcycle as having been involved in money laundering. Probable cause is predicated on the motorcycle having been involved in a transaction or attempted transaction with drug proceeds in excess of \$10,000 (18 U.S.C. § 1957) with the intent to evade taxes, specifically registration and sales taxes (18 U.S.C. § 1956(a)(1)(A)(i)) and was a knowing transaction designed to avoid a reporting requirement, specifically, sales taxes (18 U.S.C. § 1956(a)(1)(B)(ii)).

11. Once the Government establishes probable cause, the burden of proof shifts to the claimant to prove a defense to the forfeiture. 19 U.S.C. § 1615; *U.S. v. \$149,442.43 in U.S. Currency* at 876; *See also United States v. one 1975 Ford F100 pickup Truck*, 558 F.2d 755, 576 (5th Cir. 1977), *United States v. one 1971 Chevrolet Corvette automobile*, 496 F.2d 210, 212 (5th Cir. 1975). The claimant must prove a defense by a preponderance of the evidence. *Ford F100 Pickup Truck*, 558 F.2d at 756.
12. Claimant Murphy failed to establish a defense to the forfeiture of the Defendant Currency by a preponderance of the evidence.
13. Claimant Murphy failed to establish a defense to the forfeiture of the Defendant Motorcycle by a preponderance of the evidence.
14. Claimant has the burden of proof to establish that his Fourth Amendment rights have been invaded. *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Wilson v. United States*, 218 F.2d 754, 757 (10th Cir. 1955).
15. Claimant Murphy has failed to establish that his Fourth Amendment rights were violated. Based on the totality of the circumstances in this case, the stop and detention of Claimant Murphy and the search and seizure were not conducted in violation of the Fourth Amendment.

A separate Judgment of Forfeiture in keeping with these Findings of Fact and conclusions of Law shall be prepared and submitted by the Plaintiff within ten (10) days

of the date of this Order.

DATED this 29th day of September, 1999.

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

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

LARRY ASHBY,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,

Defendant.

ENTERED ON DOCKET

DATE **SEP 30 1999**

Case No. 98-CV-796-K (E)

F I L E D

SEP 28 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before this Court is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (# 4). Defendants request this court to dismiss, pursuant to Fed. R. Civ. Pro. 12(b)(1) and (6), Plaintiff's claim as barred by claim preclusion. In the alternative, Defendant requests the Court to grant summary judgment under Fed. R. Civ. Pro 56.

Plaintiff is barred from pursuing the above-captioned action due to claim preclusion. This case satisfies the four elements of res judicata. See *Nwosun v. Gen. Mills Restaurants*, 124 F.3d 1255, 1257 (10th Cir. 1997). First, the prior suit, *Ashby v. United States Postal Serv.*, No. 98-CV-113-K, was dismissed with prejudice at the stipulation of the parties. This constitutes a judgment on the merits in the prior case. Second, the parties in both cases are identical. Third, the suits are based on the same causes of action - namely Plaintiff's dismissal. As noted in *Nwosun*, this circuit has adopted the transactional approach to determining "same cause of action." See 124 F.3d at 1257. A cause of action includes all claims or legal theories arising out of the same transaction, event, or occurrence. See *id.* Therefore, all such claims must be raised in the earlier suit or barred from subsequent litigation. See *id.* Fourth, Plaintiff had a full and fair opportunity to raise this claim in the earlier suit and chose not to do so. Therefore, Plaintiff's current claim is precluded and the case must be dismissed.

Because the Court is dismissing this action with prejudice, the Motion for Summary Judgment is

moot.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (# 4-1) is GRANTED and the Alternative Motion for Summary Judgment (# 4-2) is DENIED as MOOT.

ORDERED this 27 day of September, 1999.


TERRY C. KEEN, Chief
United States District Judge

ll
9.22.99

F I L E D

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Orlean L. Rice and Maxine Rice,)
)
Plaintiffs,)
)
vs.)
)
BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY,)
)
Defendant.)

ENTERED ON DOCKET
DATE SEP 29 1999
98 CV 0857H (M) ✓

) Class Action on Limited
) Issue of Defendant's
) Title
)

**SUMMARY JUDGMENT FOR PLAINTIFFS
ON DEFENDANT'S TITLE UNDER
ACT OF CONGRESS OF MARCH 2, 1899, CH 374, 30 STAT. 990**

This matter comes before the Court for decision this 10th day of September, 1999 at a regular setting on Plaintiffs Motion for Summary Adjudication (Docket #24) and Defendant's Motion for Summary Adjudication (Docket #25) under Rule of Civil Procedure 56 on Defendant's Title to it's right of way acquired under the Act of Congress of March 2, 1899, Ch 374, 30 Stat. 990. The Plaintiffs appeared by their Attorneys Robert J Scott and Curtis A. Parks. The Defendant appeared by it's Attorney Hugh D. Rice. The Plaintiffs' Motion sought Summary Adjudication that Defendant The Burlington Northern and Santa Fe Railway Company's right of way across the following described land, to-wit:

Southwest Quarter (SW/4) of Section 13, Township 23 North, Range 5 East of Indian Meridian, Pawnee County, State of Oklahoma, herein after referred to as 'Rice

28

Land'

was an easement that has been permanently abandoned for railway purposes prior to filing of this action on October 22, 1998 in the sense that the 'Rice Land', as servient estate, is no longer burdened with such railroad right of way. The Defendant's Motion sought Summary Adjudication that it's right of way across said land was a fee title.

The Court finds based upon the Stipulation of Parties for Motion for Summary Adjudication on Defendant's Title under Act of Congress of March 2, 1899, CH 374, 30 Stat. 990 as follows:

-1-

The Eastern Oklahoma Railway Company pursuant to Act of Congress of March 2, 1899, ch 374, 30 Stat. 990 obtained permission of United States of America to survey and locate a line of road across Pawnee County, Oklahoma, together with other land, that is the subject of this litigation.

-2-

Under the authority of the above act The Eastern Oklahoma Railway Company acquired the railroad right-of-way across land that had been allotted in severalty to individual members of the Pawnee Indian Tribe but had not been conveyed to the allottees with full power of alienation.

-3-

The railroad right of way was acquired under the following

Schedule of Damages:

- A. Schedule of Damages approved by Secretary of Department of Interior of United States on November 18, 1901 and filed in Pawnee County Clerk's office in Book 13 of Misc. at pages 254-59 to land reserved for The Pawnee Indian Agency, to land reserved for the Pawnee Indian School and to land that had been allotted in severalty to individual members of the Pawnee Indian Tribe that had not been conveyed to the allottees with full power of alienation.

-4-

The Schedule of Damages described in paragraph 3-A. above included the railroad right-of-way across the 'Rice Land' described as:

Item 12, Allotment 125, Annie Pipe Chief, SW/4 13-23-5, from S line 1275' R of W 200' wide From thence to N line R of W 100' wide.

-5-

Plaintiffs Orlean L. Rice and Maxine Rice, claim on November 18, 1901 (erroneously referred to as April 28, 1902 in Stipulation of Parties filed herein on July 19, 1999), the date of approval of said Schedule of Damages, the 'Rice Land' was titled in the United States of America, in trust subject to restrictions on alienation for the sole use and benefit of Annie

Pipe Chief and her heirs, a member of the Pawnee Indian Tribe, as her allotment, under Trust Patent dated October 9, 1893, filed in Pawnee County Clerk's office on December 18, 1906 and recorded in Book 11 at page 138. The Defendant The Burlington Northern and Santa Fe Railway Company has no evidence to submit that is contrary to this evidence.

-6-

Plaintiffs Orlean L. Rice and Maxine Rice, claim the restraint on alienation contained in the Trust Patent described above was removed when Emma Riggs Beaver, heir of Annie Pipe Chief, conveyed the 'Rice Land' to W. S. Tucker which deed was approved by Secretary of Interior of United States of America on November 2, 1906, filed in Pawnee County Clerk's office on November 22, 1906 in Book 9 on page 106. The Defendant The Burlington Northern and Santa Fe Railway Company has no evidence to submit that is contrary to this evidence.

-7-

The Plaintiffs, Orlean L. Rice and Maxine Rice, husband and wife, claim they acquired title to the 'Rice Land' by Warranty Deed from J. L. Rice and Minnie A. Rice, husband and wife, dated July 22, 1955, which deed was recorded in Pawnee County Clerk's office on July 22, 1955 and recorded in Book 76 at page 284. The Defendant The Burlington Northern and Santa Fe Railway Company has no evidence to submit that is contrary to this evidence.

-8-

Plaintiffs, Orlean L. Rice and Maxine Rice, claim they have been in the actual, open, notorious, exclusive and continuous possession of the 'Rice Land' claiming the title thereto at all times since the delivery of said deed to them on July 22, 1955; that since July 22, 1955 no person has at any time asserted any claim to the 'Rice Land' adverse to said affiant other than the Defendant, The Burlington Northern and Santa Fe Railway Company. Defendant The Burlington Northern and Santa Fe Railway Company has no evidence to submit that is contrary to this evidence.

-9-

The railroad right-of-way acquired in the above Schedule of Damages, was assigned by The Eastern Oklahoma Railway Company to The Atchison, Topeka and Santa Fe Railway Company by Deed No. AT-18479 dated June 20, 1907 and recorded in the land records of Pawnee County Clerk's office in Book 18 of Deeds at page 306 on July 6, 1907.

-10-

The Interstate Commerce Commission of the United States of America issued it's certificate that the present or future public convenience and necessity permits the abandonment of the railroad right of way that crosses the Indian Allotments involved in the Schedule of Damages described in Paragraph 3-A above between Camp and Fairfax, Oklahoma by it's Certificate and Decision, decided

May 9, 1986 served May 16, 1986 in Docket No AB-52 (Sub-45), The Atchison, Topeka and Santa Fe Railway Company - Abandonment in Pawnee and Osage Counties, Oklahoma.

-11-

The railroad right-of-way that crosses the Indian Allotments involved in the Schedule of Damages described in Paragraph 3-A were acquired by The Burlington Northern and Santa Fe Railway Company, defendant, on September 22, 1995, by merger.

-12-

While the parties do not stipulate on the date, the parties do stipulate that if the railroad right-of-way across the 'Rice Land' was an easements it has been permanently abandoned for railway purposes prior to filing of this action on October 22, 1998 in the sense that the servient estate is no longer burdened with the easement created by said Schedule of Damages. The parties further stipulate that if the railroad right-of-way across the 'Rice Land' created by the above-scheduled damages described in paragraph 3-A was not an estate in the nature of an easement acquired pursuant to the Act of Congress of March 2, 1899 ch. 374, 30 Stat. 1990, then Plaintiffs Orlean L. Rice and Maxine Rice have no claim or right, title and interest in and to that portion of the abandoned railroad right-of-way across the 'Rice Land'.

Based on the review of the record, in particular the

stipulations of the parties in this case and the applicable law, in particular the Great Northern Railway vs. United States, 315 U.S. 362; Sand Springs Home vs. Department of Highways, 536 Pacific 2nd 1280 and the Midwestern Development Incorporated vs. City of Tulsa, 259 F. Supp. 554, the Court finds that under the applicable rules of construction that the motion for summary adjudication by the Plaintiffs should be granted and the motion for summary judgment by the railway should be denied. Specifically, the Court finds that:

(1) The rules of construction necessarily must be resolved in favor of the sovereign, in this case the United States;

(2) That the rules of construction, that there cannot be an absurdity which would obtain by having a different view of the public lands from that of Indian lands;

(3) That a careful reading of the statute itself appears to indicate that something less than a fee is granted;

(4) That the legislative history makes clear that during that time period it would be inconsistent with the intent of Congress as expressed in other statutes and in the background to be granting a fee to the railway;

(5) And finally, that Midwestern Development has in fact addressed this issue in the Northern District and has resolved it consistent with this ruling here today.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the

Plaintiffs' Motion for Summary Adjudication is granted and the Defendant's Motion for Summary Adjudication is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, The Burlington Northern and Santa Fe Railway Company, as successor in interest to The Eastern Oklahoma Railway Company, owns no right, title or interest in the following described real property, to-wit:

Southwest Quarter (SW/4) of Section 13, Township 23
North, Range 5 East of Indian Meridian, Pawnee County,
State of Oklahoma,

it's right of way having been acquired under the Schedule of Damages approved by Secretary of Department of Interior of United States on November 18, 1901 and filed in the County Clerk's office of Pawnee County, Oklahoma, in Book 13 of Misc. at pages 254-59.

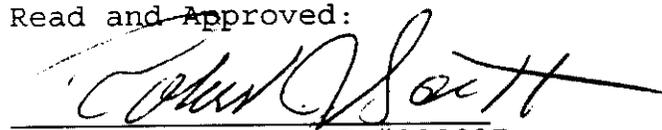
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of way granted in said Schedule of Damages was pursuant to the Act of Congress of March 2, 1899, ch 374, 30 Stat. 990 and was an easement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the right of way across the above land has been permanently abandoned for railway purposes prior to filing of this action on October 22, 1998 in the sense that the servient estate is no longer burdened by such railroad right of way.



Sven Erik Holmes
United States District Judge

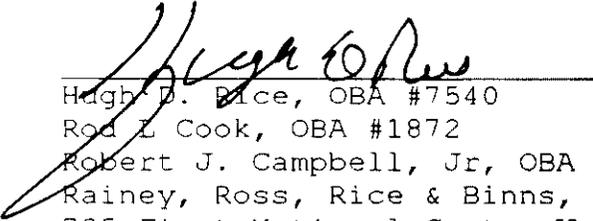
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rgs.

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

MARCEL BINSTOCK, M.D.,)

Plaintiff,)

v.)

THE PAUL REVERE LIFE INSURANCE)
COMPANY and KENNETH L.)
RAINBOLT,)

Defendants.)

ENTERED ON DOCKET
DATE SEP 29 1999

Case No. 98-CV-640-K (M) ✓

F I L E D

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before this Court is Plaintiff's motion asking the Court to find that ERISA does not apply to the above-captioned case and to remand for lack of federal question jurisdiction.

On July 21, 1998, Plaintiff filed suit in Tulsa County District Court alleging breach of contract, tortious breach of contract, breach of fiduciary duty, deceit and fraud, and negligence against Defendants. Defendants removed to federal district court on August 21, 1998, alleging that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, governs this case. The Court will remand if the Court lacks jurisdiction over the matter removed. *See* 28 U.S.C. § 1447(c). In this case, the Court's jurisdiction turns on whether ERISA applies to the disability insurance at issue in this case. Whether ERISA governs a claim is primarily a legal question. *See Peckham v. Gem State Mut.*, 964 F.2d 1043, 1047 n.5 (10th Cir. 1992) ("Because this mixed question [of fact and law] essentially involves conclusions drawn from undisputed facts, it is primarily a legal question.").

Whether Plaintiff's insurance is covered by ERISA turns on whether it is an employee benefit plan, as that term is defined in 29 U.S.C. § 1002. An "employee benefit plan" means either an

employee welfare benefit plan ("EWBP"), employee pension benefit plan, or a combination of the two. *See* 29 U.S.C. § 1002(3). EWBP is defined as

any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . disability

29 U.S.C. § 1002(1). Plaintiff, as sole shareholder of Tulsa Retina Clinic, Inc. ("TRC"), is an employer and not an employee for the purpose of determining the existence of an employee benefit plan. *See* 29 C.F.R. § 2510.3-3(c)(1) (1999) ("An individual . . . shall not be deemed to be [an] employee[] with respect to a . . . business, whether incorporated or unincorporated, which is wholly owned by the individual"). Moreover, the term "employee benefit plan," which includes EWBP, excludes plans under which no employees are participants. *See id.* § 2510.3-3(b). The Tenth Circuit has accepted this regulation's statement of the law. *See Peckham v. Bd. of Trustees*, 653 F.2d 424, 427 (10th Cir. 1981).

In order to determine whether Plaintiff's plan qualifies as an EWBP, the Court must first determine what policies are included in that plan. There is insufficient precedent to convince the Court to lump Plaintiff's disability insurance with his employees' disability insurance or TRC's retirement and health insurance policies. Defendants cite to *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), for the proposition that several policies can be lumped together for ERISA purposes. This case, however, involves a very different factual situation. In *Peterson*, the company purchased a policy for both partners and employees. *See id.* at 406. Then, the company switched to a new policy, leaving only one person, a partner who failed his physical examination, on the prior policy. *See id.* In a suit over this earlier policy, the court ruled that, "[b]ecause the . .

. policy was purchased . . . for the purpose of fulfilling its plan to provide benefits to its employees as well as its partners, the policy is part of an ERISA plan and is governed by ERISA." *Id.* at 408.

The other cases cited by Defendants are from district courts within the Ninth Circuit that are bound by *Peterson*. In the present suit, Plaintiff provides a complete benefit package to his employees and purchases individual disability policies for those employees. However, there is no evidence that Plaintiff intended his disability insurance, for which he pays the premiums, to be part of a plan established to provide benefits to his employees. That Plaintiff passed the premiums through his Chapter S corporation does not negate this lack of intent.

Considered in this light, Plaintiff's disability insurance does not constitute an EWBP. As noted above, an "'employee benefit plan' shall not include any plan . . . under which no employees are participants covered under the plan." 29 C.F.R. § 2510.3-3(b). Plaintiff is the only person covered by the insurance at issue. Therefore, it is not an EWBP and not covered by ERISA.

Even if Plaintiff's disability insurance were a part of an EWBP, ERISA would not govern his suit. In the Tenth Circuit, a person cannot be both employer and employee under ERISA.¹ See *Peckham v. Bd. of Trustees*, 653 F.2d 424, 427 (10th Cir. 1981) (citing the anti-inurement provision of ERISA, 29 U.S.C. § 1103(c)). Some circuits, building on this reasoning, have found that an employer cannot sue under ERISA, even under an ERISA-covered EWBP. See, e.g., *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992) (employer and dependents cannot be participants or beneficiaries under an ERISA plan, even though ERISA still applies to

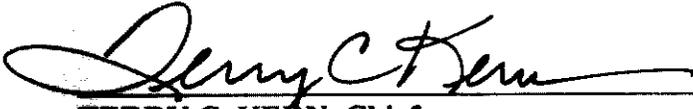
¹Defendants cite to *Garratt v. Walker* as controlling authority on this issue. See 164 F.3d 1249, 1251 n.2 (10th Cir. 1998) (*en banc*). This reliance is misplaced, as *Garratt* involves an interpretation of the Internal Revenue Code.

employees covered by the plan); *Giardono v. Jones*, 867 F.2d 409, 412 (7th Cir. 1989) (citing the anti-inurement clause to find that an employer cannot be a participant in an ERISA-covered health insurance contract). *But see Vega v. National Life Ins. Servs., Inc.*, — F.3d —, —, No. 97-20645, 1999 WL 680319 at *7 (5th Cir. Sept. 1, 1999) (employer cannot be employee for determining whether the existence of an "employee benefit plan" but otherwise can be considered an employee under ERISA); *Wolk v. Unum Life Ins. of Amer.*, — F.3d —, —, No. 98-3542, 1999 WL 437286 at *5 (3d Cir. June 30, 1999) (employer, who shares coverage with employees under an EWBP, can be an ERISA "beneficiary" under that plan); *Peterson*, 48 F.3d at 408 (finding that once a plan is covered by ERISA, a partner can sue under ERISA as a beneficiary). Those circuits that have found that ERISA does not govern a suit by an employer who participates in an ERISA-covered EWBP follow *Peckham's* approach to employer status. Therefore, this Court finds those cases more persuasive.

Because ERISA covers neither Plaintiff's disability insurance nor his participation in an ERISA-covered employee welfare benefit plan, there is no federal question before this Court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand (# 10) is GRANTED and the case is REMANDED to the District Court in and for Tulsa County, State of Oklahoma.

ORDERED this 27 day of September, 1999.


TERRY C. KERN, Chief
United States District Judge

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

FILED

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TOM W. HARDRIDGE,
SSN: 448-60-7462,

Plaintiff,

v.

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

Defendant.

CASE NO. 98-CV-856-M ✓

ENTERED ON DOCKET

DATE SEP 29 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 28th day of SEPT., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED₂

SEP 28 1999 *cl*

TOM W. HARDRIDGE,
SSN: 448-60-7462,

PLAINTIFF,

vs.

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

DEFENDANT.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE No. 98-CV-856-M ✓

ENTERED ON DOCKET

DATE SEP 29 1999

ORDER

Plaintiff, Tom W. Hardridge, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ 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

¹ Plaintiff's October 25, 1993 application for benefits was denied initially and upon reconsideration. [R. 89-99]. On September 21, 1994, Plaintiff requested a hearing before an Administrative Law Judge (ALJ). [114-115]. An appointment for a consultative medical examination of the Plaintiff was scheduled April 10, 1995, at which Plaintiff failed to appear. [R. 84-85]. ALJ Payne sent a "show cause" notice, which Plaintiff received May 11, 1995 and to which he never responded. [R. 85, 223-224]. On July 11, 1995, ALJ Payne rendered a decision denying Plaintiff benefits. [R. 228-235]. On July 12, 1996, the Appeals Council remanded the claim to the ALJ for hearing. [R. 239-241]. A hearing was held November 14, 1996. By decision dated January 17, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 24, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born August 30, 1964 and claims to have been unable to work since August 5, 1992, due to massive obesity, diabetes, chronic back and knee pain, chronic fatigue and right hand injury. The ALJ determined that Plaintiff has severe impairments consisting of severe diabetes, obesity and "is status post fracture of the right fourth finger but that he retained the residual functional capacity (RFC) to perform work-related activities except for work involving lifting over 25 pounds frequently or 50 pounds occasionally, limited by no more than occasional stooping, bending or climbing of ramps or stairs; or more than infrequent crouching or kneeling; with no climbing of ladders, ropes or scaffolds; work that requires driving at night; or work that requires full grip strength in the right hand. [R.26]. He determined that Plaintiff's past relevant work (PRW) of film wrap and food products packager did not require

performance of those precluded work activities. [R. 26]. The ALJ also made an alternative finding that, in addition to his PRW, there were other jobs in the national economy Plaintiff could perform with his RFC. The ALJ found, therefore, at both steps 4 and 5, that Plaintiff was not disabled as defined by the Social Security Act. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988)(discussing five steps in detail).

Plaintiff lists several grounds for reversal, only one of which will be discussed as it requires reversal and remand of the ALJ's decision.

Plaintiff contends the ALJ failed to give appropriate weight to his treating physician's opinion. The opinion at issue is a handwritten note on a prescription form by J. White, M.D., as follows:

DX: Alcoholic Hepatitis
Pt. has liver failure and will
be unable to work for at
least 12 months

[R. 251]. The note, dated November 10, 1995, follows two typewritten pages in the record which were dictated by Dr. White on November 9, 1995, in which she reported her assessment of dehydration and a plan to rule out hepatitis syndrome by further lab tests. [R. 249-250]. These are the only records in the administrative record on appeal from Dr. White.

In his decision denying benefits, the ALJ noted Plaintiff's hospitalization in November 1995 for alcoholic hepatitis and dehydration. [R. 20]. He also noted Dr. White's statement regarding Plaintiff's inability to work for at least 12 months. *Id.* He

rejected the opinion of Dr. White, stating: "However, Dr. White has failed to provide any progress notes or findings that would support his statement." *id.* The ALJ decided the treating physician rule did not apply in this instance because the statement was conclusory and not supported by diagnostic testing, laboratory reports or clinical findings.

Plaintiff asserts the ALJ did not give specific legitimate reasons for disregarding Dr. White's opinion and that he was required, under Social Security Ruling 96-5p to contact Dr. White for clarification if he believed her opinion was not supported by the evidence. Social Security Ruling 96-5p reads, in pertinent part:

Requirements for Recontacting Treating Sources
Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

S.S.R. 96-5p, 1996 WL 374183, *6 (S.S.A.).

The Commissioner acknowledges that it is unclear whether the November 10, 1995 handwritten note by Dr. White was based upon the laboratory tests mentioned in the earlier, November 9, 1995, report of Dr. White. He argues that, "as the record stands" the ALJ was correct in rejecting Dr. White's opinion as conclusory and unsupported by objective medical findings.

The court notes that the ALJ asked Plaintiff's attorney at the hearing to "get a statement from Dr. White regarding this physician's statement on a prescription form."

[R. 76]. He wanted clarification on the work restriction and an updated assessment of Plaintiff's condition. *Id.* The attorney agreed to try to get Dr. White to "expound" upon her statement. However, none of the records later produced by Plaintiff's attorney included any additional records or reports from Dr. White or the results of any laboratory tests or clinical studies from St. Francis Hospital during the time period in question. Plaintiff has the burden of providing medical evidence proving disability. *Henrie v. United States Dep't of Health & Human Servs.*, 13 F.3d 359, 360 (10th Cir. 1993). However, the ALJ has the duty to fully and fairly develop the record as to material issues. See *Carter v. Chater*, 73 F.3d 1019, 1021 (10th Cir.1996). This duty applies even when, like here, the Plaintiff is represented by counsel. See *Baca v. Department of Health & Human Servs.*, 5 F.3d 476, 479-80 (10th Cir.1993). The ALJ's duty "is one of inquiry, ensuring that the ALJ is informed about facts relevant to his decision and learns the claimant's own version of those facts." *Henrie* 13 F.3d at 360-61 [quotations and brackets omitted]. Thus, the ALJ bears responsibility for ensuring "an adequate record is developed during the disability hearing consistent with the issues raised." *Id.* at 360-61.

The ALJ acknowledged the importance of Dr. White's statement of disability and apparently recognized that the laboratory tests and clinical studies upon which she based her opinion of disability would be material to his determination of Plaintiff's RFC and his ability or inability to work. Yet, in the two months that followed the hearing before the ALJ rendered his decision, he appears to have made no attempt to either obtain the records or to recontact the treating physician. "An ALJ has the duty to

develop the record by obtaining pertinent, available medical records which come to his attention during the course of the hearing." *Carter v. Chater*, 73 F.3d 1019, 1022 (10th Cir. 1996); see also *Baker v. Bowen*, 886 F.2d 289, 291-92 (10th Cir. 1989); 20 C.F.R. § 416.1444. The ALJ also has the power to subpoena such records if necessary. See *Baker*, 886 F.2d at 292; 20 C.F.R. § 416.1450(d)(1). The ALJ then rejected Dr. White's statement of disability in his decision on the basis that no progress notes or findings that would support [her] statement were provided. [R. 20]. The court finds the Commissioner's failure to make a reasonable effort to obtain the necessary records or recontact the treating physician is error requiring reversal. See 20 C.F.R. §§ 404.1512(e); 416.912(e) (If evidence from the Plaintiff's treating doctor is inadequate to determine if the Plaintiff is disabled, the Commissioner must first recontact the treating doctor to determine if additional needed information is available).

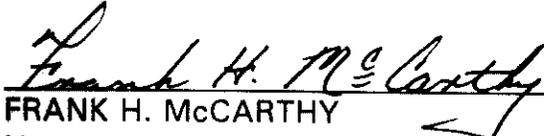
Furthermore, where the medical evidence in the record is in conflict or is inconclusive, "a consultative examination is often required for proper resolution of a disability claim." *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir.1997)(step two); see also 20 C.F.R. §§ 404.1512(f); 416.912(f) ("If the information we need is not readily available from the records of your medical treatment source, or we are unable to seek clarification from your medical source, we will ask you to attend one or more consultative examinations at our expense."); *Hawkins*, 113 F.3d at 1169 (suggesting ALJ should order consultative examination when record establishes reasonable possibility of disability and result of examination could be expected to assist in resolving disability issue); *Thompson v. Sullivan*, 987 F.2d 1482, 1492 (10th

Cir.1993). The court notes that a consultative examination had been previously scheduled for Plaintiff and that he failed to appear for the examination. [R. 223]. However, Plaintiff was questioned about this missed appointment at the hearing and offered an explanation that appeared to be reasonable. [R. 84-85]. The ALJ made no attempt to reschedule the appointment.

In this case, the ALJ did not meet his burden of fully and fairly developing the record. The medical records presented are insufficient to determine whether Plaintiff was disabled for any twelve-month period of time. The medical evidence contains treatment notes of other treating doctors [R. 253-258, 272-275] which establish that Plaintiff presented sufficient medical evidence to warrant further investigation of his physical condition. See *Hawkins*, 113 F.3d at 1169. Because the ALJ did not have sufficient facts before him to make an informed decision, his decision is not supported by substantial evidence.

This case is REVERSED AND REMANDED to the Commissioner for further development of the record. The ALJ is urged to obtain a summary and evaluation from Plaintiff's treating doctor of Plaintiff's disability with a clear indication of the permanency of Plaintiff's condition and/or a detailed evaluation from a consulting doctor who personally examines Plaintiff. *Bishop v. Sullivan*, 900 F.2d 1259, 1263 (8th Cir.1990)(remanding for ALJ to develop record by directing interrogatories to Plaintiff's doctor or by ordering consulting examination). After the evidence of Plaintiff's impairments is further developed, the Commissioner should reevaluate Plaintiff's impairments and reconsider his application for disability benefits.

So ORDERED this 28th day of Sept., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

F I L E D

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

SEP 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUTH I. PRIM,
SSN: 446-48-1381,

Plaintiff,

v.

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

Defendant.

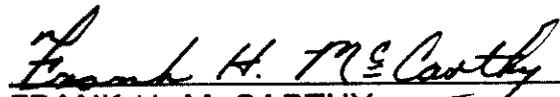
CASE NO. 98-CV-876-M ✓

ENTERED ON DOCKET

DATE SEP 29 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 28th day of sept., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

10

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUTH I. PRIM,
SSN: 446-48-1381,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE NO. 98-CV-876-M ✓

ENTERED ON DOCKET

DATE SEP 29 1999

ORDER

Plaintiff, Ruth I. Prim, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ 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

¹ Plaintiff's May 12, 1997 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held November 3, 1997. By decision dated November 21, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 28, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born July 13, 1947 and was 50 years old at the time of the hearing. [R. 30, 75]. She claims to have been unable to work since February 17, 1997, due to carpal tunnel syndrome, back pain, uncontrolled diabetes and bladder leakage. [R. 75, 89].

The ALJ determined that Plaintiff has severe impairments consisting of "status post lumbar laminectomies times two and residuals of tendinitis of the right wrist" but that she retained the residual functional capacity (RFC) to perform work-related activities except for work that requires lifting over 10 pounds frequently and 20 pounds occasionally or that requires heavy or repetitive use of her right wrist. [R. 20-21]. He determined that Plaintiff was unable to perform the duties of her past relevant work (PRW) but, based upon the testimony of a Vocational Expert (VE), concluded that there were other jobs existing in the national economy which Plaintiff could perform with those limitations. [R. 21]. He found, therefore, that Plaintiff was not disabled as

defined by 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).

In her brief before this court, Plaintiff asserts several grounds for reversal. The Commissioner responds that only one of Plaintiff's contentions is preserved for appeal before this court because it was the only one submitted to the Appeals Council by Plaintiff upon her request for review. The Commissioner argues that, pursuant to the Tenth Circuit's holding in *James v. Chater*, 96 F.3d 1341 (10th Cir. 1996), Plaintiff waived the other issues because they were not raised by her previous attorney at the administrative level to the Appeals Council.² Plaintiff has not replied to the Commissioner's argument.

In *James* the Tenth Circuit announced a new rule applicable to Social Security disability appeals: "Issues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review." *Id.* at 1344. The Court stressed the importance of specifically identifying the issues, finding that a summary request for review which did not address the ALJ's decision at all, but merely stated in conclusory terms, "I am disabled and entitled to benefits," was inadequate to apprise the Appeals Council of the particularized points of error subsequently argued in the courts. *Id.* at 1343. In addition, the Court stated that a request for review which does not identify the issues

² Plaintiff is represented by different counsel on appeal to this court.

with any particularity effectively sandbags the Appeals Council, thus depriving the Court of the Appeals Council's views on the issues and unnecessarily causing delay in the Claimant's possible receipt of benefits. *Id.* at 1344.

The ALJ's decision advised Plaintiff of her rights on appeal, stating:

- (1) any issue upon which you appeal must be **specifically stated**, so as to adequately apprise the Appeals Council of the particular points of error alleged to be made by the United States Administrative Law Judge in the decision;
 - (2) it is insufficient to simply state "*I am disabled and entitled to benefits*" or similar conclusory language when appealing. Such language has been held to be inadequate in apprising the Appeals Council of error(s) by the United States Administrative Law Judge;
 - (3) failure to state with particularity the issues raised to the Appeals Council on appeal will result in **waiver of those issues** should judicial review later be sought before the United States Courts;
 - (4) issues not stated with particularity to the Appeals Council will **not be able to be raised** for the first time before the United States Courts.
- See, James v. Chater, Case No. 95-2231 (10th Cir. 1996).**

[R. 22]. [emphasis in original]. Thus, the ALJ clearly and unambiguously advised Plaintiff of the necessity of identifying contested issues to the Appeals Council with particularity, and of the consequences of failing to do so.

Plaintiff's November 24, 1997 letter to the Appeals Council is set forth as follows in its entirety:

By virtue of this correspondence, I am requesting a thorough review of the decision of Richard J. Kallsnick, United States Administrative Law Judge, rendered on Ruth I. Prim on November 21, 1997. I trust you have a copy of that decision, but I attach a copy for your convenience. I take strong issue to the Administrative Law Judge's decision as both being contrary to the fact and the law in the case. I

direct the Appeals Council specifically to the testimony of William Young, Vocational Expert who testified contrary to the Judge's ruling that Ruth I. Prim could not perform any substantial gainful employment of any sedentary nature due to her limitations and based upon her testimony. Ruth Prim has had two disabling lumbar surgeries, is approaching advanced age, has disabling pain and carpal tunnel syndrome in her right wrist, she is right hand dominant, has a 12th grade education and is disabled.

I fully agree with the sequential steps imposed by the law and disregarded by Judge Kallsnick. Judge Kallsnick is correct in finding that based upon the entire record, that Ruth I. Prim cannot return to any of her previous relevant work and therefore the burden shifts to the Social Security Administration to prove that she can perform less demanding more sedentary occupations. Judge Kallsnick, (sic) by virtue of his decision, both ignores the testimony of the vocational expert and the burden of proof had shifted and further declined to properly quote the evidence. There was no cross examination of the expert because the expert testified unequivocally that Ruth I. Prim, based upon her limitations, age, education and prior work experience could perform none of the employments outlined by the Administrative law Judge. I respectfully direct the Appeals Council to page 8 of the Judge's decision and the lack of his recitation of the facts that William E. Young, Vocational Expert hired by the Social Security Administration, testified that she could perform none of those vocations.

This case needs immediate review and Judge Kallsnick's decision reversed. I remain available for copies of any exhibits and any of the record that the Appeals Council desires or deems necessary. However, I strongly direct the Appeals Council to the transcription of William E. Young's testimony. It will be found in the transcript recorded by the court reporter, not in the Order issued by the Judge.

[R. 392-393]. The issue on appeal is, therefore, limited to that which Plaintiff raised with particularity to the Appeals Council: the propriety of the ALJ's reliance upon the VE's response to the hypothetical questions.

The ALJ first questioned the VE regarding the demands of Plaintiff's past jobs and then proposed a hypothetical to the VE which included Plaintiff's age, sex, education, with the capability of performing light and sedentary activity and being able to use her right wrist for hand controls but limited to no heavy or repetitive use of the right wrist. [R. 47-49]. He included in his hypothetical, mild to moderate pain symptomatology from a variety of sources, chronic pain that would be of sufficient severity as to be noticeable at all times, and use of medication that would not preclude functioning at the light or sedentary level and allowing her to remain reasonably alert. The ALJ asked whether this individual would be able to perform any of Plaintiff's past relevant work, to which the VE responded that she could not. [R. 48]. The ALJ then asked the VE whether there would be other jobs which could be performed by such an individual. [R. 49]. The VE responded that there were unskilled jobs in both the light and sedentary levels consisting of inspector, cashier, office helper, telephone solicitor and janitorial jobs. [R. 50].

The second hypothetical presented by the ALJ to the VE assumed that the testimony of Plaintiff as given at the hearing was found to be credible, substantially verified by third party medical evidence which is part of the record and without any significant contradictions. [R. 50]. Asked whether Plaintiff could perform her past relevant work or any of the jobs identified in the first hypothetical, the VE responded that such an individual could not work on a sustained and continuous basis. [R. 50-51].

According to the Plaintiff, the ALJ improperly ignored the answer to the final hypothetical. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the 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). It is clear that the ALJ did not accept as true Plaintiff's testimony that she suffered pain and bladder leakage so severe as to be unable to work at any job. In reaching his decision, the ALJ properly discussed the relevant evidence, which included Plaintiff's medical record, frequency of medical contacts, daily activities, pain medication and testimony and determined her pain was not as severe as alleged. Therefore, the Court finds that the ALJ was not required to rely upon the VE's response to his second hypothetical question and that the first hypothetical question asked of the vocational expert and relied upon by the ALJ was proper and based upon substantial evidence.

Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 28th day of SEPT., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

Weapon (Count II), and Kidnapping (Count III), all After Former Conviction of a Felony, in Tulsa County District Court, Case No. CRF-84-379. He was sentenced to 800 years, 300 years and 400 years imprisonment on each conviction, **respectively**, with the sentences to run concurrently. Petitioner, represented by an assistant appellate public defender, appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals where, on November 29, 1989, his conviction was affirmed (#24, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Petitioner, appearing *pro se*, sought post-conviction relief in the state district court. After that court denied post-conviction relief, Petitioner appealed to the Oklahoma Court of Criminal Appeals where the trial court's denial of post-conviction relief was affirmed on February 15, 1995. (#24, Ex. B).

The Clerk of Court received the instant petition for writ of habeas corpus for filing on May 21, 1997 (#1). Petitioner signed the "Declaration Under Penalty of Perjury" on May 16, 1997 (#1, at 10).

ANALYSIS

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

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

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

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the

United States is removed, if the applicant was prevented from filing by such State actions;

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

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

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

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

In addition, the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled while pursuing state post-conviction proceedings properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas

petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about February 26, 1990, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

Although the limitations period would be tolled during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts, § 2244(d)(2), the Court finds that in this case, Petitioner's only application for post-conviction relief was filed and resolved prior to the April 24, 1996 commencement of the grace period. As a result, Petitioner's post-conviction proceeding had no effect on the running of the limitations period. Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed May 21, 1997,¹ almost one month after expiration of the grace period, is clearly untimely.

In his reply to Respondent's response (#27), Petitioner alleges that (1) the § 2244(d) limitations period does not apply to his petition because he asserts his actual innocence of the crimes for which he was convicted, (2) that he could not present his federal habeas petition within the one year limitations period due to an incapacitating mental illness, (3) his trial was fundamentally unfair and to allow his conviction to stand would result in a miscarriage of justice, (4) the late filing of the

¹The Court notes that the earliest possible filing date for this petition would be May 16, 1997, the date Petitioner signed the "Declaration Under Penalty of Perjury" and the earliest possible date he could have given the petition to prison officials for mailing. See Hoggro, 150 F.3d at 1226-27 n.3 (applying "prison mailbox rule" of Houston v. Lack, 487 U.S. 266, 270 (1988), to filing of federal habeas corpus petition). Recognition of May 16, 1997 as the filing date does not alter the conclusion that this petition is untimely.

petition is "excusable in the interest of justice," and (5) Petitioner can seek relief from his convictions under the Ninth Amendment.

In his arguments numbered 1, 3, 4 and 5, Petitioner contends that because he asserts his actual innocence, this Court should overlook the limitations bar and consider the merits of the claims to prevent a miscarriage of justice. However, Tenth Circuit authority provides that claims of actual innocence alone cannot serve to toll the limitations period. Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). The record must also demonstrate that the habeas petitioner has pursued his claims diligently but has been prevented from filing a timely petition due to extraordinary circumstances. Id. After reviewing the record in this case, the Court finds that Petitioner has not pursued his claims diligently. Petitioner offers no explanation for his failure to pursue his constitutional claims during the five years between his direct appeal and his post-conviction proceedings. Finding nothing in the record indicating Petitioner pursued his claims diligently, the Court concludes that Petitioner's claim of actual innocence alone is insufficient to prevent a limitations bar.

The Court also finds that Petitioner's alleged mental ailments are insufficient to entitle him to equitable tolling of the AEDPA's limitations period. As discussed above, the limitations period may be equitably tolled when a petition is untimely due to extraordinary circumstances that are both beyond the petitioner's control and unavoidable even with diligence. See Miller, 141 F.3d at 978. Few courts have addressed whether a habeas petitioner's mental illness can equitably toll the AEDPA's limitations period. See, e.g., Fisher v. Johnson, 174 F.3d 710, 715-16 (5th Cir. 1999) (recognizing that mental incompetency might support equitable tolling but concluding that petitioner's "brief period of incapacity [in a mental ward] during a one-year statute of limitations . . . does not necessarily warrant equitable tolling"). In contexts other than habeas corpus, courts which have

recognized an exception for mental incapacity have limited the application of equitable tolling to exceptional circumstances. See, e.g., Lopez v. Citibank, N.A., 808 F.2d 905, 906-07 (1st Cir.1987) (where the plaintiff was able to pursue his claim despite illness, equitable tolling was not warranted); Moody v. Bayliner Marine Corp., 664 F.Supp. 232, 236 (E.D.N.C.1987) (panic disorder suffered by plaintiff did not constitute "exceptional circumstances" such that she was prevented from pursuing her claim). In Bassett v. Sterling Drug, Inc., 578 F.Supp. 1244, 1248 (S.D. Ohio 1984), the court further narrowed the exception, stating that equitable tolling for mental incapacity should be limited to "the objective standard of adjudication or institutionalization . . . [to] protect[] defendants against specious allegations of mental incompetence advanced in desperate efforts to save time-barred claims." In the context of a Title VII action found to be barred by the statute of limitations despite the plaintiff's alleged mental illness, the Tenth Circuit Court of Appeals declined to toll the limitations period because the plaintiff failed to allege "exceptional circumstances" required to toll the statute, was able to pursue his claims in spite of his mental condition, and was represented by counsel during the 90-day time period. Biester v. Midwest Health Services, Inc., 77 F.3d 1264, 1268 (10th Cir. 1996). Similarly, in Ebrahimi v. Hutton & Co., Inc., 852 F.2d 516, 522 (10th Cir. 1988), the circuit court looked to federal law, the Uniform Probate Code, § 5-401, 8 U.L.A. 478 (1983), to conclude that a person would have to be unable to manage property and business affairs effectively due to mental illness for equitable tolling to apply to claims of excessive trading, unauthorized trading and trade misappropriation brought under the Commodity Exchange Act and barred by a three-year limitations period.

In the instant case, Petitioner claims in his reply, filed January 15, 1998, that he suffers from "schizophrenia" (sic) which goes in "regression" with periodic relapses and "anxiety which was

diagnosed over the last two to three years" (#27 at 4). Petitioner asserts that he could not file his federal habeas corpus action until May 1997 because of "the severe anxiety attacks." He claims that he suffered from "anxiety attacks" from February 1995 until May 1997 and "could not even comb his hair or brush his teeth because of sickness." (Id. at 5). Petitioner attaches copies of memoranda from his facility's Chiefs of Security to watch commanders and shift supervisors. (#27, Exs. A and B). The memos are dated June 13, 1996 and January 2, 1997 and state that Petitioner was to be allowed to walk outside his cell in order to "overcome the [anxiety] attacks."

The Court finds that Petitioner has failed to demonstrate "extraordinary circumstances" sufficient to justify equitable tolling of the limitations period. Although the memoranda indicate that Petitioner suffered periodic anxiety attacks, they do not support Petitioner's contention that he was completely incapacitated for over two years. In fact, the memoranda suggest that simply allowing Petitioner to walk outside his cell served to overcome the anxiety attacks. Nothing indicates that Petitioner was adjudicated incompetent or institutionalized due to mental incompetence during the relevant time period. The Court also notes that when Petitioner filed his habeas petition on May 21, 1997, the petition was accompanied by a voluminous brief. Also, since this case was filed, Petitioner has filed prolifically, inundating the Court with supplemental briefs and frequent motions. None of Petitioner's filings suggests he suffers from mental incompetence. Examining all evidence presented in the light most favorable to the petitioner, Petitioner in this case has shown no exceptional circumstances to demonstrate that he was incapable of pursuing his claim during the one year grace period. As a result, the Court finds that equitable tolling should not apply in this case.

Because the limitations period should not be extended beyond April 23, 1997 or equitably tolled, the Court concludes that the petition filed May 21, 1997 is untimely. The petition for writ of habeas corpus should be dismissed with prejudice.

CONCLUSION

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

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for writ of habeas corpus is **dismissed with prejudice** as barred by the statute of limitations.
2. Any pending motion is **denied as moot**.

SO ORDERED THIS 27 day of September, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

MARTIN MORRIS MOSES, SR.,)
)
Plaintiff,)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

ENTERED ON DOCKET

DATE SEP 29 1999

No. 98-CV-126-K (M) ✓

FILED

SEP 28 1999 ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Defendants' motion for summary judgment. Having previously dismissed Defendants Wakefield, Turley, Gall, Geiger, Palmer, Spurlock, Griffith, Spears, Taylor, England and Cannon, the Court considered and granted summary judgment on Plaintiff's remaining claim against Defendants Glanz, Petitt, Pierce, Wheeler and Ingram.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants Glanz, Petitt, Pierce, Wheeler and Ingram, and against Plaintiff and that Plaintiff take nothing by his claims.

SO ORDERED THIS 27 day of September, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

MARTIN MORRIS MOSES, SR.,)
)
Plaintiff,)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

ENTERED ON DOCKET
DATE SEP 29 1999
No. 98-CV-126-K (M)
FILED
SEP 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion for **summary judgment** (#13) filed by Defendants Glanz, Petitt, Wheeler, Pierce and Ingram in this 42 U.S.C. § 1983 civil rights action. Plaintiff, appearing *pro se* and *in forma pauperis*, alleges that **Defendants** denied him the right to attend church services, in violation of the First Amendment while **he was** a pretrial detainee at the Tulsa County Jail. In response to the motion for **summary judgment**, Plaintiff filed his "motion to dispell and brief in support thereof" (#14). For the reasons **stated below**, the Court grants Defendants' motion for **summary judgment** and denies any relief sought by Plaintiff in his "motion to dispell."

BACKGROUND

Plaintiff was arrested on November 18, 1997 on charges of assault and battery on a police officer, resisting arrest, and speeding. **Because his charges were of a violent nature**, he was housed on the Eighth Floor of the Tulsa County Courthouse, which was the maximum-security area of the Tulsa County Jail system at that time. **At the time of the events giving rise to Plaintiff's claim**, he was housed in unit K on the eighth floor of the jail.

On February 17, 1998, Plaintiff **filed the instant civil rights action**. He filed his second

amended complaint (#10) on June 4, 1998, alleging the following violations: (1) denial of access to the courts; (2) physical, verbal and psychological abuse; (3) retaliation and denial of due process by grievance procedures and rules and policies set forth; (4) denial of right to attend religious services, and (5) conduct unbecoming of numerous jail officials, in violation of the First, Eighth and Fourteenth Amendments to the United States Constitution. By Order dated July 30, 1998, the Court dismissed all of Plaintiff's claims pursuant to 28 U.S.C. § 1915A, except his claim that he had not been allowed to attend religious services. Defendants Glanz, Petitt, Pierce, Wheeler and Ingram were directed to prepare a Special Report and to answer and/or file dispositive motion(s) in response to Plaintiff's claim.

Plaintiff seeks declaratory, compensatory and punitive relief.

ANALYSIS

A. Summary Judgment Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. The court cannot resolve material

factual disputes at summary judgment based on conflicting affidavits. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). However, the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a *pro se* plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's *pro se* pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972). When reviewing a motion for summary judgment it is not the judge's function to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

B. Rights of Pretrial Detainees

"There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Even convicted prisoners do not forfeit all constitutional rights by reason of their conviction and confinement in prison. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Those rights retained include freedom of speech and religion under the First and Fourteenth Amendments. See e.g. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). The court has recognized that pretrial detainees retain at least those constitutional rights as those retained by convicted prisoners. Bell, 441 U.S. at 545. However, these rights are not immune from restrictions or limitations pursuant to lawful incarceration. Id. at 545-46. Detainees do not possess the full range of freedoms as unincarcerated individuals. Id. at 546. Courts must accommodate both the legitimate needs of the institution and the rights of the incarcerated. See id. Courts should ordinarily defer their judgment in the day-to-day operations of a corrections facility to the appropriate officials unless there is substantial evidence that the response is exaggerated. Id. at 546-47.

Conditions or restrictions which implicate only the detainee's liberty interest are evaluated under the Due Process Clause. Bell, 441 U.S. at 535. Because a detainee cannot be punished without adjudication of guilt in accordance with due process of law, restrictions which amount to punishment are invalid. See id. Loss of freedom of choice and privacy are inherent incidents of lawful confinement and, while they interfere with the detainee's desire to live as comfortably as possible, do not amount to punishment. Id. at 537. Absent a showing of intent to punish on the part of corrections officials, if a condition or restriction is reasonably related to a legitimate government objective, without more, it is valid. Id. at 538-39. However, if the restriction is arbitrary,

purposeless, or appears excessive in relation to the purpose assigned to it, the court may infer a punitive purpose. Id. Such a restriction, although not imposed with the expressed intent to punish, contravenes a detainee's rights under the Fourteenth Amendment. See id.

C. Analysis of Plaintiff's Claim of Denial of Right to Attend Religious Services

In his second amended complaint, Plaintiff alleges that on certain dates from November 29, 1997, through February 7, 1998, he was not allowed to attend religious services held at the Tulsa County Jail. He alleges that inmates housed in units L, M, and N were allowed to attend the services but inmates housed in unit K were not. When Plaintiff asked certain Defendant Detention Officers why unit K inmates were not allowed to attend, he states he saw them "turn red in the face and exit[] the sallyport entrance of both K and L units" (#10 at 2-C).

As part of the court-ordered Special Report, Defendants submitted the Affidavit of Dinisha R. Ezell, a Corporal in the Detention Division of the Tulsa County Sheriff's Office. (#13, Special Report, Ex. C). Corporal Ezell states that at the time of the occurrences giving rise to Plaintiff's claim, Plaintiff was housed in the maximum-security area of the Tulsa County Jail System. Group religious services were conducted in a holding cell on the ninth floor of the County Jail. However, due to security concerns, the number of prisoners allowed to attend each service was limited.¹ According to Corporal Ezell, inmates were allowed to attend the services on a "first-come, first-served" basis and "when it is time for a service, detention personnel go to the individual cells and

¹According to the Report, only ten (10) inmates were allowed to attend each service on a first-come, first-served basis. In his response to the motion for summary judgment, Plaintiff disputes the number, asserting that fifteen (15) inmates were allowed to attend each service. However, the Court finds that the discrepancy in the number of inmates allowed to attend is not material to the resolution of Plaintiff's claim.

ask for the inmates who want to attend . . . Once the [] maximum is reached, no other inmates are allowed out of their cells." (Id.) Also, an inmate known to have conflicts with other inmates will not be allowed to attend a service if one of the conflicted inmates has been allowed out to attend. Corporal Ezell also states that "[i]n addition to regular church services, the Tulsa County Sheriff's Office makes available individual clergy from Tulsa Metropolitan Ministry for one-on-one consultation and prayer with inmates seven days a week." (Id.)

Prisoners continue to be protected by the First Amendment even while incarcerated, including the right of free exercise of religion, O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987), and prison authorities must afford prisoners "reasonable opportunities . . . to exercise the religious freedom guaranteed by the First . . . Amendment[]." Cruz v. Beto, 405 U.S. 319, 321 n.2. (1972). Nevertheless, lawful incarceration necessarily brings about restrictions on certain constitutional rights, including the right of free exercise of religion. Thornburgh v. Abbott, 490 U.S. 401, 405 (1989). Limitations on free exercise derive both from the fact of incarceration as well as valid penological objectives, such as security within the institution, deterrence of crime and rehabilitation of prisoners. O'Lone, 482 U.S. at 348.

Before November 16, 1993, a prison regulation which impinged on a prisoner's desire to pursue his religion did not violate the First Amendment if it was "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). Enactment of the Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb to 2000bb-4 (West Supp. 1994) ("RFRA"), cited by Plaintiff as a basis for jurisdiction in the instant case, replaced the Turner and O'Lone standards. Under the RFRA standard, if the government "substantially burden[ed] a person's exercise of religion," it had to demonstrate that the burden "is in furtherance of a compelling governmental

interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000bb-1. However, in 1997, prior to the filing of the instant action, the United States Supreme Court ruled that RFRA was unconstitutional. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance"). As a result of the Supreme Court's ruling in City of Boerne, the RFRA standard has no applicability to Plaintiff's claim.

Prior to RFRA, a prison regulation which infringed on a specific constitutional right was valid if it reasonably related to a legitimate penological interest. O'Lone, 482 U.S. at 349; Turner v. Safley, 482 U.S. 78, 89 (1987). The policy must be evaluated in light of the essential institutional goals of maintaining security and internal order. Bell, 441 U.S. at 546-47. The Supreme Court has articulated several factors relevant in determining the reasonableness of a regulation. O'Lone, 482 U.S. at 350; Turner, 482 U.S. at 89-91. First, there must be a logical connection between the regulation and the government interest relied upon to justify it. O'Lone, 482 U.S. at 350. Second, the presence or absence of alternative accommodations for the prisoner's right must be considered. Id. at 351. A third factor is the impact that the accommodation would have on other inmates, guards, and allocation of prison resources. Turner, 482 U.S. at 90. Finally, the existence of obvious and easy alternatives may be evidence that the regulation is not reasonable. Id. This factor does not require that prison officials adopt the least restrictive alternative, rather, if there is evidence of an alternative that fully accommodates the infringed right at de minimis cost to the valid interests the court may consider the evidence that the regulation is not reasonable. Id. at 91. In addition, denial of separate church services because of security and space interests has been held valid where inmates were provided alternative means of practicing their religion. Clifton v. Craig, 924 F.2d 182, 184

Cir.), cert. denied, 112 S.Ct. 97 (1991).

After carefully reviewing the record in this case, the Court concludes that the Tulsa County Jail's policies which prevented Plaintiff from attending group religious services, i.e., those limiting the number of inmates allowed to attend and restricting attendance by inmates known to have conflict, are reasonably related to a legitimate penological interest in security. First, the regulations are logically related to the interest asserted. The majority of the inmates on the eighth and ninth floors are violent offenders and increased security risks. Second, Plaintiff had alternative opportunities to pursue his religion. Although Plaintiff contends that these opportunities did not provide the same fellowship as group services would have provided (#14 at 10), the Constitution only proscribes the deprivation of all means of expression. See O'Lone, 482 U.S. at 352. Here, Plaintiff retained access to ministers as well as the fellowship of other inmates in his cell.

Therefore, the Court concludes that there remain no genuine issues of material fact that the regulation in question is sufficiently related to the legitimate penological interest in security to be valid. No First Amendment violation occurred in this case.

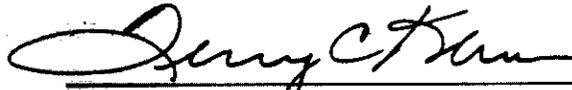
CONCLUSION

Viewing the evidence in the light most favorable to the Plaintiff for purposes of Defendants' motion for summary judgment, the Court concludes that Defendants are entitled to judgment as a matter of law on the only remaining claim in this case, Plaintiff's First Amendment claim.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion for summary judgment (doc. #13) is **granted**.
- (2) Any relief requested by Plaintiff in his "motion to dispell" (doc. #14) is **denied**.

SO ORDERED THIS 27 day of September, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

WC
12399

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

MICHAEL JONES, Guardian for)
the Estate of B.S.R., a minor,)
EARNEST E. CANADY, MARTHA)
CANADY, KAY WHITE and)
CINDERELLA SCHOOL AND CHILD)
CARE CENTER, INC.,)

Plaintiffs,)

vs.)

ASSOCIATED INTERNATIONAL)
INSURANCE COMPANY,)

Defendant.)

F I L E D

SEP 28 1999 *SW*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98 CV 0302-H(J) ✓

ENTERED ON DOCKET

DATE SEP 29 1999

ORDER

Before the Court, are the parties' simultaneously filed Motions for Summary Judgment. Each party has responded in opposition to the opposing motions. The parties further presented oral argument to the Court on September 10, 1999. Based upon the parties' submissions and argument of counsel, the Court makes its determination.

This is a declaratory judgment action seeking interpretation of a policy of insurance issued by Associated International Insurance Company to Cinderella School and Child Care Center, Inc. Michael Jones, Guardian for the Estate of B.S.R., a minor, originally brought this action seeking a determination of the amount of insurance coverage available as a result of State Court

claim being made against Cinderella School and Child Care Center, Inc., and its employees. Plaintiffs, Earnest E. Canady, Martha Canady, and Kay White, are employees and/or owners of Cinderella School and Child Care Center, Inc., and were added as parties plaintiff herein.

The claim being made in the State Court action resulted from the molestation of B.S.R., a minor, while in the care and custody of Cinderella School and Child Care Center, Inc., and its employees. The policy of insurance issued by Associated International Insurance Company contained policy limits of \$100,000 per occurrence and \$100,000 general aggregate annual limit. The policy also contains an endorsement entitled "Abuse or Molestation Limitation Endorsement". This endorsement provides coverage for claims arising out of abuse or molestation in the reduced amounts of \$25,000 per occurrence, \$50,000 annual aggregate limit. The issue before the Court is whether the Abuse or Molestation Limitation Endorsement applies to the claims of the plaintiff, and thereby provides the lower limit of liability coverage.

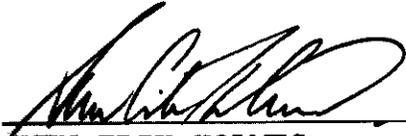
It is clear that the intent of the endorsement, and thereby the parties entering into the contract, was to modify and limit the amount of coverage available for claims arising out of abuse or molestation. The endorsement provides coverage for abuse or molestation claims committed by, caused by or contributed to by any

insured, which would include employees. Further, the endorsement provides insurance for molestation claims by children in the care of the day care center arising out of negligent acts of the insured alleged to have contributed to the incident, although committed by a third-party.

The claims being made by the minor, arise from molestation alleged to have been contributed to by negligent acts of the day care center and its employees. The Abuse or Molestation Limitation Endorsement therefore applies to the claims being made by the plaintiff and limits liability at \$25,000 per occurrence and an annual aggregate limit of \$50,000.

Plaintiffs' Motions for Summary Judgment are therefore overruled. The Motion for Summary Judgment of defendant, Associated International Insurance Company, is granted. Judgment in favor of defendant shall issue forthwith.

IT IS SO ORDERED this 27TH day of September, 1999.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:


Robert Todd Goolsby, OBA# 12676
GOOLSBY, OLSON & PROCTOR LAW FIRM
3700 Classen Boulevard, #220
Oklahoma City, Oklahoma 73118
**ATTORNEY FOR MICHAEL JONES, GUARDIAN
FOR THE ESTATE OF B.S.R., A MINOR**

*Bruce N. Powers by [Signature] per written authority of
9-15-99 attached*

Bruce N. Powers, OBA# 12822
Attorney at Law
4867 South Sheridan Road, Suite 701
Tulsa, Oklahoma 74145-5721
**ATTORNEY FOR EARNEST E. CANADY,
MARTHA CANADY, KAY WHITE AND
CINDERELLA SCHOOL AND CHILD CARE CENTER, INC.**

[Signature]

A.T. Elder, Jr., OBA# 2657
STEWART & ELDER
P.O. Box 2056
Oklahoma City, Oklahoma 73101
**ATTORNEY FOR ASSOCIATED INTERNATIONAL
INSURANCE COMPANY**



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September 15, 1999

Mr. A. T. Elder, Jr.
Attorney at Law

Via facsimile only to (405) 239-7073.

RE: Jones, et al. v. Associated, USND case # 98 CV 0302-H (J)

Dear Mr. Elder:

I am in receipt of your proposed Order and Judgment in the above matter. Subject to any input by Mr. Goolsby, I have no objections to either document. If you wish to send them directly to the Court, you have my authorization to either sign my name or sign for me with my permission. Please let me know once they are finalized.

Yours very truly,

A handwritten signature in black ink that reads "Bruce N. Powers". The signature is fluid and cursive, with a long horizontal line extending to the right.

Bruce N. Powers

LL
9-23-99

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

MICHAEL JONES, Guardian for)
the Estate of B.S.R., a minor,)
EARNEST E. CANADY, MARTHA)
CANADY, KAY WHITE and)
CINDERELLA SCHOOL AND CHILD)
CARE CENTER, INC.,)

Plaintiffs,)

vs.)

ASSOCIATED INTERNATIONAL)
INSURANCE COMPANY,)

Defendant.)

F I L E D

SEP 28 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98 CV 0302-H(J) ✓

ENTERED ON DOCKET

DATE SEP 29 1999

JUDGMENT

By a separate order entered this date, the court granted defendant's motion for summary judgment in this matter. Accordingly, the court hereby orders that judgment should be and is entered in favor of the defendant, Associated International Insurance Company, and against plaintiffs', Michael Jones, Guardian for the Estate of B.S.R., a minor, Earnest E. Canady, Martha Canady, Kay White and Cinderella School and Child Care Center, Inc.

Dated at Tulsa, Oklahoma, this 27TH day of September, 1999.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

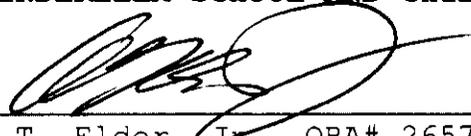


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*per written authority of
9-15-95 attached*

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Bruce N. Powers

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

FILED

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VBF, INC., an Oklahoma Corporation, Vernon
Lawson, Bill Coday & Fred Smith,

Plaintiffs,

vs.

Case No. 97 C-535-H (M)

CHUBB GROUP OF INSURANCE
COMPANIES, GREAT NORTHERN
INSURANCE CO., FEDERAL
INSURANCE COMPANY and
CHUBB & SON, INC.,

Defendants.

ENTERED ON DOCKET
DATE SEP 28 1999

STIPULATION OF DISMISSAL

Plaintiffs and Defendants file this stipulation of dismissal under Federal Rules of Civil Procedure 41(a)(1)(ii).

1. VBF, Inc., an Oklahoma Corporation, Vernon Lawson, Bill Coday & Fred Smith, are the Plaintiffs in this suit.

2. On June 3, 1997, the Plaintiffs sued the Chubb Group of Insurance Companies; Chubb & Son, Inc.; Federal Insurance Company; and Great Northern Insurance Co.

3. Plaintiffs move to dismiss the suit as to the Defendant Chubb Group of Insurance Companies.

4. Defendants Chubb & Son, Inc.; Federal Insurance Company; and Great Northern Insurance Co., who have answered, agree to the dismissal of the suit against the Chubb Group of Insurance Companies.

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5. This case is not a class action, and a receiver has not been appointed.
6. Plaintiffs have not dismissed an action based upon or including the same claim or claims as those presented in this suit.
7. The dismissal of the Defendant Chubb Group of Insurance Companies is with prejudice.



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ATTORNEYS FOR PLAINTIFFS



John H. Tucker, Esq., OBA No. 9110
Chris Davis, Esq. OBA No. 16639
Rhodes, Hieronymus, Jones, Tucker & Gable
P. O. Box 21100
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(918)582-1173

ATTORNEYS FOR DEFENDANTS

MT

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

FILED

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DUSTIN FINNEY, by and through his)
natural father and next friend, GEORGE)
FINNEY, and GEORGE AND JEAN)
FINNEY, individually,)

Plaintiffs,)

vs.)

Case No. 98-CV-955H(E)

WALMART STORES, INC.,)

ENTERED ON DOCKET

Defendant.)

DATE SEP 28 1999

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Come now the Plaintiffs, Dustin Finney, by and through his natural father and next friend, George Finney, and George and Jean Finney, individually, and the Defendant, Walmart Stores, Inc., and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate and agree to the dismissal of the above-caption cause of action, without prejudice.

DATED this 28 day of SEPT, 1999.



Mark Steele - OBA #14078
LATHAM, STALL, WAGNER
STEELE & LEHMAN
1437 S. Boulder, Suite 820
Tulsa, OK 74119
Attorney for Defendant



Timothy P. Clancy - OBA #14199
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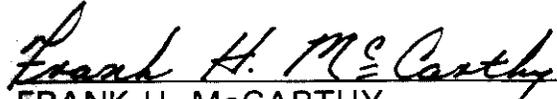
Jack Zurawik - OBA #11588
P.O. Box 35346
Tulsa, OK 74153-0346
Attorneys for Plaintiffs

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CL5

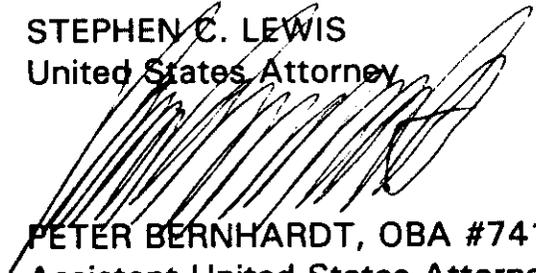
award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 27th day of Sept, 1999.


FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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

GREGORY DOUGLAS WILLIAMS,)
)
 Petitioner,)
)
 vs.)
)
 KEN KLINGLER, Warden,)
)
 Respondent.)

ENTERED ON DOCKET

DATE SEP 28 1999

No. 98-CV-582-K (M) ✓

FILED

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court in this habeas corpus action is Respondent's motion to dismiss for failure to file within the limitations period (Docket #8). Petitioner, appearing *pro se*, has filed a response (#11) and a supplemental response (#12) to the motion to dismiss. In addition, Petitioner has filed a motion for equitable tolling (#13), a supplement to the motion for equitable tolling (#14), a request for the Court to take judicial notice (#15), and a motion for appointment of counsel (#16) supported by a motion for leave to proceed *in forma pauperis* (#17). Respondent's motion to dismiss is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. Respondent argues that the limitations period has expired as to Petitioner's conviction entered in Tulsa County District Court, Case No. CRF-87-3293. However, as discussed below, the issue raised in this case is whether Petitioner's present sentence, entered in Comanche County District Court, Case No. CF-96-363, is improper because it was enhanced by the allegedly unconstitutional Tulsa County conviction. Because the challenged sentence was entered as a result of the Comanche County

conviction, Respondent's motion to dismiss and Petitioner's motion to equitably toll the limitations period, both based on Petitioner's direct challenge to his Tulsa County conviction, are moot. Furthermore, based on 28 U.S.C. § 2241(d), the Court finds that this petition should be transferred to the United States District Court for the Western District of Oklahoma.

BACKGROUND

On January 28, 1988, Petitioner was convicted after entering a plea of guilty to Leaving the Scene of an Accident Involving Personal Injury in Tulsa County District Court, Case No. CRF-87-3293 (see #10, Ex. A). On February 19, 1988, Petitioner was sentenced to one year imprisonment. Petitioner did not move to withdraw his plea and did not otherwise perfect a direct appeal. Petitioner indicates he discharged his one-year sentence in May, 1988.

Thereafter, in October, 1996, Petitioner was convicted in Comanche County District Court, Case No. CF-96-363. According to Petitioner, his current sentence was enhanced based on the 1988 Tulsa County conviction. On August 7, 1998, Petitioner filed the instant petition for writ of habeas corpus (#1). Petitioner alleges that his 1988 Tulsa County conviction was invalid because (1) the trial court failed to advise him of the consequences of his plea and failed to establish a factual basis for his plea in violation of the Fourteenth Amendment, (2) he was denied effective assistance of counsel, and (3) he was improperly advised of his appeal rights. Petitioner seeks to invalidate his 1988 Tulsa County District Court conviction because it was used to enhance his current sentence entered in Comanche County District Court.

ANALYSIS

A. Preliminary considerations

In his "request for the District Court to take judicial notice of adjudicative facts" (#15), Petitioner provides the Court with a summary of the outcome of his efforts to obtain an appeal out of time from his conviction in Tulsa County District Court, Case No. CRF-87-3293. The Court construes Petitioner's request as a request to supplement his response to Respondent's motion to dismiss with the additional information and finds the request should be granted.

As to Petitioner's motion for appointment of counsel and motion for leave to proceed *in forma pauperis*, the Court exercises its discretion to deny Petitioner's motion for appointment of counsel at this time. There is no constitutional right to counsel beyond the direct appeal of a conviction. See Swazo v. Wyoming Department of Corrections, 23 F.3d 332 (10th Cir. 1994). The motion to proceed *in forma pauperis*, submitted in support of the motion for appointment of counsel, should be denied as moot.

B. At issue is sentence entered in Comanche County District Court, Case No. CF-96-363, rather than conviction entered in Tulsa County District Court, Case No. CRF-87-3293

In his petition, Petitioner identifies the challenged conviction as his conviction entered in Tulsa County District Court, Case No. CRF-87-3293. Petitioner admits he discharged his Tulsa County sentence in May, 1988. However, in his response to Respondent's motion to dismiss, Petitioner explains that he seeks to invalidate his Tulsa County conviction because it was improperly used to enhance his subsequent sentence entered in Comanche County District Court, Case No. CF-96-363.

"The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody in violation

of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); see also 28 U.S.C. § 2254(a). In Maleng v. Cook, 490 U.S. 488, 491-92 (1989), the United States Supreme Court concluded that while the concept of "in custody" does not require that the petitioner be physically confined and extends beyond incarceration to parole on an unexpired sentence, it does not extend to the "situation where a habeas petitioner suffers no present restraint from a challenged conviction" at the time of the filing of the habeas petition. The Tenth Circuit Court of Appeals, interpreting Maleng, has ruled that:

a defendant [is precluded] from challenging a fully-expired conviction in isolation even though it may have potential collateral consequences in some future case. Further, even if the fully-expired conviction, has, in fact been used to enhance a subsequent sentence it may not be attacked directly in a habeas action. Rather the attack must be directed toward the enhanced sentence under which the defendant is in custody. However, if the attack is so directed, the defendant may argue that his present sentence is improper because it has been enhanced by a prior, unconstitutional conviction.

Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990). The habeas corpus petitioner in Gamble, like Petitioner in the instant case, appeared *pro se*. As a result, the circuit court went on to state that "[w]e believe appellant's habeas petition, when construed with the deference to which he is entitled as a *pro se* litigant, should be read as asserting a challenge to his present sentence to the extent that it has been enhanced by the allegedly invalid prior conviction." Id.

In his response to the motion to dismiss (#11 at 3), Petitioner in the instant case argues that as in Gamble, his petition should be liberally construed as a challenge to his present sentence, i.e., his Comanche County District Court sentence, to the extent it was improperly enhanced by a prior, unconstitutional conviction. The Court agrees with Petitioner and finds that, after liberally construing the petition, see Haines v. Kerner, 404 U.S. 519 (1972), the petition constitutes a

challenge to Petitioner's current sentence imposed in Comanche County District Court, Case No. CF-96-363 rather than a direct challenge to the discharged conviction entered in Tulsa County District Court, Case No. CRF-87-3293. As a result, the Court concludes that Respondent's motion to dismiss and Petitioner's motion for equitable tolling, both premised on the application of the statute of limitations to the 1988 Tulsa County conviction, are moot and should be denied on that basis. The Court makes no finding as to the timeliness of Petitioner's challenge to the Comanche County sentence.

However, because the petition has been liberally construed as asserting a claim of improper enhancement of the Comanche County sentence, the Court finds the case must be transferred to the United States District Court for the Western District of Oklahoma. Pursuant to 28 U.S.C. § 2241(d), concurrent jurisdiction of this habeas action lies in the district within which the State court was held which convicted and sentenced Petitioner and the district wherein Petitioner is in custody. In this case, when Petitioner filed his petition, he was incarcerated at the Oklahoma State Reformatory, located in the territorial jurisdiction of the Western District of Oklahoma. He is presently incarcerated at the Lawton Correctional Center, located in the territorial jurisdiction of the Western District of Oklahoma. The challenged conviction was entered in Comanche County, also located in the territorial jurisdiction of the Western District of Oklahoma. Therefore, a petition challenging the Comanche County sentence could be filed only in the United States District Court for the Western District of Oklahoma. Therefore, pursuant to § 2241(d) and in furtherance of justice, this case should be transferred to the United States District Court for the Western District of Oklahoma.

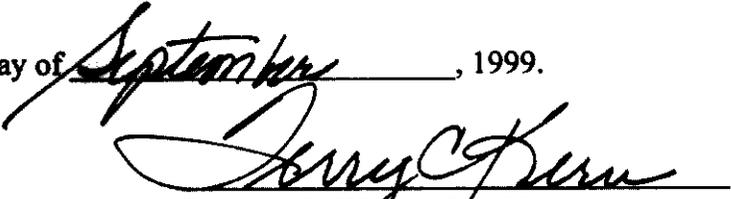
CONCLUSION

This *pro se* 28 U.S.C. § 2254 habeas corpus petition challenges Petitioner's enhanced sentence entered in Comanche County District Court Case No. CF-96-363. Pursuant to 28 U.S.C. § 2241(d), this case must be transferred to the United States District Court for the Western District of Oklahoma. Respondent's motion to dismiss and Petitioner's motion for equitable tolling, both based on application of the § 2244(d) limitations period to Petitioner's 1988 Tulsa County District Court conviction, are moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's "request for the District Court to take judicial notice of adjudicative facts" (#15) is construed as a request to supplement Petitioner's response to Respondent's motion to dismiss with additional information provided in the request and is **granted**.
2. Petitioner's motion for appointment of counsel (#16) is **denied** and his motion for leave to proceed *in forma pauperis* (#17) is **denied as moot**.
3. This case is **transferred** to the United States District Court for the Western District of Oklahoma.
4. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#8) is **moot**.
5. Petitioner's motion for equitable tolling of the limitations period, as supplemented (#s 13 and 14) is **moot**.

SO ORDERED THIS 28 day of September, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

SEP 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MACK BRALY, an individual,)
et al.,)
)
Plaintiffs,)
)
vs.)
)
1 WORLD CENTER CORPORATION,)
a Nevada corporation, et al.,)
)
Defendants.)

Case No. 98-CV-593-BU ✓

ENTERED ON DOCKET

DATE SEP 28 1999

ORDER

This matter comes before the Court upon Defendants' Motion to to Transfer Venue to More Convenient Forum or, in the Alternative, to Dismiss for Improper Venue.¹ Based upon the parties' submissions, the Court makes its determination.

In their motion, Defendants request the Court to transfer this action to the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1404(a). Defendants assert that a trial in the Southern District of California would be more convenient to the witnesses and parties and would be in the interest of justice. In the alternative, Defendants request the Court to dismiss this action for improper venue pursuant to Rule 12(b)(3), Fed. R. Civ. P. Defendants contend that the Operating Agreement and Management Agreement of Designer Fragrances, LLC

¹ Contemporaneous with the filing of their motions, Defendants filed an Application for Order for Hearing on Motion to Dismiss for Improper Venue, or in the Alternative to Transfer Venue to a More Convenient Forum. Upon review of the motions, the Court finds that a hearing is unnecessary. The Court therefore finds that Defendants' application should be denied.

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included forum selection clauses which provided for venue in San Diego, California. Defendants also contend that venue is improper in the Northern District of Oklahoma under 28 U.S.C. § 1391(b) as none of the Defendants reside in the district and a substantial part of the events or omissions giving rise to this action did not occur in the district.

At the outset, the Court finds that this action should not be dismissed for improper venue. Although the Operating Agreement and Management Agreement include forum selection clauses, Plaintiffs do not seek relief under either of those agreements. Moreover, Plaintiffs' action is not one to resolve any dispute between the members of Designer Fragrances, LLC. In addition, Plaintiffs have alleged claims under the federal securities laws and 15 U.S.C. § 77v(a) provides that venue lies in the district where the offer or sale of the securities took place. Defendants do not dispute that three of the Plaintiffs purchased units of interest in the Northern District of Oklahoma. Therefore, the Court concludes that venue is proper in the Northern District of Oklahoma.²

As stated, Defendants also request the Court to transfer the above-entitled action to the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1404(a).

² In reaching its decision, the Court recognizes that Defendants have raised an issue as to whether the units of interest in Designer Fragrances, LLC constitute "securities" for purposes of the federal securities laws. The Court, however, concludes that such issue should be decided on the merits rather than on a motion for improper venue. The Court therefore concludes that venue properly lies in this district pursuant to 15 U.S.C. § 77v(a).

Section 1404(a) allows a court in its discretion to transfer a civil action to any other district where the action might have been brought when the court is satisfied that the transfer is "for the convenience of parties and witnesses, in the interest of justice". 28 U.S.C. § 1404(a). A transfer under Section 1404(a) lies within the discretion of the district court. William. A. Smith Contracting Co., Inc. v. Travelers Indem. Co., 467 F.2d 662, 664 (10th Cir. 1972). Generally, a plaintiff's choice of forum is entitled to great weight and should rarely be disturbed unless the balance of other factors is strongly in favor of the defendant. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). The burden is on the movant to show why transfer is warranted. Chrysler Credit Corporation v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991); Jacobs v. Lancaster, 526 F. Supp. 767, 769 (W.D. Okla. 1981).

Under Section 1404(a), the Court at the outset must determine whether the instant action might have been brought in the Southern District of California. Pope v. Missouri Pac. R. Co., 446 F. Supp. 447, 449 (W.D. Okla. 1978). The Court must determine not only whether venue would be proper in the district but also whether the district would have subject matter jurisdiction and personal jurisdiction. DeMoss v. First Artists Production Co., Ltd., 571 F. Supp. 409, 413 (N.E. Ohio 1983). Even if Defendants were to consent to the transfer, the Court cannot transfer this action if the Southern District of California lacks personal jurisdiction over Defendants. Chrysler Credit Corporation, 928 F.2d at 1515.

In reviewing the pleadings and the parties' briefs, the Court finds that all Defendants reside in the Southern District of California. As a result, the Court finds that venue would be proper in the district. See, 28 U.S.C. § 1391(b)(1) (a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought in a judicial district where any defendant resides, if all defendants reside in the same State); see also, 15 U.S.C. § 77v(a) (any action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business). The Court also finds that the Southern District of California would have subject matter jurisdiction in that Plaintiffs have alleged claims under the federal securities laws. See, 28 U.S.C. § 1331. The Court further finds that the Southern District of California would have personal jurisdiction as all Defendants reside and/or transact business in the district. Consequently, the Court finds that this action might have been brought in the Southern District of California.

Since the action might have been brought in the Southern District of California, the Court must consider the other factors under § 1404(a). The first factor is the convenience of the parties. In the instant case, one of the Plaintiffs and all eleven Defendants reside and/or transact business in the district. Two other Plaintiffs live in California and three other Plaintiffs live in Nevada. The majority of lay witnesses who will testify reside or work in the Southern District of California. Also, the majority of documents for the case are located in the district. Although

there are three Plaintiffs who reside in the Northern District of Oklahoma and obviously prefer this district as the appropriate forum, the Court concludes that, under the facts, the Southern District of California is more convenient to the parties. The only contacts with the Northern District of Oklahoma are three of the Plaintiffs and Plaintiffs' attorney. However, the convenience of Plaintiffs' attorney, without more, is not decisive in determining whether to grant or deny a transfer motion. Ayers v. Arabian American Oil Co., 571 F. Supp. 707, 709 n.1 (S.D.N.Y. 1983). Thus, the Court finds that the first factor under § 1404(a) favors the transfer of this action to the Southern District of California.

The second factor under § 1404(a) is the convenience of the witnesses. In their motion, Defendants identify approximately 9 lay witnesses who are not named parties but who were directly involved in the sales of the units of interest of Designer Fragrances, LLC and can testify as to the fraud allegations in the First Amended Complaint. Defendants also identify 16 lay witnesses who are not named parties but who have direct knowledge of the transaction at issue. The majority of these lay witnesses reside and/or work in the Southern District of California. Most of the identified witnesses are not employed by Defendants. Obviously, the employment schedules and personal lives of these individuals will be more inconvenienced if they are required to testify in Tulsa, Oklahoma rather than San Diego, California. Thus, the Court concludes that the convenience of the lay witnesses favors transfer of this action.

The final factor under § 1404(a) is the interest of justice. Under this factor, the Court should consider the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; the enforceability of any judgment obtained; relative administrative difficulties; burden of jury duty and appropriateness of forum for particular questions involved; relative advantages and obstacles to a fair trial and all other practical problems that make trial of a case easy, expeditious and inexpensive. Gulf Oil Corp., 330 U.S. at 508.

As stated, the majority of the lay witnesses reside and/or work in the Southern District of California. The documents relating to Plaintiffs' claims are also located in the Southern District of California. Obviously, access to proof will be of relative ease in the Southern District of California. Moreover, the costs of obtaining the attendance of the lay witnesses will be much less if the action is adjudicated in that district. Plane tickets, rental cars and hotel lodging will not be required for the lay witnesses willing to testify if the trial is held San Diego, California. Furthermore, as to the witnesses unwilling to testify, the availability of compulsory process will be greater in the Southern District of California. While Plaintiffs contend that Defendants may obtain the testimony of all of the lay witnesses, willing or unwilling, by deposition, the Court concludes that it would be unfair to force Defendants to present a significant portion of their case by deposition, particularly since Plaintiffs'

claims are to be tried to a jury. Cargill Incorporated v. Prudential Insurance Company of America, 920 F. Supp. 144, 147 (D. Colo. 1996); Cook v. Atchison, Topeka & Santa Fe Railway Company, 816 F. Supp. 667, 669 (D. Kan. 1993).

There appears to be no problem with the enforceability of any judgment obtained if the case is transferred to the Southern District of California. Moreover, all federal courts handle federal securities cases and the Southern District of California would be an appropriate to adjudicate these claims. As to the state law claims alleged by Plaintiffs based upon Oklahoma law, the Court perceives no novel or complex issue of Oklahoma state law which requires the issue be left to an Oklahoma court to decide. There also appears to be no problem related to congested dockets. Discovery in this case has been stayed pending the Court's ruling on Defendants' motions to dismiss and no trial date has yet been scheduled. Additionally, the Court finds that the transfer of this case will not result in the jury being called to decide an issue which has no relation to the community.

The Court further concludes that transfer of venue to the Southern District of California should not result in a hardship to Plaintiffs in this case. Although the forum selection clauses in the Operating Agreement and Management Agreement do not apply to this particular case, the Court is persuaded that Plaintiffs' consent in those agreements to venue in San Diego, California for disputes involving the agreements and disputes between the members shows a willingness of Plaintiffs to conduct litigation in San

Diego, California.

In sum, the Court finds that the interest of justice favors transfer of this action. The majority of lay witnesses and sources of proof are located in the Southern District of California. Potential problems relating to the attendance of lay witnesses at trial will be obviated by a transfer. And costs of obtaining the attendance of the lay witness will be greatly reduced by a transfer. There appears to be no problem with enforcing any judgment obtained in the Southern District of California. Finally, the Southern District of California is clearly an appropriate forum to adjudicate Plaintiffs' claims.

Having considered the factors for a transfer under § 1404(a) and having found that such factors weigh in favor of such a transfer, the Court finds that this action should be transferred to the United States District Court for the Southern District of California.

Based upon the foregoing, Defendants' Motion to Transfer Venue to More Convenient Forum (Docket Entries #16-1; #48-1) is **GRANTED**. Defendants' Alternative Motion to Dismiss for Improper Venue (Docket Entry #16-2) is **DENIED**. Defendants' Application for Order for Hearing on Motion to Dismiss for Improper Venue, or in the Alternative to Transfer Venue to a More Convenient Forum (Docket Entry #18-1) is **DENIED**.

The Clerk of the Court is **DIRECTED** to effect the transfer of the above-entitled case to the United States District Court for the

Southern District of California.

ENTERED this 28th day of September, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

GREGORY DOUGLAS WILLIAMS,)

Petitioner,)

vs.)

KEN KLINGLER, Warden,)

Respondent.)

ENTERED ON DOCKET

DATE SEP 28 1999

No. 98-CV-582-K (M) ✓

FILED

23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court in this habeas corpus action is Respondent's motion to dismiss for failure to file within the limitations period (Docket #8). Petitioner, appearing *pro se*, has filed a response (#11) and a supplemental response (#12) to the motion to dismiss. In addition, Petitioner has filed a motion for equitable tolling (#13), a supplement to the motion for equitable tolling (#14), a request for the Court to take judicial notice (#15), and a motion for appointment of counsel (#16) supported by a motion for leave to proceed *in forma pauperis* (#17). Respondent's motion to dismiss is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. Respondent argues that the limitations period has expired as to Petitioner's conviction entered in Tulsa County District Court, Case No. CRF-87-3293. However, as discussed below, the issue raised in this case is whether Petitioner's present sentence, entered in Comanche County District Court, Case No. CF-96-363, is improper because it was enhanced by the allegedly unconstitutional Tulsa County conviction. Because the challenged sentence was entered as a result of the Comanche County

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conviction, Respondent's motion to dismiss and Petitioner's motion to equitably toll the limitations period, both based on Petitioner's direct challenge to his Tulsa County conviction, are moot. Furthermore, based on 28 U.S.C. § 2241(d), the Court finds that this petition should be transferred to the United States District Court for the Western District of Oklahoma.

BACKGROUND

On January 28, 1988, Petitioner was convicted after entering a plea of guilty to Leaving the Scene of an Accident Involving Personal Injury in Tulsa County District Court, Case No. CRF-87-3293 (see #10, Ex. A). On February 19, 1988, Petitioner was sentenced to one year imprisonment. Petitioner did not move to withdraw his plea and did not otherwise perfect a direct appeal. Petitioner indicates he discharged his one-year sentence in May, 1988.

Thereafter, in October, 1996, Petitioner was convicted in Comanche County District Court, Case No. CF-96-363. According to Petitioner, his current sentence was enhanced based on the 1988 Tulsa County conviction. On August 7, 1998, Petitioner filed the instant petition for writ of habeas corpus (#1). Petitioner alleges that his 1988 Tulsa County conviction was invalid because (1) the trial court failed to advise him of the consequences of his plea and failed to establish a factual basis for his plea in violation of the Fourteenth Amendment, (2) he was denied effective assistance of counsel, and (3) he was improperly advised of his appeal rights. Petitioner seeks to invalidate his 1988 Tulsa County District Court conviction because it was used to enhance his current sentence entered in Comanche County District Court.

ANALYSIS

A. Preliminary considerations

In his "request for the District Court to take judicial notice of adjudicative facts" (#15), Petitioner provides the Court with a summary of the outcome of his efforts to obtain an appeal out of time from his conviction in Tulsa County District Court, Case No. CRF-87-3293. The Court construes Petitioner's request as a request to supplement his response to Respondent's motion to dismiss with the additional information and finds the request should be granted.

As to Petitioner's motion for appointment of counsel and motion for leave to proceed *in forma pauperis*, the Court exercises its discretion to deny Petitioner's motion for appointment of counsel at this time. There is no constitutional right to counsel beyond the direct appeal of a conviction. See Swazo v. Wyoming Department of Corrections, 23 F.3d 332 (10th Cir. 1994). The motion to proceed *in forma pauperis*, submitted in support of the motion for appointment of counsel, should be denied as moot.

B. At issue is sentence entered in Comanche County District Court, Case No. CF-96-363, rather than conviction entered in Tulsa County District Court, Case No. CRF-87-3293

In his petition, Petitioner identifies the challenged conviction as his conviction entered in Tulsa County District Court, Case No. CRF-87-3293. Petitioner admits he discharged his Tulsa County sentence in May, 1988. However, in his response to Respondent's motion to dismiss, Petitioner explains that he seeks to invalidate his Tulsa County conviction because it was improperly used to enhance his subsequent sentence entered in Comanche County District Court, Case No. CF-96-363.

"The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody in violation

of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); see also 28 U.S.C. § 2254(a). In Maleng v. Cook, 490 U.S. 488, 491-92 (1989), the United States Supreme Court concluded that while the concept of "in custody" does not require that the petitioner be physically confined and extends beyond incarceration to parole on an unexpired sentence, it does not extend to the "situation where a habeas petitioner suffers no present restraint from a challenged conviction" at the time of the filing of the habeas petition. The Tenth Circuit Court of Appeals, interpreting Maleng, has ruled that:

a defendant [is precluded] from challenging a fully-expired conviction in isolation even though it may have potential collateral consequences in some future case. Further, even if the fully-expired conviction, has, in fact been used to enhance a subsequent sentence it may not be attacked directly in a habeas action. Rather the attack must be directed toward the enhanced sentence under which the defendant is in custody. However, if the attack is so directed, the defendant may argue that his present sentence is improper because it has been enhanced by a prior, unconstitutional conviction.

Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990). The habeas corpus petitioner in Gamble, like Petitioner in the instant case, appeared *pro se*. As a result, the circuit court went on to state that "[w]e believe appellant's habeas petition, when construed with the deference to which he is entitled as a *pro se* litigant, should be read as asserting a challenge to his present sentence to the extent that it has been enhanced by the allegedly invalid prior conviction." Id.

In his response to the motion to dismiss (#11 at 3), Petitioner in the instant case argues that as in Gamble, his petition should be liberally construed as a challenge to his present sentence, i.e., his Comanche County District Court sentence, to the extent it was improperly enhanced by a prior, unconstitutional conviction. The Court agrees with Petitioner and finds that, after liberally construing the petition, see Haines v. Kerner, 404 U.S. 519 (1972), the petition constitutes a

challenge to Petitioner's current sentence imposed in Comanche County District Court, Case No. CF-96-363 rather than a direct challenge to the discharged conviction entered in Tulsa County District Court, Case No. CRF-87-3293. As a result, the Court concludes that Respondent's motion to dismiss and Petitioner's motion for equitable tolling, both premised on the application of the statute of limitations to the 1988 Tulsa County conviction, are moot and should be denied on that basis. The Court makes no finding as to the timeliness of Petitioner's challenge to the Comanche County sentence.

However, because the petition has been liberally construed as asserting a claim of improper enhancement of the Comanche County sentence, the Court finds the case must be transferred to the United States District Court for the Western District of Oklahoma. Pursuant to 28 U.S.C. § 2241(d), concurrent jurisdiction of this habeas action lies in the district within which the State court was held which convicted and sentenced Petitioner and the district wherein Petitioner is in custody. In this case, when Petitioner filed his petition, he was incarcerated at the Oklahoma State Reformatory, located in the territorial jurisdiction of the Western District of Oklahoma. He is presently incarcerated at the Lawton Correctional Center, located in the territorial jurisdiction of the Western District of Oklahoma. The challenged conviction was entered in Comanche County, also located in the territorial jurisdiction of the Western District of Oklahoma. Therefore, a petition challenging the Comanche County sentence could be filed only in the United States District Court for the Western District of Oklahoma. Therefore, pursuant to § 2241(d) and in furtherance of justice, this case should be transferred to the United States District Court for the Western District of Oklahoma.

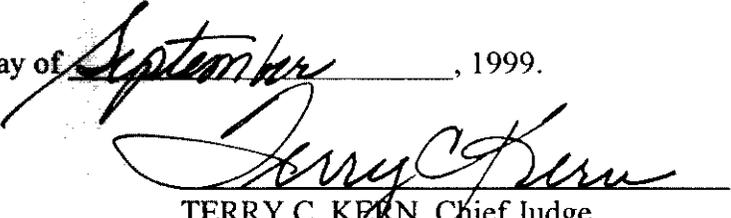
CONCLUSION

This *pro se* 28 U.S.C. § 2254 habeas corpus petition challenges Petitioner's enhanced sentence entered in Comanche County District Court Case No. CF-96-363. Pursuant to 28 U.S.C. § 2241(d), this case must be transferred to the United States District Court for the Western District of Oklahoma. Respondent's motion to **dismiss** and Petitioner's motion for equitable tolling, both based on application of the § 2244(d) **limitations period** to Petitioner's 1988 Tulsa County District Court conviction, are moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's "request for the District Court to take judicial notice of adjudicative facts" (#15) is construed as a request to **supplement** Petitioner's response to Respondent's motion to dismiss with additional information **provided** in the request and is **granted**.
2. Petitioner's motion for appointment of counsel (#16) is **denied** and his motion for leave to proceed *in forma pauperis* (#17) is **denied as moot**.
3. This case is **transferred** to the United States District Court for the Western District of Oklahoma.
4. Respondent's motion to dismiss **petition** for writ of habeas corpus as barred by the statute of limitations (#8) is **moot**.
5. Petitioner's motion for equitable **tolling of the limitations period**, as supplemented (#s 13 and 14) is **moot**.

SO ORDERED THIS 28 day of September, 1999.


TERRY C. KEENAN, Chief Judge
UNITED STATES DISTRICT COURT

FILED

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

SEP 27 1999 *plw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LANCAS, C.A.)

Plaintiff,)

vs.)

THE PRO-QUIP CORPORATION,)

Defendant and Third Party
Plaintiff,)

vs.)

PDVSA SERVICES, INC., a Texas corporation,)

Third Party Defendant.)

Case No. 99-CV-0254-B(J) ✓

ENTERED ON DOCKET
SEP 28 1999
DATE _____

ORDER

Upon the Joint Application to Reopen Case and for Dismissal of Case With Prejudice filed by the parties in this case, the Court finds that the requested relief should be granted. The case shall be opened and all claims filed therein should be dismissed with prejudice to their refiling, with each party to bear its respective costs and attorney's fees.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that for good cause shown, this case shall be reopened, for the purpose of entering the requested dismissal.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this case, and all claims, counterclaims, cross-claims and third party claims are dismissed with prejudice to their refiling, with each party to bear its respective costs and attorney's fees.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

MT

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

F I L E D

SEP 27 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TULSA COUNTY RURAL WATER)
DISTRICT NO. 2, an agency and)
legally constituted authority of the)
STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

CREEK COUNTY RURAL WATER)
DISTRICT NO. 4, an agency and legally)
constituted authority of the STATE OF)
OKLAHOMA,)

Defendants.)

Case No. 98-CV-0983-K(M)

ENTERED ON DOCKET

DATE ~~09/21/99~~

JURY TRIAL DEMANDED 9/28/99

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties to the above styled litigation pursuant to Rule 41 (a)(1)(ii) of the Federal Rules of Civil Procedure and hereby **dismiss** all claims and counterclaims filed therein with prejudice, each party to pay his/its own attorneys fees and costs.

Respectfully submitted,



Steven M. Harris, OBA #3913
Michael D. Davis, OBA #11282
DOYLE & HARRIS
1350 South Boulder, Suite 700
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(918) 592-1276 (tel)
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Attorneys for Plaintiff



Larry Click
15-B North Elm
Sapulpa, OK 74066
(918) 227-0300
(918) 248-4530 (Fax)
Attorney for Defendant

CERTIFICATE OF MAILING

I do hereby certify that on the 27 day of September, 1999, I caused a true and correct copy of the above and foregoing instrument to be faxed and mailed to the following parties, with proper postage fully prepaid thereon:

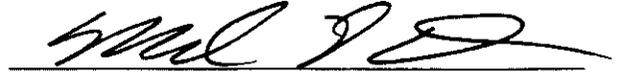
LINDA MARTIN
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333 W 4TH STREET
ROOM 411
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RICHARD A PASCHAL
ADJUDICANT SETTLEMENT JUDGE
2727 E 21ST STREET
SUITE 103
TULSA OK 74114

CHUCK SITTLER
TULSA COUNTY RURAL WATER
DISTRICT #2
7272 WEST 51ST STREET
TULSA OK 74107

A handwritten signature in black ink, appearing to read "Chuck Sittler", written over a horizontal line.

970-2.037:lm

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

F I L E D
SEP 24 1999

J.S.M.,)
)
Plaintiff,)
)
vs.)
)
INDEPENDENT SCHOOL DISTRICT)
NUMBER 3, BROKEN ARROW,)
OKLAHOMA,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. CV-98-0193-H (J)

ENTERED ON DOCKET
DATE SEP 27 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, J.S.M. ("JSM"), and the defendant, Independent School District No. 3 of Tulsa County, Oklahoma, a/k/a Broken Arrow Public Schools (the "School District"), hereby present to this Court their stipulation of dismissal with prejudice of the above-entitled action and all claims and allegations made therein. JSM and the School District agree and stipulate:

1. That JSM and the School District have entered into an agreement whereby all the issues, allegations and claims, known or unknown, made in the above-captioned action are resolved, discharged and released with each party bearing its own attorney's fees and costs.
2. That the parties hereby stipulate to the dismissal of the above-captioned action and all claims and allegations made therein, known or unknown, with prejudice.

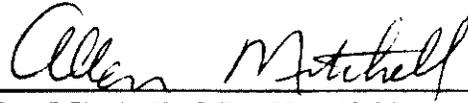
WHEREFORE, the parties stipulate that the above-captioned action be dismissed, with prejudice, with the parties bearing their own attorney's fees and costs.

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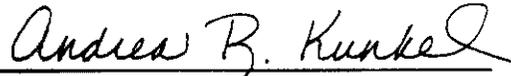
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Dated this 19 day of August, 1999.



Allen Mitchell, OBA No. 6264
P.O. Box 190
Sapulpa, OK 74067

Attorney for Plaintiff,
James Shannon Minnick



Andrea R. Kunkel, OBA No. 11896
Rosenstein, Fist & Ringold
525 South Main, Suite 700
Tulsa, OK 74103

Attorneys for Defendant, Independent School
District No. 3 of Tulsa County, Oklahoma

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

STEPHEN A. SCHWAB,)
)
Petitioner,)
)
vs.)
)
JAMES SAFFLE, Warden,)
)
Respondent.)

ENTERED ON DOCKET
DATE SEP 27 1999
No. 98-CV-756-H(J)
F I L E D
SEP 27 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are Petitioner's motion for appointment of counsel (Docket #5), Respondent's motion to dismiss petition for writ of habeas corpus as time barred by the statute of limitations (#14), and Petitioner's motion for default judgment (#16). Petitioner has filed a response to Respondent's motion to dismiss (#18). Respondent's motion to dismiss is premised on the allegation that Petitioner, a state inmate appearing *pro se*, failed to file this petition for writ of habeas corpus within the one-year limitations period prescribed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons discussed below, the Court finds that the petition is untimely filed and Respondent's motion to dismiss should be granted. Petitioner's motions for appointment of counsel and for default judgment should be denied.

BACKGROUND

According to the petition, Petitioner was convicted by a jury of First Degree Manslaughter and Driving Under the Influence -- Causing Great Bodily Harm, in Rogers County District Court, Case No. CRF-91-289. He was sentenced to fifty (50) years imprisonment and five (5) years

imprisonment on the two convictions, respectively. Petitioner appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals where, on May 16, 1995, his conviction was affirmed (see #15, Ex. A). Petitioner filed a petition for rehearing which was denied on November 1, 1995. Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Respondent indicates that Petitioner filed an application for post-conviction relief in the state district court on April 24, 1997 (#15 at 2; see also #15, Ex. C, Petitioner's post-conviction appeal brief at 2). On August 19, 1997, the trial court denied post-conviction relief (#15, Ex. B). Petitioner appealed and on October 21, 1997, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief (#15, attachment to Ex. C).

Petitioner filed the instant federal petition for writ of habeas corpus on October 2, 1998 (#1).

ANALYSIS

A. Petitioner's motion for appointment of counsel

After carefully reviewing the complexity of the factual and legal issues involved, the Court exercises its discretion to deny Petitioner's motion for appointment of counsel. There is no constitutional right to counsel beyond the direct appeal of a conviction. See Swazo v. Wyoming Department of Corrections, 23 F.3d 332 (10th Cir. 1994).

B. Petitioner's motion for default judgment

In his motion for default judgment (#16) filed March 10, 1999, Petitioner argues that because Respondent failed to file a timely response in compliance with the deadline imposed by the Court's

January 7, 1999 Order, he is entitled to entry of default judgment. However, on March 4, 1999, the Court, in its discretion and pursuant to Fed. R. Civ. P. 6(b), allowed Respondent to file his responsive pleading, i.e., his motion to **dismiss** time-barred petition, out of time (see #13). Therefore, Petitioner's motion for default judgment should be denied.

C. Statute of limitations

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the **preclusion** of habeas corpus relief for any prisoner whose

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

In addition, the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled while pursuing state post-conviction proceedings properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about January 30, 1996, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

As discussed above, the limitations period could be tolled if Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts during the grace period. 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226. However, Petitioner did not file his application for post-conviction relief in the state trial court until April 24, 1997, the day after

his April 23, 1997 federal habeas corpus deadline. Because the limitations period had already expired when Petitioner filed his application for post-conviction relief, the limitations period could no longer be tolled. See Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998) (finding that a collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations). Absent a basis for further statutory or equitable tolling of the limitations period, this petition, filed October 2, 1998 is clearly untimely.

In his response to the motion to dismiss (#18), Petitioner argues that the AEDPA's amendments to the habeas corpus statutes do not apply to his case. However, as stated above, Petitioner filed his petition on October 2, 1998, more than two (2) years after the AEDPA's enactment. As a result, AEDPA's amendments clearly apply to this case.

Petitioner also provides the Affidavit of attorney Randy D. Evers (#19). Mr. Evers states that he represented Petitioner during his state district court post-conviction proceeding and that "the filing date for Stephen A. Schwab's application for post-conviction relief, in the District Court of Rogers County, Oklahoma, was not under Mr. Schwab's control or due in any way to his actions." (Id.) Apparently, Petitioner provided Mr. Evers's affidavit in an effort to persuade the Court to toll the limitations period during the pendency of his state post-conviction proceedings. However, the Court need not determine whether Petitioner would be entitled to tolling under these facts. Even if the Court were to credit Petitioner with the time spent pursuing post-conviction relief, the instant petition would still be untimely.¹ Furthermore, Petitioner offers no explanation for the lack of diligence evidenced by his waiting almost a full year after conclusion of post-conviction proceedings

¹Petitioner filed the instant petition on October 2, 1998, or 892 days after April 24, 1996. His state post-conviction proceedings were pending for 181 days (from April 24, 1997 through October 21, 1997). After crediting Petitioner with 181 days, his federal petition was filed 711 days after April 24, 1996, far in excess of 365 days.

in the state courts before filing the instant petition. See Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (stating that "[t]he one-year time period begins to run in accordance with individual circumstances that could reasonably affect the availability of the remedy . . . but requires inmates to diligently pursue claims). Based on these considerations, the Court concludes that Petitioner's federal petition for writ of habeas corpus was not filed within the limitations period and should be dismissed as time-barred.

CONCLUSION

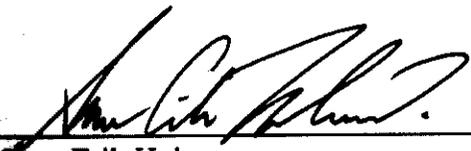
Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period. Therefore, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice. Petitioner's motions for appointment of counsel and for default judgment should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion for appointment of counsel (#5) is denied.
2. Petitioner's motion for default judgment (#16) is denied.
3. Respondent's motion to dismiss petition for writ of habeas corpus (#14) is granted.
4. The petition for writ of habeas corpus is dismissed with prejudice.

IT IS SO ORDERED.

This 27th day of September, 1999.



Sven Erik Holmes
United States District Judge

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

STEPHEN A. SCHWAB,)
)
Petitioner,)
)
vs.)
)
JAMES SAFFLE, Warden,)
)
Respondent.)

ENTERED ON DOCKET
SEP 27 1999
DATE _____

No. 98-CV-756-H (J)

FILED
SEP 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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

IT IS SO ORDERED.

This 27th day of September, 1999.


Sven Erik Holmes
United States District Judge

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

FILED

SEP 24 1999

PHIL LOMBARDI, CLERK
U.S. DISTRICT COURT

ANGELA SIPES,

Plaintiff,

v.

AESTHETECH CORPORATION,

et. al.,

Defendants.

Case No. 92-C-1013-E

ENTERED ON DOCKET
DATE SEP 27 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Kenda D. Ausmus, Naomi Blood, Debra Kristine Davis and Lavenia Taylor, and Defendant, Baxter Healthcare Corporation, by and through their attorneys of record, hereby stipulate that these Plaintiffs' claims against Baxter Healthcare Corporation, Baxter International Inc., American Heyer-Schulte Corporation, f/k/a Heyer-Schulte Corporation, and American Hospital Supply Corporation, should be and hereby are dismissed with prejudice.



MARK B. HUTTON

Of the Firm:

HUTTON & HUTTON

P.O. Box 638
Wichita, KS 67201-0638
Telephone: (316) 688-1166
Telefax: (316) 686-1077

**ATTORNEYS FOR PLAINTIFFS
KENDA D. AUSMUS, NAOMI BLOOD,
DEBRA KRISTINE DAVIS and
LAVENIA TAYLOR**

51

mail-copy ret'd
C/S



CHARLES E. GEISTER III (OBA #3311)
PHILLIP G. WHALEY (OBA #13371)

Of the Firm:

HARTZOG CONGER & CASON
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-7801
Telephone: (405) 235-7000
Telefax: (405) 235-7329

ATTORNEYS FOR DEFENDANT
BAXTER HEALTHCARE CORPORATION

CERTIFICATE OF MAILING

I hereby certify that on this the 22nd of September, 1999 a true and correct copy of the foregoing instrument was mailed via First Class Mail, postage prepaid thereon, to the following attorneys of record:

Mark B. Hutton, Esq.
Hutton & Hutton
P.O. Box 638
Wichita, KS 67201-0638



Charles E. Geister III

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

F I L E D

SEP 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GREGORY ELLIS,)
)
PLAINTIFF,)
)
VS.)
)
VICKY SMEDLEY, MARK GROVES,)
AND BRUCE BURTON, officers of the)
Tulsa Police Department, SHERIFF)
STANLEY GLANZ, in his official capacity,)
and SGT. RODNEY FLOYD, in his)
individual capacity, officers of the Tulsa)
County Sheriff's Department,)
)
DEFENDANTS.)

CASE NO. 98-C-357-B ✓

ENTERED ON DOCKET
SEP 27 1999
DATE _____

JUDGMENT

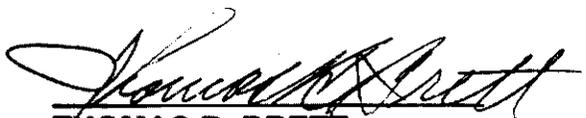
This case was tried to a jury on September 23 and 24, 1999 with counsel of record and the parties present. At the conclusion of the plaintiff's evidence on September 23, 1999, the defendants moved for a directed verdict pursuant to Fed.R.Civ.P. 50(a). As stated on the record, the Court concluded the evidence permitted no issues of material fact to be submitted to the jury on plaintiff's claim of excessive force pursuant to 42 U.S.C. §1983 against individual Tulsa police officers, Mark Groves and Bruce Burton, and Sheriff Stanley Glanz, in his official capacity. The Court thus directed a verdict in favor of Mark Groves and Bruce Burton, individually, and Sheriff Stanley Glanz, in his official capacity on September 23, 1999. The trial continued the next day against Tulsa police officer, Vicky Smedley, and Tulsa Deputy Sheriff, Sergeant Rodney Floyd, in their individual capacities, and plaintiff's claims against them were submitted to the

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jury. On September 24, 1999, the jury entered its verdict against plaintiff Gregory Ellis and in favor of defendants Vicky Smedley and Rodney Floyd.

Accordingly, judgment is hereby entered in favor of defendants Vicky Smedley, Bruce Burton, Mark Groves, and Rodney Floyd, in their individual capacities and Sheriff Stanley Glanz in his official capacity, and against plaintiff Gregory Ellis on his claim of excessive force pursuant to 42 U.S.C. §1983. Costs are assessed against Plaintiff Gregory Ellis, if timely applied for under Local Rule 54.1. The parties are to pay their respective attorneys' fees.

Dated this 24th day of September, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LENARD BARBER, an individual,

Plaintiff,

vs.

T.D. WILLIAMSON, INC.,

Defendant.

Case No. 98-CV-615-J ✓

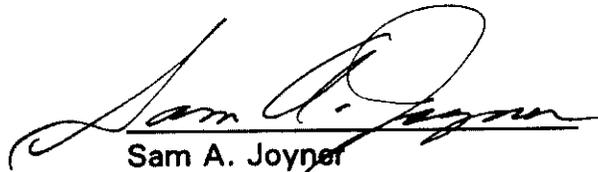
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JUDGMENT FOR THE PLAINTIFFS

Pursuant to the unanimous verdict of the jury, the Court hereby enters judgment for the Plaintiff in the amount of \$1.00 (one dollar).

IT IS SO ORDERED.

Dated this 23rd day of September 1999.



Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HELEN L. NOEL,
SSN: 164-42-4226

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-828-J

ENTERED ON DOCKET

DATE SEP 24 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 23rd day of September 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

HELEN L. NOEL,
SSN: 164-42-4226

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

SEP 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-828-J

ENTERED ON DOCKET
DATE SEP 24 1999

ORDER^{1/}

Plaintiff, Helen L. Noel, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ did not properly reevaluate Plaintiff's residual functional capacity ("RFC") at Step Five and therefore failed to recognize the shift in burden at that step, and (2) the ALJ did not properly evaluate Plaintiff's subjective complaints of pain and the ALJ's finding with regard to Plaintiff's credibility is not supported by substantial evidence. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

^{2/} Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated November 19, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on August 28, 1998. [R. at 4].

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born December 7, 1949, and was 46 years old at the time of her hearing before the ALJ. Plaintiff did not graduate from high school, but obtained her GED. Plaintiff additionally completed three years of college work, obtaining an Associates' Degree, and completed additional credit hours after obtaining that degree.

A Residual Functional Capacity Assessment completed by Thurma Fiegel, M.D., on December 8, 1995, indicates that Plaintiff can occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, sit six hours in an eight hour day, and push or pull an unlimited amount. [R. at 39]. The doctor noted that Plaintiff's pain did not further limit her RFC. The RFC assessment was "affirmed as written" by a second doctor on May 1, 1996.

On her disability report, Plaintiff reported that she had TMJ (temporal mandibular joint syndrome) which caused headaches, that she also suffered from pain due to arthritis and a previous car accident, and cystic disease. [R. at 56]. Plaintiff noted that she could drive but that she had difficulty sitting for any length of time. [R. at 59].

Plaintiff was admitted for treatment related to an abscessed tooth on December 30, 1987. [R. at 70].

Plaintiff was admitted on November 20, 1994 complaining of vaginal lesions. On November 21, 1994, Plaintiff's record indicated that Plaintiff was doing well and had no complaints. [R. at 87].

Plaintiff was admitted February 2, 1995 complaining of stomach pains. Plaintiff stated that she had eaten spoiled peaches. [R. at 73]. X-rays of Plaintiff's abdomen were interpreted as unremarkable. [R. at 79].

An MRI of Plaintiff's lumbar spine was completed August 10, 1995. Plaintiff's alignment was reported as "normal." [R. at 90]. A disc protrusion was noted at T11-T12, with the remainder of the scan reported as "unremarkable." [R. at 91].

Plaintiff was examined by Angelo Dalessandro, D.O., on October 26, 1995. [R. at 91]. He noted that Plaintiff's primary complaint was her back. Plaintiff explained that she had been involved in a motor vehicle accident in 1975 and that she dislocated her shoulders and herniated two disks.^{3/} [R. at 91]. Dr. Dalessandro reported that Plaintiff exhibited a normal gait, had no difficulty getting on or off the examination table, and showed no muscle atrophy. In addition, Plaintiff's finger dexterity was appropriate for gross and fine manipulation. Plaintiff's grip strength in her right hand was 10 kg, and her left hand 5 kg. The doctor additionally noted that Plaintiff "may have a chronic low back problem, making it difficult for her to stand for any period of time." [R. at 94].

X-rays dated July 27, 1995 indicated no acute fracture or subluxation of Plaintiff's vertebral bodies. The examiner noted degenerative changes involving the lower thoracic and upper lumbar spine, and mild narrowing of L5, S1. [R. at 110].

^{3/} This information is not in Plaintiff's medical records. Plaintiff reported this information to Dr. Dalessandro.

On September 15, 1995, Plaintiff saw her doctor with complaints of arthritis pain. [R. at 104]. On September 20, 1995, Plaintiff had a follow-up appointment related to her back. [R. at 103].

In October 1995, Plaintiff failed to show for two appointments with her doctor. [R. at 101]. In November 1995, Plaintiff canceled her appointment with her doctor.

On July 19, 1996, Plaintiff complained of pain in her lower back and complained of swelling in her legs, feet and hands. [R. at 128]. Plaintiff also complained of "arthritis pain." [R. at 128]. Plaintiff's best corrected vision was reported as 20/30. [R. at 111].

The record additionally indicates that Plaintiff did not show for appointments in May, June, August (missed two appointments) and October of 1996 with her doctor.

Plaintiff testified that she had not worked very many jobs, and that the longest period of time that she had held a job was six months. Plaintiff stated that the main reason that she could not work was due to her pain. Plaintiff noted that she had been injured in an accident in 1974, and that her pain had become increasingly worse since that date. [R. at 182]. Plaintiff complained of pain in her lower back, pain in both of her knees, pain in her ankles, hands, and shoulders. [R. at 184]. Plaintiff additionally testified that she experienced headaches fairly frequently and took medication for her headache pain. [R. at 186].

According to Plaintiff, her doctors told her not to drive because Plaintiff had difficulty with her knees locking. [R. at 187].

Plaintiff testified that she could sit for only 20 to 30 minutes at a time, could lift approximately eight pounds, could walk 100 feet, and could stand for only 20 to 30 minutes. [R. at 187-89]. Plaintiff testified that she takes medication for her pain but that the medication makes her groggy. [R. at 190].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).^{4/}

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more

perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

III. THE ALJ'S DECISION

Plaintiff was insured through December 30, 1987. The ALJ concluded that Plaintiff had not met her burden of proof to establish that she had a severe impairment prior to that date, and that Plaintiff was therefore not disabled prior to December 30, 1987.

The ALJ concluded that, after that date, Plaintiff had the residual functional capacity to perform light work subject to no repetitive pushing or pulling of arm or leg controls, only occasional stooping, crouching, bending, kneeling, and crawling, only occasional climbing of ramps or stairs, no climbing of ladders, ropes, or scaffolds, no repetitive overhead work, and moderate to marked limitation on the ability to grip bilaterally. [R. at 16]. Based on the testimony of a vocational expert, the ALJ found several jobs which Plaintiff could perform in the national economy.

IV. REVIEW

JAMES DECISION AND WAIVER

Plaintiff raises two issues in Plaintiff's appeal before this Court. Plaintiff asserts that the ALJ improperly determined Plaintiff's RFC and failed to recognize the burden shift at Step Five, and Plaintiff asserts that the ALJ did not properly evaluate Plaintiff's subjective complaints of pain.

In the decision issued by the ALJ, the ALJ specifically informed Plaintiff of James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996). The ALJ noted that Plaintiff must state, "with particularity" the issues Plaintiff wished to appeal to the Appeals Council or those issues would be waived by Plaintiff if Plaintiff later sought review in the United States Courts.

In the brief filed before the Appeals Council, Plaintiff predominantly discusses her medical history, her testimony, and her background. On the last page of her brief, Plaintiff lists but does not discuss "five issues" for consideration on appeal by the Appeals Council. Plaintiff states that the issues on appeal are: (1) the ALJ's findings are not supported by substantial evidence, (2) the ALJ erred in concluding Plaintiff can perform light or sedentary work on a consistent basis, (3) the ALJ's findings regarding credibility do not comply with Tenth Circuit case law, (4) the ALJ failed to follow the vocational expert testimony which was favorable, and (5) Plaintiff has additional medical records which support her claim. Plaintiff did not develop these issues in her appeal to the Appeals Council.

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

The first issue raised by Plaintiff before this Court was not asserted by Plaintiff to the Appeals Council. The second issue presented by Plaintiff which addresses the credibility evaluation by the ALJ was mentioned by Plaintiff before the Appeals Council, but was not discussed, and was not developed.^{6/} The Court concludes that the first issue raised by Plaintiff in this appeal was waived by Plaintiff. The Court is concerned that the second issue was not sufficiently raised by Plaintiff. However, the Court chooses to separately address both issues below. The Court notes that Plaintiff's counsel raises the "shift in the burden" argument with increasingly regularity in Social Security appeals and concludes that this issue should be addressed even though Plaintiff has waived it.

^{6/} The focus of the issue raised by Plaintiff to the Appeals Council was the credibility analysis in accordance with Luna and Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). The issue raised by Plaintiff before this Court includes no reference to Kepler, but instead focuses on Luna and the ALJ's failure to follow the appropriate Luna analysis.

SHIFT IN BURDEN OF PROOF/STEP FIVE

Plaintiff asserts that although the ALJ seemingly recognized that the burden of proof shifted to the Commissioner at Step Five, the ALJ applied the law as though the burden had not yet shifted. Plaintiff suggests that "a proper step five analysis requires that the ALJ reevaluate the RFC based on the shift in the burden." *Plaintiff's Brief at 3.*

The Court does not accept Plaintiff's premise. Initially, Plaintiff offers no case law to support her claim that Step Five requires a reevaluation of the Plaintiff's RFC, which was already determined at Step Four.^{7/} In addition, nothing in the regulations, the case law, or the statutes, suggests to this Court that the Commissioner is required to conduct what essentially results in two separate RFC evaluations -- an initial one at Step Four, and a new one at Step Five. Finally, if the RFC determination is supported by substantial evidence at Step Four, no reason exists to "reevaluate the RFC based on the shift in the burden of proof." This Court can contemplate no set of circumstances upon which an RFC which is supported by substantial evidence (at Step Four) suddenly lacks support in the record simply because the burden of proof has shifted to the Commissioner (at Step Five).^{8/}

^{7/} Plaintiff does refer to Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). The Court does not read Thompson, however, as requiring what is essentially a second RFC determination when an ALJ reaches Step Five.

^{8/} The Court is concerned that Plaintiff's counsel is actually attempting to force a higher standard of review on the Commissioner because of the "shift" in the burden of proof identified by Plaintiff at Step Five. In accordance with case law, the decision of the Commissioner is affirmed if substantial evidence supports the findings of the Commissioner. The "substantial evidence" requirement exists at each Step of the Commissioner's review and is not greater at Step Five and "less" at Step Four.

The case law in this Circuit contemplates the determination of a claimant's RFC at Step Four. In Winfrey v. Chater, 92 F.3d 1017 (10th Cir. 1996), the Tenth Circuit Court of Appeals specifically identified "three steps" at Step Four. "In the first phase [of the Step four sequential analysis] the ALJ must evaluate a claimant's physical and mental residual functional capacity. . . ." Id. at 1023. The regulations refer to "RFC" in the singular, clearly contemplating that only one RFC evaluation will be made. See 20 C.F.R. §§ 404.1520(e)-(f), 404.1560, 404.1561, 416.920(3)-(f), 416.960, 416.961. See also Social Security Ruling, Policy Interpretation Ruling Titles li and Xvi: Assessing Residual Functional Capacity in Initial Claims, SSR 96-8p, July 2, 1996 ("This assessment of RFC is used at step 4 of the sequential evaluation process to determine whether an individual is able to do past relevant work, and at step 5 to determine whether an individual is able to do other work, considering his or her age, education, and work experience.").

The RFC is utilized by the ALJ at Step Four to determine whether or not a claimant can perform his or her past relevant work. The RFC is again used at Step Five. At Step Five, however, the emphasis of the Commissioner's evaluation has shifted, and the RFC (which was made at Step Four) is used to determine whether a significant number of jobs exist in the national economy which, given the claimant's

RFC, the claimant can perform.^{9/} See, e.g., 20 C.F.R. §§ 404.1560(b)-(c), 416.960 (b)-(c).

The Court has located nothing which suggests that the Commissioner has a burden to reevaluate the RFC due to the shift in the burden of proof which occurs at Step Five. Regardless of the "Step" at which the RFC determination is made, if that determination is supported by "substantial evidence," there should be no need to "reevaluate" the RFC due to the "shift in the burden of proof." As the Court reads the Plaintiff's argument, Plaintiff is almost attempting to impose a burden greater than the "substantial evidence" burden on the Commissioner. The bottom line, regardless of who has the burden of proof, is that the ALJ's determination of the Plaintiff's RFC must be supported by substantial evidence.

Plaintiff additionally asserts that the ALJ relied on the "absence of evidence" at Step Five in making his RFC determination.

Plaintiff initially suggests that the ALJ erred by pointing to the "lack of medical evidence." Plaintiff notes that an ALJ cannot rely on an "absence of evidence" as

^{9/} Several unpublished Tenth Circuit Court of Appeals cases support the use of the "Step Four RFC" in the ALJ's evaluation at Step Five. See Shaffer v. Apfel, No. 97-5174, 1998 WL 314376 (10th Cir. (Okla.) June 4, 1998) (citations omitted) ("Finally, Mr. Shaffer contends the ALJ erroneously failed to shift the burden of proof to the Commissioner until after he made the RFC determination. The RFC determination is initially part of the step four evaluation and, thus, is made before the burden of proof shifts at step five."); Roberson v. Apfel, Case No. 97-7093, 1998 WL 203090 (10th Cir. (Okla.) April 27, 1998).

In other cases pending in this district, Plaintiff's counsel has referred the Court to Smith v. Apfel, Case No. 98-5015, 1998 WL 747121 (10th Cir. (Okla.) 1998). Smith, however, is a termination of benefits case and the Court therefore concludes that it has limited applicability. Some troubling language additionally appears in Baugh v. Apfel, Case No. 98-5128, 1999 WL 410307 (10th Cir. (Okla.) April 26, 1999) ("Although the ALJ could have been more specific about the Commissioner's burden of establishing appellant's RFC. . ."). The Court concludes, however, that neither case requires a conclusion by this Court that an ALJ is required to conduct a second RFC evaluation at Step Five.

evidence. Plaintiff points to the ALJ's analysis with regard to Plaintiff's testimony not being fully credible because the record does not contain complaints by Plaintiff regarding headaches, knee problems, neck problems, and hand problems. Plaintiff argues that this constitutes the "lack of evidence" which was disapproved of by the Tenth Circuit Court of Appeals in Thompson. The Court disagrees.

The Court in Thompson was properly concerned about an ALJ determining lifting, standing, sitting and other physical requirements when the record contained nothing to support the physical RFC findings. The Thompson situation is not present in this case.^{10/} Essentially, Plaintiff criticizes the ALJ because the ALJ commented upon the Plaintiff's lack of complaints regarding her physical ailments to her physicians. This type of evaluation is entirely proper. Certainly one might expect that an individual who is suffering from continuing migraines, and pain in the hands, knees, and neck, would comment upon such pain to her doctors and would seek medical treatment for such pain. The Tenth Circuit Court of Appeals has noted that such factors can be considered in the evaluation of a claimant's credibility. See, e.g., Hargis

^{10/} Two non-examining physicians provided RFC evaluations of Plaintiff's capabilities which are far in excess of the RFC which the ALJ attributed to Plaintiff. In addition, the ALJ noted the opinion of Dr. Dalessandro. Plaintiff complains that Dr. Dalessandro observed that Plaintiff might have a low back problem which could make it difficult for her to stand for any period of time. Plaintiff is correct that Dr. Dalessandro's report does contain this statement. Dr. Dalessandro's report is dated November 6, 1995. Dr. Dalessandro appears not to have had the benefit of Plaintiff's MRI, and his report does not indicate which records he reviewed. He noted that it would be necessary to "rule out chronic lumbar strain secondary to herniated disk." The August 1995 MRI indicated the alignment of Plaintiff's lumbar spine was "normal." A central disc protrusion was noted at T11-T12. [R. at 90]. The record contains two RFC Assessments by reviewing physicians dated December 18, 1995, and May 1, 1996. The two physicians concluded that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six hours in an eight hour day, sit six hours in an eight hour day, and push or pull an unlimited amount. [R. at 40]. In addition, assuming Plaintiff cannot stand for "any period of time," the ALJ's RFC included a sit/stand option at every 30 minutes. Plaintiff fails to explain how this option does not accommodate Plaintiff's physical limitations.

v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991); Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987). The Court concludes that the ALJ's comments upon Plaintiff's lack of complaints to her doctors **does** not constitute reliance on "an absence of evidence."

Plaintiff additionally complains that the ALJ noted that Plaintiff's treating medical source records were "for the most part, illegible," yet the ALJ relied on the reports, to some degree, in concluding that Plaintiff had not complained to her doctors regarding her headaches, knees, and neck. The Court is troubled by this seeming inconsistency. However, although the ALJ notes the "illegibility," the ALJ additionally noted that "it is clear from those reports that the claimant was being seen for low back problems."

The Court has reviewed the **entire** medical record. Portions of the treating doctors' reports are illegible. Some items can be deciphered, however, which indicate the nature of the visit, the complaints of Plaintiff at the visit, and the general medications prescribed. A review of the ALJ's decision as compared to the doctor's reports and the record convince the Court that the ALJ had sufficient information upon which to determine Plaintiff's RFC.

CREDIBILITY ANALYSIS

Plaintiff first summarizes Luna and the three-step analysis and states that the ALJ did not follow the analysis but merely "jumped" to the third step which is the credibility analysis. The Court has increasingly noticed the tendency of the

Commissioner to "skip over" the first two steps of the Luna analysis and plunge into the third step. This tendency, if anything, benefits Plaintiff.

Luna outlined the analysis for the Commissioner to follow in evaluating a claimant's complaints of pain. First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

If the Commissioner concludes that the alleged pain-producing impairment is not supported by medical evidence, or if the Commissioner determines that no nexus exists linking the alleged impairment with the asserted pain, the Commissioner is not required to evaluate a claimant's subjective complaints of pain. Unless the first part of the analysis is favorable to the claimant, the claimant's subjective complaints of pain do not have to be considered.^{11/} Plaintiff is correct that the Commissioner frequently bypasses the first two-thirds of the Luna analysis and plunges into an analysis of the claimant's subjective complaints of pain. This procedure benefits the claimant because it assumes the Commissioner has resolved the first two questions

^{11/} Evaluating the subjective complaints of pain of a claimant makes no sense if the claimant has no impairment which could produce the alleged pain.

in favor of the claimant regardless of whether the complaints are supported by objective medical evidence.

Plaintiff additionally asserts that the ALJ's credibility analysis is merely boilerplate and contains few references to the specific facts in this case. The ALJ's decision does contain some general references to Luna and the requirements in analyzing pain. However, the ALJ also analyzes Plaintiff's complaints of pain. The ALJ noted that Plaintiff did not complain of hand pain, TMJ problems, headaches, neck pain, or knee locking to her treating source. The ALJ compared Plaintiff's doctors' reports to the consulting physician's report and noted that an improvement existed in straight-leg-raising. The ALJ additionally noted the lack of medication for severe pain, the infrequency of treatment by physicians, and the lack of discomfort exhibited by Plaintiff at the hearing. Although the treatment of Plaintiff's credibility is not as clear^{12/} as it could be, and the ALJ's credibility discussion is not as in-depth as it might be, the Court concludes that it is in accord with Luna.^{13/}

V. CONCLUSION

The Court has reviewed the record and the issues presented by Plaintiff. Initially, the Court is persuaded that, pursuant to James Plaintiff has waived the issues

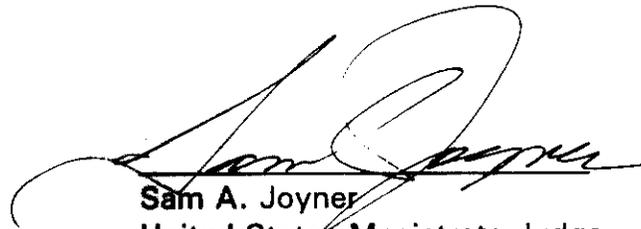
^{12/} Although, as noted by Plaintiff, the ALJ appears to have "skipped" to the credibility portion of the Luna analysis, the ALJ's "credibility analysis" contains references to the lack of objective medical testimony to support the Plaintiff's complaints of pain. This analysis is more appropriate in the initial two portions of the Luna analysis, and is confusing when incorporated in the analysis of Plaintiff's subjective complaints of pain.

^{13/} Plaintiff briefly mentions Luna and Kepler in his appeal to the Appeals Council. In his appeal to this Court, Plaintiff does not mention Kepler, but instead focuses on Luna and Thompson. As noted above, the "issue" presented to the Appeals Council appears quite different than the issue which Plaintiff presents to this Court.

which Plaintiff presents to this Court. However, the Court chooses to also address those issues on their merits, and concludes that the decision by the Commissioner is supported by substantial evidence.

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

Dated this 23rd day of September 1999.



Sam A. Joyner
United States Magistrate Judge

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

FILED

SEP 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NANCY HARRINGTON,)

Plaintiff,)

vs.)

No. 98-C-977-C

COMMERCIAL UNION INSURANCE)
COMPANY and EMPLOYERS FIRE)
INSURANCE COMPANY,)

Defendants.)

ENTERED ON DOCKET
SEP 24 1999
DATE _____

JUDGMENT

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

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for defendants and against plaintiff.

IT IS SO ORDERED this 22nd day of September, 1999.


H. DALE COOK
United States District Judge

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

NANCY HARRINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 COMMERCIAL UNION INSURANCE)
 COMPANY and EMPLOYERS FIRE)
 INSURANCE COMPANY,)
)
 Defendants.)

No. 98-C-977-C

ENTERED ON DOCKET
DATE SEP 24 1999

FILED
SEP 24 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Pending before the Court is the motion for summary judgment filed by defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

On November 25, 1998, plaintiff, Nancy Harrington, filed the present action in Tulsa County District Court, against defendant, Commercial Union Insurance Company, alleging bad faith failure to settle an insurance claim. Harrington seeks compensatory and punitive damages. Commercial Union removed the present action to this Court on December 28, 1998, under diversity jurisdiction, pursuant to 28 U.S.C. §§ 1446 and 1332(a)(1). Commercial Union represents that Harrington is a resident and citizen of Oklahoma and Commercial Union is a corporation organized under the laws of Connecticut with its principle place of business in Massachusetts. Commercial Union further represents that the amount in controversy exceeds the sum of \$75,000.

At a status hearing held on May 26, 1999, this Court granted Harrington's request to amend her complaint, and she filed her amended complaint on May 27. The amended complaint added Employers Fire Insurance Company as a defendant in this action. Harrington represents that, although a defendant was added, diversity jurisdiction continues, as Employers Fire is a corporation organized under the laws of Massachusetts and it has its principle place of business in that state. The

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Court is satisfied from the representations of the parties that diversity jurisdiction exists.

On August 16, 1999, defendants filed their motion for summary judgment. Harrington filed her response brief on September 7, and defendants filed a reply on September 20. On September 21, Harrington filed a motion to supplement the record regarding defendants' motion for summary judgment, arguing that new matters were raised by defendants in their reply brief. The Court finds that the motion is proper, and it is therefore granted. All materials regarding defendants' motion for summary judgment have now been submitted, and the matter is ripe for ruling.

Facts

The following material facts are undisputed. In May 1997, Harrington was involved in a vehicle accident when she attempted to avoid boxes which fell from a pickup truck traveling in front of her. Harrington collided with concrete barriers on the side of the road, and her vehicle spun around before coming to a stop.¹ The authorities were not called to the scene, and no accident report was filed.

At the time of the accident, Harrington had a personal automobile policy in effect with defendant, Employers Fire, which was a wholly owned subsidiary of defendant, Commercial Union. All of Employers Fire's claims were handled through the Oklahoma City Commercial Union claims office.

Approximately four months after being involved in the accident, Harrington sought medical treatment in September 1997. She also reported the accident and her injuries to her to Melisa DeShazo, the adjuster for Commercial Union.² Harrington filed a claim with defendants seeking

¹ Apparently, the driver of the pickup did not stop at the scene, and the identity of the driver has never been discovered.

² Harrington claims that she reported the accident to her insurance company the day after it happened and reported it to DeShazo prior to September 1997. Defendants claim that

benefits under the uninsured motorist (UM) provisions of her automobile policy, based on the fact that the responsible party was unknown. She claimed pain and suffering and permanent physical injury.

Harrington was first examined by Thomas Cate, D.O., at the Tulsa Regional Medical Center emergency room. Harrington was referred to Craig Wolff, M.D., and orthopedic surgeon, and Jorge Gonzalez, M.D., a neurologist. She was examined by Dr. Wolff in April 1998, and he recommended surgery. Dr. Gonzalez diagnosed her with traumatic brain injury.

During the course of its investigation, in May 1998, Employers Fire requested that Harrington submit to a medical examination to be performed by Andrew John, M.D. Employers Fire sought to evaluate Harrington's need for surgery. Harrington denied the request and refused to submit to an examination by Dr. John, citing her belief that Dr. John was not qualified to evaluate her medical condition. Harrington further claimed that Dr. John was biased in favor of insurance companies. The perceived bias and lack of qualifications of Dr. John were the sole reasons for Harrington's refusal to submit to an examination by him. Harrington offered to be seen by any qualified orthopedist in the telephone book, but defendants rejected the offer and insisted that Harrington be examined by Dr. John.

Dr. John does not normally treat patients, and most of his income comes from examining individuals and writing reports for insurance companies and attorneys.³ Dr. John is trained in the

Harrington first reported her injuries to DeShazo on October 20, 1997. However, the Court does not find this dispute material to the present case.

³ Dr. John testified that, in June 1997, one hundred percent of his income came from doing evaluations and writing reports for insurance companies, and he testified that he does not usually treat patients. Rather, he normally sees patients for evaluation purposes only. Dr. John testified that the "examinations that I do are for the evaluation of permanent disability, or some kind of disability. . . . I don't provide examinations in the same way that an orthopedic surgeon provides an examination." He further testified that he usually sees patients who have previously been treated

field of emergency medicine, but he is not an orthopedic surgeon and has never performed orthopedic surgery. Dr. John claims to practice traumatology, which is not a recognized medical specialty by the American Medical Association. However, Dr. John testified that he is a licensed medical doctor qualified to examine and evaluate orthopedic injuries, and that he does examine and evaluate such injuries daily.

As a result of Harrington's refusal to submit to an examination by Dr. John, defendants have not paid any benefits to Harrington under her UM policy and have not made an offer of settlement. Defendants base their decision to withhold payment on Harrington's refusal to be examined by Dr. John, and on the language of the UM policy, which provides that Harrington must submit to a physical examination by a physician of defendants' choice. Defendants made several requests to Harrington from May 1998 through November 1998, asking that she submit to an examination by Dr. John. However, Harrington refused each request made by defendants. Harrington has not been examined by Dr. John. Recently, Harrington was examined by Dr. Patrick Evans, an orthopedic surgeon selected by defendants.

Standard of Review

In considering a motion for summary judgment, the Court "has no real discretion in determining whether to grant summary judgment." U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant, Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir.1994), and summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

by a physician, and he issues a report either agreeing or disagreeing with findings of the prior physician.

any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). “A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Akin v. Ashland Chemical Co., 156 F.3d 1030, 1034 (10th Cir. 1998). “[T]he moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.” Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) (quoting Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir.1987)). However, once the moving party meets its burden, the burden then shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir.1991). The “party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citations omitted).

Discussion

The narrow issue raised by Harrington’s complaint is whether defendants⁴ acted in bad faith or breached their contract with her by refusing to make an offer of payment on her UM claim. That is, the issue is whether defendants breached their duty of good faith and fair dealing and breached the parties’ contract by refusing to evaluate Harrington’s claim and make an offer of payment to her to compensate her for her injuries and medical expenses. The Court is not confronted with the issue

⁴ Defendants argue that Commercial Union is in a different position from Employers Fire. Defendants allege that Harrington has no contract with Commercial Union and that Employers Fire issued the policy at issue. Thus, defendants argue that Commercial Union owes Harrington no duty of good faith and fair dealing. Defendants apparently make this argument because Employers Fire is a subsidiary of Commercial Union and liability is therefore limited. However, the Court need not consider this issue, as the Court has determined that defendants’ summary judgment motion has merit.

of whether Harrington is in breach of contract, thereby forever and completely relieving defendants of all obligations to her under the UM policy, as no action or counterclaim was filed against her alleging the same.⁵

The Court finds and concludes that there is no genuine issue as to any material fact, and summary judgment in favor of defendants is proper. Harrington's sole claim is that defendants acted in bad faith and in breach of contract by refusing to make an offer of payment on her UM claim. During the course of its investigation, Employers Fire requested Harrington to submit to an examination to be performed by a physician of its choice, namely, Dr. Andrew John. Harrington argues that she refused to submit to the requested examination because Dr. John is biased, and he is "in the pocket of the insurance industry." Harrington further argues that when presented with this information regarding Dr. John, defendants failed to investigate the allegations of bias.⁶ Harrington additionally argues that although she offered to be examined by any orthopedic surgeon in the telephone book, defendants stubbornly refused and insisted that she be examined by Dr. John. Harrington argues that insurers have a good faith duty to deal fairly with their insureds, and insurers have an obligation to send their insureds to an unbiased physician. Defendants admit that an insurer should not knowingly send an insured to a biased physician, and they agree that to do so constitutes bad faith.

As grounds for her claim, Harrington points to the fact that Dr. John primarily receives his

⁵ Defendants argue that by refusing to submit to an examination by a physician of their choice, Harrington is in breach of contract by anticipatory repudiation, thereby relieving defendants of their obligation to pay any amount on her claim. However, as defendants did not file a lawsuit or counterclaim against Harrington raising this issue, it is not properly before the Court. The only issue under consideration is whether defendants acted in bad faith or breached their contract with Harrington by refusing to make an offer of payment on her claim.

⁶ Aside from pointing to Dr. John's practice of providing reports to insurance companies, Harrington has not provided any competent evidence of actual bias.

income from writing reports for insurance companies, a fact which defendants do not dispute. She then concludes that, based on this fact, Dr. John is biased in favor of insurers and, consequently, by demanding that she be examined by him, defendants acted in bad faith. However, the record contains no competent evidence that Dr. John is actually biased in favor of insurance companies. At most, the Court only has Harrington's speculation on this issue. Moreover, simply because Dr. John is not an orthopedic surgeon, it does not follow that he is not qualified to examine Harrington or that he is biased. As Dr. John testified, he is a licensed medical doctor qualified to examine and evaluate orthopedic injuries, and he does examine and evaluate such injuries daily. Other than conjecture and unsupported conclusions, there is simply nothing to show that Dr. John is either unqualified or biased.

Harrington additionally complains that she asked defendants to evaluate her claim based on the information she provided and make an offer of settlement based on that information. She argues that even without a report issued by Dr. John, defendants "had all the information necessary to evaluate Plaintiff's claim and make an offer of payment." Harrington contends that they refused to do so and instead proceeded to prepare their case for litigation.

The policy at issue provides: "We have no duty to provide coverage under this policy unless there has been full compliance with the following duties . . . A person seeking any coverage must . . . Submit, as often as we reasonably require . . . To physical exams by physicians we select. We will pay for these exams." Clearly, under the UM contract, Harrington was obliged to submit to an examination by a physician of defendants' choice, and, if she refused, defendants had no duty to make an offer of payment on her claim or otherwise provide coverage. In the present case, Employers Fire requested that Harrington submit to an examination by Dr. John. She refused, citing bias and lack of qualification. Defendants subsequently refused to make an offer of payment. Under

the very terms of the parties' contract, **defendants** had the right to withhold coverage. As the contract clearly provides, **defendants** had the right to unilaterally select a physician to conduct an examination; there is nothing in the contract providing that the parties must mutually agree on the selection of a physician.

Harrington's bad faith and bias arguments do not excuse her failure to comply with the terms of the contract. As explained above, there is no competent evidence of actual bias on the part of Dr. John. Further, the Court does not find that **defendants** acted in bad faith by insisting that Harrington comply with the terms of her policy, i.e., **submit** to an examination by a physician of the insurer's choosing. There is no indication by so insisting that **defendants** acted unreasonably toward Harrington. Rather, it can be argued that Harrington unreasonably refused to submit to an examination as required by the policy. Harrington also argues that the policy is somehow unfair because it gives **defendants** the right to order virtually unlimited examinations, and this is a greater right than parties enjoy under the Oklahoma Discovery Code. However, the Court finds this argument unavailing, primarily because **defendants** did not order an unreasonable number of examinations or an unreasonably invasive examination. Rather, **defendants** simply requested that Harrington submit to one examination by Dr. John, and she refused. There is nothing amounting to bad faith in requiring Harrington to meet her obligations under the policy and submit to an examination by a qualified, licensed physician, where no actual bias has been shown.

Moreover, the issue of whether Dr. John issues reports unfairly favorable to insurers is essentially a credibility question. If Dr. John had examined Harrington and issued a report in this case that she found unreasonable, and if **defendants** relied only on this report and ignored all other evidence of injury in making their offer of settlement, Harrington would likely have some type of claim against **defendants**. Here, however, Harrington, by refusing to submit to a requested

examination, did not even give defendants an opportunity to make an offer of settlement. It would appear, therefore, that any claim of bad faith is premature.

Accordingly, the Court hereby GRANTS Harrington's motion to supplement the record and GRANTS defendants' motion for summary judgment. All other pending motions are hereby rendered MOOT by entry of this order.⁷

IT IS SO ORDERED this 23rd day of September, 1999.



H. DALE COOK
United States District Judge

⁷ Defendants' argument that Harrington's breach totally excuses them from payment is not properly before the Court. This argument should have been raised in a counterclaim, alleging breach on the part of Harrington, and requesting appropriate relief. The present summary judgment motion merely addresses Harrington's claim of bad faith and breach of contract. In any event, the Court doubts that, if Harrington submits to an examination by a physician of their choice, defendants are completely relieved of all obligations arising from the May 1997 accident.

11/27

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

FILED

BECKY JONES, *ET AL.*,)
)
 Plaintiffs,)
)
 v.)
)
 SIMMONS FOODS, INC., an)
 Arkansas corporation,)
)
 Defendant.)

SEP 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-798-BU(E) ✓

ENTERED ON DOCKET

DATE SEP 24 1999

NOTICE OF DISMISSAL

COME NOW the Plaintiffs, Jesse and Beverly Jamison, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, hereby dismiss themselves from the above-captioned action without prejudice.

RESPECTFULLY SUBMITTED,



Blake K. Champlin, OBA No. 11788
Jamie Taylor Boyd, OBA No. 13659

SHIPLEY, JENNINGS & CHAMPLIN, P.C.
201 West Fifth Street, Suite 400
Tulsa, Oklahoma 74103
(918) 582-1720
(918) 584-7681 (f)

ATTORNEYS FOR PLAINTIFFS

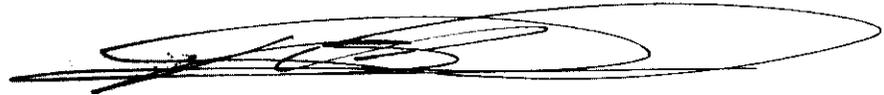
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 24th day of September, 1999, a true and correct copy of the above document was mailed, postage prepaid to the following:

Simmons Foods, Inc.
Registered Service Agent
c/o Mark C. Simmons
P.O. Box 430
Siloam Springs, AR 72761

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

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

~~SEP 23 1999~~

SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

LAWRENCE T. SHILES, individually
and d/b/a ACCIDENT & INJURY
ATTORNEYS, INC.,

Plaintiff,

vs.

HARTFORD INSURANCE COMPANY,
a foreign insurance corporation,

Defendant.

ENTERED ON DOCKET

DATE SEP 23 1999

Case No. 98-CV-0916 BU (E) ✓

FILED

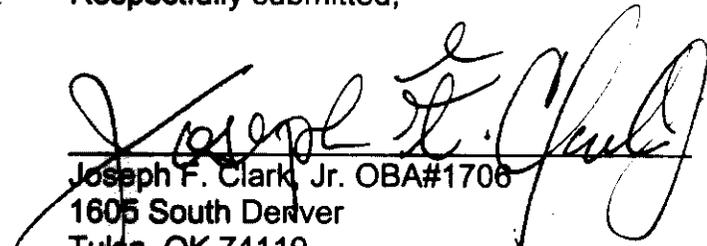
SEP 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW Lawrence T. Shiles, individually and doing business as Accident & Injury Attorneys, Inc., Plaintiff herein, and Hartford Insurance Company of the Midwest, improperly named herein as Hartford Insurance Company, Defendant herein, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure do stipulate to the dismissal of the above styled and numbered cause, and all claims and counterclaims asserted therein, with prejudice to the refiling thereof.

Respectfully submitted,


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

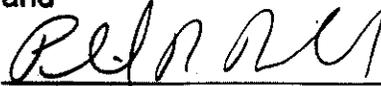
Attorney for Plaintiff
Lawrence T. Shiles,
Individually and doing business as
Accident & Injury Attorneys, Inc.

MT

18

CLT

and



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

Attorney for Defendant
Hartford Insurance Company of
the Midwest

C:\th\6167\stipulation of dismissal.wpd

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SILVERADO FOODS, INC.,)
)
Plaintiff,)
)
v.)
)
GOURMET SPECIALTY BAKERS, INC.,)
)
Defendant.)

ENTERED ON DOCKET

DATE SEP 23 1999

Case No. 99-CV-118-H (E) ✓

F I L E D

SEP 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

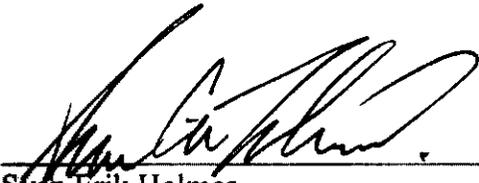
The Court has received and reviewed the Application of Plaintiff, Silverado Foods, Inc., Defendant/Third-Party Plaintiff, Gourmet Speciality Bakers, Inc., and Third Party Defendant, Lawrence Field, jointly requesting the Court to enter an administrative closing order in the above-styled and numbered case.

The Court finds that a settlement agreement has been voluntarily entered into by the parties. The request for administrative closing is supported by the fact of settlement between the parties and is in the best interests of justice.

Therefore, the Court hereby orders that this case be administratively closed until May 1, 2000. On or before that date, the parties are hereby ordered to file either (i) a joint dismissal with prejudice, or (ii) Plaintiff's motion to enter an agreed-upon judgment of the parties. Such motion shall be filed at Plaintiff's sole discretion, pursuant to and in accordance with the stipulations of the parties filed in this case.

IT IS SO ORDERED.

This 23rd day of September, 1999.



Sven Erik Holmes
United States District Judge

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

ROBERT M. BOWERS, JOE L. BOWERS,)
LOIS BOWERS,)

Plaintiffs,)

vs.)

CITY OF TULSA CHIEF OF POLICE,)
RON PALMER, TULSA POLICE)
RESERVE SERGEANT WINFRED L.)
"SKIPPER" BAIN, TULSA COUNTY)
SHERIFF, STANLEY R. GLANZ,)
CAPTAIN ROGER FETTERHOFF, CITY)
OF OWASSO POLICE CHIEF MARIA)
ALEXANDER, LIEUTENANT CLIFFORD)
MOTTO, MARK ADAM TRAILL,)

Defendants.)

ENTERED ON DOCKET

DATE SEP 23 1999

Case No. 98-CV-732-BU(M) /

FILED

SEP 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon the Motion to Dismiss filed by Defendant, Winfred L. "Skipper" Bain, the Motion to Dismiss filed by Defendant, Ron Palmer, the Motion to Dismiss or in the Alternative, Motion for Summary Judgment filed by Defendants, Stanley R. Glanz and Roger Fetterhoff, the Motion to Dismiss filed by Defendants, Maria Alexander and Clifford Motto, and the Motion to Dismiss filed by Defendant, City of Owasso. Based upon the parties' submissions, the Court makes its determination.¹

The individual Defendants, in their dismissal motions, raise the affirmative defense of qualified immunity. In the context of

¹ At the outset, the Court notes that Plaintiffs failed to respond to the Motion to Dismiss filed by Defendant, City of Owasso. Pursuant to N.D. LR 7.1(C), the Court, in its discretion, deems Defendant's motion confessed. The claims against Defendant, City of Owasso, are therefore dismissed.

2/

c/m

a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the district court's review of the qualified immunity defense is limited to the pleadings. Dill v. City of Edmond, 155 F.3d 1193, 1203 (10th Cir. 1998). The district court must construe the allegations of a plaintiff's complaint and any reasonable inferences to be drawn from them in favor of the plaintiff. Id. at 1203-1204, (citing Breidenbach v. Bolish, 126 F.3d 1288, 1292 (10th Cir. 1997)). However, where the qualified immunity defense is asserted in a Fed. R. Civ. P. 12(b)(6) motion, the district court applies a heightened pleading standard, requiring the complaint to contain, "specific, non-conclusory allegations of fact sufficient to allow the district court to determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in light of clearly established law." Dill, 155 F.3d at 1204 (quoting Breidenbach, 126 F.3d at 1293). After the qualified immunity defense is raised, the plaintiff may amend the complaint to include additional "specific, non-conclusory allegations of fact" sufficient to allow the district court to determine whether the defendant is entitled to qualified immunity. Id.

In the instant case, Plaintiffs have not amended their Complaint nor have they requested to amend their Complaint. Therefore, Plaintiffs stand on the allegations of the Complaint in regard to Defendants' assertion of the qualified immunity defense. Hence, the Court reviews the qualified immunity defense based upon the allegations of Plaintiffs' Complaint.

In their Complaint, Plaintiffs allege that on March 29, 1998,

at approximately 2:00 a.m., Mark Adam Traill ("Traill")², a Tulsa Police Reserve Officer, followed Plaintiff, Robert M. Bowers ("Bowers"), south, from U.S. Highway 20, for six miles, on rural county roads, to Bowers' residence. They allege that when Bowers turned into his driveway, Traill parked parallel behind Bowers' truck, blocking him in his driveway. According to Plaintiffs, Bowers thereafter exited his truck and asked why he was being followed and what Traill and Traill's wife, the passenger in the car, wanted. Plaintiffs allege that Bowers requested that Traill and his wife leave his property and leave him alone. They also allege that when Traill and his wife refused to leave, Bowers, fearful of these nighttime strangers, walked around the front of his truck to the passenger side and got his gun. Plaintiffs allege that Bowers then walked to the rear of his truck, stopped at the tailgate and told Traill and his wife to leave his property. By that time, Traill was standing outside of his parked car on the driver's side. Plaintiffs allege that Bowers thereafter turned toward the front of his truck and started walking toward his driver's side door, with his back to Traill. Plaintiffs allege that Bowers then heard a noise and when he turned back toward Traill's car, Traill shot Bowers in the stomach and neck. According to Plaintiffs, while Bowers was lying on the grass, Traill pointed a gun to Bowers' temple and Bowers stated: "Please

² Mark Adam Traill was originally named as a Defendant in Plaintiffs' Complaint. However, subsequent to the filing of the Complaint, Plaintiffs dismissed their federal and state law claims against Mr. Traill, pursuant to Rule 41(a), Fed. R. Civ. P.

don't kill me."

In addition, Plaintiffs allege that Plaintiff, Lois M. Bowers, who had been awakened by what she thought was a gunshot, came out of the family home. Plaintiffs allege that she saw Bowers, her son, lying on the grass, Traill starting to stand up and Traill's wife coming toward Traill. They allege Traill's wife told Plaintiff, Lois M. Bowers, that Traill was a Tulsa Police Reserve Officer. Plaintiffs allege that shortly thereafter, Plaintiff, Joe L. Bowers, came out of the home and also saw his son lying on the ground. According to Plaintiffs, Traill told Plaintiff, Joe L. Bowers, that he was a Tulsa Police Reserve Officer and showed him his badge.

Plaintiffs allege in the Complaint that from October 1991 through March 1998, the Tulsa County Sheriff's Department, the Owasso Police Department and the Tulsa Police Reserve Officers Division, received numerous reports of incidents involving criminal acts and "color of title" abuse/misuse of power against Traill from tax-paying, law-abiding citizens. Plaintiffs allege that Defendants established an unwritten policy, practice and custom of "dumping" all of the cases and/or incidents involving Traill. Plaintiffs allege that the unwritten policy, practice and custom of ignoring, dumping, and failing to investigate, screen, train, supervise and discipline Traill deprived Bowers of being free from criminally inflicted physical injury. Plaintiffs allege that by their unwritten policy, practice and custom, Defendants affirmatively placed Bowers at a greater risk of harm. Plaintiffs

further allege that the unwritten policy, practice and custom of Defendants caused Bowers' parents, Plaintiffs, Joe L. Bowers and Lois M. Bowers, to sustain emotional distress. Based upon Defendants' conduct, Plaintiffs seek to recover damages against Defendants under 42 U.S.C. § 1983 for alleged violations of their substantive due process and equal protection rights under the Fifth Amendment and Fourteenth Amendment.

As stated, the individual Defendants raise qualified immunity as a defense to Plaintiffs' claims. Qualified immunity spares a defendant the burden of proceeding with this action unless the plaintiff can show that the defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Dill, 155 F.3d at 1204 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The district court must first access whether the plaintiff has alleged a deprivation of a constitutional right. County of Sacramento v. Lewis, 118 S.Ct. 1708, 1714 n. 5 (1998). If the complaint alleges a valid claim, then the district court must determine whether the constitutional right was clearly established so that a reasonable official would have understood that his or her conduct violated that right. Id.

Upon review of Plaintiffs' Complaint, the Court concludes that it fails to sufficiently allege facts that, if proven, would constitute a violation of Bowers' substantive due process rights. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or

property, without due process of law." Plaintiffs essentially claim that Defendants deprived Bowers of his liberty interest in failing to protect Bowers from Traill's violence. However, in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195 (1989), the Supreme Court found that "nothing in the language of the Due Process Clause requires the State³ to protect the life, liberty, and property of its citizens against invasion by private actors." In the Complaint, Plaintiffs allege that Traill was a Tulsa Police Reserve Officer. A Tulsa Police Reserve Officer is appointed by the Chief of Police of the City of Tulsa and serves on behalf of the City of Tulsa. Okla. Stat. tit. 11, § 34-101. While Plaintiffs allege that all Defendants, including Traill who was originally named as a Defendant, were agents, servants and employees of each other, the Court finds that such allegation is insufficient under the heightened standard of pleading to show that Traill was an agent, servant or employee of the Tulsa County Sheriff's Department or the City of Owasso. There are no specific facts to establish that Traill was an agent, servant or employee of either of these two governmental entities. Because the allegations do not reveal that Traill was an agent, servant or employee of either of these governmental entities and a governmental entity and its agents cannot be held liable for failing to act affirmatively to protect the citizens from private violence or other mishaps not attributable to the conduct of the governmental entity's employees,

³ According to the Supreme Court, the term "State" refers generically to state and local governmental entities and their agents. DeShaney, 489 U.S., at 195.

the Court concludes that the allegations in Plaintiffs' Complaint fail to state a cognizable substantive due process claim on behalf of Bowers against the individual Defendants, Stanley R. Glanz, Roger Fetterhoff, Maria Alexander and Clifford Motto.

The Court acknowledges that two exceptions to the DeShaney proposition have been recognized. The first exception, known as the special relationship doctrine, exists when the governmental entity assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual. The second exception, referred to as the "danger creation" theory, provides that a governmental entity may also be liable for an individual's safety if it created the danger that harmed the individual. Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995), cert. denied, 516 U.S. 1118 (1996). Upon review of Plaintiffs' Complaint, the Court finds that the factual allegations therein do not support liability under either recognized exception.

In order for the "special relationship" exception to apply, the governmental entity must have restrained the individual's freedom to act on his own behalf--through incarceration, institutionalization or other similar restraint of personal liberty. DeShaney, 489 U.S. at 199, 200 (explaining that "when the State takes a person into its custody and holds him against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being). The Tenth Circuit has held that a plaintiff must show involuntary restraint by an governmental official. Liebson v. New Mexico

Corrections Dep't, 73 F.3d 274, 276 (10th Cir. 1996) (holding that a librarian who was sexually assaulted while working in a prison failed to show the existence of a special relationship because her employment was voluntary).

In the Complaint, Plaintiffs do not allege any facts to show a restraint of Bowers' personal liberty so as to give rise to the existence of a special relationship between Bowers and Defendants, Stanley R. Glanz, Roger Fetterhoff, Maria Alexander and Clifford Motto. In order to establish the exception, Plaintiffs merely allege in the Complaint that a special relationship existed between Defendants and Bowers because Defendants were on notice of the specific risk of harm to him. However, as stated by the Supreme Court in DeShaney, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament but from the limitation which it has imposed on his freedom to act on his own behalf." DeShaney, 489 U.S. at 200. A defendant's knowledge of the risk of harm is irrelevant to the determination as to whether a special relationship existed. Armijo By And Through Chavez v. Wagon Mound Public Schools, 159 F.3d 1253, 1262 n. 5 (10th Cir. 1998). Therefore, even if Defendants had notice of the specific risk of harm to Bowers, such notice did not create a special relationship with Bowers so as to impose an affirmative duty on the part of Defendants, Stanley R. Glanz, Roger Fetterhoff, Maria Alexander and Clifford Motto, to protect Bowers from Traill's actions.

"For the state to be liable under § 1983 for creating a

special danger, (i.e. where a third party other than a state actor causes the complained of injury) a plaintiff must allege a constitutionally cognizable danger" which ultimately rests on reckless or intentional "injury-causing state action which shocks the conscience." Uhlrig, 64 F.3d at 572.

In Uhlrig, the Tenth Circuit set forth five factors to be considered when determining whether a defendant's conduct created a danger to the plaintiff that shocks the conscience. To meet this standard, the plaintiff must show that (1) the plaintiff was a member of a limited and specifically definable group; (2) the conduct of the defendant placed the plaintiff and the group at substantial risk of serious, immediate and proximate harm; (3) the danger was obvious or known to the defendant; (4) the defendant acted recklessly and in conscious disregard of that risk; and (5) the defendant's conduct "when viewed in total" is conscience shocking. Uhlrig, 64 F.3d at 574.

Additionally, as explained by the Tenth Circuit, "it is not enough to show that the state increased the danger of harm from third persons; the [§] 1983 plaintiff must also show that the state acted with the requisite degree of culpability in failing to protect the plaintiff." Id. at 573 (quoting Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994)). There must be an "intent to harm" or "an intent to place a person unreasonably at harm." Id. at 573. A plaintiff must go beyond intentional or reckless conduct and assert a "high level of outrageousness." Id. at 574.

Upon review, the Court finds that the Complaint fails short of this standard. The Court finds that the Complaint fails to allege any facts which would support the factors necessary for Bowers to maintain his suit under the danger creation theory. The Complaint alleges no state actor conduct which could be considered intentional or reckless, let alone outrageous. There are no facts which would lead this Court to believe that the risk was obvious and that the individual Defendants knew that their alleged omissions would place Bowers at risk to be shot by Traill. The Court concludes that the Complaint overall fails to show that the individual Defendants' conduct rises to the level of a substantive due process violation. Therefore, Plaintiffs cannot maintain an action against Defendants, Stanley R. Glanz, Roger Fetterhoff, Maria Alexander and Clifford Motto, under the danger creation theory.

As to the individual Defendants, Ron Palmer and Winfred L. "Skipper" Bain, the Court finds that the Complaint fails to allege that they deprived Bowers of his substantive due process rights. Although the Complaint alleges that Traill was a Tulsa Police Reserve Officer, that Defendant, Ron Palmer, was Chief of Police for the City of Tulsa and that Defendant, Winfred L. "Bain" Skipper, was a Tulsa Police Reserve Officer and was a ranking officer in charge of supervising and disciplining officers of the Tulsa Police Reserve Officers Division, the Complaint fails to allege any facts to establish that these Defendants caused or contributed to the alleged violation of Bowers' substantive due process rights. In

order to prevail on a claim for damages for a constitutional violation pursuant to 42 U.S.C. § 1983, a plaintiff must establish that the defendant acted under color of state law and caused or contributed to the alleged violation. Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996). The plaintiff must show that the defendant personally participated in the alleged violation. Id. Conclusory allegations are not sufficient to state a constitutional violation. Id.

With respect to Defendants, Ron Palmer and Winfred L. "Skipper" Bain, the Court finds that the Complaint is devoid of any specific facts indicating that they personally participated in the alleged violation of Bowers' substantive due process rights. The Court therefore finds that the Complaint fails to state a claim under § 1983 against Defendants, Ron Palmer and Winfred L. "Skipper" Bain, for violation of Bowers' substantive due process rights.⁴

In the Complaint, Plaintiffs, Joe L. Bowers and Lois M. Bowers, have also alleged substantive due process claims against all of the individual Defendants. Similar to Bowers' claim, the Court finds that these claims are subject to dismissal. In the Complaint, Plaintiffs, Joe L. Bowers and Lois M. Bowers, allege that they sustained emotional distress as a result of the unwritten policy, practice and custom of ignoring, dumping and failing to

⁴ The Court also finds that the Complaint fails to allege any specific facts that Defendants, Stanley R. Glanz, Roger Fedderhoff, Maria Alexander and Clifford Motto, personally participated in the alleged violation of Bowers' substantive due process rights. The Complaint is devoid of any facts as to how these Defendants participated in the alleged constitutional violation.

investigate, screen, train, supervise and discipline Traill. It appears to the Court that the interest Plaintiffs, Joe L. Bowers and Lois M. Bowers, are alleging is a liberty interest to be free from emotional distress suffered by observing their son having been shot. Plaintiffs, however, have no such liberty interest. Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990). As explained by the Tenth Circuit in Archuleta, the problem with Plaintiffs' substantive due process claims is that no governmental conduct was directed at them and they cannot establish that Defendants had the requisite intent to violate their constitutional rights. Id. at 498. Plaintiffs were merely bystanders who are claiming indirect and unintended injury. They were not the object of the alleged unconstitutional governmental action. Consequently, they are unable to assert the kind of deliberate deprivation required to state a substantive due process claim under § 1983. Id.

To the extent that Plaintiffs, Joe L. Bowers and Lois M. Bowers, allege substantive due process claims based upon a deprivation of the familial association with their son, the Court finds that such claims also fail as there are no allegations in the Complaint that the individual Defendants directed any activity toward the familial relationship with an intent to interfere with that relationship. An allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under § 1983. Archuleta, 897 F.2d at 498; Trujillo v. Board of County Com'rs of Santa Fe

County, 768 F.2d 1186, 1190 (10th Cir. 1990). Therefore, the Court finds that Plaintiffs' substantive due process claims against Defendants, Stanley R. Glanz, Roger Fetterhoff, Maria Alexander, Cliiford Motto, Ron Palmer and Winfred L. "Skipper" Bain, must be dismissed.

In the Complaint, Bowers alleges that the individual Defendants violated his equal protection rights. Under the Equal Protection Clause of the Fourteenth Amendment, a state may not deny "any person within its jurisdiction the equal protection of the laws." U.S. Constitutional Amendment 14. The clause prohibits the government from treating similarly situated persons differently. Norton v. Village of Corrales, 103 F.3d 928, 933 (10th Cir. 1996) (citing Buckley Constr., Inc. v. Shawnee Civic & Cultural Develop. Auth., 933 F.2d 853, 859 (10th Cir. 1991)).

Bowers' claim does not involve a law which discriminates against persons who are victims of criminal acts by police officers. Rather, he claims that Defendants followed an unwritten policy or custom of responding differently to victims of criminal acts by police officers than to victims of criminal acts by non-police officers. Although there is no general constitutional right to police protection, the government may not discriminate in providing such protection. Watson v. City of Kansas City, Kan., 857 F.2d 690, 694 (10th Cir. 1988).

In order to allege a viable equal protection claim, the plaintiff must first make the threshold showing that he was treated differently from others who were similarly situated to him. Barney

v. Pulsipher, 143 F.3d 1299, 1312 (10th Cir. 1998) (citing Gehl Group v. Koby, 63 F.3d 1528, 1538 (10th Cir. 1995)). An allegation that a plaintiff was treated differently from those similarly situated is an essential element of an equal protection claim. Hennigh v. City of Shawnee, 155 F.3d 1249, 1257 (10th Cir. 1998).

In the instant case, the Complaint fails to allege specific facts to show that Bowers was treated differently from others similarly situated to him. The Complaint only makes conclusory allegations that Defendants intentionally discriminated against Bowers. In his response briefs, Bowers relies upon the cases of Watson and McIntosh v. City and County of Denver, 1996 WL 108539 (10th Cir. 1996), as support for his claim. However, these cases are distinguishable from the instant case. In Watson, the victim had made previous complaints to the police but they did not arrest the offender based upon an alleged policy or custom of treating incidents of domestic violence differently and affording less police protection to victims of domestic violence. In McIntosh, the victim had made a complaint to the police and the police had issued an arrest warrant but had not notified other jurisdictions of the arrest warrant based upon an alleged policy or custom of providing less protection to victims of domestic violence than for other assault victims. There are no allegations in the Complaint that Bowers had made prior complaints of criminal acts by Traill and that Defendants failed to investigate and/or arrest Traill based upon the alleged unwritten policy or custom of treating incidents involving police officers differently. Bowers merely

alleges that Defendants were aware of incidents of criminal acts involving Traill and other citizens and had failed to investigate and had dumped those cases. This allegation does not establish that Bowers was treated differently and discriminated against by the individual Defendants. Therefore, the Court finds that Bowers' equal protection claim against Defendants, Stanley R. Glanz, Roger Fetterhoff, Maria Alexander, Clifford Motto, Ron Palmer and Winfred L. "Skipper" Bain, must be dismissed.

To the extent Plaintiffs, Joe L. Bowers and Lois M. Bowers, allege equal protection claims against the individual Defendants, the Court finds that the claims must also be dismissed. The Complaint fails to allege any specific facts to establish that they were treated differently than other similarly situated persons. Hennigh, 155 F.3d at 1257.

With respect to the equal protection claims, the Court finds that dismissal is also appropriate as the Complaint fails to allege how the individual Defendants personally participated in the alleged constitutional violation. There are no allegations of specific facts as to how any of the individual Defendants caused or contributed to the alleged violation of Plaintiffs' equal protection rights. Jenkins, 81 F.3d at 994.

Based upon the foregoing, the Motion to Dismiss filed by Defendant, Winfred L. "Skipper" Bain (Docket Entry #2), the Motion to Dismiss of Defendant, Ron Palmer (Docket Entry #3), the Motion to Dismiss filed by Defendants, Stanley R. Glanz and Roger Fetterhoff (Docket Entry #5-1), the Motion to Dismiss of

Defendants, Maria Alexander and Clifford Motto (Docket Entry #8), and the Motion to Dismiss of Defendant, City of Owasso (docket Entry #10) are **GRANTED**. The Alternative Motion for Summary Judgment filed by Defendants, Stanley Glanz and Roger Fetterhoff, (Docket Entry #5-2) is **DECLARED MOOT**. In light of the Court's rulings, the remaining Defendant in this case is Defendant, City of Tulsa. A case management conference relating the claims against Defendant, City of Tulsa, is hereby scheduled for October 28, 199~~8~~⁹ at 3:30 p.m.

ENTERED this 22nd day of September, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GAIL McELYEA,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security
Administration,

Defendant.

Case No. ⁹⁸99-CV-683-EA

ENTERED ON DOCKET

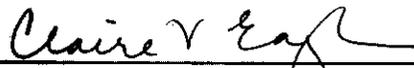
DATE SEP 23 1999

ORDER

On June 7, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on ^{or}~~or around~~ ^{CE} September 7, 1999, the parties have stipulated that an award in the amount of \$3,250.00 for attorney fees and \$150.00 for costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of \$3,250.00 and costs of \$150.00 for a total award of \$3,400.00 under the Equal Access To Justice Act.



CLAIRE V. EAGAN

United States Magistrate Judge

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

ENTERED ON DOCKET
DATE SEP 23 1999

ESTATE OF JAMES S. BISHOP, formerly,)
JAMES S. BISHOP, d/b/a ESSENCE OF LIFE,)
)
Plaintiff,)
)
vs.)
)
EQUINOX INTERNATIONAL CORPORATION,)
)
Defendant.)

Case No. 96-C-006-E

FILED

SEP 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter is before the Court on the reversal and remand of the Court of Appeals wherein they reversed the denial of an award of profits and remanded, directing this Court to “fashion a remedy that will satisfy the equities of the case.” Bishop v. Equinox International Corp., 154 F.3d 1220, 1223 (10th Cir. 1998).¹ At this same time, the Court will consider the Application for Contempt Citation (Docket # 91) of the Plaintiff, Estate of James S. Bishop.

Statement of the Case

This is an action for trademark infringement and unfair competition wherein the plaintiff

¹ Plaintiff has filed, on the day before the issuance of this Order, a Motion for Disqualification of this Court, arguing that the wording of this Court’s Minute Order of January 5, 1999, and the Court’s failure to set the case for status and scheduling conference, give the appearance that the “Judge was trying to avoid the ruling of the Court of Appeals.” and “give an appearance of partiality on the part of the Judge and against the Plaintiff.” The test on such a request is “whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge’s impartiality. . . . In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judge’s impartiality into question.” United States v. Cooley, 1 F.3d 985, 983 (10th Cir. 1993). In applying this test, the Court notes that its Minute Order clearly directed the parties to brief the issue raised by the Court of Appeals for remand. Neither that Order nor the failure to set a status and scheduling conference provide a reasonable factual basis for calling the court’s impartiality into question.

claimed that defendant infringed on its federally-registered trademark “Essence of Life,” a “Mineral Electrolyte Solution in Liquid and Capsule Form” by marketing a product under the primary mark of Equinox Master Formulas, and using the secondary mark “Essence of Life Liquid Mineral Complex.” After a two day bench trial, the Court found that the use of the secondary mark “Essence of Life Liquid Mineral Complex” creates a likelihood of confusion, entered an injunction prohibiting Defendant from marking its product with “Essence of Life Liquid Mineral Complex,” and awarded attorney fees in favor of Plaintiff. The Court, however, declined to award damages and further held that because “[p]laintiff has not established entitlement to any actual damage [plaintiff] is therefore not entitled to any portion of Defendant’s profits.” The Court of Appeals upheld the award of attorney fees, but reversed the denial of an award of profits, finding that, as a matter of law, an award of profits may be proper absent a showing of actual damage.

Previous Factual Findings

The Court has previously found that plaintiff owns federal “registration number 1,504,568” and common-law rights in and to the “Essence of Life” trademark used in conjunction with mineral electrolyte solutions in both liquid and capsule form. The Court also found that Defendant markets and sells a liquid mineral complex named “Essence of Life Liquid Mineral Complex” which is one among nineteen products in its Equinox Master Formula’s line of products. The Court further found a likelihood of confusion created by Defendant’s product. In addition, it was noted that, when Plaintiff demanded that Defendant cease and desist from the use of the registered “Essence of Life” trademark, Defendant advised Plaintiff that it would cease and desist from use of the trademark, but did not honor its cease and desist commitment.

The Court found that the failure to honor the cease and desist commitment constituted a

trademark infringement which was deliberate or willful, and further found that the evidence was not sufficient to justify a theory of abandonment of the mark. The Court concluded that there was no evidence of actual consumer confusion or deception, and no proof of any lost sales or loss of goodwill. The Court declined to award profits, concluding “Plaintiff’s mark is weak and it is clear that Defendant did not benefit from the Plaintiff’s relatively obscure mark.”

Analysis

The Court was directed to reconsider the issue of an award of profits in light of equitable considerations. An award of profits to the successful plaintiff in trademark infringement case is allowed by 15 U.S.C. §1117(a):

When a violation of any right of the registrant of a mark registered in the patent and Trademark Office, or a violation under section 1125(a) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled . . . subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) costs of the action. . . .

The Court of Appeals noted that “there are two widely recognized rationales for awarding profits to a plaintiff who cannot demonstrate that he or she has suffered damages as a consequence of the infringement: preventing unjust enrichment and deterring willful infringement.” Bishop, 154 F.3d at p. 1222. Moreover, the Court acknowledged that an “award of profits required a showing that defendant’s actions were willful or in bad faith.” Bishop, 154 F.3d at p. 1223.

It is on the issue of willfulness or bad faith that the parties disagree. Plaintiff argues that, because this court found the necessary willfulness or bad faith necessary to make an award of attorney fees, an award of profits must follow. Defendant argues that in all of the Tenth Circuit cases where an award of profits was made, the Defendant was found to have intended to confuse the public as to the origin of the product in question. See, e.g., Blue Bell Co. v. Frontier Refining Co., 213 F.2d

354, 361 (10th cir. 1954), Friedman v. Sealy, Inc., 274 F.2d 255, 262 (10th Cir. 1960). Relying on this fact, and the Restatement (Third) of Unfair Competition §37(1)(a) (1995) which premises an award of profits on a showing that the defendant had the intention of causing confusion or deception, Equinox argues that the theory of unjust enrichment does not apply because the court did not find intentional deception.

Nonetheless, in light of the Bishop Court's reliance on International Star Class Racing Ass'n v. Tommy Hilfiger, U.S.A., Inc., 80 F.3d 749 (2d cir. 1996), wherein the Court reversed and remanded for additional findings on an award of profits despite a finding of no intentional deception, this Court believes that the task before it is to consider all the equities in the case anew and make a determination on the applicability of an award of profits.

In considering all of the equities in this case, the relative weakness of the mark, the lack of consumer confusion or deception, and that Equinox did not benefit from Bishop's mark, the court rejects, as it did in the original findings, the notion that prevention of unjust enrichment is a sufficient rationale for awarding profits. In particular, the Court found that Defendant did not benefit from Plaintiff's "relatively obscure" mark. Further, assuming that profits can be awarded in this circuit as a deterrence to willful infringement, the Court finds that when weighing the equities, particularly that the bad faith was found in Defendant's failure to honor the cease and desist agreement, the award of attorney fees is a sufficient deterrent under these circumstances.

Application For Contempt Citation

Plaintiff has also filed an Application for Contempt Citation, arguing that two references on the web site of Equinox, one which states that Mint-T-Fresh Herbal Toothpaste should be used "while nourishing the teeth and gums with Essence of Life-Liquid Mineral Complex," and one which

states that Equinox “suggest[s] using Mega-Cal Wafers along with our Essence of Life-Liquid Mineral complex, which is rich in magnesium,” violate the injunctive provision of the Court’s Findings of Fact and Conclusions of Law found in Conclusion of Law No. 12. Plaintiff also argues that the fact that one of Equinox’ independent distributors is offering for sale Essence of Life Liquid Mineral Complex violates the injunctive provision as well.

Conclusion of Law No. 12 provides:

In considering the issue of injunction the court must balance the equities and in so doing, the Court will allow the Defendant to market its available supply of articles marked with the trademark “Essence of Life Liquid Mineral Complex”. No further marking will be made on Defendant’s product subsequent to this date. W.E. Basett Co. v. Revlon, Inc., 354 F.2d 868 (2nd cir. 1966). The Defendant Equinox international corporation is enjoined from further distribution of its products carrying the mark “Essence of Life Liquid Mineral Complex.”

In examining the particular wording of the injunction, as well as Fed.R.Civ.C. 65(d), pertaining to the form and scope of an injunction, the Court concludes that the evidence of the plaintiff, without more, is insufficient to demonstrate a violation of the injunction. The reference to “Essence of Life Liquid Mineral Complex” on the web page does not demonstrate that Defendant used the mark on its product or distributed such a product after the injunction was issued. Plaintiff simply has no evidence that anyone was able to buy Essence of Life Liquid Mineral Complex on March 15, 1999, the date that the web page was accessed.

Conclusion

On remand, in consideration of the Court of Appeals’ ruling regarding an award of profits in absence of a showing of actual damages, the Court deletes Conclusion of Law No. 10, and reaffirms its findings of Fact and Conclusions of Law in all other respects, including the conclusion that an award of profits is not appropriate under these circumstances. The Court further finds that

the Application for Contempt Citation (Docket #91) should be Denied In light of these findings, the Request for Status/Scheduling Conference (Docket # 87) and the Request for Status Conference and Additional Discovery on Defendant's Profits (Docket #99) of the Plaintiff, Estate of James S. Bishop, are Denied as Moot, and the Motion for Disqualification is Denied.

IT IS SO ORDERED THIS 22nd DAY OF SEPTEMBER, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

MT

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

ENTERED ON DOCKET
DATE SEP 23 1999

AEGIS MORTGAGE CORPORATION,)
)
Plaintiff,)
)
vs.)
)
DENNIS RETTIG, GREG AUEN, MONTE S.)
COX, JAMES COATS, LANCE WALKER,)
ANTHONY POUND, LANNY PEREZ, and)
CHRISTI HEELAN, and FIELDSTONE)
MORTGAGE COMPANY,)
)
Defendants.)

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

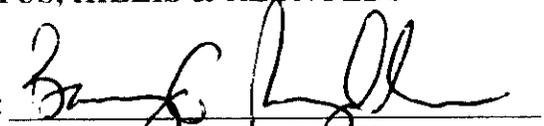
Case No. 99-C-0619-B (M)

JOINT DISMISSAL WITH PREJUDICE

Plaintiff AEGIS Mortgage Corporation d/b/a UC Lending, and Defendants Dennis Rettig, Greg Auen, George A. Cox, James Coats, Lance Walker, Anthony Pound, Lanny Perez, Christi Heelan, and Fieldstone Mortgage Company, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulate that all claims asserted in the above captioned action are hereby dismissed with prejudice. Each party shall bear its own costs and expenses, including attorney fees.

Respectfully submitted,

TITUS, HILLIS & REYNOLDS

By: 
R. Tom Hillis, OBA #10738
Barry Reynolds, OBA #13202
First Place Tower
15 East 5th Street, Suite 2750
Tulsa, Oklahoma 74103
(918) 587-6800

-and-

EXHIBIT "A"

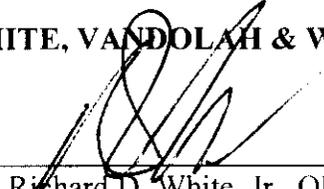
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LOCKE LIDDELL & SAPP LLP
Janet E. Militello, TSB #14051200
Ryan Lee Dennaard, TSB #24001982
3400 Chase Tower
600 Travis
Houston, Texas 77002
(713) 226-1208

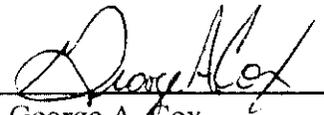
**ATTORNEYS FOR PLAINTIFF
AEGIS MORTGAGE CORPORATION
d/b/a UC LENDING**

WHITE, VANDOLAH & WEBB

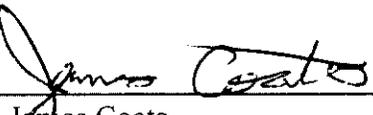
By: 

Richard D. White, Jr., OBA #9549
111 West 5th Street, Suite 510
Tulsa, Oklahoma 74103
(918) 582-7888

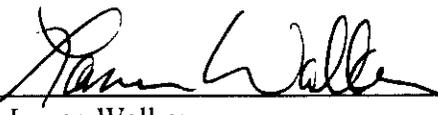
**ATTORNEY FOR DEFENDANT
DENNIS RETTIG**

By: 

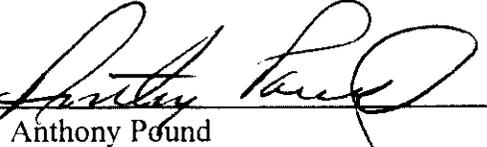
George A. Cox

By: 

James Coats

By: 

Lance Walker

By: 

Anthony Pound

By: Lanny Perez
Lanny Perez

By: Christi Heelan
Christi Heelan

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

By: Donald L. Kahl
Donald L. Kahl. OBA #4855
T. Lane Wilson. OBA #16343
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

**ATTORNEYS FOR DEFENDANTS
FIELDSTONE MORTGAGE COMPANY
AND GREG AUEN**

F I L E D

SEP 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

BILL L. MITCHELL,)
Plaintiff,)
)
vs.)
)
CINEMARK U.S.A., INC.,)
d/b/a/ Movies 8,)
a Texas corporation,)
Defendant.)

Case No. 98 CV-616-B (J)

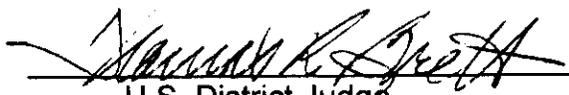
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SEP 23 1999
DATE _____

**AGREED JUDGEMENT
ON RULE 68 OFFER AND ACCEPTANCE**

This action was commenced by due personal service of Summons and Complaint on the Defendant, Cinemark U.S.A., Inc. ("Cinemark"), on August 24, 1998, and the Defendant Cinemark also appeared in the case. Defendant Cinemark offered in writing to allow the Plaintiff, Bill L. Mitchell ("Mitchell"), to take judgement against it for Seventy-Five Thousand Dollars (\$75,000.00), which offer the Plaintiff Mitchell, within ten (10) days, duly accepted in writing:

It is adjudged that Plaintiff, Bill L. Mitchell, recover of Defendant, Cinemark U.S.A., Inc., Seventy-Five Thousand Dollars (\$75,000.00). Plaintiff has filed a Bill of Costs on this judgement with the Court and it has been set for hearing. Defendant objects to the Plaintiff's Bill of Costs.

Dated: Sept 22nd, 1999


U.S. District Judge

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Approved as to form and content:



Timothy S. Gilpin, O.B.A. # 11844
Attorney for Plaintiff, Bill L. Mitchell



Robert P. Redemann, OBA#7454
Attorney for Defendant, Cinemark USA, Inc.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ROGELIO SAMUELS, A/K/A)
 ROGELIO A. SAMUELS,)
)
 Defendant.)

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99CV542BU(J) ✓

ENTERED ON DOCKET
DATE SEP 22 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 20th day of September, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Rogelio Samuels, a/k/a Rogelio A. Samuels, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Rogelio Samuels, a/k/a Rogelio A. Samuels, was served with Summons and Complaint on August 12, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

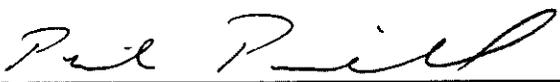
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Rogelio Samuels, a/k/a Rogelio A. Samuels, for the principal amounts of

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\$2,615.60 and \$2,809.11, plus accrued interest of \$1,226.37 and \$1,430.48, plus interest thereafter at the rates of 11.4 percent and 8% per annum respectively until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.285 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

PEP/dlo

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

DWAYNE M. GARRETT,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA and MYRNA)
 LANSDOWN, Judge of Bartlesville,)
 Oklahoma and CURTIS DELAPP,)
 Assistant District Attorney of)
 Washington County, Oklahoma and)
 CARLOTTA GORDEN, Ex-wife of)
 Dwayne M. Garrett and JOE WHITE)
 Attorney for Carlotta Gorden,)
 Collinsville, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET

DATE SEP 22 1999

Case No. 99-CV-577-BU(E) ✓

FILED

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon the motions to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., filed by Defendants, Myrna Lansdown, Carlotta Gorden, and Joe White and the motion for more definite statement pursuant to Rule 12(e), Fed. R. Civ. P., filed by Defendants, Carlotta Gorden and Joe White. Plaintiff, Dwayne M. Garrett, has not responded to the motions within the time prescribed by N.D. LR 7.1(C). Pursuant to N.D. LR 7.1(C), the Court deems the motions confessed.

Having independently reviewed the motions and having liberally construed Plaintiff's Complaint, the Court concludes that Defendants' motions to dismiss should be granted. In his Complaint, Plaintiff seeks damages and declaratory relief for alleged violations of his rights under the Fourth and Fourteenth Amendments to the Constitution. Although not specified, it appears

4

Plaintiff seeks his relief pursuant to 42 U.S.C. § 1983. In regard to Plaintiff's claim for damages against Defendant, Myrna Lansdown, the Court finds that dismissal is appropriate because Defendant is absolutely immune from liability. Judges enjoy absolute immunity from liability for damages under § 1983 for acts performed in their judicial capacity. Dennis v. Sparks, 449 U.S. 24, 27 (1980). In his Complaint, Plaintiff merely takes issue with Defendant's rulings. Plaintiff alleges that Defendant knew the law, but did not abide by it. He also alleges that "because of [his] identity, [Defendant's] ruling was not according to law, resulting in discrimination against him." As Plaintiff has not alleged that Defendant acted in clear absence of her jurisdiction, the Court finds that Plaintiff's claim for damages against Defendant must be dismissed. See, Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (a judge will not be deprived of immunity because the action she took was in error, was done maliciously or was in excess of her authority, rather, he will be subject to liability only when she has acted in clear absence of all jurisdiction.); see also, Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986).

As to Plaintiff's claim for declaratory relief against Defendant, Myrna Lansdown, the Court finds that dismissal is appropriate as the allegations do not state a claim upon which relief may be granted. Although Plaintiff alleges that Defendant violated his Fourth and Fourteenth Amendment rights; the allegations regarding Defendant's conduct do not state any violation of the Fourth and Fourteenth Amendment.

In regard to the claims for damages and declaratory relief against Defendants, Carlotta Gorden and Joe White, under § 1983, the Court finds that dismissal of these claims is also appropriate. The Court concludes that Plaintiff has failed to state a claim under § 1983 upon which relief may be granted. Section 1983 provides that "[e]very person" who acts "under color of" state law to deprive another of constitutional rights shall be liable in a suit for damages. 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must show that the alleged constitutional violations were committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). In this case, Plaintiff has failed to allege any facts to show that Defendants, Carlotta Gorden and Joe White, were acting under color of state law when the alleged constitutional violations occurred. Therefore, the Court finds that Plaintiff's § 1983 claims against Defendants must be dismissed.

In the caption of the Complaint, Plaintiff lists the State of Oklahoma as a Defendant. To the extent Plaintiff alleges § 1983 claims against the State of Oklahoma, the Court finds that the claims should be dismissed. The Eleventh Amendment of the Constitution bars a suit in federal court against a state, unless the state unequivocally waives its immunity or Congress expressly abrogates the state's immunity in creating a statutory cause of action. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97-102 (1984). The Eleventh Amendment immunity applies whether the relief sought against the state is legal or equitable. Papasan v.

Allain, 478 U.S. 265, 276 (1986). The State of Oklahoma has not waived its immunity under the Eleventh Amendment. Okla. Stat. tit. 51, § 152.1. Nor did Congress abrogate the Eleventh Amendment immunity when it enacted § 1983. Quern v. Jordan, 440 U.S. 332, 341 (1979). Therefore, the Court finds that the State of Oklahoma is entitled to immunity under the Eleventh Amendment and dismissal of the claims under § 1983 is appropriate.¹

It appears from the Complaint that Plaintiff has brought suit against Defendant, Myrna Lansdown, in her official capacity as special judge. Official capacity suits represent "another way of pleading an action against an entity of which an officer is an agent." Monell v. Department of Social Servs., 436 U.S. 658, 690 n. 55 (1978). As Defendant is a state officer, Plaintiff is, in effect, asserting claims against the State of Oklahoma. Such claims are also barred the Eleventh Amendment.²

With the dismissal of Plaintiff's claims against Defendant, State of Oklahoma, Myrna Lansdown, Carlotta Gorden and Joe White, the only remaining Defendant is Curtis Delapp, Assistant District Attorney of Washington County. Pursuant to Rule 16.1(A) of the Local Civil Rules of the United States District Court for the Northern District of Oklahoma, a case management conference shall

¹ Although the State of Oklahoma has not filed a motion to dismiss as it has not been served with the Complaint, the Court has exercised its discretion in raising the Eleventh Amendment issue sua sponte. Mascheroni v. Board of Regents of University of California, 28 F.3d 1554, 1558-59 (10th Cir. 1994).

² In reaching its decision, the Court notes that Plaintiff has not sought prospective injunctive relief against Defendant, Myrna Lansdown, in her official capacity.

be held on October 28, 1999 at 3:15 p.m.

Based upon the foregoing, the Motion to Dismiss of Defendants, Carlotta Gorden and Joe White (Docket Entry #2-1) is **GRANTED**. In light of the Court's ruling, the Motion for More Definite Statement of Defendants, Carlotta Gorden and Joe White (Docket Entry #2-2) is **DECLARED MOOT**. The Motion to Dismiss of Defendant, Judge Myrna Lansdown (Docket Entry #3-1) is **GRANTED**. The claims against Defendant, State of Oklahoma, and Defendant, Myrna Lansdown, in her official capacity, are also **DISMISSED**. A case management conference is scheduled for October 28, 1999 at 3:15 p.m.

ENTERED this 20th day of September, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

BACKGROUND

In its March 31, 1998 Order (#33), the Court summarized the procedural history of this case. That history is repeated here, modified to include recent events.

In 1991, Plaintiff was convicted in Osage County District Court, Case No. CRF-88-27, of Shooting With Intent to Kill. After entering judgment in Plaintiff's criminal case, the state district court granted Plaintiff leave to proceed *pro se* on direct appeal. Plaintiff states that after being granted a series of extensions of time, the trial court record and transcripts were due in the Oklahoma Court of Criminal Appeals ("OCCA") on January 31, 1994. On October 19, 1994, the OCCA dismissed the appeal because it had not been timely perfected in accordance with Rule 3.4, *Rules of the Court of Criminal Appeals*, 22 O.S. Supp. 1989, Ch. 18, App. In the instant complaint, Plaintiff alleges that after his 1991 conviction and sentencing in Osage County District Court, Defendants conspired to interfere with the perfection of his direct appeal by failing to provide all of the trial documents he needed to prepare his appeal in violation of his civil rights. Because Osage County District Court lacked jurisdiction to enter his conviction, Plaintiff claims that he continues to be incarcerated pursuant to an allegedly invalid conviction.

In an Order filed July 24, 1996, this Court found that Plaintiff's claims accrued no later than January 31, 1994, when the period to prosecute his appeal expired, and that his Complaint, filed June 21, 1996, was barred by the two-year statute of limitations. See Okla. Stat. Ann. tit. 12, § 95(3); Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). Pursuant to the "Screening" section of the *in forma pauperis* statute, 28 U.S.C. § 1915A, added by the Prison Litigation Reform Act of 1995 ("PLRA"), this Court dismissed the complaint as frivolous, finding that it lacked an arguable basis in law. Plaintiff appealed. On May 19, 1997, the Tenth Circuit Court of Appeals reversed and

remanded, finding that the limitations period may have been tolled due to Plaintiff's long history of mental illness, a legal disability recognized by Oklahoma law. See Okla. Stat. Ann. tit. 12, § 96; Walker v. Pacific Basin Trading Co., 536 F.2d 344, 347 (10th Cir. 1976).

A review of Plaintiff's previous case filings in this Court reveals that he has in the past filed three (3) petitions for writ of habeas corpus, each challenging his conviction in Osage County District Court, Case No. CRF-88-27, and one civil rights action arising from events surrounding the conviction.

Plaintiff's first habeas petition, case No. 93-CV-494-E, was dismissed without prejudice for failure to exhaust state remedies on November 26, 1993. At the time of the dismissal, Petitioner's "motion to reverse conviction and remand for new trial based upon lack of adequate record on appeal" was pending in the Oklahoma Court of Criminal Appeals ("OCCA"). The OCCA denied the motion on March 2, 1994.

Plaintiff's second habeas petition, case No. 94-CV-691-K, was dismissed without prejudice, on February 13, 1995, on Plaintiff's own motion due to his mental incompetency and resulting incarceration in the Mental Health Unit at Joseph Harp Correction Center.

Plaintiff's most recent habeas petition, case no. 95-CV-952-B, was dismissed without prejudice for failure to exhaust state remedies on June 13, 1996.¹ In the Order dismissing the petition for writ of habeas corpus, Judge Thomas R. Brett found that although Plaintiff did not obtain a complete copy of all the trial court records until after the OCCA had dismissed his direct appeal, he nonetheless had an available remedy in the state courts of Oklahoma, i.e., to apply for an appeal

¹Although Plaintiff appealed the dismissal, the Tenth Circuit Court of Appeals denied a certificate of probable cause and dismissed the appeal on January 22, 1997.

out of time in Osage County District Court. See Okla. Stat. Ann. tit. 22, § 1086; White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988) (citing Smith v. State, 611 P.2d 276, 277 (Okla. Crim. App. 1980) (Oklahoma Court of Criminal Appeals permitted to hear time barred appeals if a petitioner files an application for post-conviction relief in the county of conviction followed by an application or "appeal" with the Court of Criminal Appeals). A successful applicant must demonstrate that he was denied an appeal "through no fault of his own." As to Plaintiff's habeas claims, Judge Brett went on to say that "an appeal out of time would vindicate Petitioner's right to a direct appeal and afford him the complete appellate review he would have received but for the delay in obtaining the necessary records and transcripts. See Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991)." In other words, because Plaintiff could still seek an appeal out of time, his direct appeal rights had not been completely foreclosed. He had an available state remedy.

Plaintiff has also previously sought money damages from these and other defendants in a civil rights action filed in this Court on July 21, 1994, Case No. 94-CV-707-K. In that action, Plaintiff sued J. R. Pearman, William H. Mattingly, and David Gambil, Osage County District Court Judges; Larry D. Stuart, Osage County District Attorney; Warren L. Smith, Doctor at Eastern State Hospital; Sharon Casebolt, Renee Swope, and Denise Cale, Court Clerks at the Osage County District Court; Merrell Tubbs, court reporter for the Osage County District Court; and Geoffrey M. StandingBear, court appointed counsel.² Plaintiff claimed that those defendants conspired to find him competent to stand trial in Osage County District Court in violation of Okla. Stat. tit. 22, § 1175.2(C), although he had been determined to be incompetent to stand trial in Delaware County District Court. Plaintiff alleged that Delaware County, and not Osage County, had subject matter

²Defendants Pearman and Cale were never served in Case No. 94-CV-707-K.

jurisdiction to redetermine his competency. Also, as in the instant case, Plaintiff alleged that certain Defendants, including the four (4) named defendants in this case, engaged in a conspiracy to deprive him of counsel on direct appeal and to destroy, withhold, and delay the preparation and submission of a full record on appeal to the OCCA. Because a judgment in favor of Plaintiff on the lack of jurisdiction to determine competency issue would have necessarily implied the invalidity of Plaintiff's underlying conviction, see Heck v. Humphrey, 512 U.S. 477 (1994), the Court dismissed the case without prejudice.

Currently pending before the Court in the instant case are Defendant Pearman's motion to dismiss (#35) and Defendant Cale's motion to dismiss (#45), both supplemented (#62); Plaintiff's motion for appointment of guardian ad litem or for appointment of counsel (#54); the motion to dismiss for failure to state a claim upon which relief may be granted filed by Defendants Casebolt and Swope(#65); and Plaintiff's motion to deny Defendants' motion to dismiss (#68). For the reasons discussed below, the Court finds Plaintiff's motion for appointment of counsel or for appointment of a guardian ad litem should be denied. Defendants' motions to dismiss should be granted and this action should be dismissed without prejudice pursuant to the holding of Heck v. Humphrey, 512 U.S. 477 (1994). As a result of the dismissal of this action, any remaining pending motion should be denied as moot.

DISCUSSION

A. Appointment of counsel/guardian ad litem

In the case of an indigent plaintiff, the Court has discretion to appoint an attorney to represent the indigent plaintiff where, under the totality of circumstances of the case, the denial of counsel would result in a fundamentally unfair proceeding. McCarthy v. Weinberg, 753 F.2d 836, 839-40 (10th Cir. 1985); Swazo v. Wyoming Dep't of Corrections State Penitentiary Warden, 23 F.3d 332, 333 (10th Cir. 1994). The Tenth Circuit Court of Appeals has stated that "if the plaintiff has a colorable claim then the district court should consider the nature of the factual issues raised in the claim and the ability of the plaintiff to investigate the crucial facts." Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir. 1995) (quoting McCarthy, 753 F.3d at 838).

After reviewing the merits of Plaintiff's case, the nature of the factual issues involved, Plaintiff's ability to investigate the crucial facts, the probable type of evidence, Plaintiff's capability to present his case, and the complexity of the legal issues, see Rucks, 57 F.3d at 979 (cited cases omitted); see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981), the Court finds Plaintiff's motion for appointment of counsel should be denied.

The Court also finds that Plaintiff's motion for appointment of a guardian ad litem should be denied. Fed. R. Civ. P. 17(c) provides that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." As recited in the "Background" section of this Order, Plaintiff has prosecuted numerous federal actions in addition to the instant case. He has undertaken and pursued these cases, both in the district court and in the circuit court of appeals, without appointment of counsel and without appointment of a guardian ad

litem. Furthermore, based on the discussion below, Plaintiff's complaint is premature as no civil rights cause of action has accrued in this case. Therefore, without addressing the question of Plaintiff's competency and after reviewing the record, the Court finds that appointment of a guardian ad litem is not necessary for Plaintiff's protection. His motion should be denied.

B. Access to courts claim is moot

As stated above, Plaintiff contends that the Defendants conspired to deprive him of his civil rights by refusing to provide transcripts and other records necessary to prepare and prosecute a direct appeal from his criminal conviction entered in Osage County District Court, Case No. CRF-88-27. As a result of Defendants' conduct, Plaintiff contends that he has been "deprived of meaningful access to the Courts" in violation of his First and Fourteenth Amendment rights. Plaintiff alleges that Defendants' conduct has caused him to suffer "emotional distress and mental injuries."

However, it has come to the Court's attention that on February 17, 1998, during the pendency of this civil rights action, the Oklahoma Court of Criminal Appeals granted Plaintiff a direct appeal out of time from his conviction in Case No. CRF-88-27 (see Oklahoma Court of Criminal Appeals Case No. 98-260). As of today's date, Plaintiff's direct appeal remains pending in the state appellate court. As a result, Plaintiff's civil rights claim, that he has been denied his right to access the courts, has been rendered moot and should be denied on that basis.

C. All claims subject to dismissal under Heck v. Humphrey, 512 U.S. 477 (1994)

In their supplement to motions to dismiss (#62), Defendants Pearman and Cale argue that because a judgment in favor of Plaintiff would necessarily imply the invalidity of his Osage County

conviction, this action must be dismissed pursuant to Heck v. Humphrey, 512 U.S. 477 (1994). Similarly, as Proposition III of their motion to dismiss (#65), Defendants Casebolt and Swope argue that Heck requires dismissal of the instant action. In response (#s 67 and 68), Plaintiff emphasizes that he seeks compensatory and punitive damages against Defendants and does not attack his criminal conviction "in any way."

In Heck, 512 U.S. at 487-87, the United States Supreme Court held that in order to recover damages under § 1983 for an allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a plaintiff must prove that the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. Unless the § 1983 plaintiff can demonstrate reversal of the allegedly invalid conviction, no cognizable § 1983 claim exists. Id. at 483.

Although Plaintiff in the instant case repeatedly emphasizes that he is in no way challenging the validity of his conviction, the Court nonetheless finds that the validity of Plaintiff's criminal conviction is necessarily at issue. Plaintiff asserts that by failing to provide his trial transcripts and other records for purposes of appeal, Defendants in effect insured his continued unconstitutional incarceration. That allegation implies that Petitioner has a valid basis for challenging his conviction on direct appeal. Plaintiff's assertion that his constitutional rights on direct appeal were violated constitutes a direct challenge to the validity of his conviction and the legality of Plaintiff's ongoing incarceration. Any judgment entered in Plaintiff's favor would necessarily imply the invalidity of his conviction. As a result, this action is barred by Heck.

Furthermore, Plaintiff has now been allowed to proceed with a direct appeal out of time. Therefore, he cannot have been damaged by the alleged conduct of Defendants unless and until his conviction and sentence are vacated on constitutional grounds. If the actions complained of did not deprive Plaintiff of a fair and adequate appellate review of his conviction, he cannot prevail on his damage claim. A claim for damages based on an allegedly wrongful confinement attributable to Defendants' interference with a direct appeal is premature so long as that confinement has not been successfully challenged.

Plaintiff's direct appeal out of time remains pending in the state appellate court. Therefore, Plaintiff in this case cannot demonstrate that his conviction has been vacated, overruled or otherwise expunged and no civil rights claim based on Defendants' alleged conduct has yet accrued. As a result, Plaintiff's civil rights complaint must be dismissed without prejudice as premature.

CONCLUSION

Plaintiff's complaint fails to state a claim upon which relief can be granted. Pursuant to Heck v. Humphrey, 512 U.S. 477 (1994), this action must be dismissed without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- 1 Plaintiff's motion for appointment of guardian ad litem (#54-1) or for appointment of counsel (#54-2) is **denied**.
2. Defendants' motions to dismiss for **failure** to state a claim upon which relief may be granted (#s 35 and 45, both as supplemented by #62; and # 65) are **granted**.
4. This action is **dismissed without prejudice**.
5. Any pending motion is **denied as moot**.

SO ORDERED THIS 17 day of September, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

MARY JOY MORTON,

Plaintiff,

v.

METRIS DIRECT, INC., a Minnesota
Corporation, and LEVONIA MORTON,
an individual,

Defendants.

ENTERED ON DOCKET

DATE SEP 21 1999

Case No. 99-CV-038-H

FILED

SEP 20 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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.

The parties are ordered to notify the Court within thirty 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 thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 20th day of September, 1999.



Sven Erik Holmes
United States District Judge

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

CHARLES B. RAUS, individually)
)
Plaintiff,)
)
vs.)
)
GEICO GENERAL INSURANCE)
COMPANY, a foreign insurance)
corporation,)
)
Defendant.)

ENTERED ON DOCKET
DATE SEP 21 1999
Case No. 98 CV 671 H (M) ✓

FILED
SEP 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

NOW on this 17TH day of September, 1999, the Court, after hearing the Joint Application of the parties in open Court on September 2, 1999, and having received the Joint Application of the parties, hereby finds that the above captioned matter shall be dismissed with prejudice to the filing of another action.

That further the Defendant is granted leave to file an Application for Costs and Attorney Fees and the Plaintiff is granted his right to oppose said Application

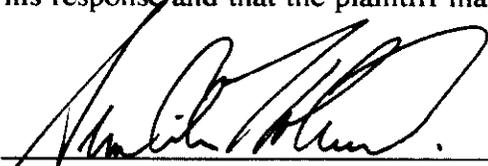
Defendant shall file its application for attorney fees and cost by September 15, 1999. Plaintiff shall have until September 29, 1999 to respond and defendant may file a reply by October 5, 1999. .

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above captioned matter be dismissed with prejudice to the filing of another action and that the Court retains jurisdiction in order to determine whether or not costs and/or attorney fees should be assessed against the Plaintiff and in favor of the Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant may

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file its application for cost and attorney fees on or before September 15, 1999 and that the plaintiff shall have until September²_x9, 1999 to file his response and that the plaintiff may file and reply by October 5, 1999



Judge of the District Court

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

CERTIFICATE OF MAILING

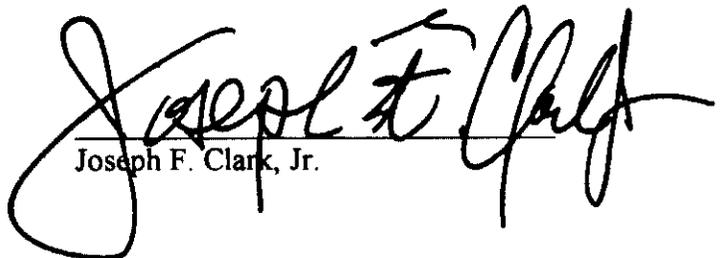
I hereby certify that on the 14 day of September, 1999, I mailed a true and correct copy of the above and foregoing instrument through the United States mail with sufficient postage thereon fully prepaid to:

Mr. Charles B. Raus
7532 South Sandusky
Tulsa, Oklahoma 74136

Mr. Chris Harper, Esq.
P.O. Box 12908
Oklahoma City, Oklahoma 73157

Mr. Raymond S. Allred, Esq.
2424 East 21st Street, Suite 450
Tulsa, Oklahoma 74114

Mr. Kevin B. White, Esq.
2424 E. 21st Street
Suite 450
Tulsa, Oklahoma 74114



Joseph F. Clark, Jr.

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

SEP 20 1999 *SE*

JOHN ZINK COMPANY,

Plaintiff,

vs.

ZINKCO, INC., JOHN SMITH ZINK,
and ZEECO, INC.,

Defendants.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 85-C-292-K (M)

ENTERED ON DOCKET

DATE SEP 21 1999

REPORT AND RECOMMENDATION

This Report and Recommendation addresses the amount of attorney fees, expenses and costs to be awarded to Plaintiff pursuant to the Court's Order of February 23, 1999. [Dkt. 267]. In that Order, the district court affirmed the magistrate judge's recommendation in part; issued an order finding defendants Zeeco and John Smith Zink to be in civil contempt for their violation of the December 19, 1986, Writ of Injunction; and found that Plaintiff is entitled to an award of attorney fees and costs.

Plaintiff seeks a total of \$356,560.95 in attorney fees including time expended by: lawyers and paralegals from Pattishall, McAuliffe, Newbury, Hilliard & Geraldson (the Pattishall firm); local counsel; John Zink Company in house counsel; and Robert Schwartz a vice president of the John Zink Company. Plaintiff also seeks reimbursement of approximately \$18,730 in attorney expenses¹ which are out of

¹ This figure is approximate. The estimated figures contained in Plaintiff's First Supplemental Declaration have not been included, nor has the court attempted to differentiate the attorney expenses from costs that were lumped together under the general category of "costs and expenses" in Plaintiff's Second Supplemental Declaration.

pocket expenses normally charged fee paying clients such as transportation, courier services, and postage. Plaintiff has claimed \$11,740.33 on its bill of costs.

I. ATTORNEYS' FEES

The court rejects Plaintiff's argument that it is entitled to an award of all fees requested because Defendants did not specifically object to its fee request. The court has the obligation to determine that an attorney fee award is reasonable.

To calculate a reasonable attorney fee, the court multiplies the reasonable number of hours spent on the litigation by a reasonable hourly rate.² The burden of proving the number of hours and rate is on the applicant. *Malloy vs. Monahan*, 73 F.3d 1012, 1017-18 (10th Cir. 1996). The number of hours requested must be proven "by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243,1250 (10th Cir. 1998) citing *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983). Not all hours expended in litigation are normally billed to a client. An applicant for a fee award should exercise "billing judgment" with respect to the number of hours claimed, excluding from the fee request hours that are redundant, excessive, or otherwise unnecessary. The district court has a corresponding obligation to exclude hours not reasonably expended.

² Throughout this recommendation, the court has relied on Tenth Circuit authority concerning the calculation of reasonable fees in civil rights cases. The Tenth Circuit has written extensively on the subject and the parties have not suggested that any different criteria should be employed.

However, the district court need not identify and justify every hour allowed or disallowed because to do so would essentially convert a fee request into a second major litigation. *Malloy*, 73 F.3d at 1018; *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1202 (10th Cir. 1998).

A. Number of Hours

The nature and course of the litigation must be examined to determine the number of hours reasonably expended on the litigation. In that regard, the court observes that the proceedings were vigorously contested by parties who devoted substantial resources to the case and who were zealously represented. Further, although the proceedings concerned a motion for contempt for violations of the terms of an injunction, the injunction was one involving a specialized area of the law. In addition, Plaintiff engaged in substantial pre-filing research and investigation; discovery was extended; pre-trial motions were contested; trial lasted 3 days; and objections to the Magistrate Judge's Report and Recommendation were filed. Thus, the proceedings were more involved than a routine motion for contempt.

The court also notes that Plaintiff's allegations of misleading and deceptive advertising, confusion in the marketplace, and use of the JZ trademark were issues that unnecessarily complicated the proceedings. Plaintiff spent considerable attorney time developing these issues and resisting Defendants' efforts to excise them from these proceedings. After expressing doubts that these matters were within the scope of the motion for contempt, at Plaintiff's urging the court allowed evidentiary development of the issues to determine if Plaintiff could demonstrate a connection to

the injunction. Plaintiff failed to show any such connection. The court therefore finds it is not appropriate to require Defendants to pay fees related to these matters. Also, Plaintiff was not successful in proving the Defendants were willful in their violation of the injunction or in recovering expenses for the purpose of running a corrective advertising campaign. The court has made a significant reduction in attorney hours to account for time spent on these matters.

(i) Pattishall Firm Billing

Having conducted a thorough review of the Pattishall firm billing statements, including the supplemental declarations of attorneys' fees, the court finds that 897 represents a reasonable number of attorney hours to have expended on this litigation. In reaching a reasonable number of hours, the court notes that although numerous attorneys billed time in the case, the vast majority of time was billed by attorneys August, Cohn, and Hilliard. [Transcript p. 55-56 (testimony that 91% of hours were billed by these three attorneys)].

According to declarations signed by attorney Brett August, Plaintiff's attorney fee request for hours expended by the Pattishall firm is broken down, as follows:

Investigation/preparation of contempt motion	270.4 hours
Discovery/motion practice	606.8
Trial preparation/trial	596.2
Post-trial practice	30.25
Opposition to R&R objections	27.6
Fee statement/bill of costs preparation	57.4
Objection to request for fee hearing	76.2
Fee hearing preparation	32.0
Fee hearing preparation and fee hearing	<u>140.7</u>
TOTAL	1,837.55 hours

This total does not correspond to the Pattishall billing statements which total 1,779 hours, and since the court is unable to determine the source of the 58.55 hour difference, the court has used 1,779 as the starting point for the Pattishall billing. Of the 1,779 hours, approximately 163 hours are paralegal time, which is being separately addressed.

According to Plaintiff's First Supplemental Declaration of Attorney's Fees [Dkt. 264], 57.4 hours, or \$11,900, were expended in "Preparing fees statement and bill of costs" [Dkt. 264, p. 3] and 76.2 hours, or \$16,640, were expended "Responding to Defendants' motion for a hearing on fees (including briefing on motion and plaintiff's right to fees on fees; preparation for and participation in telephone conference with Judge McCarthy regarding proposed hearing)." *Id.* The court finds the number of hours devoted to these subjects to be excessive. Based on the lack of complexity of the issues, the experience of the law firm and the end product filed with the court, the court finds that 30 hours is a reasonable number of hours to have expended on these categories. The Pattishall billing has therefore been reduced by 103.6 hours.

Plaintiff's First Supplemental Declaration of Attorneys' Fees [Dkt. 264] indicates that 32 hours were spent preparing for hearing on fees, and Plaintiff's Second Supplemental Declaration of Attorneys' Fees [Dkt. 274] indicates that 140.7 hours were expended on "Further litigation on contempt order and fee award, including preparation for and participation in August 11, 1998 hearing on fees." *Id.* at 2. The court finds that the total of 172.7 hours, roughly a month's work, is not a reasonable number of hours to have devoted to the fee issue. Plaintiff's briefs, submissions and

presentation at the hearing on the fee issues have not been particularly helpful to the court in resolving these issues. There is an absence of citation to and compliance with Tenth Circuit authority concerning the burden of proof to establish the reasonableness of hours and rates. Having thoroughly reviewed the Pattishall billing statements, studied the briefing, and having presided over the fee hearing, the undersigned finds that 40 hours is a reasonable number of hours to award for matters included in the category "Further litigation on contempt order and fee award, including preparation for and participation in August 11, 1998 hearing on fees." Consequently the Pattishall billing has been further reduced by 132.7 hours.

Of the remaining 1380 hours, 30% or 414 hours have been subtracted for time devoted to the extraneous issues of misleading and deceptive advertising, alleged confusion in the marketplace, and use of the JZ mark. Another 5% or 69 hours have been subtracted for what appears to have been duplicative work performed by more than one attorney. The number of hours is not subject to precise calculation because of the lack of specificity in the Pattishall billing statements. *See Malloy*, 73 F.3d at 1018 (district court need not identify and justify every hour allowed or disallowed). The specified percentage represents the court's best estimate of the time devoted to the extraneous issues based on the undersigned's involvement in discovery, pre-trial matters, and the contempt hearing. In this regard, the court notes that had Plaintiff properly restricted the scope of the proceedings, the burden of discovery and other pretrial matters would have been reduced. However, the extraneous issues were fact intensive and were the subject of a significant amount of pre-trial dispute which

materially increased the number of hours expended on this litigation. The court finds that the remaining hours (897) were reasonably expended in the prosecution of the motion for contempt and related proceedings.

Concerning billing for paralegal time, the court acknowledges that it is often cost-effective to make use of paralegals. The court has reviewed the paralegal time and finds that 100 hours of paralegal time was reasonably expended on this litigation. The reduction of 63 hours was made to account for what appears to be duplicative work and for paralegal time expended on what the court has identified as extraneous issues.

(ii) Local Counsel

The 133.87 hours requested for the services of Lawrence R. Watson as local counsel reflect the diligent performance of that role in this case and the court finds those hours to be reasonable. To the extent that Mr. Watson's billing contains duplicative work or work devoted to extraneous issues, the court has factored that into the percentage reduction to the Pattishall billing.

(iii) In-House Counsel

The court has reviewed the billing statements of in house counsel, Sarah Steele, and finds that the statements do not contain sufficient explanation of how hours were allotted to specific tasks to enable the court to determine that the time spent was reasonable. Thus, Plaintiff has not met its burden of demonstrating that Ms. Steele's time was not duplicative of the work performed by outside counsel, or that the time spent was reasonable. Therefore, no time has been allotted for Ms. Steele.

(iv) Management Time

No time has been allotted for time expended by John Zink Company Vice President Robert E. Schwartz. Assuming, arguendo, that it would otherwise be appropriate to tax against Defendants the management time expended by Mr. Schwartz, the lack of meticulous, contemporaneous time records for his time precludes consideration of such an award.

(v) Sum of Reasonable Hours

In exercise of its obligation to exclude hours not reasonably expended, the court finds that 133.87 hours are reasonable for the services of local counsel, and 897 hours represents a reasonable number of attorney hours expended by the Pattishall firm for the investigation and prosecution of the motion for contempt, including proceedings before the district court in connection with objections to the magistrate judge's recommendation, and the attorney fee and cost issues. In addition, the court finds that 100 hours represents a reasonable number of paralegal hours for this litigation.

B. Hourly Rate

After determining the number of hours reasonably expended, a reasonable hourly rate must be determined. "A reasonable rate is the prevailing market rate in the relevant community." *Malloy*, 73 F.3d at 1018 (citing *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). However, the relevant market value is not necessarily the price a party's lawyer charged to prosecute the case, but "the price that is customarily paid in the community for services like those involved in

the case at hand." *Beard v. Teska*, 31 F.3d 942, 956 (10th Cir. 1994). Plaintiff bears the burden of showing that the requested rates are in line with those prevailing in the Tulsa community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Ellis*, 163 F.3d 1203 (citing *Malloy*, 73 F.3d at 1018).

Attorney Brett August had primary responsibility for the legal work on Plaintiff's behalf. Mr. August's time was billed at the rate of \$170 per hour for time charged before January 1, 1998, and \$200 per hour for time charged after that date, other billing by Pattishall attorneys ranged from \$150 per hour to \$330. The Pattishall firm billed paralegal time from \$90 to \$150 per hour.

Plaintiff, the party with the burden of proof, presented no evidence either in its papers or at the hearing concerning the prevailing rate in this community for the type of legal work required in this case. On the other hand, Defendants made no specific objection in their papers or at the hearing concerning the rates charged by Plaintiff's attorneys. There was testimony at the hearing from Tulsa attorney Joel Wohlgemuth concerning his litigation experience in Tulsa, that he was charging \$125 per hour for his time as an expert witness, and that paralegals in Tulsa charge between \$45 and \$65 per hour. Lawrence R. Watson served as local counsel for Plaintiff. He specializes in this area of the law, practices in the Tulsa community and billed his time at \$190 per hour. Based upon the court's familiarity with the rates in the local community and considering the specialized area of law involved, the court finds that Attorney Watson's hourly rate of \$190 per hour is a prevailing rate in the Tulsa community and will approve a rate up to this amount.

The undersigned recommends that Defendants be assessed 133.87 at \$190 per hour or \$25,435.30 for Mr. Watson's work as local counsel.

Because of the percentage reductions taken in the number of hours the court has determined to be reasonable for the Pattishall firm, application of the hourly rate to the number of hours will not correspond directly to the billing statements. Consequently, to avoid the task of making a line-by-line recalculation of the Pattishall billing statements, the court is forced to adopt some methodology for making the hours-times-rate calculation. In so doing the court has allocated the Pattishall firm hours among the three attorneys who performed the bulk of the work in the case: David Hilliard, Brett August, and Bradley Cohn. However, by specifically naming these three attorneys, the court does not mean to suggest that all work performed by others was excluded or that the number of hours specified corresponds exactly to the number of hours reasonably expended by the three named attorneys. The methodology employed roughly approximates the number of hours expended by these attorneys in relation to each other.

Mr. Hilliard billed his time at \$320 to \$330 per hour. The court has allotted \$190 per hour for Mr. Hilliard's time because there was no evidence that \$320 to \$330 is a prevailing market rate in the Tulsa community, and Mr. Watson's bills established \$190 to be a market rate. Mr. August billed his time at \$170 to \$200 per hour with the bulk of his time billed at the \$170 rate. Assigning \$170 to Mr. August's time takes into account that the time allotted for Mr. August does not correspond precisely to his hours and that some of the time reduction occurred on the work

performed at \$200 per hour. The court allocated \$150 per hour for Mr. Cohn's time although the billing statements reflect \$150 to \$170 was billed for his time. Mr. Cohn's time is a composite of his time and the time expended by other junior members of the firm.

The hours and rates are allocated as follows:³

David Hilliard	81 hours at \$190 per hour
Brett August	664 hours at \$170 per hour
Bradley Cohn	152 hours at \$150 per hour

Multiplying the above rates by the number of hours allocated results in a reasonable fee of \$151,070 for the attorney work performed by the Pattishall firm in the prosecution of the motion for contempt and related proceedings.

Based on the hearing testimony of Mr. Wohlgemuth; the testimony of attorney Brett August that the work performed by paralegals in this case tended to be small discrete tasks; and its knowledge of the Tulsa market, the court finds \$50 per hour to be a reasonable hourly rate for the 100 hours of paralegal time reasonably expended in this case.

Based on the foregoing, the court finds that the sum of \$181,505.30 is a reasonable fee for the legal work in these proceedings. The undersigned recommends that sum be assessed against Defendants.

³ The court allocated the hours among the named attorneys by first roughly computing the number of hours each attorney billed to the case, then determining the percentage of hours billed by each of the named attorneys relative to each other. Those percentages were then applied to the total number of hours the court has determined to be reasonable.

II. NONTAXABLE COSTS AND EXPENSES

Expenses Plaintiff incurred in the prosecution of the motion for contempt should be included in the attorney fee award, provided the expenses are reasonable. Plaintiff's billing statements reflect that expenses were incurred in a number of categories: in-house duplicating; facsimile; courier and delivery charges; clerical services; telephone; local travel; computerized legal research; storage; and travel. However, Plaintiff's fee request is not broken into such categories. Since Plaintiffs did not break their request for expenses into categories, the court cannot discern what expenses they are attempting to recover, or whether the expenses were reasonable. In a similar situation the District Court of Kansas stated "[d]umping billing statements on the court is not an adequate means of supporting the expenses component of an attorney fee request." *United Phosphorus, Ltd., v. Midland Fumigant, Inc.*, 21 F.Supp.2d 1255, 1262 (D. Kan. 1998). In the *United Phosphorus* case, the court attempted to distill the invoices and calculate totals for each category of expenditures in the plaintiff's fee application, noting that "plaintiffs have only themselves to blame" for any omission or computational error by the court. *Id.*

In the present case the court has spent hours attempting to "distill" the Defendants billing statements into compensable categories. In so doing, it became apparent that the billing statements lack sufficient detail concerning the out of pocket expenses to enable Plaintiff's to formulate a rational objection to them or for the court to determine that the expenditures were reasonable. Under these circumstance it would be unfair to tax the out-of-pocket expenses. Therefore, the undersigned

recommends that Plaintiff's request for attorney expenses be denied, except for computer research expense and travel expense hereafter discussed.

Plaintiff's have requested reimbursement for approximately \$6090 for computer assisted legal research expenses. The court recognizes that use of the computer for legal research often reduces the amount of attorney time that might otherwise be spent on research. To place this figure in context, 40 hours of attorney time billed at \$150 per hour is \$6,000. The court finds that not all of the claimed amount should be taxed against Defendants. The billing statement entries do not specifically identify the legal research subject, therefore the court is not able to discern whether the research is redundant of other work performed or whether the computer assisted research was related to allegations concerning misleading and deceptive advertising; confusion in the marketplace; and use of the JZ mark. *See Case 157 F.3d at 1258* (district court did not abuse its discretion when it denied a portion of Westlaw charges where it was not able to determine whether charges were related to successful or unsuccessful claims). Therefore, because the billing entries lack specificity the court has reduced the amount of research expense and finds that an allowance of \$3,000 for computer assisted research is reasonable.

The Pattishall billing statements contain a category for travel, hotel, meals, and transportation for a number of trips from Chicago to Tulsa for depositions and hearings. Expenses for this category reflected on the Pattishall billing statements total \$10,522.26. The court finds that \$5,104.06 of this amount should be charged to Defendants. This amount represents the expenses related to travel to Tulsa for the

various hearings attended by Mr. August and Mr. Cohn. The November 16-17, 1997, expenses for Mr. Hilliard's travel have been excluded. Since Mr. Hilliard did not participate in the hearing, the court concludes that the travel expenses were not necessarily incurred. The court has also excluded travel expenses for depositions. Since the statements do not relate the travel expenses to specific depositions and since there was no argument submitted concerning the necessity of the depositions, the court cannot discern which of the depositions were necessary for the prosecution of the contempt motion and which were related to the extraneous issues. The court finds the following travel expenses should be taxed against Defendants:

Brett August travel 5/22 to 5/23/97	\$ 585.36
Brett August travel 11/15 to 11/16/97	762.26
Bradley Cohn travel 11/15 to 11/19/97	112.77
Brett August travel 11/16 to 11/19/97	2,538.35
Brett August travel 8/11/98	616.89
Bradley Cohn travel 8/11/98	310.00
Bradley Cohn travel 8/10/98	<u>178.43</u>
TOTAL	\$ 5,104.06

On the basis of the foregoing, the court recommends that Defendants be assessed \$8,104.06 as necessary out-of-pocket attorney expenses.

III. STATUTORY COSTS

Plaintiffs seek to recover \$11,740.33 pursuant to 28 U.S.C. § 1920. The following items are taxable as costs under § 1920: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for

use in the case; (5) docket fees under 28 U.S.C. § 1923; and (6) compensation of court-appointed experts, interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828. Local Rule 54.1A requires a party recovering costs under § 1920 to file a brief supporting the bill of costs. The brief must include copies of applicable invoices, receipts, and disbursement instruments for the cost items.

Plaintiff's brief contains no such documentation. Nor is the documentation found elsewhere in the file. Law firm billing statements are attached to the several declarations supporting Plaintiff's fee requests, but those billing statements do not satisfy the local rule requiring documentation of costs by way of invoice or receipt. The court has no way of determining what portion of the costs were necessarily expended as Plaintiff's submissions do not contain the particularized justification for costs required for an award. Therefore, the undersigned United States Magistrate Judge recommends that no § 1920 costs be awarded. *Karsian v. Inter-Regional Financial Group, Inc.*, 13 F.Supp.2d 1085, 1088-93 (D. Colo. 1998) (denying costs for depositions taken only for discovery or counsel convenience; absent showing of necessity, costs for daily trial transcripts not taxed; absent specific demonstration of necessity, costs of photocopies not taxed).

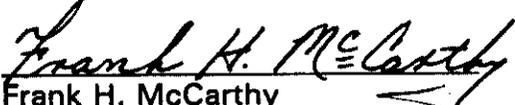
IV. CONCLUSION

The undersigned United States Magistrate Judge recommends that Plaintiff be awarded attorney fees and out-of-pocket expenses of \$ 189,609.36 representing 897 attorney hours for the Pattishall firm at an average of approximately \$168.50 per hour;

100 paralegal hours at \$50 per hour; local counsel time of 133.87 hours at \$190 per hour; \$3,000 for computer assisted research expense; and \$5,104.06 for travel expenses. It is further recommended that no costs be awarded under 28 U.S.C. § 1920 because the amounts sought have not been adequately documented, nor has it been demonstrated that the expenses were necessarily incurred.

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 20th Day of September, 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 21 Day of Sept., 1999.

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

F I L E D

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID MAULE and
TRACI MAULE,

Plaintiffs,

vs.

SOONER EQUIPMENT & LEASING,
INC., and GEORGE CORNELISON,
d/b/a SOONER TRUCK SALES, and
JASON LEONARD,

Defendants.

Case No. 98-CV-84-C

ENTERED ON DOCKET

DATE SEP 21 1999

JUDGMENT

This matter came before the Court for nonjury trial on March 30-31, and April 2, 1999. The issues having been considered and a decision having been rendered in accordance with the Findings of Fact and Conclusions of Law, filed simultaneously herein:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendants Sooner Equipment & Leasing, Inc. d/b/a Sooner Truck Sales and George Cornelison and against the plaintiffs David Maule and Traci Maule on their claims for violation of the Motor Vehicle Information and Costs Savings Act, Title 49, United States Code, Section 32701 et. seq., common law fraud, breach of contract, and breach of express warranties under Title 12A, Okla. Stat., Sections 2-313, 2-318, 2A-209 and the Oklahoma Commercial Code under Title 12A, Okla. Stat., Sections 1-101 et. seq. and 2A-101 et. seq., regarding the 1989 Kenworth T-800 truck.

IT IS SO ORDERED this 20th day of September, 1999.



H. DALE COOK
Senior U. S. District Judge



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

FILED

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED DOMINION INDUSTRIES,
formerly AMCA INTERNATIONAL
CORPORATION,

Plaintiff,

vs.

ECONO-THERM ENERGY SYSTEMS
CORP.,

Defendant,

and

KANSAS CITY FIRE & MARINE
INSURANCE COMPANY,

Garnishee.

No. 98-C-906-B(J) ✓

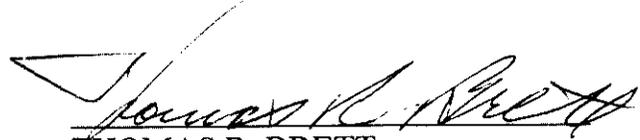
ENTERED ON DOCKET
DATE SEP 21 1999

JUDGMENT

In accord with the Order filed **this date** denying the Plaintiff's Motion for Summary Judgment, the Court hereby **enters judgment** in favor of the Garnishee, Kansas City Fire & Marine Insurance Company, **and** against the Plaintiff, United Dominion Industries, formerly AMCA International Corporation. Plaintiff shall take nothing on its claim. Costs are assessed against the **Plaintiff**, if timely applied for under N. D. LR 54.1,

and each party is to pay its respective attorney's fees.

Dated this 20th day of September, 1999.

A handwritten signature in black ink, appearing to read "Thomas R. Brett". The signature is written in a cursive style with a large, sweeping initial "T".

THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

FILED

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

UNITED DOMINION INDUSTRIES,
formerly AMCA INTERNATIONAL
CORPORATION,

Plaintiff,

vs.

ECONO-THERM ENERGY SYSTEMS
CORP.,

Defendant,

and

KANSAS CITY FIRE & MARINE
INSURANCE COMPANY,

Garnishee.

No. 98-C-906-B(J)

ENTERED ON DOCKET

DATE SEP 21 1999

ORDER

Before the Court is the Motion For Summary Judgment of Judgment Creditor/Plaintiff, United Dominion Industries ("UDI") (Docket #11), seeking a determination from this Court that the Comprehensive General Liability insurance policy issued by Garnishee, Kansas City Fire & Marine Insurance Company ("KCFM"), to the Judgment Debtor/Defendant, Econo-Therm Energy Systems Corp. ("Econo-Therm"), provides coverage available to satisfy a judgment obtained by UDI against Econo-Therm,

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and the Court, being fully advised, finds as follows:

Undisputed Material Facts

1. UDI and Econo-Therm entered into an Asset Purchase Agreement (“Agreement”) on October 7, 1985 whereby UDI purchased one of Econo-Therm’s divisions, manufacturing facilities known as the “Braden Plant” which designed, manufactured and distributed gas turbine silencers.
2. The Agreement contains a number of provisions relating to Econo-Therm’s indemnification of UDI and representations relating to workplace safety.
3. At the time of the Agreement, Econo-Therm had a Broad Form Comprehensive General Liability policy of insurance (the “Policy”) from KCFM, Policy No.L2 68 40 87.
4. UDI sued Econo-Therm for damages UDI incurred after the Agreement which were caused by misrepresentations and breach of contract by Econo-Therm.
5. Judgment was entered by this Court following entry of findings of fact and conclusions of law in favor of UDI and against Econo-Therm in Case No. 91-C-424-B, in the amount of \$226,534.22, plus attorney’s fees and costs.
6. The Court found the damages were “incurred due to breaches of the Contract [Agreement] by Econo-Therm” and also indicated they were caused by Econo-Therm’s misrepresentations of certain terms and conditions. UDI’s damages arise from payment of workers compensation claims to workers who had previously worked for Econo-Therm who suffered long-term hearing loss due to noise exposure which could have been

detected prior to the Agreement had Econo-Therm performed audiometric studies as required by OSHA.

7. KCFM's extent of coverage, if any, in regard to UDI's judgment is \$500,000.00.

Summary Judgment Standard

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

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v.*

Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

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

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

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

Arguments and Authority

The parties advance several theories in support of their respective positions. All of these depend however upon the Court's interpretation of the Policy. The relevant provisions of the Policy must therefore be examined.

Under Oklahoma law, the language of a contract is to govern its interpretation if the language is clear, explicit and unambiguous. 15 O.S. 1991 §153. Further, the words used in a contract are to be understood in their ordinary and popular sense. 15 O.S.

1991§160. The Court finds the language at issue herein is unambiguous and is susceptible to interpretation by reference to the ordinary meanings ascribed to them.

The Policy provides the insurance does not apply "to liability assumed by the insured under any contract or agreement **except an incidental contract. . .**" In an attached endorsement, the term "**incidental contract**" is "extended to include any oral or written contract or agreement relating to the **conduct** of the named insured's business." An additional exclusion negates coverage **under an incidental contract** for "bodily injury or property damage for which the insured **has assumed liability. . .**if such injury or damage occurred prior to the execution of the **incidental contract.**" Finally, the Policy contains an exclusion in the Comprehensive General Liability Form which states:

- (i) This insurance does **not apply**: to any obligation for which the insured or any carrier as **his insurer** may be held liable under workers compensation, **unemployment compensation**, or disability benefits law or under any similar law. . .

The findings of fact and **conclusions** of law entered by this Court in the underlying suit in which UDI sought to enforce the **indemnification** clauses of the Agreement clearly establish that the damages paid by UDI **arise** from workers compensation claims for hearing impairment caused by **long-term noise exposure** which exposure began preceding the Agreement and which would have **been known** to UDI absent the misrepresentations made by Econo-Therm regarding **compliance** with OSHA requirements for audiometric studies.

UDI attempts to evade the application of the workers compensation exclusion, as well as the exclusion regarding bodily injury or property damage for which the insured has assumed liability if it occurred prior to the execution of the Agreement, by characterizing the judgment as one for damages due to breach of the Agreement. UDI's position is that because Econo-Therm denied liability and refused to indemnify in the underlying action, the damages are not for bodily injury or property damages and are therefore covered by the Policy.¹ This however appears to be exactly the type of "obligation for which the insured or any carrier as his insurer may be held liable under workers compensation," referenced in the exclusion. The Court therefore concludes the Policy provides no coverage under the facts of this case.

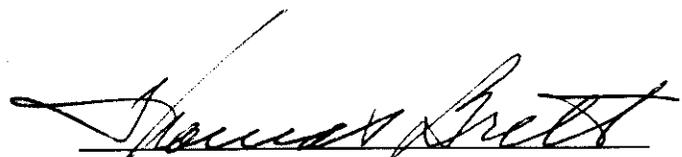
The Court further finds the parties have submitted this case by agreement as if it were an action for declaratory judgment. Consequently, although KCFM did not file a cross-motion for summary judgment, summary judgment must be rendered in favor of KCFM as opposing party. *Dickeson v. Quarberg*, 844 F. 2d. 1435, 1444 n.8 (10th Cir. 1988).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Motion For Summary Judgment of Judgment Creditor/Plaintiff, United Dominion Industries ("UDI") (Docket #11) is denied.

¹KCFM makes a similar, and equally unconvincing, argument in advancing the theory that the damages arising from payment of worker's compensation claims are not damages for bodily injury. Absent bodily injury, no claim for damages would arise.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT summary judgment is granted to Kansas City Fire & Marine Insurance Company.

DONE THIS 20th DAY OF SEPTEMBER, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES C. ARMSTRONG,)

Plaintiff,)

v.)

No. 98-C-688-B(E)

RALSTON PURINA COMPANY,)
a Missouri corporation, and)
PROTEIN TECHNOLOGIES)
INTERNATIONAL, INC., a)
Delaware corporation,)

Defendants.)

ENTERED ON DOCKET

DATE SEP 21 1999

JUDGMENT

This case was tried to a jury on September 16 and 17, 1999 with counsel of record and the parties present. At the conclusion of the plaintiff's evidence, the defendants Ralston Purina Company and Protein Technologies International, Inc. moved for a directed verdict pursuant to Fed.R.Civ.P. 50(a).

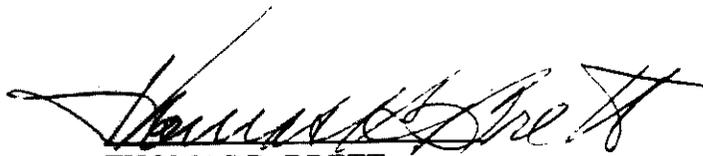
As stated on the record, the Court concluded the evidence permitted no issues of material fact to be submitted to the jury because plaintiff's evidence had failed to establish a prima facie case under 85 O.S. §5(A)(1) and (2) and the evidence established as a matter of law the defendants had no liability to the plaintiff as set forth in 85 O.S. §5(B). In addition, the Court found plaintiff's retaliatory discharge claim was barred by the three-year statute of limitations.

Accordingly, judgment is entered in favor of the defendants, Ralston Purina Company and Protein Technologies International, Inc., and against the plaintiff, James C. Armstrong on plaintiff's claim for retaliatory discharge under 85 O.S. §5(A)(1) and (2). Costs are assessed against Plaintiff James C. Armstrong, if timely applied for under Local Rule 54.1. The parties

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are to pay their respective attorneys' fees.

Dated this 20th day of September, 1999.

A handwritten signature in black ink, appearing to read "Thomas R. Brett". The signature is stylized with a large, sweeping initial "T" and "B".

THOMAS R. BRÉTT
UNITED STATES DISTRICT JUDGE

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

F I L E D

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID MAULE and
TRACI MAULE,

Plaintiffs,

vs.

SOONER EQUIPMENT & LEASING,
INC., and GEORGE CORNELISON,
d/b/a SOONER TRUCK SALES, and
JASON LEONARD,

Defendants.

Case No. 98-CV-84-C ✓

ENTERED ON DOCKET

DATE SEP 21 1999

**FINDINGS OF FACT
and
CONCLUSIONS OF LAW**

This matter came before the Court for nonjury trial on March 30-31, and April 2, 1999. Plaintiffs David Maule and Traci Maule bring this action against Sooner Equipment & Leasing, Inc. and George Cornelison d/b/a Sooner Truck Sales alleging claims for violation of the Motor Vehicle Information and Costs Savings Act, Title 49, United States Code, Section 32701 et. seq., common law fraud, breach of contract, and breach of **express** warranties under Title 12A, Okla.Stat., Sections 2-313, 2-318, 2A-209 and the Oklahoma Commercial Code under Title 12A, Okla.Stat., Sections 1-101 et. seq. and 2A-101 et. seq. **Plaintiffs claim** that the defendants knowingly and/or recklessly made false statements regarding the **mileage of a 1989 Kenworth T-800 truck** that they acquired on October 13, 1997. A default judgment was entered against defendant Jason Leonard on June 18, 1999.

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After considering the pleadings, briefs, exhibits, case law, statutory authority, evidence presented at trial, and in regard to the demeanor and credibility of the witnesses, the Court enters the following findings of fact and conclusions of law pursuant to Rule 52 (a) F.R.Cv.P.

FINDINGS OF FACT

Jurisdiction

1. Federal question jurisdiction under Title 28, United States Code, Section 1331 is shown by plaintiffs' claim for violation of the Motor Vehicle Information and Costs Savings Act.

2. Diversity of citizenship jurisdiction under Title 28, United States Code, Section 1332, is shown in that plaintiffs are citizens of the State of Colorado, defendant Sooner Equipment & Leasing, Inc., is an Oklahoma corporation, and defendant George Cornelison is an individual residing in the State of Oklahoma. The amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

3. Venue is proper in this Court pursuant to Title 28, United States Code, Section 1391 in that a substantial part of the events giving rise to this claim occurred in Oklahoma and one or more of the defendants reside in the Northern District of Oklahoma.

Acquisition of Truck

4. George Cornelison is the president of Sooner Equipment & Leasing, Inc., an Oklahoma Corporation, which operates its business under the name Sooner Truck Sales.

5. In 1992, Raymond Strickland purchased a 1989 Kenworth T-800 truck with mileage of 551,886. Mr. Strickland was an over-the-road truck driver and used the truck for interstate transportation until he sold it to Sooner Truck Sales on June 16, 1997.

6. Jason Leonard, a salesman for Sooner Truck Sales, handled the transaction. On June 16, 1997, Sooner Truck Sales purchased the truck from Mr. Strickland for \$ 7,000. At the time of sale, the odometer read approximately 34,000 miles. Mr. Strickland told Jason Leonard that the odometer had turned the one million mile mark and that the actual mileage on the truck was 1,034,995.

7. After purchasing the truck from Mr. Strickland, George Cornelison authorized modification on the truck, which included removing the sleeper cab and adding a dump bed. Sooner Truck Sales spent approximately \$16,000 in modifications and repairs to the truck.

8. In the September 12, 1997, issue of *Truck Paper South Central*, a regional trade newspaper, Sooner Truck Sales placed an advertisement offering to sell the Kenworth T-800 dump truck. Plaintiff David Maule saw the advertisement and telephoned Sooner Truck Sales. Jason Leonard took the call.

9. Jason Leonard told Mr. Maule that the price of the truck was \$ 37,000 and that the truck's mileage was 300,000. Jason Leonard also faxed Mr. Maule a Used Truck Appraisal specification sheet which showed a speedometer reading on the truck of 330,000. Jason Leonard told Mr. Maule that the reason the truck had low mileage was because the previous owner was retired, fairly wealthy and he used the truck only on occasions when he wanted to take an over the road trip.

10. Mr. Maule wanted the truck because of the low mileage and therefore agreed to purchase the truck for \$ 37,000.

11. Mr. Maule acquired the truck for his hauling and excavating business in the Silverthorne, Colorado area which he conducted under the name of M&M Enterprises.

12. Mr. Maule has a high school education and two years of service in the Army as a command engineer and demolitions expert. He has considerable experience with large trucks. In the

military, Mr. Maule drove heavy equipment and trucks larger than the one involved in this litigation. He has driven both large and small trucks and has worked on engines since his early teens. Mr. Maule overhauled his first engine when he was fourteen years old.

13. Mr. and Mrs. Maule needed to finance the acquisition of the truck. The Maule's first application for financing was denied. Sooner Truck Sales referred Mr. Maule to Appleway Equipment Leasing, Inc. Appleway agreed to purchase the truck from Sooner Truck Sales for \$ 37,000 and lease the truck to the Maules. The Lease Agreement required the Maules to make a 25 percent down payment of \$ 9,250 to Sooner Truck Sales. Appleway paid to Sooner Truck Sales the balance of \$ 27,750 . Appleway based the lease payment of \$ 1,384.95 on the \$ 27,750 balance for a 30 month term. At completion of the lease payments, the Maules had an option to purchase the truck from Appleway for \$ 3,225.

14. The Maules executed the Lease Agreement with Appleway on October 11, 1997. The Lease Agreement provided that warranties must be in writing. Page 4, Section 3.7, provides:

The Lessee may enforce any claim, warranty, agreement or representation which may have been made by any manufacturer or vendor of the Equipment; but only if the same was made in writing by the Person bound thereby, and no such claim may be asserted against the Lessor.

15. On October 13, 1997, a Bill of Sale and the title to the truck was transferred from Sooner Truck Sales to Appleway. No other purchase agreement was executed. An odometer disclosure statement was not provided by Sooner Truck Sales. Appleway's Bill of Sale does not require warranties, nor an odometer disclosure statement. Appleway agreed to purchase the Kenworth T-800 from Sooner Truck Sales without a warranty as to mileage or condition of the truck.

16. Mr. Maule flew to Tulsa, Oklahoma on October 13, 1997, to take possession of the truck. The truck was difficult to start. The heater cable was not connected properly, the jake brake

was not working, and coolant was discharging on the ground. Sooner Truck Sales did some additional repairs on the truck before releasing it to Mr. Maule.

17. Mr. Maule left Tulsa with the truck on October 14, 1997 and arrived in Silverthorne, Colorado on the afternoon on October 15.

Engine Breakdown

18. On the day of his return, Mr. Maule had a pre-arranged hauling job but before he could complete the haul, the engine overheated and the truck broke down. The next day, Mr. Maule took the truck to Wagner Equipment Company in Denver, Colorado and spoke to Ray Horner, the lead mechanic. Ray Horner advised Mr. Maule that the engine needed major work.

19. Mr. Maule told Ray Horner that he had just acquired the truck. Mr. Maule said he was told by the dealership that the odometer had recently been replaced, and that the actual mileage on the truck was 330,000. He relayed the story that the prior owner was fairly wealthy and drove the truck only on occasion.

20. Ray Horner told Mr. Maule that it was unlikely that he would be experiencing this type of engine problems if the truck had mileage of 330,000. Ray Horner advised that the engine would have to be torn down to determine the extent of the damage and repairs needed. Mr. Maule authorized the tear down of the engine. Mr. Horner said that after he tore into the engine he would know more about it.

21. Within a day or so, Ray Horner dismantled the engine and invited Mr. Maule back to examine it with him. Ray Horner spent approximately two hours discussing the engine's condition with Mr. Maule. The No. 6 cylinder had a crack in it, the head was damaged in the combustion chamber area and the No. 6 sleeve had to come out of the block. Ray Horner told Mr. Maule that

the wear pattern on the engine was not consistent with a mileage of 330,000. Mr. Horner indicated that the excess block erosion on the engine was consistent with a mileage of 600,000 or 700,000, and the condition of the chassis and the hoses was consistent with a mileage of at least 500,000.

22. Ray Horner showed Mr. Maule the cylinder block, cylinder head, liners, head gasket, and timing. Ray Horner testified that Mr. Maule was knowledgeable about engines and that Mr. Maule was "pretty much" able to communicate in technical language when discussing the engine. In his trial testimony, David Maule also demonstrated considerable knowledge of engines.

23. After Mr. Maule examined the engine parts, he concurred with Mr. Horner's assessment of the condition of the engine and the mileage. Mr. Maule showed frustration and indicated that he was going to contact Sooner Truck Sales to see if they would pick up the tab, take the truck back or make some other amends.

24. Mr. Maule told Ray Horner to prepare an estimate of the cost to rebuild the engine and to fax the estimate to Sooner Truck Sales in Tulsa. Ray Horner prepared an estimate for an in-frame overhaul of the engine utilizing both new and re-manufactured parts. The initial estimate was \$ 7,000 to \$ 7,500. A subsequent estimate was prepared after Ray Horner discovered a substantial build up of stop leak in the radiator. The quantity of stop leak was indicative that the radiator, heater coil and the oil cooler could be plugged. Mr. Maule was very upset in learning of the presence of stop leak. Ray Horner stated that the formation of the stop leak also indicated that the truck had more miles on it than had been represented to Mr. Maule.

25. Ray Horner used a computerized Caterpillar warranty information network to determine for Mr. Maule the original owner of the truck. Mr. Maule was present while Ray Horner made the on line search. Through the search, Ray Horner identified the original owner, and determined that

the truck had been purchased in the Northern states. Before the engine was overhauled, Ray Horner gave Mr. Maule the name of the original owner and his telephone number.

Termination of the Lease, Negotiations and Repairs

26. Mr. Maule telephoned Don Bates with Appleway and told him that the engine in the truck had broken down and that he was going to stop payment on the check that he had given to Sooner Truck Sales and suggested that Appleway do the same. On Wednesday, October 15, 1997, Mr. Maule stopped payment on his check to Sooner Truck Sales in the amount of \$9,250. On October 19, 1997, Don Gates stopped payment on Appleway's check to Sooner Truck Sales in the amount of \$ 27,750.

27. On October 16, 1997, Appleway faxed a message to George Cornelison notifying him of the breakdown of the engine and that a hold had been issued on Appleway's check to Sooner Truck Sales. Appleway stated that the check would be held pending negotiations and resolution of the matter between Sooner Truck and the Maules.

28. The Lease Agreement between Appleway and the Maules was terminated. Mr. Michael Klotz, Vice President and General Manager for Appleway, rescinded the sale and released the Maules from their obligation under the Lease Agreement. The Maules could look for another truck with another company.

29. George Cornelison was unwilling to pay Wagner Equipment the cost to rebuild the engine. Mr. Cornelison agreed to rescind the sale and transport the truck and the engine parts back to Tulsa.

30. Mr. Maule wanted to keep the truck and overhaul the engine at Wagner Equipment in Denver. He authorized Wagner Equipment to overhaul the engine and do the warranty work. Ray

Horner advised that the hoses, transmission, rear end and other parts on the truck should be checked since the mileage seemed greater than had been represented to Mr. Maule. Mr. Maule agreed but stated he had the ability to perform some of the repairs himself or he could take the truck to another repair facility at a later date.

New Agreement Reached

31. A new agreement between Sooner Truck Sales, David Maule and Appleway was negotiated on the following terms.

- 1) A full engine overhaul, radiator repaired and jake plates replaced.
- 2) All work to be performed by Wagner Equipment in Denver, Colorado to the specifications of David Maule.
- 3) The overhauled engine to carry a 2 year/200,000 mile warranty.
- 4) Sooner Truck Sales to pay \$ 6,000 of the total cost.
- 5) Appleway to advance \$ 4,500 of the cost and incorporate the amount into its Lease Agreement with David Maule.
- 6) David Maule to pay \$ 1,500 of the cost.

32. While rebuilding the engine, Ray Horner discovered other repairs that were needed and brought the matter to Mr. Maule's attention. Some additional repair work was authorized.

33. Mr. Maule told Ray Horner that he had contacted a former owner of the truck and learned that the truck had considerable more miles on it than had been represented by Jason Leonard.

34. Wagner Equipment completed the work on the truck on October 24, 1997 at a cost of \$ 14,259.80. Don Gates was present in Denver when David Maule took possession of the truck from

Wagner Equipment . The weather was hazardous so David Maule spent the night in Denver and left for Silverthorne the next morning on October 25, 1997.

Meeting With Raymond Strickland

35. The next day, on October 26, 1997, Mr. Maule telephoned Raymond Strickland in Claremore, Oklahoma to confer with him regarding the misrepresentation of the truck's mileage by Sooner Truck Sales. He informed Mr. Strickland that he had located his name on an invoice that he found behind the dashboard of his truck. Mr. Maule said that he was returning to Tulsa to discuss the matter with Sooner Truck Sales and asked Mr. Strickland if he would meet with him at that time.

36. Mr. Maule telephoned Mr. Strickland from his attorney's office in Tulsa to arrange for a meeting place in Claremore. Mr. Strickland and his wife met with Mr. Maule at a Hardee's restaurant. They discussed the mileage and the condition of the truck. Mr. Maule did not meet with Jason Leonard or George Cornelison on his return trip.

37. On January 29, 1998, David and Traci Maule filed this action against Sooner Truck Sales, George Cornelison and Jason Leonard for violations of federal odometer disclosure requirements and state law claims of fraudulent misrepresentation, breach of contract and breach of warranty.

38. The State of Colorado requires an odometer disclosure statement in order to obtain vehicle license tags. At Appleway's request, in February 1998, George Cornelison issued Appleway a written odometer statement. George Cornelison, post-dated the odometer statement to show the sales date of October 13, 1978, and a mileage of 685,320. George Cornelison estimated the mileage based on an average of 80,000 to 90,000 miles per year for a period of 8 years.

CONCLUSIONS OF LAW

Jurisdiction and Venue

1. This court has jurisdiction over **the subject matter** of this action pursuant to Title 28, United States Code, Sections 1331 and 1332.

2. Venue is proper within the **Northern District** of Oklahoma under Title 28, United States Code, Section 1391.

Terms of Lease Agreement Controls

3. Appleway purchased the **Kenworth T-800** truck from Sooner Truck Sales because the Maules were unable to do so and then **leased it to the Maules**. Appleway is not in the business of selling vehicles. Appleway purchases **vehicles** from vendors, enters into lease agreements with potential purchasers, and offers its lessees **an option** to purchase the leased vehicle at the completion of the lease. The terms of the **Lease Agreement** determine plaintiffs' rights in this action. A written purchase agreement was not entered into **between** Sooner Truck Sales and Appleway. Mr. Maule did not negotiate the purchase price, terms or conditions of the Bill of Sale executed by Sooner Truck Sales to Appleway. Mr. Maule's **rights and obligations** flow from the written Lease Agreement he executed with Appleway.

False Statement and Failure to Disclose Mileage

4. Jason Leonard knowingly **misrepresented** the mileage of the Kenworth T-800 truck to plaintiff David Maule with the intent to **induce** him to purchase the truck. Jason Leonard misrepresented the mileage of the truck **orally on the telephone** and in writing when he faxed to Mr. Maule the Used Truck Appraisal **specification** sheet. Jason Leonard misrepresented the

circumstances of the truck's prior ownership. Mr. Maule relied on the misrepresentation and false statements in his decision to acquire the truck.

5. Jason Leonard was an employee of Sooner Truck Sales and acting within the scope of his employment at the time that he made the misrepresentation to Mr. Maule.

6. Sooner Truck Sales did not disclose to Appleway the correct mileage of the truck when it transferred title and ownership of the truck on October 13, 1997. Appleway did not require an odometer disclosure statement or warranties, nor did Appleway rely on the failure to disclose the correct odometer reading in its decision to purchase the truck from Sooner Truck Sales. Appleway did not rely on the odometer reading in its decision to enter into the Lease Agreement with David and Traci Maule.

7. No written or express warranties were conveyed to Appleway in its purchase of the truck from Sooner Truck Sales. The Lease Agreement between the Maules and Appleway excluded warranties unless the same were in writing. No written warranties were conveyed in the Lease Agreement.

8. Mr. Maule believed that the truck had low mileage when he took possession of it from Sooner Truck Sales on October 13, 1997.

Knowledge of the Misrepresentation

9. The truck engine broke down in Silverthorne, Colorado on October 15, 1997, two days after Mr. Maule took possession of the truck from Sooner Truck Sales.

10. On October 16, 1997, Mr. Maule took the truck to Wagner Equipment and spoke with Ray Horner, the lead mechanic.

11. After examining the condition of the engine, Ray Horner advised Mr. Maule that the odometer reading had been misrepresented to him by Sooner Truck Sales. To substantiate his assessment of the misrepresentation, Ray Horner spent two hours showing Mr. Maule the repairs needed to the engine. Mr. Maule understood what Ray Horner was conveying to him regarding the condition of the engine and the extent of repairs needed.

12. Mr. Maule was frustrated and upset with Sooner Truck Sales for misrepresenting the mileage and the condition of the truck. David Maule wanted Sooner Truck Sales to either rectify the condition of the engine or rescind the sale to Appleway.

13. Mr. Maule conferred extensively with Ray Horner as to the condition of the engine and the misrepresentation of the mileage.

14. Ray Horner provided to Mr. Maule the name and telephone number of the original owner of the truck before completing the repairs to the truck and before he released the truck to Mr. Maule.

15. At the time that Mr. Maule renegotiated the new agreement with Sooner Trucks Sales, David Maule knew that the actual mileage on the truck was greater than 330,000 and that the actual mileage could be as high as 700,000. Mr. Maule conducted no further investigation as to the actual mileage on the truck, although he had the name and telephone number of the original owner, and he could ask Sooner Truck Sales the name of the person who had sold it the truck.

16. With knowledge that the mileage was greater than represented, Mr. Maule was provided the opportunity to determine the actual mileage of the truck prior to negotiating the cost of repairs with Sooner Truck and Appleway. David Maule had notice of the fraudulent conduct and the false representations prior to entering into the new agreement.

Termination of Agreements

17. Sooner Truck Sales and Appleway agreed to rescind the sale and to release the Maules from their obligation under the Lease Agreement. Sooner Truck Sales agreed to rescind the purchase and take possession of the truck in Denver, Colorado. Appleway offered Mr. Maule the option to locate a different truck from a different vendor and enter into a new lease agreement.

18. Mr. Maule elected not to deliver the truck back to Sooner Truck Sales. Instead, Mr. Maule negotiated with Appleway, and in turn with Sooner Truck, the terms of a new agreement which included allocation of the costs of a rebuilt engine with a two year or 200,000 mile warranty and a rebuilt radiator. The agreement was supported by consideration and mutual obligations. The new agreement required Sooner Truck Sales to pay \$ 6,000 toward the costs of repairs and released Mr. Maule by an equivalent sum of his down payment to Sooner Truck Sales.

No Justifiable Reliance on Fraud After Notice

19. Mr. Maule was not relying on any false representations from Appleway or Sooner Truck Sales in negotiating the terms of the new agreement. At that time Mr. Maule knew or should have known that Sooner Truck Sales had previously misrepresented the mileage and the condition of the truck. Mr. Maule was also provided the opportunity to determine the actual mileage on the truck prior to entering into the new agreement with Appleway and Sooner Truck Sales by virtue of being furnished the name and telephone number of the original owner of the truck.

20. Mr. Maule entered into a new agreement after he knew that the truck had considerably more mileage on it than originally represented. This put him on notice that the mileage was far in excess of what he had been originally told by the Sooner Truck salesman. Thus the extent of the wear and tear on the entire truck, not just the then known repairs, was a known fact to Maule. Maule

negotiated a new agreement in order to retain the truck. This was not just an agreement for limited repairs. Thus the Maules did not retain any cause of action under the original agreement resulting from the original misrepresentation. After negotiating the new agreement with knowledge of the truck's uncertain mileage condition, Mr. Maule could not later rely on the original misrepresentation for any claims. On such a state of facts, plaintiffs have not set forth a cause of action for deceit. "The maker of a fraudulent misrepresentation is not liable to one who does not rely upon its truth but upon the expectation that the maker will be held liable in damages for its falsity." *Slaymaker v. Westgate State Bank*, 739 P.2d 444, 525 (Kan.1987), citing The Restatement (Second) of Torts § 548 (1976). A person cannot justifiably rely upon misrepresentations if a full investigation would show them to be false, when he has already discovered that other representations in the same transaction were untrue. "Having ascertained that the defendants falsely represented one material matter in the transaction, this was notice that the defendants may have been false in all else that they said; and therefore it was incumbent upon the plaintiff thereafter to make a full investigation as to the truth or falsity of every other material representation." *Id. citing, Gantz v. Schuler*, 142 P. 899 (1914). "If the recipient of a fraudulent representation has information which would serve as a danger signal to a person of ordinary intelligence and experience, he is not justified in relying upon that representation." *Id. citing, Young v. Hecht*, 597 P.2d 682, rev. denied 226 Kan. 793 (1979).

The Odometer Requirements Act

21. In their Third Amended Complaint, plaintiffs set forth a claim for violation of the Motor Vehicle Information and Cost Savings Act, commonly referred to as the Odometer Requirements Act. Plaintiffs' claim is pleaded under Title 15, United States Code, Section 1988, for failure to disclose the actual mileage of a vehicle (re-codified as 49 U.S.C. § 32705(a)(2)). Plaintiffs Traci and David

Maule have failed to state a claim under Section 1988. The Maules were parties to a lease agreement with Appleway and were not purchasers of the Kenworth T-800 truck. The Act does not cover lease agreements. *See, e.g. Francesconi v. Kardon Chevrolet, Inc.*, (D.N.J.), 703 F. Supp. 1154, *aff'd* 888 F.2d 18 (3rd Cir.1989), and *Henricks v. Fletcher Chrysler Products, Inc.*, 570 N.E.2d 115 (Ct.App.Ind.1991). The transfer of title and ownership of the Kenworth T-800 truck from Sooner Truck Sales to Appleway falls outside of the Act's coverage.

22. The Act generally requires a transferor of a vehicle to disclose to the transferee the cumulative mileage registered by the odometer (*See*, 49 U.S.C. § 32705(a)), prohibits the making of false statements in the disclosure (*See*, 49 U.S.C. § 32705(a)(2)), and provides for civil actions to enforce the odometer requirements (*See*, 49 U.S.C. § 32710). The purpose of the disclosure requirements is to assist purchasers "in determining a vehicle's condition and value by making the disclosure of a vehicle's mileage a condition to title." (*See*, 49 U.S.C. § 32701). The Act does refer to lease vehicles, however, the reference only requires a lessee to make written disclosure of the mileage of a leased vehicle to the lessor at the close of the lease term. (*See*, 49 U.S.C. § 32705 (c)).

Fraud and Deceit

23. In their second claim, the Maules contend that Sooner Truck Sales falsely and fraudulently represented that the truck had been driven 330,000 miles when, in fact, Sooner Truck Sales had knowledge from the previous owner that the truck had been driven 1,034,995. "The elements of a common-law action for fraud are 1) a material misrepresentation, 2) knowingly or recklessly made, 3) with the intent that it be relied upon, and 4) the party relying on the false statement suffers damages". *Silver v. Slusher*, 770 P.2d 878, 882 (Okla. 1988). Jason Leonard made a material false representation to David Maule regarding the mileage on the truck. After being put

on notice of the fraudulent statement, the Bill of Sale and the Lease Agreement were both rescinded. "A contract is extinguished by its rescission." Title 15, Okla. Stat., Section 232. A new contract was entered into between the parties, at which time the Maules knew or should have known of the prior fraudulent representation. The new contract allocated the cost of rebuilding the engine and the radiator. Mr. Maule was under a duty at that time to investigate any further damage caused by the previous fraudulent misrepresentation. Mr. Maule's failure to do so precludes a subsequent action for damages arising out of the fraudulent conduct.

Breach of Contract

24. In their third claim, the Maules contend that they entered into a contract with Sooner Truck Sales for the sale of the truck. Plaintiffs allege that under the terms of the contract, plaintiffs agreed to purchase a truck with an odometer reading of approximately 330,000 miles for \$37,000. Plaintiffs contend that Sooner Truck Sales breached the sales contract because the truck had been driven for 1,034,995. The evidence clearly established that the Maules did not enter into a sales contract with Sooner Truck Sales. Appleway purchased the truck from Sooner Truck Sales and entered into a separate Lease Agreement with the Maules. Neither the Bill of Sale conveyed by Sooner Truck Sales to Appleway nor the Lease Agreement executed by the Maules warrants the truck's mileage. The evidence established that Appleway did not rely on a warranty of mileage in its decision to purchase the truck from Sooner Truck Sales. Accordingly the court finds and concludes that the Maules have failed to state a claim for breach of contract against defendants Sooner Truck Sales and George Cornelison.

Breach of Warranty

25. In their fourth claim, plaintiffs assert that Sooner Truck Sales gave Appleway and the Maules an express warranty regarding the mileage on the truck which was false and was known to

be false at the time it was made. Plaintiffs claim that as lessees and as a third party beneficiary of the sales transaction they have suffered damages by their reliance on the false warranty. In Oklahoma, a vendor's oral representation regarding the condition of a vehicle creates an express warranty which is breached with the tender of a nonconforming vehicle. *Goodwin v. Durant Bank and Trust Co.*, 952 P.2d 41 (Okla. 1998). Although plaintiffs have stated a claim for breach of warranty, the claim fails in that plaintiffs rescinded their prior agreement with Sooner Truck Sales and Appleway after they knew or reasonably should have known that the mileage had been substantially misrepresented. Additionally, the Maules were provided the opportunity to learn the actual mileage of the truck prior to entering into the new agreement with Sooner Truck Sales and Appleway. Thus plaintiffs' claim for additional damages resulting from a prior breach of warranty is foreclosed as a matter of law.

CONCLUSION

Plaintiffs have failed to establish their right to relief against the defendants, Sooner Equipment & Leasing, Inc. and George Cornelison, on their claims for violation of the Odometer Requirements Act, common law fraud, breach of contract and breach of warranty.

Accordingly, it is the order of the Court that judgment be entered on behalf of the defendants Sooner Equipment & Leasing, Inc., and George Cornelison d/b/a Sooner Truck Sales, and against the plaintiffs Traci and David Maule.

IT IS SO ORDERED this 20th day of September, 1999.



H. DALE COOK
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN OF OKLAHOMA

KURT HOFFMAN,)
)
Plaintiff,)
)
v.)
)
ALLSTATE INSURANCE COMPANY,)
)
Defendant.)

ENTERED ON DOCKET
DATE SEP 21 1999
No. 99-CV-0600K (M)

FILED
SEP 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

THIS CAUSE comes before the Court on the Stipulation of Dismissal With Prejudice of the Plaintiff. After considering said stipulation, this Court hereby grants same. This action is hereby dismissed *with prejudice*.

IT IS SO ORDERED this 17 day of Sept., 1999


Terry Kern
United States District Court Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS EUGENE JOHNSON,)
)
Petitioner,)
)
v.)
)
GARY GIBSON, Warden,)
)
Respondent.)

Case No. 99-CV-0054-H (E)
(Base File)

ENTERED ON DOCKET

DATE SEP 21 1999

SECOND REPORT AND RECOMMENDATION

Petitioner Thomas Eugene Johnson filed a Petition for Writ of Habeas Corpus (Docket # 1), pursuant to 28 U.S.C. § 2254, on January 20, 1999. On April 5, 1999, the undersigned issued a Report and Recommendation, recommending that the Petition be dismissed due to petitioner's failure to file the Petition within the applicable statute of limitations period and for petitioner's failure to exhaust his state court remedies. On June 9, 1999, the Court issued an Order recommitting the matter to the undersigned for supplementation of the record. On June 11, 1999, the undersigned ordered respondent to brief the statute of limitations issue and to provide all relevant state records, including, but not limited to, a complete copy of the docket sheet for Case No. CRF 80-1457, Tulsa County, Oklahoma, any applications for post-conviction relief filed or pending during the April 24, 1996 to April 24, 1997 grace period, and any orders disposing of those applications.

Respondent filed the requested brief on July 22, 1999, and attached a copy of the Tulsa County District Court docket sheet. Respondent stated that he was unable to obtain the other relevant materials, although he had requested them from the Tulsa County Court Clerk. He also stated that he would supplement his brief with these documents in the event they were forthcoming. The docket sheet submitted by respondent shows that a Response to Application for Post-Conviction

Relief was filed on January 27, 1997, and an "Order Denying 4th Application for Post-Conviction Relief" was filed on February 13, 1997.¹ There is no entry indicating that a fourth application (or any prior application) was filed.

The undersigned issued an order on August 13, 1999, directing respondent to supplement his July 22, 1999 Memorandum Brief with a **complete** copy of the docket sheet for Case No. CRF 80-1457, Tulsa County, Oklahoma, or an **explanation** as to the discrepancies identified therein, a copy of any application for post-conviction relief **filed** or pending during the April 24, 1996 to April 24, 1997 grace period, and a copy of any orders **disposing** of such application(s). On September 1, 1999, respondent filed its Supplemental Notice to the Court with correspondence to and from the Tulsa County Court Clerk's office, a certified copy of the docket sheet, and two documents. The Tulsa County Court Clerk was unable to **explain the discrepancies** in the docket sheet. According to the Court Clerk, the docket sheet is **complete and an Application for Post-Conviction Relief** was not in the Court file. (Suppl. Notice, Docket #13, Exhibit 1.) Respondent represents that the Response to Application for Post-Conviction Relief, **filed January 27, 1997**, and the Order Denying 4th Application for Post-Conviction Relief, **filed February 13, 1997**, are the only two documents the Tulsa County Court Clerk could locate to **satisfy the Court's request**.²

¹ There is no evidence that petitioner **appealed this denial** to the Oklahoma Court of Criminal Appeals. See Mem. Br., Docket #5, Ex. A and Ex. B.) The Tulsa County District Court docket sheet also indicates that petitioner filed **another application** for post-conviction relief in August 1998 that was denied in September 1998, and **another in July 1999**; however, these last applications fall outside the one-year grace period in which **petitioner** was required to file his federal habeas petition.

² The reference to "fourth" application **is puzzling** because there are no prior applications for post-conviction relief docketed. All prior **post-trial motions** were filed before the grace period.

Petitioner has not responded to the Supplemental Notice or otherwise admitted or denied the correctness of the supplemental materials, although he was given that opportunity.

As set forth in the Report and Recommendation of April 5, 1999, petitioner had one year from April 24, 1996, to file an application for federal habeas relief because his state conviction became final prior to the enactment of the AEDPA. See 28 U.S.C. § 2244(d)(1); Hoggro v. Boone, 150 F.3d 1223, 1225 (10th Cir. 1998). A properly filed application for post-conviction relief will toll the one-year period while it is pending. See 28 U.S.C. § 2244(d)(2); Barnett v. Lemaster, 167 F.3d 1321 (10th Cir. 1999). Although there is no entry for the filing of an application for post-conviction relief, because the State responded and the application was ruled upon, the undersigned recommends that the Court deem it filed.³ Under State procedure, the State must respond to an application for post-conviction relief within thirty days after its docketing. OKLA. STAT. tit. 22, § 1083(a). Therefore, assuming the State took thirty days to respond,⁴ the application should be deemed filed no earlier than December 28, 1996. It was denied February 13, 1997; the statute of limitations was tolled for 48 days. Thus, petitioner had until June 11, 1997 to file his federal habeas petition. He failed to file his Petition until January 29, 1999 -- almost 600 days later.

On July 14, 1999, while the Court was awaiting respondent's supplemental brief and materials, petitioner filed another petition for writ of habeas corpus in the United States District Court for the Northern District of Oklahoma, Case No. 99-CV-571 B (J). In that petition, petitioner attacks the same conviction and sentence he received in Case No. CRF 80-1457, Tulsa County,

³ It should be noted that the Order Denying the 4th Application for Post-Conviction Relief recites that "Petitioner has now filed this application for post-conviction relief . . ." (Suppl. Notice, Docket #13, Ex. 5 at 3) (emphasis added).

⁴ There are no extensions of time for the State to respond entered on the docket sheet.

Oklahoma. Petitioner received a 90-year sentence after a jury convicted him on September 17, 1980, of First Degree Rape. The second petition (Case No. 99-CV-0571 B (J)) was consolidated with the first petition (Case No. 99-CV-0054 H(E) ("Base File")) and reassigned by Order dated July 22, 1999 (Docket #11). In the second petition for writ of habeas corpus, petitioner does not allege that his trial counsel was ineffective for failing to raise an issue as to age of the victim in his case, as he alleged in his January 29, 1999 petition. Nonetheless, the underlying basis for his claims is the same.

In the July 14, 1999 petition, petitioner again claims that the victim lied about her age and about her lack of consent. As grounds for his July 14, 1999 petition, he states (1) "I was tried but not proven guilty [sic] of statutory rape;" (2) "I was tried and convicted of statutory rape plaintiff comit [sic] purgur [sic];" and (3) "I was not given a chase [sic] to say I don't [sic] blive [sic] plaintiff." Petitioner further requests an investigation to prove that the victim lied about her age. It may be questionable as to whether these grounds represent constitutional violations cognizable for federal habeas corpus review and whether petitioner has exhausted all available state court remedies with regard to these claims; however, the same statute of limitations analysis that bars petitioner from bringing the claims set forth in his January 29, 1999 petition bars him from bringing the claims in his July 14, 1999 petition. He cannot circumvent an unfavorable outcome with regard to his January 29, 1999 petition by filing a similar petition in the same court before a final decision is rendered.

CONCLUSION

For the reasons set forth herein, the undersigned recommends that Thomas Eugene Johnson's Petition for Writ of Habeas Corpus (Docket # 1) as well as his Petition for Writ of Habeas Corpus in Case No. 99-CV-571H(E) be **DISMISSED**.

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

DUANE LEROY FOX,

Plaintiff,

vs.

GARY GIBSON, Warden, Oklahoma
State Penitentiary; JIMMY SHIPLEY;
MIKE PRUITT, MICHELLE
THOMASON; DENISE GREEN; and
JOHN DOES, other officers whose names
are unknown,

Defendants.

ENTERED ON DOCKET

DATE SEP 21 1999

No. 99-CV-779-H (E) ✓

FILED

SEP 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state inmate appearing *pro se*, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983 and a motion for leave to proceed *in forma pauperis*. Upon review of the complaint, the Court finds that venue is not proper in this district court, and therefore, this action should be transferred to the appropriate judicial district. See Costlow v. Weeks, 790 F.2d 1486 (9th Cir. 1986) (court has the authority to raise venue issue *sua sponte*).

The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

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

There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt

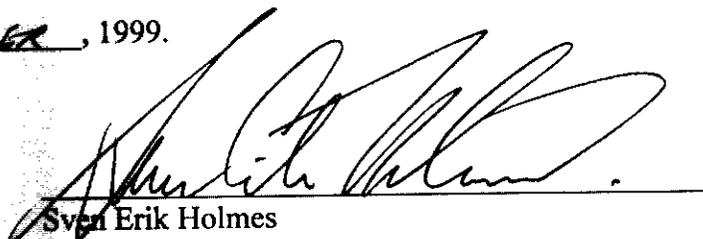
this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff, an inmate at the Oklahoma State Penitentiary ("OSP"), McAlester, Oklahoma, identifies the defendants in this action as Gary Gibson, Warden, Jimmy Shipley, Mike Pruitt, Michelle Thomas, Denise Green, and other OSP employees whose names are unknown. He bases his complaint on allegations that while he has been incarcerated at OSP, the named defendants have failed to protect him from sexual and physical abuse by a fellow inmate. According to the complaint, all Defendants are Department of Corrections employees and residents of Pittsburg County, Oklahoma, and the events giving rise to Plaintiff's claims arose in Pittsburg County, Oklahoma. Pittsburg County is located within the territorial jurisdiction of the United States District Court for the Eastern District of Oklahoma. 28 U.S.C. § 116(b). Thus, it is clear that venue is not proper before this Court. In the interest of justice, this case should be transferred to the United States District Court for the Eastern District of Oklahoma. 28 U.S.C. § 1406(a).

ACCORDINGLY, IT IS HEREBY ORDERED that because venue is improper in this district, this action is transferred to the United States District Court for the Eastern District of Oklahoma.

IT IS SO ORDERED.

This 17TH day of SEPTEMBER, 1999.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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DATE SEP 21 1999

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 99-CV-0309-K ✓
)
 MICHAEL P. METCALF,)
)
 Defendant.)

FILED
SEP 20 1999
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEFAULT JUDGMENT

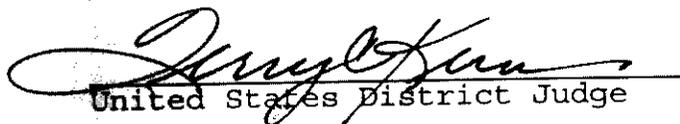
This matter comes on for consideration this 17 day of September, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Michael P. Metcalf, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Michael P. Metcalf, was served with Summons and Complaint on August 3, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Michael P. Metcalf, for the principal amount of \$1,448.82 and \$2031.76,

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plus accrued interest of \$533.40 and \$760.16, plus interest thereafter at the rate of 8% and 10.20% per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.285 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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PEP/alh