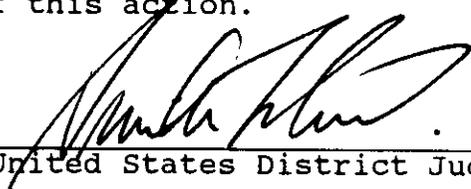


\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.411 percent per annum until paid, plus costs of this action.


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/11f

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
v.)
)
JAMES E. ETHINGTON, JR.;)
SPOUSE, if any, OF JAMES E. ETHINGTON, JR.;)
KAREN E. ETHINGTON aka Karen E. Freeland;)
SPOUSE, if any, OF KAREN E. ETHINGTON)
aka Karen E. Freeland;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE NOV 1 1999

F I L E D
NOV 9 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 98-CV-0709-H (M) ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9TH day of NOVEMBER, 1999.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Karen E. Ethington aka Karen E. Freeland, appears not, having previously filed her Disclaimer; and the Defendants, James E. Ethington, Jr.; Spouse, if any, of James E. Ethington, Jr.; and Spouse, if any, of Karen E. Ethington aka Karen E. Freeland, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, James E. Ethington, Jr., executed a Waiver of Service of Summons on October 24, 1998; that the Defendant, Karen E. Ethington aka Karen E. Freeland, was served with Summons

14

clerk

and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on November 5, 1998.

The Court further finds that the Defendants, Spouse, if any, of James E. Ethington, Jr. and Spouse, if any, of Karen E. Ethington aka Karen E. Freeland, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 23, 1999, and continuing through August 27, 1999, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Spouse, if any, of James E. Ethington, Jr. and Spouse, if any, of Karen E. Ethington aka Karen E. Freeland, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Spouse, if any, of James E. Ethington, Jr. and Spouse, if any, of Karen E. Ethington aka Karen E. Freeland. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter

the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on October 13, 1998; that the Defendant, Karen E. Ethington aka Karen E. Freeland, filed her Disclaimer on November 13, 1998; and that the Defendants, James E. Ethington, Jr.; Spouse, if any, of James E. Ethington, Jr.; and Spouse, if any, of Karen E. Ethington aka Karen E. Freeland, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-two (22), Block Thirteen (13), LEISURE LANES, an Addition in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on May 27, 1993, James E. Ethington, Jr. and Karen E. Ethington executed and delivered to BancOklahoma Mortgage Corp. their mortgage note in the amount of \$74,925.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, James E. Ethington, Jr. and Karen E. Ethington, husband and wife, executed and delivered to BancOklahoma Mortgage Corp. a real estate mortgage dated May 27, 1993, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on June 9, 1993, in Book 5511, Page 0958, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 26, 1996, BancOklahoma Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Corporation Assignment of Mortgage was recorded on July 18, 1996, in Book 5828, Page 1540, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 5, 1996, the Defendant, James E. Ethington, Jr., executed and delivered to the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on that date was made principal and the interest rate changed to 5.5 percent per annum.

The Court further finds that the Defendants, James E. Ethington, Jr. and Karen E. Ethington aka Karen E. Freeland, made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, James E. Ethington, Jr. and Karen E. Ethington aka Karen E. Freeland, are indebted to the Plaintiff in the principal sum of \$71,529.09, plus administrative charges in the amount of \$248.29, plus penalty charges in the amount of \$257.40, plus accrued interest in the amount of \$3,875.33 as of June 1, 1997, and the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, James E. Ethington, Jr.; Spouse, if any, of James E. Ethington, Jr.; and Spouse, if any, of Karen E. Ethington aka Karen E. Freeland, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendant, Karen E. Ethington aka Karen E. Freeland, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendants, James E. Ethington, Jr. and Karen E. Ethington aka Karen E. Freeland, in the principal sum of \$71,529.09, plus administrative charges in the amount of \$248.29, plus penalty charges in the amount of \$257.40, plus accrued interest in the amount of \$3,875.33 as of June 1, 1997, until judgment, plus interest thereafter at the current legal rate of 5.411 percent per annum until paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, James E. Ethington, Jr.; Spouse, if any, of James E. Ethington, Jr.; Karen E. Ethington aka Karen E. Freeland; Spouse, if any, of Karen E. Ethington aka Karen E. Freeland; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, James E. Ethington, Jr. and Karen E. Ethington aka Karen E. Freeland, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

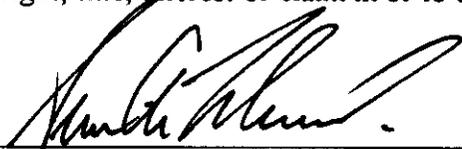
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

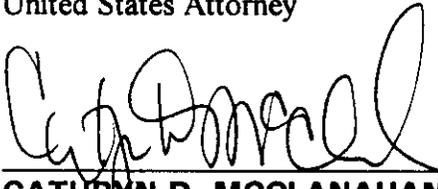
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

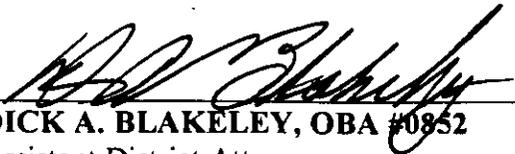
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #0852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4841

Attorney for County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure

Case No. 98-CV-0709-H (M) (Ethington)

CDM:css

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

FILED

NOV 9 - 1999 *SE*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDSEY K. SPRINGER,)
)
Plaintiff,)
)
vs.)
)
ALABAMA, a Union State,)
)
et al.,)
)
Defendants.)

Case No. 99-CV-3-BU

ENTERED ON DOCKET

DATE NOV 10 1999

ORDER

This matter comes before the Court upon the motions to dismiss filed by Defendants, Maryland, West Virginia, Oklahoma, Minnesota, Connecticut, Montana, Indiana, Hawaii, New York, Rhode Island, Kansas, Nevada, Texas, California, Arizona, Vermont, Ohio, Colorado, Pennsylvania, Missouri, South Carolina, Kentucky, Massachusetts, North Dakota, Oregon, Alabama, Illinois, North Carolina, Arkansas, Alaska, Maine, Washington, New Mexico, Tennessee, Michigan, New Hampshire, Florida, Georgia, Wisconsin, Nebraska, Louisiana, South Dakota, Utah, New Jersey, Mississippi and Delaware (Docket Entries #325, #328, #329, #330, #331, #333, #336, #340, #341, #343, #346, #350, #354, #355, #361, #362, #365, #366, #367, #369, #370, #373, #375, #376, #378, #379, #380, #382, #386, #387, #390, #393, #394, #397, #399, #401, #402, #403, #404, #407, #412, #419, #425, #435, #438, and #451). Plaintiff, Lindsey K. Springer, has responded to the motions and upon due consideration of the parties' submissions, the Court makes its determination.

Plaintiff brings this action against all fifty states pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief. Specifically, Plaintiff seeks a declaratory judgment finding that the states' election laws are unconstitutional and an injunction directing each state to place Plaintiff's name on the 2000 presidential election ballots to be distributed to each state's appointed Electors.

In their motions, Defendants request dismissal of Plaintiff's action on various grounds. One of the grounds raised by all Defendants is that Plaintiff's action is barred by the Eleventh Amendment. Upon review, the Court concurs with Defendants and concludes that Plaintiff's action is precluded by the Eleventh Amendment. Because this issue is dispositive of Plaintiff's action, the Court shall not address the other grounds raised by Defendants in support of dismissal.

The Eleventh Amendment provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. IX. The Supreme Court's decisions establish that the Eleventh Amendment restricts federal jurisdiction not only over suits brought against a state by citizens of another state but also over suits brought against a state by its own citizens. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 100 (1984); Hans v. Louisiana, 134 U.S. 1, 10 (1890). This

jurisdictional bar applies regardless of the nature of the relief sought against a state. Pennhurst, 465 U.S. at 100.

The sovereign immunity afforded by the Eleventh Amendment, however, is not absolute. In Clark v. Barnard, 108 U.S. 436, 447 (1883), the Supreme Court held that if a state waives its sovereign immunity and consents to suit in federal court, the Eleventh Amendment is not a bar. A state's waiver of Eleventh Amendment immunity, though, is not easily presumed. Any waiver by a state must be unequivocally expressed. Edelman v. Jordan, 415 U.S. 651, 673 (1974) (a state's waiver of Eleventh Amendment immunity occurs only where stated by the "most expressive language" or by such "overwhelming implications" as will leave no room for doubt). Furthermore, "constructive consent" by a state is not sufficient to overcome sovereign immunity. Id. In addition, the Supreme Court has held that Congress may abrogate Eleventh Amendment sovereign immunity without the state's consent. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). However, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." Atascadero State Hosp. v. Scalon, 473 U.S. 234, 243 (1985). The Supreme Court will not infer Congressional abrogation of the Eleventh Amendment. Pennhurst, 465 U.S. at 99.

In the instant case, Plaintiff has not cited to or referred to any state statutes or constitutional provisions wherein Defendants have expressly waived Eleventh Amendment immunity for Plaintiff's claims in this action. Atascadero, 473 U.S. at 238 n.1 (a state

may effectuate a waiver of sovereign immunity by a state statute or constitutional provision). Nevertheless, Plaintiff, citing to Quern v. Jordan, 440 U.S. 332, 342 (1979), suggests that a state's Eleventh Amendment immunity may be impliedly waived and that Defendants have impliedly waived their Eleventh Amendment immunity or consented to suit by "acting outside [their] immunity." However, as previously discussed, a state's waiver of Eleventh Amendment immunity must be unequivocally expressed. Edelman, 415 U.S. at 673. Quern does not, as suggested by Plaintiff, stand for the position that a state's waiver or consent to suit may be implied. Therefore, the Court finds that Plaintiff has failed to establish an effective waiver of sovereign immunity by Defendants.

Next, the Court must consider whether Congress has abrogated the states' sovereign immunity in unmistakable language in 42 U.S.C. § 1983. The Court finds no such unmistakable language in the statute. Furthermore, the Court notes that the Supreme Court has specifically held that Congress did not abrogate Eleventh Amendment immunity when it enacted § 1983. Quern, 440 U.S. at 345.

In addition, the Court notes that the Supreme Court has held that a state is not a "person" for purposes of a claim brought under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 65 (1989). In his response brief, Plaintiff argues that because Defendants raised as one of their grounds for dismissal a lack of jurisdiction over their persons, the states are also to be considered "persons" for purposes of § 1983. Plaintiff, however, has not cited any authority for his position. As the Supreme Court

has specifically held that a state is not a person within the meaning of § 1983, the Court finds that Defendants' Fed. R. Civ. P. 12(b)(2) motions to dismiss for lack of personal jurisdiction do not constitute a waiver of the sovereign immunity afforded by the Eleventh Amendment for Plaintiff's action under § 1983.¹

In his response brief, Plaintiff additionally argues that because he only seeks declaratory and prospective injunctive relief, the Eleventh Amendment does not bar his suit. However, as previously discussed, regardless of the nature of the relief sought against the state, the Eleventh Amendment prohibits suit in federal court against a state without its consent. Pennhurst, 465 U.S. at 100. While the Court recognizes that the Supreme Court has held that a suit may be brought against state officials in their official capacities for prospective injunctive relief, Ex parte Young, 209 U.S. 123, 155-56 (1908), Plaintiff has not brought an action against state officials in their official capacities for prospective injunctive relief. Rather, he has brought an action against the fifty states themselves.

Because Defendants have not unequivocally waived their Eleventh Amendment immunity and Congress has not abrogated that immunity in its enactment of 42 U.S.C. § 1983, the Court finds that Plaintiff's suit against Defendants is barred by the Eleventh Amendment and that Defendants' motions should be granted.

¹ In addition, the Court notes that the Tenth Circuit has held that the filing of a motion to dismiss does not, without more, waive Eleventh Amendment immunity. Mascheroni v. Board of Regents of University of California, 28 F.3d 1554, 1556, 1560 (10th Cir. 1994).

The Court notes that four Defendants, Idaho, Iowa, Virginia and Wyoming, have not filed motions to dismiss. The Court, however, exercises its discretion and raises the Eleventh Amendment bar sua sponte as to these Defendants. Mascheroni v. Board of Regents of University of California, 28 F.3d 1554, 1558-1559 (10th Cir. 1994). For the same reasons above-stated, the Court finds that the Eleventh Amendment precludes Plaintiff's action against these Defendants and dismissal of the action against them is appropriate.

Based upon the foregoing, the motions to dismiss filed by Defendants, Maryland, West Virginia, Oklahoma, Minnesota, Connecticut, Montana, Indiana, Hawaii, New York, Rhode Island, Kansas, Nevada, Texas, California, Arizona, Vermont, Ohio, Colorado, Pennsylvania, Missouri, South Carolina, Kentucky, Massachusetts, North Dakota, Oregon, Alabama, Illinois, North Carolina, Arkansas, Alaska, Maine, Washington, New Mexico, Tennessee, Michigan, New Hampshire, Florida, Georgia, Wisconsin, Nebraska, Louisiana, South Dakota, Utah, New Jersey, Mississippi and Delaware (Docket Entries #325, #328, #329, #330, #331, #333, #336, #340, #341, #343, #346, #350, #354, #355, #361, #362, #365, #366, #367, #369, #370, #373, #375, #376, #378, #379, #380, #382, #386, #387, #390, #393, #394, #397, #399, #401, #402, #403, #404, #407, #412, #419, #425, #435, #438, and #451) are **GRANTED**. The action of Plaintiff, Lindsey K. Springer, against these Defendants and Defendants, Idaho, Iowa, Virginia and Wyoming, is **DISMISSED** for lack of subject matter jurisdiction.

In light of the Court's dismissal of Plaintiff's action, the Court **DECLARES MOOT** Defendant, Louisiana's Motion to Dismiss for Failure to Comply with March 4, 1999, Court Order Directing Plaintiff to Serve Defendants With Amended Complaint on or before March 31, 1999 in Accordance with Applicable Federal Rule Provision (Docket Entry #409) and Plaintiff, Lindsey K. Springer's Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entries #457-1 and #457-2).

ENTERED this 9th day of November, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

JEFFERSON C. EDWARDS,)
)
Petitioner,)
)
vs.)
)
DEBBIE MAHAFFEY, Warden,)
)
Respondent.)

NOV 9 - 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-914-BU (M)

ENTERED ON DOCKET

DATE NOV 10 1999

ORDER OF TRANSFER

Petitioner, a state prisoner appearing pro se, has submitted for filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1), a motion for leave to proceed in forma pauperis (#2), a notice of entry of pro se appearance (#3), an opening brief in support of his petition (#4), and his own affidavit in support of the petition (#5). In his petition, Petitioner raises five (5) propositions of error concerning the execution of his sentences entered in Muskogee County District Court, Case Nos. CRF-94-582 and CRF-96-805.

A prisoner in custody pursuant to the judgment and sentence of a State court which has two or more Federal judicial districts may file a petition for writ of habeas corpus in either the district court for the district wherein such person is in custody or in the district court for the district within which the conviction was entered. 28 U.S.C. § 2241(d). Each of such district courts shall have concurrent jurisdiction over the petition and the district court wherein the petition is filed may, in the exercise of its discretion and in furtherance of justice, transfer the petition to the other district court for hearing and determination. Id.

In this case, Petitioner is incarcerated at Dick Conner Correctional Center, Hominy, Oklahoma, located within the jurisdictional territory of the United States District Court for the Northern District of Oklahoma. 28 U.S.C. § 116(a). However, Petitioner was convicted and sentenced in Muskogee County, Oklahoma, which is located within the territorial jurisdiction of the United States District Court for the Eastern District of Oklahoma. 28 U.S.C. § 116(b). The Court finds that the most convenient forum for judicial review of the issues raised in this petition would be the United States District Court for the Eastern District of Oklahoma where any necessary records concerning Petitioner's sentences would most likely be available. Therefore, in the furtherance of justice, this matter should be transferred to the United States District Court for the Eastern District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that this action, including Petitioner's petition for a writ of habeas corpus and motion for leave to proceed in forma pauperis, is **transferred** to the United States District Court for the Eastern District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

SO ORDERED THIS 9th day of NOVEMBER, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 9 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARGARET VANDEVER, an)
individual, et al.,)
)
Plaintiffs,)
)
vs.)
)
HARTFORD INSURANCE COMPANY,)
OF THE MIDWEST dba ITT)
HARTFORD, a foreign)
corporation,)
)
Defendant.)

Case No. 99-CV-670-BU

ENTERED ON DOCKET
DATE NOV 10 1999

ORDER

This matter comes before the Court upon the Application for Leave to Dismiss Without Prejudice filed by Plaintiffs, Geophysical Financial Consultants, Inc., Purewater, Inc., South Central Energy Corporation, Savage Investment Corporation, Manford Transmission Company, The Arts Foundation, and Roseland Oil and Gas Corporation. Upon due consideration of the unopposed application, the Court finds the same should be granted.

Accordingly, the Application for Leave to Dismiss Without Prejudice filed by Plaintiffs, Geophysical Financial Consultants, Inc., Purewater, Inc., South Central Energy Corporation, Savage Investment Corporation, Manford Transmission Company, The Arts Foundation, and Roseland Oil and Gas Corporation (Docket Entry #) is GRANTED. The action of Plaintiffs, Geophysical Financial Consultants, Inc., Purewater, Inc., South Central Energy Corporation, Savage Investment Corporation, Manford Transmission Company, The Arts Foundation, and Roseland Oil and Gas Corporation, against Defendant, Hartford Insurance Company of the Midwest d/b/a

ITT Hartford, is DISMISSED WITHOUT PREJUDICE.

ENTERED this 9th day of November, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

mm ✓
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 9 - 1999

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

STEVEN R. BARKSDALE,)

Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

) No. 99CV0648BU(M)

) ENTERED ON DOCKET

) **NOV 10 1999**

) DATE _____

DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of November, 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, Steven R. Barksdale, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Steven R. Barksdale, was served with Summons and Complaint on October 1, 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, Steven R. Barksdale, for the principal amounts of \$800.00 and \$2,550.89, plus accrued interests of \$207.41 and \$2,797.06, plus administrative charges in the amount of \$2.00, plus interest

thereafter at the rates of 3% and 9% 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 5.411 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/11f

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

RECEIVED

NOV 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

L.C. COBB,

Plaintiff,

v.

STB Energy Inc.,

Defendant.

Case No. 99-CV-0172H (J)

FILED

ENTERED ON DOCKET

NOV 8 1999

DATE NOV 09 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff L. C. Cobb and Defendant STB Energy, Inc., by and through their attorneys of record, and pursuant to Fed.R.Civ.P. 41(a)(1), stipulate to the dismissal of, and do hereby dismiss the above-captioned action with prejudice, each party to bear its own costs and attorneys' fees.

DATED this 8th day of November, 1999.

R. Scott Scroggs

R. Scott Scroggs
403 South Cheyenne, Suite 1100
Tulsa, OK 74119
(918) 582-9339
(918) 583-1117 fax
ATTORNEYS FOR THE PLAINTIFF

J. Ronald Petrikin

J. Ronald Petrikin, OBA #7092
CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, OK 74103-4344
(918) 586-5711
(918) 586-8547 fax
ATTORNEYS FOR THE DEFENDANT

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

FAITH ANN FOX, and EMILY ANN
O'BANION, Individuals,

Plaintiffs,

v.

MAVERICK RESTAURANT CORP.
d/b/a COTTON PATCH, a Kansas
Corporation, and MARK JENSEN,
an Individual,

Defendants.

Case No. 98CV541-H(M)

DATE

ENTERED ON DOCKET

FILED
NOV 9 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE NOV 09 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to F. R. Civ. P. 41(a)(1)(ii), all parties who have appeared in the above-entitled action hereby stipulate through counsel that this case shall be dismissed with prejudice and without costs or interest. No attorneys' fees are to be assessed.

Respectfully submitted,

FAITH ANN FOX and
EMILY ANN O'BANION,
by their attorneys,



Kevin Buchanan, OBA #10744
530 S.E. Delaware
P.O. Box 1217
Bartlesville, OK 74005
Tel: (918) 336-2520
Fax: (918)336-7709

Dated: November 1st 1999

C&C 142126

Respectfully submitted,

MAVERICK RESTAURANT CORP.,
d/b/a COTTON PATCH, a Kansas by their
corporation,
by its attorneys,



Donald M. Bingham, OBA #794
Ted Sherwood, OBA #10470
502 West 6th Street
Tulsa, OK 74119-1010
Tel: (918) 587-3161
Fax: (918)587-2150

24

C15

Respectfully submitted,



Mark Jensen, Defendant

P.O. Box 308

Boley, OK 74829

Dated: 11/5/99

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

NOV 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DARBY DODSON,

Plaintiff,

vs.

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

Defendant.

Case No. 98-CV-952-J ✓

ENTERED ON DOCKET

DATE NOV 09 1999

ORDER

Defendant has filed a motion to remand this case pursuant to sentence four of 42 U.S.C. § 405(g). Plaintiff has no objection. Defendant's motion is, therefore, **GRANTED**. This action is hereby remanded to the Commissioner for further administrative action.

IT IS SO ORDERED.

Dated this 8th day of November 1999.



Sam A. Joyner
United States Magistrate Judge

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

TWIN CITY FIRE INSURANCE COMPANY,)
a Connecticut corporation,)

Plaintiff,)

vs.)

CHEROKEE NATION, a public entity;)
REX EARL STARR, an individual;)
JENNIE L. BATTLES, an individual;)
LISA FINLEY, an individual; JOE)
BYRD, an individual; MARVIN)
SUMMERFIELD, an individual; ROBIN)
MAYES, an individual; DAVID)
CORNSILK, an individual; and CHARLIE)
ADDINGTON, an individual,)

Defendants.)

DAVID CORNSILK,)

Third Party Plaintiff,)

vs.)

HARTFORD FIRE INSURANCE)
COMPANY, a Connecticut corpora-)
tion; HARTFORD CASUALTY INSURANCE)
COMPANY, a Connecticut corpora-)
tion; STATE FARM FIRE AND CASUALTY)
COMPANY, an Illinois corporation;)
STATE FARM GENERAL INSURANCE)
COMPANY, an Illinois corporation;)
UNITED SERVICES AUTOMOBILE)
ASSOCIATION, a Texas corporation;)
FARMERS INSURANCE COMPANY, a)
Kansas corporation; and NATIONAL)
AMERICAN INSURANCE COMPANY,)
a Nebraska corporation,)

Third Party Defendants.)

ENTERED ON DOCKET

NOV 09 1999

DATE

No. 99-CV-0440H (M) ✓

FILED
NOV 8 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

59

ORDER

NOW on this 5TH day of NOVEMBER, 1999, upon the Stipulation of Dismissal of the Plaintiff and co-Defendant, Charlie Addington, by and through their legal counsel of record, the Court orders the Defendant, Charlie Addington, be dismissed with prejudice.



UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MIRIAM GEORGE, Mother, Next Friend and)
GUARDIAN OF ANTHONY L. WAGONER, an)
Incapacitated Person,)

Plaintiff,)

vs.)

LUFKIN INDUSTRIES, a Texas corporation,)
UTILITY TRI-STATE INC., an Oklahoma)
corporation,)

Defendants.)

No. 99-CV-714-B

ENTERED ON DOCKET

DATE NOV 09 1999

ORDER

Before the Court is the Motion to Remand and Request for Attorney Fees filed by plaintiff, Miriam George ("George"), the mother and guardian of Anthony L. Wagoner, and resident of Ottawa County, Oklahoma (Docket No. 5). On July 6, 1999, George filed suit in Oklahoma District Court for Rogers County against defendants Lufkin Industries ("Lufkin"), a Texas corporation, and Utility Tri-State, Inc. ("Utility"), an Oklahoma corporation, for injuries her son sustained as a result of an alleged trailer malfunction which caused her son to lose control of the tractor he was driving on May 20, 1998. In her petition, George brings a claim against Lufkin for manufacturer's products liability based on a "defective condition unreasonably dangerous" in the trailer, and against Utility for negligence in failing to discover "defects in the trailer that caused or contributed to the cause of the trailer's malfunction" when it inspected the

trailer on April 13, 1998.

Defendant Lufkin removed the action on August 25, 1999 based on diversity jurisdiction. Lufkin contends George cannot state a negligence claim against Utility, an Oklahoma corporation, and therefore Utility was fraudulently joined to defeat removal. Lufkin bases this contention on a statement plaintiff's counsel made to Lufkin's counsel that the alleged defect is a latent metallurgical defect in the "fifth wheel" of the truck and Utility was not required under the State of Oklahoma Official Motor Vehicle Emission and Mechanical Inspection Rules and Regulations ("Inspection Rules") to inspect the "fifth wheel." Lufkin attaches a copy of the Inspection Rules and Inspection Stickers on the subject truck and trailer, as well as a copy of its First Set of Interrogatories. There are, however, no responses to the interrogatories.

Plaintiff George replies that her negligence claim against Utility includes whether Utility could have discovered stress cracks during its inspection and whether Utility's failure to discover such breached its common law standard of care; therefore, she has stated a claim against Utility in the petition.

A claim that a non-diverse party has been fraudulently joined to defeat removal must be asserted with particularity and supported by clear and convincing evidence; this burden on the party seeking removal is a heavy one. *McLeod v. Cities Service Gas Co.*, 233 F.2d 242, 246 (10th Cir. 1956); *Board of County Commissioners v. Atlantic Fidelity, Inc.*, 930 F.Supp. 499, 500 (D.Colo. 1996); *see also* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 3d §3723 (1998) ("[A] party will be considered fraudulently joined - and removal will be permitted - when the plaintiff has not or cannot state a claim for relief."). "[T]he decided cases make it clear that in general there need be only a possibility that a right to relief exists under the

governing law to avoid a finding of fraudulent joinder by the court" Wright, Miller & Cooper, §3723 at 637-38. "One court has framed the district judge's inquiry as follows: 'the federal court must engage in an act of prediction: is there any reasonable possibility that a state court would rule against the non-diverse defendant?'" *Id.* at 637 (quoting *Poulos v. Naas Foods, Inc.* 959 F.2d 69 (7th Cir. 1992)).

From the record before the Court on removal, the Court cannot find there is no reasonable possibility that the state court would rule against Utility on plaintiff's negligence claim. Accordingly, the Court finds defendants have failed to sustain their heavy burden of establishing plaintiff's fraudulent joinder of Utility and grants plaintiff's motion for remand. (Docket No. 5) The Court, however, denies plaintiff's request for attorney fees.

IT IS THEREFORE ORDERED, THIS 8th DAY OF NOVEMBER, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

MT

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA NOV 8 1999

SHARON KAY BURKE,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN HOME PRODUCTS CORPORATION;)
 A.H. ROBINS COMPANY, INC.; GATE)
 PHARMACEUTICALS, a Division of Teva)
 Pharmaceuticals, USA, inc.; PAMELA S. HITI, M.D.,)
 Individually and d/b/a OKLAHOMA CENTER FOR)
 WEIGHT MANAGEMENT,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-794-E

ENTERED ON DOCKET

DATE NOV 09 1999

Removed from the
District Court of
Tulsa County
No. C-99-274

STIPULATION TO DISMISS

COME NOW Plaintiff Sharon Kay Burke and Defendant American Home Products Corporation¹, and stipulate to dismiss this action, without prejudice. The parties further agree to bear their own legal expenses associated with this action.

Respectfully submitted,

SNEED LANG, P.C.

By: Brian T. Inbody
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Brian T. Inbody, OBA #17188
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ATTORNEYS FOR PLAINTIFF

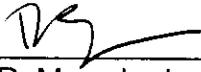
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¹On August 3, 1998, A.H. Robins Company, Inc. ("Robins") was merged into AHPC and ceased to exist as a separate entity. As a result, AHPC will respond to all allegations directed to Robins.

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**PHILLIPS McFALL McCAFFREY
McVAY & MURRAH, P.C.**

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and

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OF COUNSEL:

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AND

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AND

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

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AND

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

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CENTER FOR WEIGHT MANAGEMENT**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)

v. . 99CV#642B(J)

JOHN C. SIMMONS, A/K/A
SIMMONS, A/K/A JOHN
SIMMONS,

Defendant.

QOP

ENTERED ON DOCKET
DATE NOV 09 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 8th day of
Nov, 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, John C. Simmons, a/k/a John Simmons, a/k/a John
Charles Simmons, appearing not.

The Court being fully advised and having examined the court
file finds that Defendant, John C. Simmons, a/k/a John Simmons,
a/k/a John Charles Simmons, filed his Waiver of Service of Summons
herein on September 27, 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.

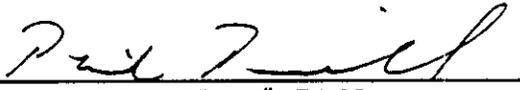
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the
Plaintiff have and recover judgment against the Defendant, John C.
Simmons, a/k/a John Simmons, a/k/a John Charles Simmons, for the

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principal amount of \$5,212.00, plus accrued interest of \$5,197.31, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 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

FILED
NOV 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DARBY DODSON,

Plaintiff

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant

CASE NO. 98-CV-952-J ✓

ENTERED ON DOCKET

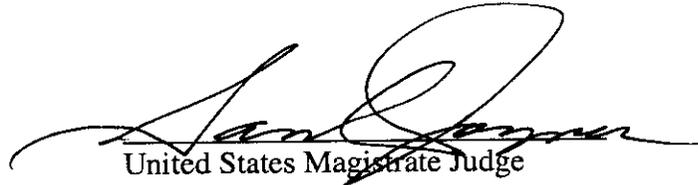
DATE NOV 09 1999

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon an Agreed Motion to Remand for Further Administrative Proceedings. An Order remanding the case to the Commissioner has been entered.

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

THUS DONE AND SIGNED on this 8 day of NOVEMBER 1999.


United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE NOV 09 1999

RICHARD J. SPICER,

Plaintiff,

vs.

UPCO, INC. an Oklahoma corporation,

Defendant.

Case No. 99-CV-0349H (M)

FILED

NOV 8 1999 SA

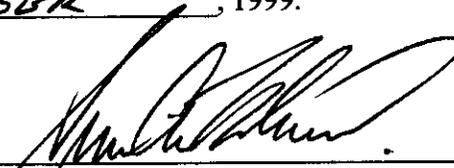
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

This matter comes on before me, the undersigned Judge, upon the Joint Application of the parties herein for an Order Dismissing this action. The Court finds that this matter should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the above-styled cause of action is hereby dismissed with prejudice, without cost to either party.

DATED this 5TH day of NOVEMBER, 1999.


UNITED STATES DISTRICT JUDGE

John F. McConnell, Jr. #5915
Pray, Walker, Jackman, Williamson & Marlar
900 Oneok Plaza
100 West 5th Street
Tulsa, Oklahoma 74103
(918) 581-5500
Attorneys for Defendant

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jfm/upco a&o4dismissal

FILED

NOV 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

PALM COMMODITIES)
INTERNATIONAL, INC.,)

Plaintiff,)

vs.)

ASEC MANUFACTURING, a Delaware)
General Partnership,)

Defendant.)

No. 98-C-738-B(M) ✓

ENTERED ON DOCKET

DATE NOV 08 1999

ORDER

Before the Court for decision is Defendant's Motion For Summary Judgment (Docket #21), Plaintiff's Motion to Strike and Motion in Limine To Exclude Evidence of Compromise Negotiations (Docket #40), and Plaintiff's Motion for Summary Judgment (Docket # 47), and the Court, being fully advised, finds as follows:

Background

Defendant ASEC ("ASEC") is part of Delphi-Energy, which is an unincorporated business unit of Delphi Automotive Systems, LLC. ASEC is in the business of manufacturing and supplying certain automotive catalysts for use in vehicles made by General Motors Corporation ("GM") and other vehicle manufacturers. In 1995, ASEC sought to outsource its

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supply of NiCe powder.¹

On February 12, 1997, ASEC and Palm Commodities ("Palm"), a multi-faceted company engaged in nickel and cobalt chemical manufacture, signed a Letter Agreement in which Palm was to be ASEC's sole source of NiCe powder.² ASEC terminated the Letter Agreement in November, 1997. Palm filed suit seeking compensatory and punitive damages under causes of action for breach of contract and tort.

ASEC seeks summary judgment claiming the Court should dismiss Palm's tort claims because this is a commercial transaction governed only by the law of contracts, that the Letter Agreement's entireties and merger clauses prevent Palm from asserting tort theories, ASEC terminated the contract in strict conformity with its terms, that Palm's potential recovery is limited under the contract to \$695,000, Palm cannot recover lost profits under the facts of this case as a matter of law and Palm cannot recover punitive damages under the facts of this case.

Palm seeks summary judgment asserting it is entitled to a finding of liability against ASEC on its fraud, breach of fiduciary duty and contract claims and also asks the Court to find that damages are not limited to \$695, 000.³

Summary Judgment Standard

-
- ¹ NiCe powder is a mixture of nickel and cerium. The powder is "wash coated" onto a ceramic honeycomb substrate (along with other chemicals) to make a catalyst. The catalyst is then placed inside a can which is installed on new vehicles. The NiCe powder primarily acts as a pollution or emissions suppressant.
 - ² Palm's promotional literature states it is active in the metal finishing industry, but also supplies products for battery, electronics and porcelain industries.
 - ³ Many of the issues raised by Palm are addressed by ASEC's motion and the Court will therefore consider these together.

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).

Undisputed Material Facts

The Court notes that ASEC submitted 12 facts it alleged were undisputed in its original motion to which Palm responded by unconditionally admitting only 2 and by adding 24 of its own "material or disputed facts." Palm submitted 22 facts it alleged were undisputed in its motion to which ASEC responded, admitting none unconditionally and adding 2 of its own undisputed material facts. After laborious consideration of the allegations and voluminous supporting evidentiary material, the Court finds the following compilation of 10 facts are the undisputed material facts on which the parties agree and which the record supports, some of which are merely recitations of provisions within the original Letter Agreement between the parties:

1. Palm is a multi-national concern with annual sales in the millions of dollars.
2. Palm entered a contract to supply NiCe powder to ASEC which was executed by Palm on February 12, 1997 (hereafter "Letter Agreement"). There were negotiations and communications between the parties beginning in 1995.
3. The Letter Agreement states:
 7. **Buyer's Termination Right.** Buyer shall have the right, upon thirty (30) days written notice to Seller, to terminate this Agreement for any reason, in its sole discretion, at any time 180 days after the Commercial Production date, upon

payment of the Termination Fee described below. The Termination Fee shall not apply or be payable by buyer in the event that Buyer terminates this Agreement for one of the reasons set forth in the "Additional Termination Rights" of Paragraph 8 below. The "Termination Fee" shall be calculated as: (Emphasis original)

$$\$695,000 \times (377,000 \text{ minus the number of kilograms of metal oxide contained in the Powder purchased by Buyer}) \text{ [divided by]} 377,000.$$

For example, if Buyer terminates this Agreement after 250,000 kilograms of metal oxide contained in the Powder have been purchased by Buyer, the Termination Fee would be calculated as:

$$\$695,000 \times (377,000 - 250,000) \text{ [divided by]} 377,000 = \$234,124.65$$

4. The Letter Agreement further states:

14. **Entirety; No Implied Waiver.** This Agreement contains the entire understanding of Seller and Buyer with respect to the subject matter hereof and supercedes all prior written or oral negotiations, agreements, and understandings. In the event that the terms of any purchase order issued pursuant to this Agreement conflict with the terms hereof, the terms of this Agreement shall govern. The failure or delay of either party at any time to require the performance of the other party shall in no way affect the right to require such performance at any time thereafter, nor shall the waiver of either party of a breach of any provision of this Agreement constitute a waiver of any succeeding breach of the same of any provision of this Agreement.

5. Palm agreed that ASEC could terminate the Letter Agreement upon the happening or non-happening of certain events. The Letter Agreement states:

8. **Additional Termination Rights.** If (i) any Powder delivered by Seller to Buyer under this Agreement does not meet the Powder Specifications, and Seller does not replace such nonconforming Powder with Powder that does meet the Powder Specification within thirty (30) days after written notice thereof by Buyer to

Seller, or (ii) the Commercial Production Date does not occur on or before 180 days after the Effective Date of this Agreement (or such later date as may be determined in accordance with Section 1 of this Agreement), or (iii) the First Sample described in Section 1 above is not delivered to Buyer within 120 days after the Effective Date of this Agreement or (iv) the Second Sample described in Section 1 is not delivered to Buyer within 14 days from notice of Buyer to Seller that the first sample failed to conform to the Powder Specifications or the Second Sample does not conform to the Powder Specifications or (v) Seller cannot deliver Powder conforming to the Powder Specifications to Buyer in Commercial Quantities, then, in any such circumstance, Buyer shall have the right, in Buyer's sole discretion, to immediately terminate this Agreement by providing written notice thereof to Seller.

Palm denies any of the contingencies were triggered or, in the alternative, asserts they were waived.

6. Palm delivered the first commercial sample of NiCe powder on or about June 5, 1997.
7. The second commercial sample of NiCe was delivered on July 22, 1997.
8. ASEC terminated the contract with Palm on November 13, 1997.
9. Palm has not sold NiCe powder to anyone before or after the Letter Agreement with ASEC.
10. ASEC continues to manufacture NiCe powder for use in certain catalytic converters.

Argument and Authority

ASEC first asserts the Court should dismiss Palm's tort claims because the law of contracts governs the commercial transaction. ASEC states Palm has attempted to transform a simple contract dispute into a case involving multiple tort theories, arguing that this is allowed

primarily in products liability cases where the protection of a third party is at stake.

Palm responds that its tort claims arise from fraud, fraudulent inducement, misrepresentation or other culpable conduct on behalf of ASEC and that these theories coexist with the contract theories raised. Palm asserts this was a joint venture and as such, ASEC owed it a fiduciary duty.

In reply, ASEC states Palm cannot establish a joint venture as a matter of law and that the allegations of fraud are insufficient to survive this motion.

Both parties submit the case of *Oklahoma Co. v. O'Neil*, 440 P.2d 978, 984 (Okla. 1968), an oil and gas investment case, in support of their opposing positions on the issue of whether the relationship between them was a joint venture or partnership. The three elements which must be established are: there must be a joint interest in the property or project involved; an agreement, either express or implied, to share in the profits and losses; and, acts or conduct reflecting cooperation in the project.

The facts in this case do not support the second element. The undisputed facts in this case establish that Palm anticipated earning profits from the eventual development and sale of the NiCe powder to ASEC and although ASEC worked with Palm to allow Palm to develop the capability to produce the powder, there was no express or implied agreement that the parties were to share in profits if that occurred and certainly no proof that they intended to share losses. The court in *O'Neil, supra.*, acknowledged, at page 984, that persons with "visions of sharing in unusual profits" may produce their checkbooks without any discussion of the consequences which result if those profits instead turn to losses. The facts of this case however do not indicate Palm was drawn into the enterprise by visions of windfall profits to be split based upon ASEC's

ultimate success as occurred in *O'Neil*. Although Palm undoubtedly entered into the relationship with the intent to make reasonable business profits-the aim of most business ventures- its expectation was to realize profits only from its efforts and not those of ASEC.

Palm is in the business of manufacturing chemicals and was aware of general risks involved in the industry, including that new technology may make their investments obsolete or unnecessary. The termination provisions of the Letter Agreement appear on their face to allow Palm to recover the costs it elected to incur in going forward with production plans even if there is a cancellation of the agreement by ASEC. Further, the amount to be paid by ASEC to Palm was not tied to the profits ASEC would realize by its use of the product produced by Palm but on a specific formulae. See *Boren v. Scott*, 928 P.2d 327 (Okla. Ct. App 1996). Accordingly, there is no basis for finding this was a joint venture.

Nevertheless, the fact that the Court finds this was not a joint venture does not preclude Palm from pursuing tort claims in addition to its breach of contract claims. *Feidler v. McKea Corp.*, 605 F.2d 542 (10th Cir. 1979). Palm is simply precluded from asserting its claims from the vantage point of a fiduciary relationship.

The Court finds numerous fact questions have been raised, including but not limited to, what representations were made by the parties, whether it was reasonable to rely upon those representations, whether terms of the written Letter Agreement were waived by the parties and whether ASEC properly terminated the Agreement, to preclude granting of summary judgment by this Court on the issue of tort liability.

ASEC urges damages should be limited to the amount specified in the contract, however, for the same reasons that this case may go forward under tort theories, the damages, including

punitive damages (assuming sufficient foundation to submit to the jury), will be determined according to the theory the jury determines to have been proved.

ASEC urges damages are not recoverable as a matter of law for lost profits because Palm was engaging in a new business. Both parties cite to *Florafax Inter. V. GTE Market Resources*, 933 P.2d 282 (Okla. 1987) in support of opposite conclusions.

The facts of that case are that Florafax sued GTE to recover lost profits when Bellerose, with which Florafax had a collateral contract, terminated the collateral contract as a direct and attributable result of the breached contract between Florafax and GTE.

The court allowed Florafax to go forward with evidence of lost profits, finding that the facts were sufficiently close to be analogized to the established business situation wherein lost profits may be recovered. The primary litigants had a clause in their contract which expressly reflected the parties' contemplation of the recovery of lost profits by Florafax should GTE cease to perform its duties and obligations during the term of the contract. Further, Bellerose had a tract record of profits prior to the contract it entered into with Florafax in the same business. Bellerose continued in that business after severing its ties with Florafax and was able to show increased business and profits after the severance. A Bellerose officer testified the business relationship with Florafax would have continued except for the breach by GTE. The court found there was sufficient evidence from which the jury could determine loss of future profits.⁴

⁴This Court notes there was a 60 day termination clause in the agreement in *Florafax* similar to the termination clause in the case at bar, however, the court did not limit damages to that time frame where there was evidence presented that the parties' expectations were to continue the contract had a third party, GTE, not breached its contract with Florafax. As a practical matter, the court did not allow GTE to benefit from the 60 day termination clause between Florafax and Bellerose when GTE's breach was the reason the clause was invoked.

Loss of anticipated profits must be clearly ascertainable in both their nature and origin, must be the natural and proximate consequence of the breach and not speculative and contingent, and must have been within the contemplation of the parties at the time the contract was entered into. New businesses have a more difficult time meeting these standards. In this case, however, Palm has presented evidence that it can present "an expert analysis of lost profits, including a breakdown of damages," similar to that allowed in *Cook v. Oklahoma Board of Public Affairs*, 736 P.2d 140 (Okla. 1987). The jury will determine whether Palm is able to establish these damages and in what amount as well as whether such damages were within the contemplation of the parties at the time of contracting. *Home-Stake Production Company v. Minnis*, 443 P.2d 91, 103 (Okla. 1968). As such, it is not subject to summary adjudication.

Palm's Motion for Summary Judgment mirrors much of the motion filed by ASEC. The Court need therefore only address newly-raised issues. Palm asserts it is entitled to judgment as a matter of law and a finding that ASEC is liable on Palm's contract claim because ASEC improperly rejected the submitted sample under the principles of equitable estoppel.

In Oklahoma, the necessary elements to establish equitable estoppel are (1) a false representation or concealment of facts (2) made with actual or constructive knowledge of the fact (3) to a person without knowledge of, or the means of knowing, those facts (4) with the intent it be acted upon, and (5) the person to whom it was made acted in reliance upon it to its detriment. *Indiana National Bank v. State Department of Human Resources*, 857 P.2d 53, 64 (Okla. 1993). The essential element of estoppel is not intent, rather it is that a party act in justifiable reliance upon the party's conduct who is allegedly estopped. *Id.*

Based upon the Court's finding that fact issues exist as to whether any false

representations or concealment of facts occurred in this case, Plaintiff's Motion for Summary Judgment on its claim of equitable estoppel is also denied.

The Court next addresses the Plaintiff's Motion to Strike and Motion in Limine which seeks to exclude references and exhibits regarding statements made by the parties during compromise settlement negotiations from the Court's consideration of summary judgment and from the trial.

ASEC responds that the evidence is admissible under two theories. First, ASEC states Palm waived its right to object to the admissibility of ASEC's offer to accept and Palm's refusal to provide another commercial sample of NiCe powder by failing to object when witnesses were questioned regarding this during depositions. The Court finds that this evidence does not fall under any category of evidence to which objection must be raised during depositions. Palm's presentation of objection at this point and in the form of a motion in limine in addition to a motion to strike is appropriate. *See Damaj v. Farmers Ins. Co. Inc.*, 164 F.R.D. 559, 561 (N.D. Okla. 1995).

ASEC next states the evidence is admissible for "other purposes" listed as exceptions to Federal Rule of Evidence 408. In this case, ASEC urges it is admissible to show that ASEC acted in good faith in terminating the contract and to show the lack of basis for punitive damages. ASEC cites to two cases in support of its position which this Court does not find applicable. *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987) involved an issue of whether evidence of prior settlements by Phillips with other landholders who had brought prior similar claims should have been admitted. The allegations raised were similar enough to negate Phillips' claim of mistake in being on the wrong property. The court allowed the evidence where it

effectively established a prior course of actionable conduct by Phillips which continued in spite of the prior claims and settlements.

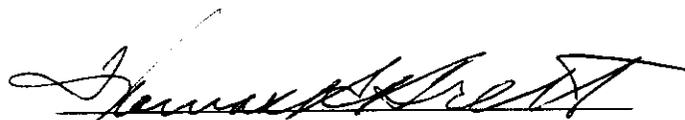
Wegerer v. First Commodity Corp. of Boston, 744 F.2d 719 (10th Cir. 1984) also involves a situation where the settlement being offered is between defendant and a third party not a party to the suit before the court, in that case a governmental agency. The court allowed the settlement agreement as evidence that defendant had continued unacceptable conduct of which it was on notice.

In the case at bar, ASEC seeks to introduce settlement negotiations between these parties shortly after filing of this action in which ASEC offered to accept one more test sample for the purpose of establishing it terminated the agreement in good faith. The Court notes the offer was contingent upon Palm dismissing with prejudice and did not solve the essential disagreement as to what constituted an acceptable sample. As such, a fact finder might well conclude the opposite of what ASEC intends were the Court to allow this evidence. In any event, the Court concludes it should follow the more prudent course referenced in *Bradbury* that it is better to exclude such evidence. Palm's Motion is *Limine* should therefore be granted. The Motion to Strike is moot by virtue of the numerous fact issues this Court finds must be determined by the fact finder, which conclusion was reached by this Court without consideration of the evidence sought to be excluded.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion For Summary Judgment (Docket #21) is denied in part and granted insofar as an adjudication regarding the existence of a joint venture, Plaintiff's Motion to Strike and Motion in *Limine* To Exclude Evidence of Compromise Negotiations (Docket #40) is granted in part and

moot in part as set forth herein, and Plaintiff's Motion for Summary Judgment (Docket # 47) is denied.

DATED THIS 5th DAY OF NOVEMBER, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

THE CITY OF VINITA, OKLAHOMA,)

Plaintiff,)

vs.)

GARON PRODUCTS, INC., and)
LAMM CONSTRUCTION COMPANY,)

Defendants,)

GARON PRODUCTS, INC.,)

Defendant/Third-Party)
Plaintiff,)

v.)

KIM CONSTRUCTION COMPANY, INC.,)

Defendant/Third-Party)
Defendant.)

FILED

NOV 4 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-296-BU(M) ✓

ENTERED ON DOCKET

NOV 08 1999

DATE _____

ADMINISTRATIVE CLOSING ORDER

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

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

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dismissed with prejudice.

Entered this 4^r day of November, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 4 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VATANA PHAISAL ENGINEERING
COMPANY, LTD., a corporation,

Plaintiff,

vs.

BORN, INC., a corporation,
SIDNEY BORN, an individual,
and HAROLD BORN, an
individual,

Defendants.

Case No. 98-CV-323-BU ✓

ENTERED ON DOCKET

DATE NOV 08 1999

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 4 day of November, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

91

FILED

NOV 1 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

LAZARUS LONG,)
)
 Plaintiff,)
 vs.)
)
 USA Ex Rel, Dept. of Justice)
 STEPHEN LEWIS; U.S. Attorney,)
)
 Defendants.)

Case No. 99-CV-511-BU(J) ✓

ENTERED ON DOCKET

DATE NOV 08 1999

ORDER

This matter comes before the Court upon Defendant's Motion to Dismiss Plaintiff's Amended Complaint. Plaintiff has responded to the motion and upon due consideration, the Court makes its determination.

In its Amended Complaint, Plaintiff seeks a writ of mandamus to compel the United States Attorney for the Northern District of Oklahoma to intervene on his behalf in the case of Securities and Exchange Commission v. Lazuras Long (a/k/a Howard Turney) individually and doing business as New Utopia, Case No. 99-CV-297-BU(M). Plaintiff claims that it is the duty of the United States Attorney to intervene in cases where a citizen's rights are being violated in "meritless bureaucratic persecution." Plaintiff requests that the Court compel the United States Attorney to intervene in the above-referenced action and file the appropriate motions to dismiss the alleged non-meritorious action.

Defendant, in its motion, seeks to dismiss Plaintiff's Amended Complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., and Rule 12(b)(1), Fed. R. Civ. P., on the basis that the Amended Complaint fails to state a claim for which relief may be granted and fails to

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give the Court subject matter jurisdiction. In response, Plaintiff contends that the Court has jurisdiction to grant the mandamus relief. Plaintiff contends that jurisdiction over this case exists pursuant 28 U.S.C. § 1331 and § 1361. He also contends that the Court has jurisdiction over this case under 28 C.F.R. § 77.4 and 28 C.F.R. § 547.2.

Upon review, the Court finds no basis for subject matter jurisdiction over this matter. Section 1361 of Title 28 of the United States Code grants district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of the defendant to do the action in question and no other adequate remedy available. Johnson v. Rogers, 917 F.2d 1283, 1285 (10th Cir. 1990). Mandamus relief is appropriate only when the person seeking such relief can show a duty owed to him by the government official to whom the writ is directed which is ministerial, clearly defined and peremptory. Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown, 656 F.2d 564, 566 (10th Cir. 1981); Wilbur v. United States, 281 U.S. 206, 218-219 (1930) ("Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a position command, it is regarded as being so far ministerial that its performance may be compelled by mandamus.") In the instant case, Plaintiff has failed to establish a duty on the part of the

United States Attorney to intervene in a private civil action and defend Plaintiff against the claims alleged by the SEC. Sections 516 and 547 of Title 28 of the United States Code set forth the duties of representation by the United States Attorney. Neither statute establishes a duty on the part of the United States Attorney to represent a private citizen in a private lawsuit.

In his response, Plaintiff argues that the SEC's attorneys have committed misconduct in the nature of pretrial publicity. Plaintiff alleges that this misconduct has prejudiced the potential jury pool in all venues and has deprived him of due process. Plaintiff contends that such misconduct is prohibited by 28 C.F.R. § 77.4 (1998) and that under 28 C.F.R. § 77.11 (1998), the Attorney General has exclusive enforcement of the violation of 28 C.F.R. § 77.4. Upon review, however, the Court finds that § 77.4 does not apply to the allegations set forth in Plaintiff's Amended Complaint. Moreover, the Court finds that § 77.11 does not establish a duty on the part of the United States Attorney for the Northern District of Oklahoma to intervene in the SEC action and defend Plaintiff. The Court further notes that 28 U.S.C. § 77.11(b) (1998) provides that a violation of the regulations by an attorney for the government does not provide a basis for dismissal of civil proceedings. Therefore, the Court finds that 28 C.F.R. § 77.4 (1998) and 28 C.F.R. § 77.11 (1998) do not provide a ministerial, clearly defined and peremptory duty on the part of Defendant to defend Plaintiff in the SEC action. Because Plaintiff has failed to demonstrate a duty owed to him by the United States

Attorney which is ministerial, clearly defined and peremptory, the Court finds that Plaintiff cannot invoke § 1361 as a basis of jurisdiction for this action.

Plaintiff seeks to invoke subject matter jurisdiction pursuant to § 1331, claiming that the Court has jurisdiction to review agency action. The Court, however, finds that Plaintiff has not demonstrated that the United States Attorney for the Northern District of Oklahoma has taken any agency action against him which must be reviewed. Through this lawsuit, Plaintiff is seeking the United States Attorney to intervene in the lawsuit filed by the SEC against him. There are no allegations that the United States Attorney for the Northern District of Oklahoma has taken any action which requires review on the part of this Court. The Court finds that the cases cited by Plaintiff are not applicable. Therefore, the Court finds no jurisdiction under § 1331 based upon a review of agency action.

Finally, Plaintiff seeks to invoke subject matter jurisdiction pursuant to 28 C.F.R. § 547.2. The Court, however, notes that such regulation does not exist. Upon review, it appears that Plaintiff is trying to rely upon 28 U.S.C. § 547, which sets forth the duties of representation of each United States attorney. Subsection 2 of § 547 provides that each United States attorney shall "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned." The Court, however, finds that subsection 2 does not apply to this action as the allegations in Plaintiff's Amended Complaint do not establish that

the United States has a concern in the SEC action. As previously stated, the SEC action is a private action against private person. There is no clear governmental interest in such suit which would require the United States Attorney for the Northern District of Oklahoma to defend the lawsuit on Plaintiff's behalf. The Court therefore finds that § 547 does not provide a basis for the exercise of subject matter jurisdiction over this case.

With his response, Plaintiff has attached other materials which he contends supports Defendant's intervention into the SEC lawsuit. The Court has reviewed those materials and finds that such materials do not support subject matter jurisdiction over Plaintiff's action.

In sum, the Court finds no basis for the exercise of subject matter jurisdiction over Plaintiff's Amended Complaint. Therefore, the Court finds that Defendant's motion should be granted.

Accordingly, Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Docket Entry #15) is GRANTED. This action is DISMISSED.

Entered this 4^m day of November, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
v.)
)
JOHN E. PIVONKA;)
EUNICE PIVONKA;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE NOV 08 1999

F I L E D

NOV 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 99-CV-0334-H (J) ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5TH day of November, 1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, John E. Pivonka and Eunice Pivonka, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, John E. Pivonka and Eunice Pivonka, were served by a United States Deputy Marshal with Summons and Complaint on July 1, 1999.

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It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on May 27, 1999; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on May 19, 1999; and that Defendants, John E. Pivonka and Eunice Pivonka, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Three (3), Block One (1), ROLLING HILLS THIRD ADDITION, an Addition in the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 4, 1987, Randy L. Dykes, Sheryl Dykes, Michael M. Smith and Paula Rae Smith executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$30,150.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Randy L. Dykes and Sheryl Dykes, husband and wife, and Michael M. Smith and Paula Rae Smith, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated

May 4, 1987, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on May 6, 1987, in Book 5021, Page 1180, in the records of Tulsa County, Oklahoma.

The Court further finds that John E. Pivonka and Eunice Pivonka are the current owners of the above-described real property as evidenced by General Warranty Deed, dated May 30, 1990, and recorded on May 31, 1990, in Book 5256, Page 824 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, John E. Pivonka and Eunice Pivonka, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, John E. Pivonka and Eunice Pivonka, are indebted to the Plaintiff in the principal sum of \$26,364.25, plus administrative charges in the amount of \$215.00, plus penalty charges in the amount of \$24.16, plus accrued interest in the amount of \$1,597.64 as of August 14, 1998, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$183.68 (\$10.00 fee for recording Notice of Lis Pendens and \$173.68 fee for serving summons and complaint).

The Court further finds that the Defendants, John E. Pivonka and Eunice Pivonka, are in default and therefore have no right, title or interest in the subject property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of

this action in the amount of \$107.33 together with interest and penalty according to law, by virtue of Tax Warrant No. ITI 1986 012042 00 dated October 2, 1986, and recorded on October 24, 1986, in Book 4978, Page 793 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendants, John E. Pivonka and Eunice Pivonka, in the principal sum of \$26,364.25, plus administrative charges in the amount of \$215.00, plus penalty charges in the amount of \$24.16, plus accrued interest in the amount of \$1,597.64 as of August 14, 1998, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.411 percent per annum until paid, plus the costs of this action in the amount of \$183.68 (\$10.00 fee for recording Notice of Lis Pendens and \$173.68 fee for serving summons and complaint), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover in rem judgment in the amount of \$107.33 together with interest and penalty

according to law, by virtue of Tax Warrant, No. ITI 1986 012042 00 dated October 2, 1986, and recorded on October 24, 1986, in Book 4978, Page 793 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, John E. Pivonka, Eunice Pivonka, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, John E. Pivonka and Eunice Pivonka, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

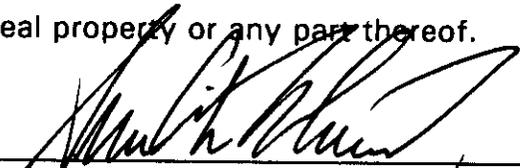
In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the in rem judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission.

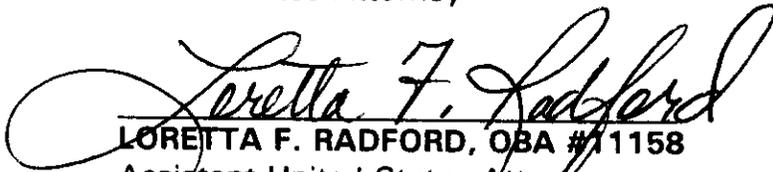
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

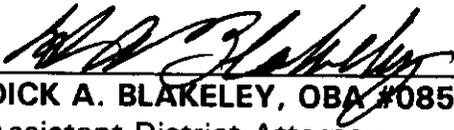

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



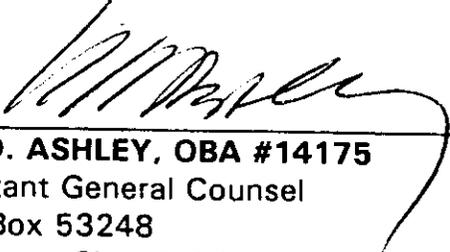
LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #0852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 99-CV-0334-H (J) (Pivonka)

LFR:css



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission
A. 99-542

Judgment of Foreclosure
Case No. 99-CV-0334-H (J) (Pivonka)

LFR:css

FILED

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

NOV 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JEREMI W. PENRICE,)
)
 Defendant.)

Case No. 99CV0859K (J)

ENTERED ON DOCKET
DATE NOV 08 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 2nd day of November, 1999.

UNITED STATES OF AMERICA

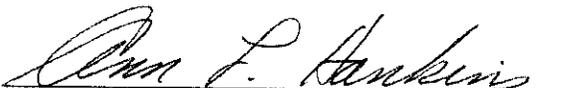
Stephen C. Lewis
United States Attorney



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 4th day of November, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Jeremi W. Penrice, 319 Robin Ave., Bartlesville, OK 74006.



Ann L. Hankins
Financial Litigation Agent

CIT

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

F I L E D

NOV 3 - 1999 *JA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN DOE 1 and JOHN DOE 2,)
)
Plaintiffs,)
)
v.)
)
RYAN WHITE IIIB PROGRAM; DEBBIE)
STARNES, as Clinical and Administrative)
Consultant; MIDGE ELLIOT, Clinical and)
Administrative Consultant; LISA RIGGS;)
DR. THOMAS STEES,)
)
Defendants.)

Case No. 97-CV-446-H ✓

ENTERED ON DOCKET
DATE NOV 05 1999

ORDER

This matter comes before the Court pursuant to the first Motion for Summary Judgment of Defendants Midge Elliot and Debbie Starnes, filed August 31, 1998 (Docket # 65) and the second Motion for Summary Judgment And/Or Motion to Dismiss of Defendants Midge Elliot and Debbie Starnes, filed July 19, 1999 (Docket # 96). In their first motion for summary judgment, Defendants allege *inter alia* that the record in this case does not support Plaintiff's cause of action for intentional infliction of emotional distress. In their second motion, Defendants seek summary judgment, alleging that Plaintiff's cause of action does not survive Plaintiff's death. Alternatively, Defendants move to dismiss on the basis that Plaintiff has not properly substituted a party for the deceased pursuant to Fed. R. Civ. P. 25(a).

A hearing was held in this matter on October 8, 1999. Subsequently, by order dated October 19, 1999, the Court granted Plaintiff's motion to substitute party (Docket # 99), filed September 2, 1999. Accordingly, Defendants' alternative motion to dismiss is moot.

I

For the purposes of the Defendants' second motion for summary judgment, the following facts are uncontroverted:

1. Plaintiff John Doe I ("Doe"), now deceased, filed the present case on May 7, 1997.
2. Doe claimed that Defendants violated his constitutionally protected right of privacy associated with his medical/HIV status. Doe sought recovery for this alleged violation under 42 U.S.C. § 1983. Doe further alleged a statutory violation of 63 O.S. § 1-502.2, a negligence and negligence per se cause of action for violation of the same statute, and a cause of action for intentional infliction of emotional distress.
3. On October 23, 1998, Doe's attorney informed the Court by first class mail that Doe had died.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an

otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

In their second motion for summary judgment, Defendants Elliot and Starnes seek summary judgment on each of Plaintiff's claims brought pursuant to 42 U.S.C. § 1983 and 63 O.S. § 1-502.2, on the grounds that Plaintiff's causes of action do not survive his death.

Plaintiff's complaint alleged that Defendants breached his constitutionally protected right of privacy by failing to protect the confidentiality of his medical information, in violation of 42 U.S.C. § 1983 and 63 O.S. § 1-502.2. Plaintiff also alleged causes of action for negligence and negligence per se stemming from the alleged violation of 63 O.S. § 1-502.2.

Survival of a federal cause of action under 42 U.S.C. § 1983 is determined by looking to state law. See Robertson v. Wegmann, 436 U.S. 584, 588 (1978). Oklahoma has two state survival statutes, which must be read together. 12 O.S. § 1051, the primary survival statute, reads as follows:

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

12 O.S. § 1052, the companion statute, reads as follows:

No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander or malicious prosecution, which shall abate by the death of the defendant. An action for libel slander or malicious prosecution shall not abate after a jury verdict or a decision by the court where the trial is by the court, unless a new trial is ordered.

Notwithstanding the facial limitations in the language of 12 O.S. § 1052, it is settled law that § 1052 does not convey survivability to causes of action which do not have that quality under 12 O.S. § 1051. See State v. City of Shawnee, 31 P.2d 552, 557 (Okla. 1934). In City of Shawnee, the Oklahoma Supreme Court articulated the proper construction of these related statutes:

If the action survives at common law and also comes within the additional causes of action set forth in [§ 1051], such action is vested with the right of revivor, and does not abate upon the death of either parties' plaintiff or defendant, solely by reason of [§ 1052]; but, if the action does not survive at common law, and does not fall within the causes of action set forth in [§ 1051], it abates upon the death of the plaintiff. Under the common law, if an action did survive, it became necessary to bring a new action. Section [1052] is strictly remedial and procedural and enacted to avoid the necessity of commencing a new action. It

seems apparent that it never was the Legislature's intention to provide that an action should continue after the death of a party when the right of action or cause of action would not survive at common law, except as otherwise provided for in section [1051].

Thus, unless Plaintiff's claims survive under common law or 12 O.S. § 1051, they cannot be revived by 12 O.S. § 1052.¹

It is settled law that, in the absence of statute, an action for invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded. See Restatement (Second) of Torts § 652I comt. B (1977); Grimes v. CBS Broadcasting Int'l of Canada, Ltd., 905 F.Supp. 964 (N.D.Okla. 1995). Furthermore, the action for invasion of privacy was unknown at common law. See Gruschus v. Curtis Publishing Co., 342 F.2d 775 (10th Cir. 1965). Thus, an action for invasion of the right of privacy did not survive at common law. Furthermore, 12 O.S. § 1051 "does not provide for the survival of an action to recover damages for violation for a decedent's civil rights while he was alive..." Black v. Cook, 444 F.Supp. 61, 64 (W.D.Okla. 1977).

For the reasons set forth above, Plaintiff's causes of action for violation of his right to privacy and failure to protect confidential medical information do not survive his death. Plaintiff's related dependent state-law claims likewise do not survive. Accordingly, Defendants are entitled to summary judgment on all causes of action which do not survive Plaintiff's death.

IV

The only cause of action which survives Plaintiff's death is his claim for intentional

¹ Plaintiff cites Pietrowski v. Town of Dibble, 134 F.3d 1006 as suggesting that 12 O.S. § 1052 governs the survivability of all § 1983 actions under Oklahoma law. Pietrowski concerned a § 1983 action brought against a town and chief of police for malicious prosecution, one of the specific areas addressed by 12 O.S. § 1052. In that case, the Tenth Circuit held that the claim for malicious prosecution abated upon the death of the plaintiff, and did not address the application of 12 O.S. § 1051 or § 1052 to other types of actions.

infliction of emotional distress. At the October 8, 1999, hearing in this matter, Plaintiff expressly withdrew this claim as to Defendant Lisa Riggs. In their first motion for summary judgment on this claim, filed before Plaintiff's death, Defendants Debbie Starnes and Midge Elliot asserted that Plaintiff had failed to show either that Defendants had acted intentionally or recklessly, or that Defendants acted in an extreme or outrageous manner.

Although Plaintiff asserted in his initial response that "the record clearly supports a cause of action for intentional infliction of emotional distress," he failed to identify any specific evidence in the record which supports this claim. Instead, Plaintiff merely repeated the conclusory, unsupported assertions contained in his complaint, stating that he was "repeatedly harassed by both Defendants and intimidated by their position and control of the Ryan White IIIB Program of which he was a grant patient" and that he "has truly had to endure outrageous and extreme conduct on the part of the defendants since the onset of this incident." Pl.'s Response at p. 11.

Plaintiff's amended response identified three items in the record in connection with his intentional infliction claim: (1) Plaintiff's deposition; (2) a memo from Defendants Starnes and Elliot to the directors of the Ryan White IIIB Program, the HIVRC and the TCCHD; and (3) the deposition of Sarah Boyd, another employee of the Ryan White IIIB Program. In his deposition, Plaintiff claimed that Defendants had called him names and made harassing phone calls to him. Upon further questioning, Plaintiff explained that Defendants had screamed at him, called him unprofessional and advised him that it would be "in his best interest, personally and professionally" to "leave it alone." The memo cited by Plaintiff, which contained a detailed summary of the events underlying this lawsuit, was not seen by Plaintiff until it was produced to

him during discovery in this case.² Finally, in her deposition, Sarah Boyd indicated that the Plaintiff and Defendant Midge Elliot had a conversation prior to a HIVRC meeting, in which Ms. Elliot tried to dissuade Plaintiff from making comments during that meeting. Ms. Boyd further stated that both Plaintiff and Ms. Elliot were "very adamant" and had to be told to calm down. Dep. of Sarah Boyd p.74.

Oklahoma recognizes a tort of intentional infliction of emotional distress, also known as the tort of outrage. See e.g., Eddy v. Brown, 715 P.2d 74 (Okla. 1986). Under Eddy, the inquiry with respect to this cause of action is "whether the ... conduct may be regarded by reasonable minds as so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and intolerable in a civilized community." Id. at 75 (internal quotes omitted). Furthermore, "not every abusive outburst or offensive verbal encounter may be converted into a tort." Id. at 77. The court in Eddy recognized, however, that "[t]he outrageous and extreme nature of the conduct to be examined should not be considered in a sterile setting, detached from the milieu in which it took place." Id.

Plaintiff has failed, as a matter of law, to allege conduct on the part of Defendants that rises to the level required to meet this standard. The exchange between Plaintiff and Defendants prior to the HIVRC meeting, while clearly upsetting to all involved, was neither outrageous in character nor extreme in degree, and certainly did not "go beyond all possible bounds of decency." Similarly, the phone calls cited by Plaintiff in which Defendants encouraged Plaintiff to "leave it alone," could not be regarded by reasonable minds as atrocious or intolerable in a civilized community. Furthermore, Plaintiff did not even see the memo cited in his response

² At the hearing in this case on October 8, 1999, Plaintiff's counsel was unable to identify anything in the record to suggest that Plaintiff had seen this memo prior to discovery in this case.

until after the commencement of this litigation and thus cannot rely upon it to support his claim.

The Court recognizes the extremely sensitive nature of the issues raised in this matter, and their emotional impact on both Plaintiff and Defendants. Certainly, the medical information at issue here must be afforded the highest protection. However, the instant claim for intentional infliction of emotional distress does not arise out of the disclosure, but rather the conduct of Defendants following that disclosure. There is simply nothing in the record which supports the contention that such conduct by Defendants Elliot and Starnes was sufficiently extreme or outrageous to constitute intentional infliction of emotional distress under Oklahoma law. Therefore, Defendant's first Motion for Summary Judgment should be granted insofar as it seeks summary judgment on Plaintiff's intentional infliction of emotional distress claim.

For the reasons set forth above, Defendants' motion for summary judgment, filed July 19, 1999 (Docket # 96) is hereby granted. With respect to the issues remaining, Defendants' first motion for summary judgment, filed August 31, 1998 (Docket # 65) is hereby granted.

IT IS SO ORDERED.

This 3RD day of November, 1999.



Sven Erik Holmes
United States District Judge

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

F I L E D

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Phil Lombardi, Clerk
U.S. DISTRICT COURT

SULLIVAN SUPPLY, INC.,

Plaintiff,

vs.

BUEL JOBE,

Defendant.

Case No. 98-CV-430-H(M)

ENTERED ON DOCKET
DATE NOV 05 1999

REPORT AND RECOMMENDATION

The parties are competitors in the livestock supply business. Each publishes a catalog to advertise its products. Plaintiff, Sullivan Supply, alleged Defendant's catalog infringed its copyrights. Judgment has been entered pursuant to the terms of a Rule 68 Offer of Judgment which Plaintiff accepted. [Dkt. 61]. A preliminary injunction was entered on August 11, 1999, which enjoins Defendant from publishing, distributing, or preparing derivative works in any form based on 62 separately enumerated product descriptions which are set out in the preliminary injunction. [Dkt. 73]. The parties have agreed to the inclusion of 24 of the enumerated product descriptions in the terms of the permanent injunction, and to the exclusion of 10 enumerated product descriptions from the permanent injunction. This report and recommendation addresses which of the remaining 28 disputed product descriptions should be included in the terms of the permanent injunction.

A casual comparison of the 28 disputed product descriptions reveals that, for the most part, the subject product descriptions are identical. However, liability for

copyright infringement will attach only where *protected* elements of a copyrighted work are copied. *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284 (10th Cir. 1996). The court must determine whether the copied product descriptions contain protected elements. It is therefore necessary to engage in a brief discussion of the fundamental copyright principles applicable to this case.

COPYRIGHT PRINCIPLES

"It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself." *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 615 (7th Cir. 1982) quoting *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2nd Cir.) *cert. denied*, 429 U.S. 980, 97 S.Ct. 492, 50 L.Ed.2d 588 (1976). See also *Feist Publications, Inc., v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345, 111 S.Ct. 1282, 1287, 113 L.Ed.2d 358 (1991)(The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates). Thus, copyright protection does not extend to the idea of describing a product for a catalog. Copyright protection may, however, extend to the manner of describing a product.

It is said that "the sine qua non of copyright is originality." *Feist*, 111 S.Ct. at 1287. So, to qualify for copyright protection a work must be original to the author. That is, the work must be independently created by the author, rather than copied from other works, and it must possess at least some minimal degree of creativity. However, the level of creativity required is low. *Id.* As applied to this case, Defendant

may copy the "idea" of describing the subject products, but he may not copy Plaintiff's description, provided some minimal degree of originality/creativity has been applied to Plaintiff's description. It is well recognized that "there is no litmus paper test by which to apply the idea-expression distinction, the determination is necessarily [a] subjective," ad hoc one. *Atari*, 672 F.2d at 615, *Country Kids*, 77 F.3d at 1285 ("Because the idea/expression distinction is somewhat elusive, courts often adopt an ad hoc approach, eschewing the application of any bright line rule or any clear formula").

Occasionally an idea and its expression will be indistinguishable. This concept, known as idea-expression unity, occurs when the expression of an idea provides nothing new or additional over the idea. *Id.* at 616, quoting *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977). In the context of literary works, this idea is expressed as *scenes a faire*, which refers to characters and situations which are indispensable or standard in the treatment of a given topic. Stock literary devices are not protectable by copyright so that similarity of expression is not actionable where the similarity necessarily results from the fact that the common idea is only capable of expression in a stereotypical form. *Id.* 616 quoting 3 M.Nimmer, *Nimmer on Copyright* § 13.03 [A][1], at 13-28 (1981).

In addressing which of the disputed descriptions should or should not be included in the permanent injunction, the court has examined each accused product description, comparing it to Plaintiff's description to discern the similarity of the descriptions. The court has also examined each of Plaintiff's product descriptions to

determine whether it was copied from a third party source, or whether the similarity of Defendant's description necessarily results from the attempt to describe the particular product. In other words, the court has viewed the product descriptions with an eye toward discerning the presence of a minimal degree of originality or creative content.

DESCRIPTIONS INCLUDED IN PERMANENT INJUNCTION

The undersigned recommends that the following product descriptions be included in the terms of the permanent injunction:

¶ B-1¹: Blue Ribbon Show Supply catalog's description of its "EXHIBITOR'S NUMBER HARNESS," page 4, in the Blue Ribbon Show Supply catalog, Volume 12. While there may only be so much that can be said about an exhibitor's harness, the precise text used by Sullivan is not strictly dictated by the subject matter. The court finds that Sullivan's description contains the slight amount of originality/creativity required to confer copyright protection.

¶ B-7: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S NECK TIES," page 4, in the Blue Ribbon Show Supply catalog, Volume 12. It is a close call whether this description contains the requisite amount of originality/creativity. There is not much to be said about an adjustable animal neck restraint, however Sullivan's description contains a minimal level of originality/creativity.

¹ Paragraph designations refer to paragraphs in the preliminary injunction entered August 11, 1999. [Dkt. 73].

¶ B-8: Blue Ribbon Show Supply catalog's description of its "COTTON NOSE PADS," page 4, in the Blue Ribbon Show Supply catalog, Volume 12. The description contains a minimal degree of originality/creativity and was obviously copied from Sullivan's.

¶ B-10: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SINGLE MISTER," page 17, in the Blue Ribbon Show Supply catalog, Volume 12. The description contains a minimal degree of originality/creativity and was obviously copied from Sullivan's.

¶ B-14: Blue Ribbon Show Supply catalog's description of its "RUBBER MAT," page 5, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that Sullivan's description contains the slight amount of originality/creativity required to confer copyright protection.

¶ B-20: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S BASE COAT," page 7, in the Blue Ribbon Show Supply catalog, Volume 12. This description is nearly identical to the description of Sullivan's Base Coat. Defendant claims Sullivan's description was copied from a third party source, but has not identified that source. Based on the record before it, the court finds the description to be original to Sullivan and subject to copyright protection.

¶ B-41: Blue Ribbon Show Supply catalog's description of its "LAMB DRENCH GUN," page 13, in the Blue Ribbon show Supply catalog, Volume 12. This description satisfies the copyright requirement of a slight amount of originality/creativity.

¶ B-58: Blue Ribbon Show Supply catalog's description of its "RICE ROOT BRUSH," page 17, in the Blue Ribbon show Supply catalog, Volume 12. Once again, there may be little to be said in describing a rice root brush. However, Sullivan's description is not completely dictated by the idea of such a description and contains the slight amount of originality/creativity required to invoke copyright protection.

¶ B-59: Blue Ribbon Show Supply catalog's description of its "RICE ROOT MIX BRUSH," page 17, in the Blue Ribbon Show Supply catalog, Volume 12. This description contains the slight amount of originality/creativity required to invoke copyright protection.

DESCRIPTIONS PARTIALLY INCLUDED IN PERMANENT INJUNCTION

The undersigned recommends that portions of the following product descriptions be included in the terms of the permanent injunction:

¶ B-19: Blue Ribbon Show Supply catalog's description of its product "MAGIC," page 6, in the blue Ribbon Show Supply catalog, Volume 12. The first sentence, "Popular with dairy showmen for top lines" contains the slight amount of originality/creativity necessary for copyright protection, and use of that sentence should be enjoined. The remainder of the description is not original to Sullivan.

¶ B-43: Blue Ribbon Show Supply catalog's description of its "MESH LAMB MUZZLE," page 13, in the Blue Ribbon Show Supply catalog, Volume 12. The following portion of the description contains the requisite degree of originality/creativity and its use should be enjoined: "One piece elastic strap holds

muzzle in place. No buckles or strings to tie." The remainder of the description is not original to Sullivan, having appeared in the Valley Vet Fall 1990 Catalog.

¶ **B-45: Blue Ribbon Show Supply catalog's description of its "ANDIS GROOM CLIPPER,"** page 14 in the Blue Ribbon Show Supply catalog, Volume 12. Much of the information contained in this description first appeared in product literature distributed by the Andis Company. However, Sullivan has re-phrased and organized the information so that except for the phrase "14,400 cutting strokes per minute," the description contains the minimal degree of originality/creativity necessary for copyright protection. Defendant's use of the description should be enjoined, except for use of the phrase "14,400 cutting strokes per minute."

¶ **B-46: Blue Ribbon Show Supply catalog's description of its "ANDIS 2-SPEED DETACHABLE PLUS + ,"** page 14 in the Blue Ribbon Show Supply catalog, Volume 12. Some of the text of this description first appeared in product literature distributed by the Andis Company. However, the following text is original to Sullivan as it contains the minimal amount of originality/creativity necessary for copyright protection, and Defendant's use should be enjoined: "Detachable blades for ease of changing and cleaning. Model A-5 Oster blades fit this clipper and with slight modification Oster Groom-Master blades can also be used."

¶ **B-48: Blue Ribbon Show Supply catalog's description of its "KNEE PADS,"** page 15 in the Blue Ribbon Show Supply catalog, Volume 12. A portion of the text of this description is not original to Sullivan, having first appeared in the Valley Vet Fall

1989 Catalog. However, the following text is original to Sullivan and Defendant's use should be enjoined as it contains the minimal amount of originality/creativity necessary for copyright protection, and Defendant's use should be enjoined: "Protects knees while clipping, fitting, or any task requiring kneeling."

DESCRIPTIONS EXLUDED FROM PERMANENT INJUCTION

The undersigned recommends that the following product descriptions be excluded from the terms of the permanent injunction:

¶ B-3: Blue Ribbon Show Supply catalog's description of its "COMB HOLDER," page 4, in the Blue Ribbon Show Supply catalog, Volume 12. Both Defendant and Sullivan's description include the typographical error of including an apostrophe where there should not be one in the word "exhibitor's." The inclusion of this typographical error indicates that Defendant copied the text directly from Sullivan. However, the court finds that the description is necessarily dictated by the idea of describing the subject matter, a comb holder, that the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ B-5: Blue Ribbon Show Supply catalog's description of its "LEATHER ROLLED NOSE SHOW HALTER," page 4, in the Blue Ribbon Show Supply catalog, Volume 12. Sullivan asks that the court enjoin the use of weight ranges assigned to each size of halter. The court finds that the weight ranges are dictated by the function of the item and facts not subject to copyright protection.

¶ B-6: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S ROPE HALTERS," page 4 in the Blue Ribbon Show Supply catalog, Volume 12. The

court finds that the description is necessarily dictated by the idea of describing the subject and the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ B-9: Blue Ribbon show supply catalog's description of its "BLUE RIBBON'S BLOCKING & GROOMING CHUTE," page 5, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that the similarities between Sullivan's description and Defendant's description are dictated by the design and function of the item and the idea of describing it, not the result of copying.

¶ B-34: Blue Ribbon Show Supply catalog's description of its "FEED SCOOP," page 9, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that the description is necessarily dictated by the idea of describing the subject, a feed scoop, and the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ B-36: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S TURBINE LIVESTOCK FAN," page 11, in the Blue Ribbon Show Supply catalog, Volume 12. Defendant's description is much shorter than Sullivan's and contains only a small amount of text identical to Sullivan's. The court finds that the similarities between Sullivan's description and Defendant's description are dictated by the design and function of the item and the idea of describing it, not the result of copying.

¶ B-37: Blue Ribbon Show Supply catalog's description of its "BARNSTORMER FAN," page 11, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that the similarities between Sullivan's description and Defendant's description are

dictated by the design and function of the item and the idea of describing it, not the result of copying. Further, the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ B-47: Blue Ribbon Show Supply catalog's description of its "LEATHER CLIPPER GUARDS," page 15 in the Blue Ribbon Show Supply catalog, Volume 12. Both Defendant and Sullivan's description include a misspelling of the word snugly as "snuggly." The inclusion of this misspelling indicates that Defendant copied the text directly from Sullivan. However, the court finds that the description is necessarily dictated by the idea of describing the attributes of the subject matter and does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ B-51: Blue Ribbon Show Supply catalog's description of its "BR-20TBC," page 16, in the Blue Ribbon Show Supply catalog, Volume 12. Both catalogs contain identical descriptions: "20-tooth blocking comb cuts on edge with sharp tip." Some of the language, "20-tooth blocking comb," is not original to Sullivan having first appeared in the Stewart by Oster © 1985 Catalog. The inventory control number is the model number assigned to the item by the manufacturer, Oster. The remainder of the description is necessarily dictated by the idea of describing the attributes of the subject matter and does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ B-52: Blue Ribbon Show Supply catalog's description of its "BR-P7112," page 16, in the Blue Ribbon Show Supply catalog, Volume 12. Both catalogs contain identical descriptions: "20-tooth goat comb with dull tip." Some of the language,

"20-tooth blocking comb," is not original to Sullivan having first appeared in the Stewart by Oster © 1985 Catalog. The inventory control number is the model number assigned to the item by the manufacturer, Oster. The remainder of the description is necessarily dictated by the idea of describing the attributes of the subject matter and lacks the slight amount of originality/creativity necessary for copyright protection.

¶ **B-53:** Blue Ribbon Show Supply catalog's description of its "LISTER HAIRHEAD BLADES," page 16, in the Blue Ribbon Show Supply catalog, Volume 12. The product code numbers and literal descriptions for the blades are not original to Sullivan, having been assigned to the products by the manufacturer.

¶ **B-54:** Blue Ribbon Show Supply catalog's description of its "OSTER CLIPMASTER BLADES," page 16, in the Blue Ribbon Show Supply catalog, Volume 12. The inventory control numbers are the model numbers assigned to the blades by the manufacturer, Oster. The remainder of the description is necessarily dictated by the idea of describing the attributes of the subject matter and lacks the slight amount of originality/creativity necessary for copyright protection.

¶ **B-55:** Blue Ribbon Show Supply catalog's description of its "LISTER SHEEPHEAD BLADES," page 16, in the Blue Ribbon Show Supply catalog, Volume 12. The inventory control numbers are the model numbers assigned to the blades by the manufacturer, Lister. The remainder of the description is necessarily dictated by the idea of describing the attributes of the subject matter and lacks the slight amount of originality/creativity necessary for copyright protection.

¶ B-56: Blue Ribbon Show Supply catalog's description of "SPEED-O-GUIDE," PAGE 16 IN THE Blue Ribbon Show Supply catalog, Volume 12. The description is necessarily dictated by the idea of describing the attributes of the subject matter and does not contain the slight amount of originality/creativity necessary for copyright protection.

CONCLUSION

For the reasons set out herein, the undersigned United States Magistrate Judge RECOMMENDS the following disposition for the remaining 28 disputed product descriptions:

The product descriptions identified at the following paragraphs in the preliminary injunction should be included in the permanent injunction: B-1, B-3, B-5, B-6, B-7, B-8, B-10, B-20, B-41, B-58, and B-59.

Portions of the product descriptions identified at the following paragraphs in the preliminary injunction should be included in the permanent injunction, as specified herein: B-19, B-43, B-45, B-46, and B-48.

The product descriptions identified at the following paragraphs in the preliminary injunction should be excluded from the permanent injunction: B-5, B-6, B-9, B-34, B-36, B-37, B-47, B-51, B-52, B-53, B-54, B-55, and B-56.

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 District Court for the Northern District of Oklahoma 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.

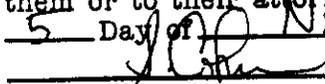
Haney v. Addison, 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 3rd Day of November, 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

5 Day of Nov, 1999.


November 3, 1999, the jury entered its verdict against plaintiffs Marvin Summerfield and David Cornsilk and in favor of defendants Joe Byrd, Jennie L. Battles and Rex Earl Starr on plaintiffs' claims under 18 U.S.C. §2511.

Accordingly, judgment is hereby entered in favor of defendants Joe Byrd, Jennie L. Battles, Mark McCollough and Rex Earl Starr and against plaintiffs Marvin Summerfield and David Cornsilk. As judgment is entered in favor of defendants, the Court considers defendants' motion for mistrial moot.

Costs are assessed against Plaintiffs Marvin Summerfield and David Cornsilk, if timely applied for under Local Rule 54.1. The parties are to pay their respective attorneys' fees.

Dated this 3rd day of November, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV -3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LANDRY TRAMELL CONNER,)
)
 Petitioner,)
)
 v.)
)
 MIKE ADDISON, Warden,)
)
 Respondent.)

Case No. 99-CV-0214-BU (E)

ENTERED ON DOCKET
DATE NOV 05 1999

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner Landry Tramell Conner filed a Petition for Writ of Habeas Corpus (Docket # 1). He has also filed a motion requesting that the Court order the transcripts from his sentencing (Docket # 7). Acting *pro se*, petitioner challenges the concurrent six-year sentences he received for grand larceny after former conviction of a felony and for false declaration of ownership. Petitioner plead guilty to these charges in the Fourteenth Judicial District Court, Tulsa County, State of Oklahoma, Case No. CF-97-3487.

Petitioner claims that he plead guilty in return for a promise that he would be permitted to participate in the "Key to Life" program in the Department of Corrections. However, once convicted, he was not allowed to participate because he did not meet the criteria of the program. He alleges that the state thus breached the terms of his plea agreement. (Petition, Docket # 1, at 2, 5.) In defense, respondent argues that petitioner's claims are procedurally defaulted because petitioner failed to follow the proper procedure to appeal his denial of post-conviction relief. (Response to Petition, Docket # 5, at 3-6.)

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

the undersigned proposes findings that petitioner's claim is procedurally defaulted. For the reasons set forth below, the undersigned recommends that the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**, and Petitioner's Motion for Transcripts (Docket # 7) be **DENIED as moot**.

Background and Procedural History

Petitioner was convicted on January 20, 1998. Under Oklahoma law, he had ten days within which to file an application to withdraw his guilty plea or to file a notice of intent to appeal. See Rule 2.5(A) and Rule 4.2(a) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1998). Neither party disputes that the Honorable Jefferson D. Sellers, District Judge, entered an Order Denying Petitioner's Application for Post-Conviction Relief on September 29, 1998, although the undersigned cannot independently verify that date or determine the basis for the denial because neither party attached a copy of Judge Sellers' Order or the docket sheet from Tulsa County. Both parties did attach a copy of a November 18, 1998 Order from the Oklahoma Court of Criminal Appeals (CCA), which recites that September 29, 1998 is the date of Judge Sellers' Order. (Petition, Docket # 1, unnumbered exhibit; Response to Petition, Docket # 5, unnumbered exhibit.) Petitioner appealed Judge Sellers' denial of post-conviction relief, but the CCA dismissed petitioner's appeal because it was filed one day late. (Id.)

Petitioner apparently attempted to file a "Petition for Rehearing/Reconsideration" with the CCA, but it was returned to him by letter on December 1, 1998. (See Petition, Docket # 1, unnumbered exhibit; Reply, Docket # 6, Ex. A.) In the letter, the Deputy Clerk explained that such petitions are not permitted by Rules 5.4 and 10.6(D) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1998). Petitioner did not seek to file a motion in the district court for

appeal out of time pursuant to Rule 2.1(E) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1998).

Petitioner filed his petition for writ of habeas corpus in this Court on March 17, 1999. Respondent stipulates that petitioner has exhausted his remedies in state court and that his Petition for Writ of Habeas Corpus was timely filed. (Response to Petition, Docket # 5, at 2.)

Discussion and Legal Analysis

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an "adequate" state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Relying on Rule 5.2(C) of the Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1998),¹ the CCA refused to reach the merits of petitioner's claims, holding that petitioner had waived his claims because he missed by one day the 30-day deadline within which to

¹ Rule 5.2(C) provides, in relevant part:

(2) A petition in error and supporting brief, WITH A CERTIFIED COPY OF THE ORDER ATTACHED must be filed with the Clerk of this Court. If the post conviction appeal arises from a misdemeanor or regular felony conviction, the required documents must be filed within thirty (30) days from the date the final order of the District Court is filed with the Clerk of the District Court.

* * *

(5) Failure to file a petition in error, with a brief, within the time provided, shall constitute a procedural bar for this Court to consider the appeal.

file his appeal. The Tenth Circuit has recognized that the state's requirement of compliance with Rule 5.2(C) is an adequate procedural rule as it applies to the requirement that a petition in error be filed and a certified copy of the district court's order denying relief be attached to the petition in error. Duvall v. Reynolds, 139 F.3d 768, 796-97 (10th Cir. 1998). Further, the Tenth Circuit has consistently held that claims raised for the first time in state post-conviction proceedings are procedurally defaulted if the petitioner fails to obtain timely appellate review of the state trial court's decision. West v. Gibson, No. 98-7151, 1999 WL 339702, at *2 (10th Cir. May 28, 1999) (Oklahoma); Bivens v. Hargett, No. 9706333, 1999 WL 7729, at **4 (10th Cir. Jan. 11, 1999) (Oklahoma); Watson v. State of New Mexico, 45 F.3d 385, 387 (10th Cir. 1995); Gee v. Shillinger, No. 94-8050, 1994 WL 697306 (10th Cir. Dec. 13, 1994) (Wyoming); see also Dulin v. Cook, 957 F.2d 758 (10th Cir. 1992) (Utah).

While the CCA based its decision on independent and adequate state procedural grounds, this Court need not find that petitioner's claims are procedurally defaulted if petitioner can demonstrate cause for the procedural default (petitioner's failure to file his appeal within 30 days from the order) and actual prejudice, or that the Court's refusal to consider the merits of his claims will result in a fundamental miscarriage of justice. See, e.g., Coleman, 510 U.S. at 750.

Cause and Prejudice

The cause standard requires a petitioner to show "something external to [himself], something that cannot fairly be attributed to him . . ." that prevented him from complying with the state procedural rules. See Coleman, 510 U.S. at 753; Demarest v. Price, 130 F.3d 922, 941 (10th Cir. 1997) (both cases citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). "Adequate cause includes interference by officials which makes compliance with a state's procedural rule impracticable,

demonstration of unavailability of a factual or legal basis, or constitutionally ineffective assistance of counsel in not bringing a claim.” Worthen v. Kaiser, 952 F.2d 1266, 1268 (10th Cir. 1992). Once cause is established, the petitioner must then show that he suffered “actual prejudice” as a result of the alleged violations of federal law. E.g., Demarest, 130 F.3d at 941. To show “prejudice,” petitioner must demonstrate “not merely that errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Murray, 477 U.S. at 488; see also United States v. Frady, 456 U.S. 152, 168 (1982).

Petitioner does not dispute that his appeal to the CCA was late; instead, he offers an explanation. He claims that, as a prisoner, he is disadvantaged because he has to respond by mail and receive all responses by mail. (Reply, Docket # 6, at 1-2.) Therefore, he argues, he does not have the benefit of the full 30 days in which to prepare and file court documents. Petitioner acknowledges that his appeal from the district court’s denial of his application for post-conviction relief was due on October 29, 1998. He states that he mailed the appeal on October 28, 1998, but the CCA did not receive it until October 30, 1999. He asserts that the appeal would not have been late if he could have taken it to the clerk himself and the untimeliness of his filing is not due to any fault of his own. (Id. at 2.)

In essence, petitioner is attempting to rely upon what has become known as the “prison mailbox rule” which deems a pleading filed on the date that a *pro se* prisoner delivers it to prison authorities for forwarding to a court clerk. Houston v. Lack, 487 U.S. 266, 270-72 (1988); Woody v. State, 833 P.2d 257, 259-60 (Okla. 1992). The prison mailbox rule recognizes the restraints imposed on prisoners which prevents them from delivering documents directly to the court or the post

office, thus forcing them to rely on prison officials to ensure timely mailing of their pleadings. The Oklahoma Supreme Court has reasoned that “Okla. Const. art. 2, § 6 mandates such a result.”² Id., at 259.

Nonetheless, the CCA has ruled that the prison mailbox rule does not apply to criminal matters filed in the CCA. Banks v. State, 953 P.2d 344, 345-47 (Okla. Crim. App. 1998); Hunnicut v. State, 952 P.2d 988, 989 (Okla. Crim. App. 1997). The CCA prefers, instead, to require a prisoner to file a motion for appeal out of time, pursuant to Rule 2.1(E) of the Rules of the Court of Criminal Appeals, Okla. Stat. tit. 22, ch. 18, app. (1997), proving that he was denied an appeal through no fault of his own. Banks, 953 P.2d at 346. Thus, the CCA forces prisoners to take an extra step, and prisoners like petitioner suffer the result.

It does not matter that petitioner attempted to file a petition for rehearing/reconsideration with the CCA or that he was not permitted to do so. (Reply, Docket # 6, at 1; see Petition, Docket # 1, unnumbered exhibit.) Rule 2.1(E) requires the prisoner to file that motion in the trial court before proceeding, again, to the CCA. Moreover, the Tenth Circuit has approved this procedure. See Bivens v. Hargett, No. 9706333, 1999 WL 7729, at **4 (10th Cir. Jan. 11, 1999). In Bivens, the Tenth Circuit explicitly recognized that the petitioner had not made a substantial showing that the CCA “deprived him of a constitutional right in dismissing his post-conviction appeal as untimely,” especially where the petitioner had “not shown cause for his failure to apply for an appeal out-of-time, which is a remedy available to a state post-conviction petitioner who has been denied an appeal through no fault of his own.” Id. (citing Banks, 953 P.2d at 346; Hunnicut, 952 P.2d at 990).

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

Petitioner has failed to show cause in this matter for his failure to apply for an appeal out of time, and, unfortunately, he cannot rely on the prison mailbox rule.

Fundamental Miscarriage of Justice

Nevertheless, if petitioner can establish that a failure to consider the claim would result in a fundamental miscarriage of justice, the Court may proceed to the merits of a procedurally defaulted claim. To come within this “very narrow exception,” petitioner must supplement his habeas petition with a “colorable showing” that he is factually innocent of the crime of which he was convicted. Schlup v. Delo, 513 U.S. 298, 311 (1995) (citing Kuhlman v. Wilson, 477 U.S. 436, 454 (1986)). Factual innocence requires a stronger showing than that necessary to establish prejudice. Schlup, 513 U.S. at 326. Such a showing does not in itself entitle the petitioner to relief but instead serves as a “gateway” which then entitles petitioner to consideration of the merits of his claims. Id. at 327.

Petitioner states:

In the Petitioners Post Conviction Brief he ask to withdraw his plea of guilt, which shows the Petitioner is now stating he is not guilty of the crime in which he plead guilty to. The Petitioners plea of guilty was illegal in dues, by the state promising him programs the state had no jurisdiction to promise. The state promised and ordered the Petitioner to the Key To Life program.

(Reply, Docket # 6, at 2.) Merely asking to withdraw a plea of guilty is insufficient to show factual innocence. It is clear that the petitioner’s claim is based on his allegation that the state breached a promise to him; it is not on his innocence. In essence, he asserts that he would not have plead guilty if not for the promise that he could participate in the Key to Life program. He does not allege that he did not commit the crime of which he was convicted. Petitioner has set forth no claim which, if proven, would bring him within the fundamental miscarriage of justice exception. Petitioner’s claim is procedurally defaulted.

Recommendation

For the reasons cited herein, the undersigned recommends that the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**, and Petitioner's Motion for Transcripts (Docket # 7) be **DENIED as moot**.

Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); and § 2254, Rules 8, 10; see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Haney v. Addison*, 175 F.3d 1217 (10th Cir. 1999).

DATED this 3rd day of November, 1999.

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 5 Day of NOV, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

JERRY GENE BRIDGES,)
)
 Petitioner,)
)
 vs.)
)
 MIKE MULLIN, Warden,)
)
 Respondent.)

ENTERED ON DOCKET

DATE NOV 4 1999

No. 99-CV-728-H (M) ✓

FILED

NOV 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

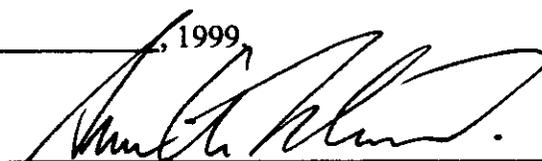
Before the Court is Petitioner's letter, filed and docketed on October 28, 1999 (Docket #6), stating that "I would like to withdraw the Petition of Habeas Corpus. I discharged from the Penitentiary (sic)." Petitioner makes his request prior to the filing of a response to the petition by Respondent. Pursuant to Rule 41(a), the Court finds Petitioner's request to withdraw should be granted and this habeas corpus petition should be dismissed without prejudice. The Court's October 12, 1999 Order (#5), directing Respondent to respond to the petition, should be stricken.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's request to withdraw petition (#6) is **granted**.
2. The petition for writ of habeas corpus is **dismissed without prejudice**.
3. The October 12, 1999 Order (#5) directing Respondent to respond to the petition is **stricken**.

IT IS SO ORDERED.

This 2nd day of NOVEMBER, 1999.



Sven Erik Holmes
United States District Judge

1022-9

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

MARSHALL HUFFMAN AND
VIRGINIA NEWTON,

Plaintiffs,

vs.

SAUL HOLDINGS LIMITED PARTNERSHIP,
a Maryland Limited Partnership,

Defendant.

FILED ON DOCKET

NOV 4 1999

Case No. 97-CV-602 H (M) ✓

FILED

NOV 2 1999

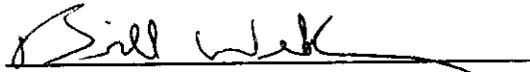
Phil Lombardi, Clerk
U.S. DISTRICT COURT

**JOINT ORDER
REMANDING CASE TO STATE COURT**

NOW on this 2nd day of ~~October~~ ^{NOVEMBER}, 1999, this action is hereby remanded back to the
District Court of Tulsa County.


UNITED STATES DISTRICT COURT JUDGE

APPROVED BY:


Bill V. Wilkinson, OBA No. 9621
Wilkinson Law Firm
7625 East 51st Street, Suite 400
Tulsa, Oklahoma 74145-7857


Jeffrey H. Contreras, OBA No. 11270
Jeffrey H. Contreras, P.C.
105 North Hudson, Suite 204
Oklahoma City, Oklahoma 73102

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

FILED

NOV 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES C. and JILL M. HUMPHREYS,)
)
Plaintiffs,)

vs.)

No. 96-CV-942-E ✓

JOHNYNE FUSELIER, individually;)
JAMES ARTHUR SPARGUR, individually)
and d/b/a SPECIALTY BUILDERS; RICK)
OVERTURF, individually; BRET D.)
BARNHART, individually and d/b/a BRET)
D. BARNHART CONSTRUCTION)
COMPANY, an Oklahoma corporation; and)
BRYAN McCART, individually,)

Defendants.)

ENTERED ON DOCKET
DATE NOV 04 1999

ORDER

Now before this Court , as considered at the Pretrial Conference held November 3, 1999, is the issue of the measure of damages in this matter. At the pretrial Conference, Margaret Clarke appeared for plaintiffs, and James Spargur appeared on his own behalf. No other parties appeared.

This is an action for damage to timber. The Humphreys who are former owners of property known as 4011 South 68th Court West, Tulsa Oklahoma, allege that on or about August 1, 1996, 5300 square feet of trees were bulldozed in the backyard of the property. Fuselier, the owner of neighboring property on which the bulldozer was being used, and James Spargur, supervisor of the building project on Fuselier's property have failed to answer. Rick Overturf, Bret Barnhart and Bryan McCart have been dismissed.

At a case management conference attended by counsel for plaintiffs and counsel for Bret

Barnhart, the parties agreed to the appointment of an Independent Real Estate Appraiser. On August 21, 1998, the Court entered an Agreed Order appointing Warren G. Morris as Independent Real Estate Appraiser. Mr. Morris conducted a market analysis concluding that "there is no loss in value to the subject property due to the number of trees that were present at the time the house was built and subsequently removed." Mr. Morris also concluded that, as of July 31, 1996, the fair market value of the property was \$127,000.00.

In their trial brief, jury instructions, and at the pretrial conference, Plaintiffs argued that, of the four possible measures of damages: 1) diminution in value of the real estate; 2) replacement or restoration cost; 3) intrinsic value of the trees (frequently the same as replacement value); and 4) the resulting loss of aesthetic value, convenience, comfort, and/or enjoyment, the measure applicable to this case is the replacement or restoration cost of the trees. Although there are no Oklahoma cases supporting the use of replacement value as the measure of damages for loss of trees, Plaintiffs argue factually that it was their "prerogative to maintain a wooded lot with a natural look," and that "although [they] were no longer living on the lot it was still their property," and "if they wanted to maintain a "primitive area" of natural trees on their lot, it was their right to keep it that way." Plaintiffs have stated they have an arborist who will testify that the replacement value of the trees, excluding the cost of replanting, would be \$39,249.60.

The commonly applied or general rule for measure of damages in removal of timber cases in Oklahoma is diminution in value. Short v. Jones, 613 P.2d 452 (Okla. 1980). Plaintiffs attempt to distinguish Short, arguing that in Short, the damage to timber was that pecan trees were rendered permanently barren, and in this case, the trees were destroyed and removed altogether. Plaintiffs conclude that in Short, the pecan trees did not have a value apart from the property, and therefore

the damages had to be calculated in terms of the value of the property. The Court finds Plaintiff's argument to be, at least under the facts of this case, a distinction without a difference. Moreover, Plaintiff's attempted distinction is not borne out by Oklahoma law. For example, in Pace v. Ott, 115 P.2d 253 (Okla. 1941), where trees were destroyed by pollution, that proof of the value of the premises prior to recovery and thereafter was "essential to a recovery." Id. at p. 255.

The best support for Plaintiff's argument that a measure of damages other than diminution in value may be appropriate is found in Texaco v. Harrison, 141 P.2d 802, 805 (Okla. 1943) wherein the Court stated:

The general rule that damages to real estate are to be determined by finding the difference between its value before the injury and its value afterwards is not of universal application; there being cases in which the rule would not do justice.

However, under the undisputed facts of this case, the Court finds that, as a matter of law, use of diminution of value as the measure of damages would not only be just, but would most directly address the language of the applicable statute, Okla. Stat. tit. 23, §72, which describes the measure of damages as the "sum as would compensate for the actual detriment."¹ In support of this conclusion, the Court notes that Plaintiffs did not live on the property at the time the trees were bulldozed, that the Plaintiffs do not now own the property, that there is no evidence that Plaintiffs went to any expense to replace the trees in order to sell the property, and that there is no evidence that the trees were sold or that any value was realized out of the trees.

Having found that diminution of value of real estate is the proper measure of damages, and noting that the Court appointed expert found there to be no diminution of value, The Court requested

¹ The statute also discusses damages in terms of a multiplier of three to ten times the amount "as would compensate for the actual detriment." In light of the Court's ruling, however, there is no need to address this multiplier.

counsel at pretrial to address whether there would be any evidence to counter the report of Mr. Morris. Counsel stated that the only witness listed who might be able to address this issue would be the the real estate agent who sold the property in question. The Court finds that a real estate agent, unless he is an Oklahoma State Certified Appraiser, does not possess the learning, expertise or experience that would justify allowing an him to testify regarding the value of property. Moreover, if the real estate agent was allowed to testify that the fair market value of the property was \$117,500 based on the sales price in May 1997, and that this decrease in value was due to the loss of trees, Plaintiff's would still be unable to prove "actual detriment" in light of the \$30,000 they received in settlement from the driver of the bulldozer, Bret Barnhart.

Counsel also requested additional time in which to secure a witness who could testify regarding the value of the real estate. The Court finds that this request is not appropriate under these circumstances. This matter was filed in 1996. Additionally, under the authority of Denver Producing & Refining Co. v. Bunch, 45 P.2d 117 (1935), Pace v. Ott, 115 P.2d 253 (1941) and Short v. Jones, 613 P.2d 452 (1980), Plaintiffs cannot argue that they are in any way surprised that the evidence regarding the diminution of value to the real estate would be required for their claim. Moreover, there is competent evidence before the Court, in the form of an independent real estate appraiser to whom no party objected, regarding the value of the property.

In light of the finding that diminution of value is the appropriate measure of damages, and counsel's implicit recognition that plaintiff's had no expert testimony on the value of the real estate, the Court finds that Plaintiffs are unable to prove damages, and this matter is therefore dismissed.

DATED, THIS 3rd DAY OF NOVEMBER, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

HOMeward BOUND, INC., et al.,)

Plaintiffs,)

v.)

THE HISSOM MEMORIAL CENTER,)
et al.,)

Defendants.)

Case No. 85-C-437-E ✓

FILED
NOV 04 1999

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on October 12, 1999, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

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

The Court hereby awards the firm Bullock & Bullock the agreed to attorney fees and expenses in the amount of \$52,510.23

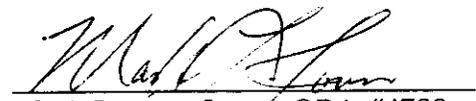
IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$52,510.23, and a judgment in the amount of \$52,510.23 is hereby granted on this day.

am

ORDERED this 29 day of November, 1999.

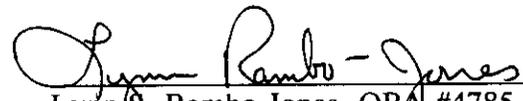

HONORABLE JAMES O. ELLISON
United States District Court


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- and -

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Oklahoma City, OK 73105
(405) 530-3439

ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR
DEFENDANTS

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

F I L E D

NOV 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TWIN CITY FIRE INSURANCE COMPANY,)
a Connecticut corporation,)

Plaintiff,)

vs.)

No. 99-CV-0440H (M)

CHEROKEE NATION, a public entity;)
REX EARL STARR, an individual;)
JENNIE L. BATTLES, an individual;)
LISA FINLEY, an individual; JOE)
BYRD, an individual; MARVIN)
SUMMERFIELD, an individual; ROBIN)
MAYES, an individual; DAVID)
CORNSILK, an individual; and CHARLIE)
ADDINGTON, an individual,)

Defendants.)

DAVID CORNSILK,)

Third Party Plaintiff,)

vs.)

HARTFORD FIRE INSURANCE)
COMPANY, a Connecticut corpora-)
tion; HARTFORD CASUALTY INSURANCE)
COMPANY, a Connecticut corpora-)
tion; STATE FARM FIRE AND CASUALTY)
COMPANY, an Illinois corporation;)
STATE FARM GENERAL INSURANCE)
COMPANY, an Illinois corporation;)
UNITED SERVICES AUTOMOBILE)
ASSOCIATION, a Texas corporation;)
FARMERS INSURANCE COMPANY, a)
Kansas corporation; and NATIONAL)
AMERICAN INSURANCE COMPANY,)
a Nebraska corporation,)

Third Party Defendants.)

ENTERED ON DOCKET
DATE NOV 04 1999

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O/S

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Brently C. Olsson, attorney for Plaintiff, and Jason C. Wagner, attorney for Defendant, Charlie Addington, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, do hereby stipulate to the dismissal of the above-styled and numbered matter with prejudice as to Defendant Charlie Addington only. Each party to bear their own costs and fees.

Dated this 29 day of October, 1999.

HUCKABY, FLEMING, FRAILEY, CHAFFIN,
CORDELL, GREENWOOD & PERRYMAN, L.L.P.

By: 

Brent C. Olsson (OBA #12807)
1215 Classen Drive
P.O. Box 60130
Oklahoma City, OK 73146
(405) 235-6648
(405) 235-1533 (fax)
ATTORNEY PLAINTIFF, TWIN CITY FIRE
INSURANCE COMPANY, HARTFORD FIRE
INSURANCE COMPANY and HARTFORD
CASUALTY INSURANCE COMPANY

COLLINS, ZORN, JONES & WAGNER, P.C.

By: 

Jason C. Wagner
429 N.E. 50th, 2nd Floor
Oklahoma City, OK 73105-1815
ATTORNEY FOR CHARLIE ADDINGTON

Dick Gann
Riggs, Abney, Neal, Turpen, Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
ATTORNEY FOR NATIONAL AMERICAN INSURANCE COMPANY

Neal E. Stauffer
Kent B. Fainey
Adam S. Denton
Stauffer, Rainey, Gudgel & Hathcoat, P.C.
1100 Petroleum Club Building
601 South Boulder
Tulsa, OK 74119
ATTORNEYS FOR STATE FARM FIRE AND CASUALTY COMPANY and
STATE FARM GENERAL INSURANCE COMPANY


Brently C. Olsson

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

FILED

NOV 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STUDENT AID FUNDS, INC.,)
a non-profit Delaware corporation,)

Plaintiff,)

vs.)

Civil Action No. 99 CV 0586H (E)

A & P ENTERPRISES, INC., an Oklahoma)
corporation, d/b/a MAMA LOU'S,)

Defendant.)

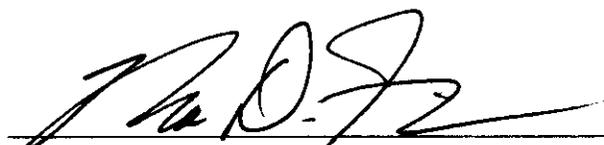
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DATE NOV 03 1999

NOTICE OF DISMISSAL

COME NOW the Plaintiff, UNITED STUDENT AID FUNDS, INC., a non-profit Delaware corporation, by and through its counsel of record, Mac D. Finlayson, pursuant to *Rule 41(a)(1), F.R.Civ.P., Tit. 28, U.S.C.*, who gives notice of the dismissal of the captioned action with prejudice to the re-filing thereof.

DATED this 3rd day of November, 1999.



MAC D. FINLAYSON, OBA #2921
Mac D. Finlayson, A Professional Corporation
115 West Third Street, Suite 480
Tulsa, OK 74103-3410
Telephone: 918-583-2900
Facsimile: 918-583-6811

ATTORNEY FOR PLAINTIFF, UNITED
STUDENT AID FUNDS, INC., a non-profit
Delaware corporation ("USA Funds")

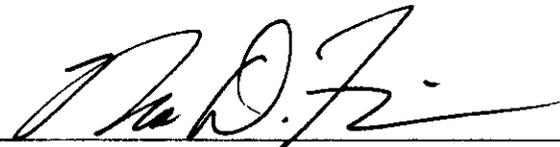
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CERTIFICATE OF SERVICE

The undersigned certifies on the date signified by the filed stamp affixed hereto, he served the following persons by causing a true and correct copy of the above and foregoing to be placed in the United States Mail, first class mail with postage duly prepaid thereon, as follows:

Adbul Ali Alimoradi, RSA
A & P Enterprises, Inc., d/b/a Mama Lou's
1427 S.E. 30th St.
Oklahoma City, OK 73129

Plaintiff, Pro Se

A handwritten signature in black ink, appearing to read "Mac D. Finlayson", written over a horizontal line.

Mac D. Finlayson, OBA #2921

FILED

NOV 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

KATHRYN S. DUKE,)
)
 Plaintiff,)
)
 v.)
)
 PARADIGM FINANCIAL GROUP, ACCOUNT)
 MANAGEMENT INFORMATION, INC.,)
 CREDIT BUREAU OF OKLAHOMA CITY,)
 INC., CSC CREDIT SERVICES, EQUIFAX)
 CREDIT INFO AND TRANS UNION,)
)
 Defendants.)

Case No. 98-CV-459B (E)

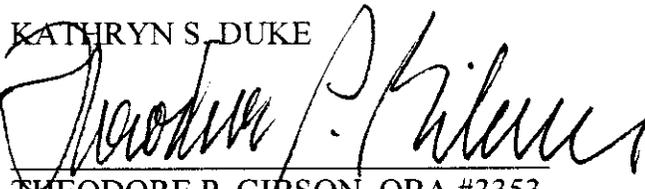
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DATE NOV 04 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

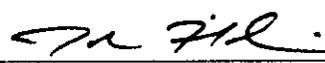
NOW COME the Plaintiff and defendant Equifax, and pursuant to Fed. R. Civ. P. 41(a)(1)(ii), stipulate and agree that this action be dismissed as to Equifax only, with prejudice, as settled, with each party to bear their own costs incurred within.

Dated: This 28th day of October, 1999.

KATHRYN S. DUKE


THEODORE P. GIBSON, OBA #3353
 Tips & Gibson
 Eleven Eleven ParkCentre, 525 S. Main
 Tulsa, Oklahoma 74103-4512
 (918) 585-1181

EQUIFAX CREDIT INFORMATION SERVICES, INC.


 JOHN J. FRIEDLINE, admitted pro hac
 Kilpatrick Stockton LLP
 1100 Peachtree Street, Suite 2800
 Atlanta, Georgia 30309-4530
 (404) 815-6500

Arthur F. Hoge, III
 Mee Mee & Hoge LLP
 1900 City Place Building
 204 N. Robinson Avenue, Suite 1900
 Oklahoma, OK 73102
 (405) 232-5900

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

FILED

NOV 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

George C. Smith and Jerry Bruce,)
)
 Plaintiffs,)
)
 vs.)
)
 Burlington Northern and Santa Fe)
 Railway Company,)
)
 Defendant.)

Case No. 99-CV-247K (E)

ENTERED ON DOCKET
DATE NOV 03 1999

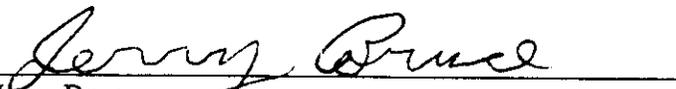
STIPULATION OF DISMISSAL

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the parties hereby stipulate and agree that this matter is dismissed with prejudice, that the causes of action of Plaintiffs and actions set forth in Plaintiffs' Petition, as amended against the Defendant have been satisfactorily settled by and between the parties hereto and that the consideration for said settlement has been accepted by Plaintiffs, George C. Smith and Jerry Bruce in full satisfaction of any causes of action or claims against the Defendant.

It is further stipulated and agreed that each party will bear its own costs and attorney fees.

Dated this 29th day of October, 1999.


George C. Smith


Jerry Bruce

APPROVAL:


Robert J. Scott

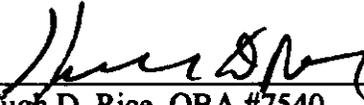
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12

10-29-99

The Shawnee Professional Building
535 6th Street
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ATTORNEY FOR PLAINTIFFS



Hugh D. Rice, OBA #7540

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RAINEY, ROSS, RICE & BINNS

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Oklahoma City, Oklahoma 73102

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ATTORNEYS FOR DEFENDANT, BURLINGTON
NORTHERN AND SANTA FE RAILWAY
COMPANY

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 02 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOROTHY M. HOPPOCK,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No. 98-CV-326-J ✓

ENTERED ON DOCKET
DATE NOV 3 1999

ORDER

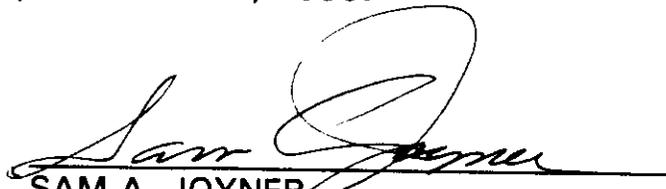
On July 19, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,365.50 for attorney fees for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,365.50 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social 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.

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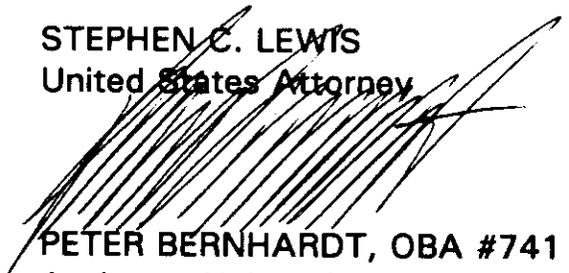
It is so ORDERED THIS 2 day of November, 1999.



SAM A. JOYNER
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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHEDRICK JOHNSON,)
)
 Plaintiff,)
)
 vs.)
)
 MARNA FRANKLIN, Office of Public Defender,)
)
 Defendant.)

Case No. 99-CV-909-E (M)

ENTERED ON DOCKET
DATE NOV 08 1999

ORDER

Plaintiff, a prisoner appearing *pro se*, has submitted a 42 U.S.C. § 1983 civil rights complaint. Attached to the complaint is a copy of Plaintiff's "Inmate Account Statement" and a "Statement of Prison Account" signed by an authorized prison official. The Court liberally construes the attachments as a motion for leave to proceed *in forma pauperis*. See Haines v. Kerner, 404 U.S. 519 (1972). Based on the information contained in the prison accounting, the Court finds Plaintiff is currently without funds sufficient to prepay the filing fee required to commence this action. Therefore, the Court concludes that Plaintiff should be allowed to proceed *in forma pauperis*, without prepayment of the filing fee.

Nonetheless, for the reasons discussed below, the Court finds Plaintiff's Complaint must be dismissed.

28 U.S.C. § 1915(e)(2) provides as follows:

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

28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added). The Court finds that, even if the allegations in Plaintiff's Civil Rights Complaint are accepted as true, the Complaint fails to state a claim on which relief can be granted under 42 U.S.C. § 1983. See Fed. R. Civ. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim).¹

I. PLAINTIFF HAS FAILED TO STATE A CIVIL RIGHTS CLAIM UNDER 42 U.S.C. § 1983.

Plaintiff alleges that Defendant violated his civil rights and that pursuant to 42 U.S.C. § 1983, Defendant is liable for those violations. The Defendant in this case was Plaintiff's public defender. Plaintiff states that at his arraignment, "Judge Singer dropped State charges to a misdemeanor, but my Public Defender denies me access to the video tape of the above recording." As a result Plaintiff contends as his only cause of action that Defendant has "denied access to courts" by failing to provide Plaintiff with a copy of his video arraignment. See Doc. No. 1. As relief, Plaintiff seeks "charges dropped to state misdemeanor and cut loose. In addition \$150,000 for punitive damages." See Doc. No. 1.

The relevant civil rights statute provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

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

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (emphasis added). The emphasized language establishes that to be liable under § 1983, the Defendant must have acted under color of state law (i.e., he must have been a state actor). See, e.g., Jett v. Dallas Independent School District, 491 U.S. 701, 724-25 (1989); and Harris v. Champion, 51 F.3d 901, 909 (10th Cir. 1995).

Public defenders, like Defendant in this case, are not state actors within the meaning of 42 U.S.C. § 1983. According to the Tenth Circuit,

Public Defenders, whether court appointed or privately retained, performing in the traditional role of attorney for the defendant in a criminal proceeding, are not deemed to act under color of state law; such attorneys represent their client only, not the state, and are not subject to suit in a 42 U.S.C. § 1983 action.

Lowe v. Joyce, No. 95-1248, 1995 WL 495208, at *1 (10th Cir. Aug. 21, 1995) (citing Harris v. Champion, 51 F.3d 901, 910 (10th Cir. 1995)). The United States Supreme Court agrees. See Polk County v. Dodson, 454 U.S. 312, 325 (1981) (holding that “a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding”).

The public defenders in Harris had allegedly asked for numerous and unreasonable extensions of time to file appellate briefs on plaintiff’s behalf, without considering whether the client desired the extension or whether the extension was in the client’s best interest. The Tenth Circuit held that even if the public defenders’ conduct was so egregious that it ultimately deprived their clients of constitutional rights, the actions were still “traditional lawyer functions.” The Court went on to hold that

even if counsel performs what would otherwise be a traditional lawyer function, such as filing an appellate brief on his or her client's behalf, so inadequately as to deprive the client of constitutional rights, defense counsel still will not be deemed to have acted under color of state law.

Harris, 51 F.3d at 910. The United Supreme Court agrees. See Briscoe v. LaHue, 460 U.S. 325, 329 n.6 (1983). In Briscoe, the Supreme Court held that “even though the defective performance of defense counsel may cause the trial process to deprive an accused person of his liberty in an unconstitutional manner, the lawyer who may be responsible for the unconstitutional state action does not himself act under color of state law within the meaning of § 1983.” Id.

The Court finds that the Defendant's actions complained of in this case were actions taken by Defendant in his traditional role as a defense lawyer for Plaintiff. Defendant's actions were taken on behalf of Plaintiff, not on behalf of the state of Oklahoma. Consequently, Defendant's conduct was not state action for purposes of 42 U.S.C. § 1983. Plaintiff cannot, therefore, maintain an action against Defendant under § 1983. Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Plaintiff's Civil Rights Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted. This dismissal constitutes a “prior occasion” for purposes of 28 U.S.C. § 1915(g).²

II. PLAINTIFF'S POTENTIAL HABEAS CORPUS CLAIM UNDER 28 U.S.C. § 2241.

With this Order, the Court has dismissed Plaintiff's civil rights claim against Defendant for “monetary compensation.” In his complaint, Plaintiff also seeks to be “cut loose” as a remedy for

^{2/} 28 U.S.C. § 1915(g) provides that “[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”

Defendant's alleged conduct. The Court construes Plaintiff's request to be "cut loose" as a request to be released from custody. A claim for release from custody cannot be litigated under 42 U.S.C. § 1983. Rather, claims for release from state custody based on the ineffective assistance of counsel must be pursued *via* a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241, if the claimant is a pretrial detainee. "[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." Heck v. Humphrey, 512 U.S. 477 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)).

The Court clerk should be directed to mail Plaintiff a copy of the Court's form Petition For a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. If Plaintiff wishes to proceed with a habeas corpus claim, he must complete the Petition For a Writ of Habeas Corpus and file it with this Court. The filing fee for a habeas corpus action is \$5.00. If Plaintiff wishes to proceed with the habeas action *in forma pauperis*, Plaintiff must also file a Motion for Leave to Proceed *In Forma Pauperis* supported by a completed statement of institutional accounts.

CONCLUSION

Defendant's alleged conduct is not state action for purposes of 42 U.S.C. § 1983. Therefore, Plaintiff's civil rights complaint should be dismissed with prejudice for failure to state a claim upon which relief may be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's civil rights complaint is **dismissed with prejudice** for failure to state a claim upon which relief may be granted.
2. The Clerk is directed to "flag" this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).
3. The Clerk is directed to send Plaintiff a blank § 2241 petition for writ of habeas corpus (form 2241pet.hc) as well as a motion for leave to proceed *in forma pauperis* (form ifp-hc.dis) and the instructions for each.

SO ORDERED THIS 28TH day of October, 1999.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ROBERT R. HORTON,
SSN: 441-64-6645,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

NOV - 1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0830-B (E)

ENTERED ON DOCKET

NOV 3 1999

REPORT AND RECOMMENDATION

Claimant, Robert Horton, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act. By minute order dated October 26, 1998, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure. For the reasons discussed below, the undersigned recommends that the District Court **AFFIRM** the Commissioner's decision.

Social Security Law and Standards of Review

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy . . ." *Id.*, § 423(d)(2)(A). Social

Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.¹

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

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

Procedural History

On July 29, 1993, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge (ALJ) Glen E. Michael was held June 20, 1994, in Tulsa, Oklahoma. By decision dated January 6, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On July 28, 1995, the Appeals Council denied review of the ALJ's findings. Claimant appealed that decision to this Court.

On May 22, 1996, at the request of the Commissioner, this Court remanded the case for further evaluation of the plaintiff's physical impairments and to obtain supplemental vocational evidence, pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). On June 12, 1996, the Appeals Council vacated the ALJ's decision and remanded with instructions for the ALJ to give further consideration to the severity of claimant's musculoskeletal impairment and the impact of his symptoms on his ability to do work-related activities. In particular, the Appeals Council directed the ALJ to obtain additional evidence concerning claimant's orthopedic impairment and to further evaluate the claimant's subjective complaints.

On remand, ALJ Stephen C. Calvarese held a hearing on October 3, 1997, and issued a new decision on February 26, 1998. He also found that claimant was not disabled at any time through the date of the decision. On August 27, 1998, the Appeals Council declined to assume jurisdiction. Thus, the decision of ALJ Calvarese represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.984(b)(2), 416.1484(b)(2).

Claimant's Background and Medical History

Claimant was born on February 25, 1957, and was 40 years old at the time of the supplemental administrative hearing in this matter. He completed the 11th grade, obtained a General Equivalency Diploma (GED), and has some vocational technical training. (R. 437) Claimant has worked as a plumber, an industrial painter, and a mechanic. (R. 436) Claimant alleges an inability to work beginning April 10, 1993, due to a ruptured disk in his neck and an injury to his left shoulder. (R. 79) He testified that he suffers from pain in his left shoulder, left neck, and lower back. (R. 423)

Claimant first injured his neck and shoulder on April 15, 1992² when he was installing a transfer case in a vehicle. (R. 108). He had surgery to repair a ruptured disk in his neck in June 1992. (R. 107-22, 243) His doctor, Allan S. Fielding, M.D., released claimant to perform desk work on June 23, 1992. (R. 130) Dr. Fielding released claimant for full-time work without restrictions to work as a mechanic in October 1992, although he encouraged claimant to consider becoming a salesman because "it certainly would be an easier life on a long-term basis." (R. 123)

Claimant re-injured his shoulder in April 1993, while he was working as a mechanic in a different shop. (R. 135, 138, 192, 221) An examination by T. A. Derstine, D.C., indicated an acute strain injury to the cervical spine, cervical abnormalities, and nerve pressure on certain emitting spinal nerves. Dr. Derstein treated claimant conservatively and referred claimant for further treatment and examination. (R. 192-93) On May 19, 1993, Daniel Fouts, D.C., examined claimant and also recommended conservative chiropractic management and neuromuscular exercises. (R.

² Claimant's testimony that the date was "third of November" appears to be an error, given the medical record in which he repeatedly reported to doctors that his injury occurred in April 1992. (See R. 423)

140) Stuart T. Hinkle, D.O., performed a Current Perception Threshold (CPT) examination on claimant on May 20, 1993, and detected significant nerve impairment which was compatible with claimant's subjective complaints of throbbing headaches, and pain in claimant's neck and shoulders, particularly on his left side. (R. 165-71)

In July 1993, claimant saw Jim Martin, M.D. for purposes of obtaining an impairment rating for a workers' compensation claim. Dr. Martin noted that claimant had sustained prior injuries in 1986, 1989, and 1992 for which he had obtained impairment ratings and/or settlements. (R. 221) Dr. Martin concluded that claimant had musculoligamentous injury to the posterior neck and left shoulder blade area, as well as chronic bursitis and brachial plexus injury affecting his left shoulder. He rated claimant pursuant to the AMA Guides to the Evaluation of Permanent Impairments as having a 19% permanent partial impairment. (R. 222) Dr. Martin indicated that he had rated claimant for a previous injury in November 1992 and recommended that the patient be re-trained in a more sedentary type of employment, given the demands involved in being a mechanic and the risk that he might re-injure himself or exacerbate his injury. (See R. 231) Dr. Martin restated that recommendation in his July 1993 report. (R. 223) In the November 1992 report, Dr. Martin found 42% permanent partial impairment as a result of claimant's neck injury. (R. 230)

Daniel Studdard, D.O. examined claimant on behalf of the Oklahoma Disability Determination Unit in October 1993 and found "[c]ervical spine fusion C6-C7 interspace with possible radiculopathy by patient's history." (R. 209) When claimant presented to the Oklahoma State University Healthcare Center in November 1993, his chief complaint was an earache, but he reported that he was taking Lodine for back pain arising from a fall off a ladder that resulted in a ruptured disk. (R. 218) He did not report neck or shoulder pain on that day, but did admit to low

back pain. (R. 217) When he returned a week later, he reported chronic neck and shoulder pain and that the Daypro he was taking provided no relief. (R. 215)

After the Appeals Council vacated ALJ Michael's decision and remanded the case, ALJ Calvarese obtained the report of a consultative examination by Emil Milo, M.D. Dr. Milo, an orthopedic surgeon, examined claimant on December 2, 1996. His diagnostic impression was "degenerative arthritis, cervical spine; chronic low back pain; and status post cervical disk surgery with mild residuals." (R. 342) He opined that claimant had the RFC to perform the physical exertional and nonexertional requirements of work except for sitting for more than three hours total at one time, standing for more than two hours total at one time, and walking for more than one hour total at one time; sitting for more than five hours total during an entire 8-hour day, standing for more than three hours total during an entire 8-hour day, and walking for more than two hours total during an entire 8-hour day; continuously lifting and/or carrying more than five pounds, frequently lifting and/or carrying more than 10 pounds, occasionally lifting and/or carrying more than 11 to 20 pounds, infrequently lifting and/or carrying more than 21 to 25 pounds, and never lifting and/or carrying objects weighing over 26 pounds; work that requires more than frequent reaching, occasional climbing, and infrequent bending, squatting, and crawling; and work activity requiring more than mild activity at unprotected heights and around moving machinery. R. (345-46)

Dr. Martin's analysis is contrary, in some respects, to the RFC evaluation submitted after the remand by Jerry Patton, D.O., claimant's treating physician. Dr. Patton opined that claimant could sit continuously in an 8-hour workday for half an hour, and claimant's full capacity for sitting in an 8-hour workday was 2 hours. He opined that claimant could stand and/or walk for two hours continuously and at full capacity in an 8-hour workday. He stated that claimant could frequently lift

or carry up to 20 lbs, he could occasionally lift and/or carry up to 50 pounds, and he could never lift or carry more than 50 pounds. (R. 411-12)

Dr. Patton indicated claimant could use his hands for repetitive actions such as simple grasping, pushing, pulling, and fine manipulations and that there was no evidence of any disorder that would limit those actions by claimant in any way. He further indicate that claimant could use both feet for repetitive movements as in operating foot controls. He noted that claimant could occasionally bend, crawl, climb, reach above, and kneel, but he could never squat, stoop, or crouch. His report indicates that claimant can frequently tolerate exposure to unprotected heights, being around moving machinery, exposure to marked changes in temperature, exposure to dust, fumes and gases, and exposure to noise, but claimant could tolerate driving automotive equipment only occasionally. Dr. Patton noted muscle spasm as an objective sign of claimant's pain, and rated claimant's pain as moderate. He predicted that claimant would frequently need rest periods during the day and would occasionally miss work due to exacerbations of pain. He concluded that claimant would probably be an unreliable employee. (R. 411-14)

At the hearing on October 3, 1997, claimant testified that he continues to work as a mechanic, although at a different shop than where he worked in 1991. He works 12 months per year, six days per week on motor vehicles from 7:00 a.m. until sometimes 9:00 p.m. (R. 430-31) He claims that it takes him three to four times longer to do his work than it would for an average mechanic, and his employer allows him to take frequent breaks (R. 431-32). He is able to use sockets, wrenches, ratchets, and screwdrivers, and the heaviest thing he lifts is a 5-pound air pipe wrench. (R. 432-33) He sometimes uses an extended breaker bar as a special device to help him at work. (R. 433) He works on approximately three cars per day (R. 434) He has earned income of approximately \$7,000

per year (R. 355-409), and he testified that his wife earns about half of that by picking up parts for him from auto parts stores or salvage yards. (R. 426-27) He mows his lawn. (R. 429) He drives eight or nine miles per day (R. 438) He takes ibuprofen, Xanax and Tylenol for pain, and the medication makes him drowsy and “dingy.” (R. 425, 435) However, he usually gets about four hours of sleep per night, despite the medication, because he cannot get comfortable. (R. 439-40, 445-46)

Decision of the Administrative Law Judge

The ALJ ultimately made his decision at the fifth step of the sequential evaluation process, after finding that claimant’s application could also be denied at the first and fourth steps. He found that claimant was currently engaging in substantial activity. He also determined that claimant is status post cervical diskectomy and fusion at C6-7, but claimant does not have an impairment or combination of impairments listed in or medically equal to one listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1.

Like Dr. Milo, ALJ Calvarese found that claimant had the RFC “to perform the physical exertional and nonexertional requirements of work except for sitting for more than three hours total at one time, standing for more than two hours total at one time, and walking for more than one hour total at one time; sitting for more than five hours total during an entire 8-hour day, standing for more than three hours total during an entire 8-hour day, and walking for more than two hours total during an entire 8-hour day; continuously lifting and/or carrying more than five pounds; frequently lifting and/or carrying more than 10 pounds; occasionally lifting and/or carrying more than 11 to 20 pounds; infrequently lifting and/or carrying more than 21 to 25 pounds; and never lifting and/or carrying objects weighing over 26 pounds, that does not require more than frequent reaching, occasional

climbing, and infrequent bending, squatting, and crawling; mildly restricted in activities at unprotected heights and around moving machinery.” (R. 309)

The ALJ determined that claimant’s past relevant work as a mechanic as he was performing that work did not require the performance of work-related activities precluded by the above limitations, and thus, claimant’s impairment did not prevent claimant from performing his past relevant work. The ALJ also decided, based on the vocational expert’s testimony, that there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that:

- (1) the ALJ found the claimant to have engaged in substantial gainful activity (SGA);
- (2) the ALJ and the Commissioner ignored the testimony of the vocational experts (VEs) in both hearings that claimant could not perform SGA;
- (3) the ALJ did not provide proper rationale in accordance with SSR 96-7p and the applicable case law in his evaluation of claimant’s pain and other non-exertional impairments. In connection with his third assertion of error, he claims that the ALJ disregarded the findings of his treating physicians.

Substantial Gainful Activity

Substantial gainful activity is defined in the regulations as “work that (a) [i]nvolves doing significant and productive physical or mental duties; and (b) [i]s done (or intended) for pay or profit.” 20 C.F.R. §§ 404.1510, 416.910; see also id. §§ 404.1572; 416.972. Work “may be

substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.” Id. §§ 404.1572(a); 416.972(a). Work activity is gainful even if no profit is realized. Id. §§ 404.1572(b); 416.972(b). The Commissioner considers: the nature of a claimant’s work; how well the claimant performs it; whether the claimant’s work is done under special conditions; whether the claimant is self-employed; and the time the claimant spends in work. Id. §§ 404.1573, 416.973. Claimant has the burden of showing, at step one, that he is not performing substantial gainful activity. Id. §§ 404.1571, 416.971.

It is not clear whether claimant was an employee or self-employed because he testified that he worked for Jack’s Quality Motors, operated by the Reverend Jack Hayes. (R. 432) However, claimant’s tax returns indicate that claimant was the sole proprietor of Jack’s Quality Motors. (R. 378, 389, 400) The name of the business changed in 1996 to Robert’s Auto Repair. (R. 400) Regardless of whether he was employed by someone else or self-employed, his earnings and other considerations indicate that he was involved in substantial gainful activity.

If a claimant’s earnings as an employee average more than \$500 a month after 1989, such earnings will ordinarily show that the claimant has engaged in substantial gainful activity. 20 C.F.R. §§ 404.1574(b)(2)(vii); 416.972(b)(2)(vii). If the claimant is self-employed, the Commissioner considers the claimant’s activities and their value to the business. Income alone is not determinative. The Commissioner will find that claimant is engaged in substantial gainful activity if (1) claimant’s work activity, in terms of factors such as hours, skill, energy output, efficiency, duties and responsibilities is comparable to that of unimpaired individuals in the community who are in the same or similar business as their means of livelihood; (2) his work activity is clearly worth the amount shown for employed individuals when considered in terms of its value to the business, or

when compared to the salary that an owner would pay to an employee to do the work he is doing; or (3) claimant renders services that are significant to the operation of the business and receives a substantial income from the business. Id. §§ 404.1575(a); 416.975(a). If claimant's business involves the services of more than one person, he is considered to be rendering significant services if he contributes more than half the total time required for the management of the business, or if he renders management services for more than 45 hours a month regardless of the total management time required by the business. Id. §§ 404.1575(b)(1); 416.975(b)(1). The Commissioner determines whether claimant is earning substantial income by deducting the reasonable value of any unpaid help from the net income and by deducting impairment-related work expenses. Id. §§ 404.1575(b)(2); 416.975(b)(2).

Claimant points out that ALJ Calvarese's opinion differs from ALJ Michael's opinion as to whether claimant was involved in SGA. (Pl. Br., Docket # 6, at 2.) ALJ Michael wrote that "There is no evidence to refute the allegation by the claimant that he has not worked since April 10, 1993. . . ." (R. 24) As a result, the ALJ proceeded to the second step of the sequential evaluation process. However, there was evidence to refute that allegation before ALJ Calvarese: claimant's tax returns for the years 1993-96. Claimant earned \$5,250 working for Firestone in 1993 (R. 356, 359); he made a profit of \$5,752 in 1994 working at Jack's Motor Cars (R. 375, 378); he made a profit of \$5,443 in 1995 at Jack's Motor Cars (R. 386, 389); and he made a profit of \$7,053 from Robert's Auto Repair in 1996. (R. 397, 400) Although his income in 1993-95 does not meet the \$500 per month guideline indicating that he was engaged in SGA, 20 C.F.R. §§ 404.1574(b)(2)(vii); 416.972(b)(2)((vii), his status as a self-employed individual for 1994 and 1995 triggers several other factors to determine whether he engaged in SGA for those years. See id. §§ 404.1575; 416.975.

Nonetheless, his 1996 profit is clearly in excess of the \$500 per month necessary to show that claimant was engaging in SGA.

Claimant testified that his wife performed half of the work when she picked up parts for him from the auto parts store or salvage yards while their son was at school during the day. (R. 427-29) Claimant argues he would not have earned enough income to meet the SGA minimum threshold without her assistance. (Pl. Br. at 2.) However, she is listed as a housewife on his tax returns; she is not listed as an employee of the business. (R. 360, 376, 387, 398) In fact, the couple's tax returns show that the business had no wage expenses and no costs of labor. (R. 378, 379, 389, 390, 400, 401) Regardless of the amount of work his wife performs or the pace at which he works, he is performing SGA if he bears most of the responsibility for the operation of the business and performs many of the managerial activities. See Rupe v. Chater, No. 95-5031, 1996 WL 131665 (10th Cir. March 25, 1996). Clearly, his services are absolutely essential to the business, which would not continue without him. See id. at **1 (citation omitted).

Claimant has not met his burden of showing, at step one, that he is not performing substantial gainful activity. See 20 C.F.R. §§ 404.1571, 416.971. Thus, ALJ Calvarese's determination that claimant was engaged in substantial gainful activity was not erroneous. In an abundance of caution, however, ALJ Calvarese wisely proceeded with the sequential evaluation process to evaluate claimant's disability claim. Claimant faults ALJ Calvarese for continuing with the review process despite ALJ Calvarese's opinion that claimant was engaged in SGA. However, it is not error for an ALJ to offer an alternative disposition. See Murrell v. Shalala, 43 F.3d 1388, 1389 (10th Cir. 1994).

Vocational Expert Testimony

Claimant also argues that the ALJs (both of them) “ignored the VE’s finding as to plaintiff’s inability to perform SGA and/or maintain an acceptable work routine.” (Pl. Br. at 2.) He bases this allegation on the VEs’ testimony, in response to questions by claimant’s representatives in each hearing, that claimant might have difficulty obtaining or keeping a job if he had to lie down one to two hours a day, three days a week or if he had to be away from work two to three times a week for two or three hours to seek medical treatment. (Id.; see R. 271-272, 450-54) As the Commissioner points out, however, the ALJs did not find that plaintiff’s RFC was restricted in the manner indicated by claimant’s representatives, and the record does not support their inclusion. (Def. Br., Docket # 7, at 4.) In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Moreover, employability is not a factor in determining disability. The determination that work exists in significant numbers in the national or local economy does not depend on whether the work exists in the area in which the claimant lives, whether a specific job vacancy exists, or whether claimant would be hired for the job if she applied. 42 U.S.C.A. § 423(d)(2)(A) (West 1991 & Supp. 1999); 20 C.F.R. §§ 404.1566(a), 416.966(a). Claimant’s second assignment of error without merit.

Pain/Credibility Analysis

Claimant’s third assignment of error appears to be an argument over semantics. He claims that the ALJ used an incorrect legal standard because the ALJ stated: “As to the claimant’s allegations of totally disabling pain, his testimony was evaluated and compared with prior statements and other evidence.” (R. 304) Claimant argues that he never alleged totally disabling pain and he

does not have to prove totally disabling pain. He then equates the words “totally disabling pain” with “totally incapacitated,” and appears to quote from a few cases that stand for the proposition that application of an incorrect legal standard is grounds for a reversal. (Pl. Br. at 4-5) None of the cited cases discusses “totally incapacitating” or “totally disabling” or the relationship, if any, between the two phrases. Further, it does not matter whether claimant was alleging “totally disabling pain” or merely “disabling” pain: it is the ALJ’s job to determine if he has the RFC to perform his past relevant work or work that exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. This the ALJ did.

The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires consideration of:

- (1) whether Claimant established a pain-producing impairment by objective medical evidence;
- (2) if so, whether there is a “loose nexus” between the proven impairment and the Claimant’s subjective allegations of pain; and
- (3) if so, whether, considering all the evidence, both objective and subjective, Claimant’s pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992); accord Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). The factors that an ALJ should consider when determining the credibility of subjective complaints of pain include, but are not limited to, “the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical

evidence.” Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted).

The ALJ fully considered claimant’s subjective complaints of disabling pain. In so doing, he specifically referenced the parameters set forth in SSR 96-7p and the criteria set forth in Luna. He analyzed the relevant factors to determine the weight to be given claimant’s subjective allegations of pain, and, as required by Kepler, the ALJ made express findings as to the credibility of claimant’s objective complaints of disabling pain, with an explanation of why specific evidence led to the conclusion that claimant’s subjective complaints were not fully credible. (R. 304-06) Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). “Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.” Diaz v. Secretary of Health and Human Servs, 898 F.2d 774, 777 (10th Cir. 1990).

Treating Physicians

Finally, claimant objects to the ALJ’s reliance on the findings of Dr. Milo, a consultative examiner, instead of relying on the findings of Dr. Patton, his treating physician. Pursuant to regulations adopted in 1991, a treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant’s impairments, including the claimant’s symptoms, diagnosis and prognosis, what claimant can do despite the claimant’s impairment, and any physical or mental restrictions. 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. §§

404.1527(d)(2), 416.927(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. §§ 404.1527(e)(2), 416.927(e)(2).

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted.) A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

The ALJ set forth specific, legitimate reasons for disregarding Dr. Patton's report. He discussed Dr. Patton's report and noted that Dr. Patton treated claimant on four occasions between 1996 and 1997, once for an earache, twice for neck pain, and once for low back pain. (R. 302, 306-07) Dr. Patton's report was not well-supported by clinical and laboratory diagnostic techniques, and it appears to be based primarily on the claimant's subjective complaints. (See R. 415-17) It is not consistent with other substantial evidence in the record. Those reasons constitute good cause for rejecting the report. The ALJ was not required to give it controlling weight.

Recommendation

Based upon the foregoing, the undersigned recommends that the District Court **AFFIRM** the decision of the Commissioner denying disability benefits to claimant.

Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Haney v. Addison*, 175 F.3d 1217 (10th Cir. 1999).

DATED this 1st day of November, 1999.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 3rd Day of November, 1999.
C. Portillo, Deputy Clerk

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

FILED
NOV 2 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DERONN WRATHER, STEPHEN)
WILLIAMS, & VINCENT TURNER,)
)
Plaintiffs,)
)
vs.)
)
THE CITY OF TULSA, a)
municipal corporation,)
et al.,)
)
Defendants.)

Case No. 97-CV-435-BU(M) ✓

ENTERED ON DOCKET
DATE NOV 3 1999

ADMINISTRATIVE CLOSING ORDER

For statistical purposes, the Court **ORDERS** the Clerk of the Court to administratively close this matter in his records pending final disposition of Defendants' interlocutory appeal by the Tenth Circuit Court of Appeals. Within five (5) days of the mandate of the Tenth Circuit Court of Appeals, the parties shall file a motion to reopen this matter for final resolution of this litigation.

ENTERED this 1st day of November, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

157

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

DAVID LEE WILLIAMS,

Plaintiff,

vs.

DAVID KANUTSON, Tulsa Police Officer;
and DONIE DERAMUS, Tulsa Police
Officer,

Defendants.

ENTERED ON DOCKET

DATE NOV 3 1999

No. 99-CV-355-H (J) ✓

FILED

NOV 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

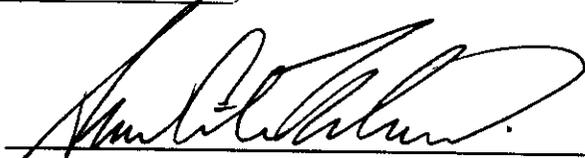
On May 11, 1999, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 (Docket #1) and a motion for leave to proceed *in forma pauperis* (#2). By order filed May 17, 1999 (#3), the Court granted Plaintiff leave to proceed *in forma pauperis* and advised him that he would nonetheless be responsible for full payment of the \$150 filing fee pursuant to 28 U.S.C. § 1915(b)(1). The Order also directed that the Clerk of Court was not to issue process until further order of the Court.

The Court's May 17, 1999 Order was mailed to Plaintiff at his last known address. However, the envelope containing the Order was returned to the Clerk of Court, marked "NOT IN CUSTODY." To date, Plaintiff has failed to provide the Court with his current address. Because Plaintiff has failed to notify the Court of his current address, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

IT IS SO ORDERED.

This 2ND day of NOVEMBER, 1999.



Sven Erik Holmes
United States District Judge

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

FRAN AGUILERA,

Plaintiff,

v.

KWIKSET CORPORATION,
a California corporation,

Defendant.

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§

ENTERED ON DOCKET

DATE NOV 03 1999

CIVIL ACTION NUMBER
96-CV-1143H

FILED

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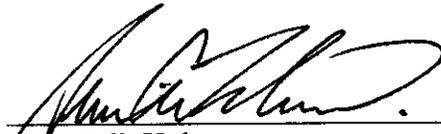
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the joint motion of the parties, this case is **DISMISSED WITH PREJUDICE.**

The parties shall bear their own costs, fees, and expenses.

ENTERED this 2ND day of NOVEMBER, 1999.



Sven Erik Holmes
United States District Judge

APPROVED AS TO FORM AND SUBSTANCE:

KATHERINE T. WALLER

By: *Katherine T. Waller*
Katherine T. Waller

COUNSEL FOR PLAINTIFF

CLARK, WEST, KELLER, BUTLER & ELLIS, L.L.P.

By: *Allen Butler*
Allen Butler
Robert J. Wood, Jr.

DOERNER, SAUNDERS, DANIEL & ANDERSON

Charles S. Plumb

COUNSEL FOR DEFENDANT
KWIKSET CORPORATION

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHEDRICK JOHNSON,

Plaintiff,

vs.

MARNA FRANKLIN, Office of Public Defender,

Defendant.

Case No. 99-CV-909-E (M)

ENTERED ON DOCKET
DATE NOV 03 1999

ORDER

Plaintiff, a prisoner appearing *pro se*, has submitted a 42 U.S.C. § 1983 civil rights complaint. Attached to the complaint is a copy of Plaintiff's "Inmate Account Statement" and a "Statement of Prison Account" signed by an authorized prison official. The Court liberally construes the attachments as a motion for leave to proceed *in forma pauperis*. See Haines v. Kerner, 404 U.S. 519 (1972). Based on the information contained in the prison accounting, the Court finds Plaintiff is currently without funds sufficient to prepay the filing fee required to commence this action. Therefore, the Court concludes that Plaintiff should be allowed to proceed *in forma pauperis*, without prepayment of the filing fee.

Nonetheless, for the reasons discussed below, the Court finds Plaintiff's Complaint must be dismissed.

28 U.S.C. § 1915(e)(2) provides as follows:

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

28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added). The Court finds that, even if the allegations in Plaintiff's Civil Rights Complaint are accepted as true, the Complaint fails to state a claim on which relief can be granted under 42 U.S.C. § 1983. See Fed. R. Civ. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim).¹

I. PLAINTIFF HAS FAILED TO STATE A CIVIL RIGHTS CLAIM UNDER 42 U.S.C. § 1983.

Plaintiff alleges that Defendant violated his civil rights and that pursuant to 42 U.S.C. § 1983, Defendant is liable for those violations. The Defendant in this case was Plaintiff's public defender. Plaintiff states that at his arraignment, "Judge Singer dropped State charges to a misdemeanor, but my Public Defender denies me access to the video tape of the above recording." As a result Plaintiff contends as his only cause of action that Defendant has "denied access to courts" by failing to provide Plaintiff with a copy of his video arraignment. See Doc. No. 1. As relief, Plaintiff seeks "charges dropped to state misdemeanor and cut loose. In addition \$150,000 for punitive damages." See Doc. No. 1.

The relevant civil rights statute provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

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

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (emphasis added). The emphasized language establishes that to be liable under § 1983, the Defendant must have acted under color of state law (i.e., he must have been a state actor). See, e.g., Jett v. Dallas Independent School District, 491 U.S. 701, 724-25 (1989); and Harris v. Champion, 51 F.3d 901, 909 (10th Cir. 1995).

Public defenders, like Defendant in this case, are not state actors within the meaning of 42 U.S.C. § 1983. According to the Tenth Circuit,

Public Defenders, whether court appointed or privately retained, performing in the traditional role of attorney for the defendant in a criminal proceeding, are not deemed to act under color of state law; such attorneys represent their client only, not the state, and are not subject to suit in a 42 U.S.C. § 1983 action.

Lowe v. Joyce, No. 95-1248, 1995 WL 495208, at *1 (10th Cir. Aug. 21, 1995) (citing Harris v. Champion, 51 F.3d 901, 910 (10th Cir. 1995)). The United States Supreme Court agrees. See Polk County v. Dodson, 454 U.S. 312, 325 (1981) (holding that “a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding”).

The public defenders in Harris had allegedly asked for numerous and unreasonable extensions of time to file appellate briefs on plaintiff’s behalf, without considering whether the client desired the extension or whether the extension was in the client’s best interest. The Tenth Circuit held that even if the public defenders’ conduct was so egregious that it ultimately deprived their clients of constitutional rights, the actions were still “traditional lawyer functions.” The Court went on to hold that

even if counsel performs what would otherwise be a traditional lawyer function, such as filing an appellate brief on his or her client's behalf, so inadequately as to deprive the client of constitutional rights, defense counsel still will not be deemed to have acted under color of state law.

Harris, 51 F.3d at 910. The United Supreme Court agrees. See Briscoe v. LaHue, 460 U.S. 325, 329 n.6 (1983). In Briscoe, the Supreme Court held that “even though the defective performance of defense counsel may cause the trial process to deprive an accused person of his liberty in an unconstitutional manner, the lawyer who may be responsible for the unconstitutional state action does not himself act under color of state law within the meaning of § 1983.” Id.

The Court finds that the Defendant's actions complained of in this case were actions taken by Defendant in his traditional role as a defense lawyer for Plaintiff. Defendant's actions were taken on behalf of Plaintiff, not on behalf of the state of Oklahoma. Consequently, Defendant's conduct was not state action for purposes of 42 U.S.C. § 1983. Plaintiff cannot, therefore, maintain an action against Defendant under § 1983. Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Plaintiff's Civil Rights Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted. This dismissal constitutes a “prior occasion” for purposes of 28 U.S.C. § 1915(g).²

II. PLAINTIFF'S POTENTIAL HABEAS CORPUS CLAIM UNDER 28 U.S.C. § 2241.

With this Order, the Court has dismissed Plaintiff's civil rights claim against Defendant for “monetary compensation.” In his complaint, Plaintiff also seeks to be “cut loose” as a remedy for

^{2/} 28 U.S.C. § 1915(g) provides that “[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”

Defendant's alleged conduct. The Court construes Plaintiff's request to be "cut loose" as a request to be released from custody. A claim for release from custody cannot be litigated under 42 U.S.C. § 1983. Rather, claims for release from state custody based on the ineffective assistance of counsel must be pursued *via* a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241, if the claimant is a pretrial detainee. "[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." Heck v. Humphrey, 512 U.S. 477 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)).

The Court clerk should be directed to mail Plaintiff a copy of the Court's form Petition For a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. If Plaintiff wishes to proceed with a habeas corpus claim, he must complete the Petition For a Writ of Habeas Corpus and file it with this Court. The filing fee for a habeas corpus action is \$5.00. If Plaintiff wishes to proceed with the habeas action *in forma pauperis*, Plaintiff must also file a Motion for Leave to Proceed *In Forma Pauperis* supported by a completed statement of institutional accounts.

CONCLUSION

Defendant's alleged conduct is not state action for purposes of 42 U.S.C. § 1983. Therefore, Plaintiff's civil rights complaint should be dismissed with prejudice for failure to state a claim upon which relief may be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's civil rights complaint is **dismissed with prejudice** for failure to state a claim upon which relief may be granted.
2. The Clerk is directed to "flag" this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).
3. The Clerk is directed to send Plaintiff a blank § 2241 petition for writ of habeas corpus (form 2241pet.hc) as well as a motion for leave to proceed *in forma pauperis* (form ifp-hc.dis) and the instructions for each.

SO ORDERED THIS 28TH day of October, 1999.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY D. TURNER, an individual,)
)
Plaintiff,)
)
vs.)
)
ORAL ROBERTS UNIVERSITY,)
)
an Oklahoma nonprofit corporation, and)
)
JEFF OGLE (Supervisor), an individual,)
)
Defendants.)

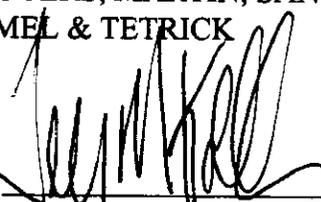
Case No. 98CV0953B(E) ✓

ENTERED ON DOCKET
DATE NOV 2 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Defendant, Oral Roberts University, by and through its undersigned attorney of record, Terry M. Kollmorgen, and the Plaintiff, Timothy Turner, by and through his undersigned attorney of record, Bill Wilkinson, pursuant to the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulate to the dismissal of the above-styled cause of action with prejudice.

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK



By _____
Terry M. Kollmorgen, OBA #13713
320 S. Boston, Suite 920
Tulsa, OK 74103-3722
Telephone: (918) 582-5281
Telecopier: (918) 585-8318
ATTORNEYS FOR DEFENDANT
Oral Roberts University

23

015

TIMOTHY TURNER

By 

Bill Wilkinson and
WILKINSON LAW FIRM
7625 E. 51st St., Ste. 400
Tulsa, OK 74145-7857
ATTORNEY FOR DEFENDANT
Timothy Turner

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 01 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE NEWMAN,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner, Social)
 Security Administration,)
)
 Defendant.)

Case No. 97-CV-509-J ✓

ENTERED ON DOCKET
DATE NOV 2 1999

ORDER

On July 19, 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.

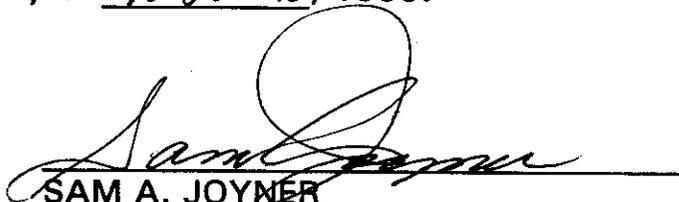
Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,493.00 for attorney fees and \$150.00 in costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,493.00 and \$150.00 in costs for a total award of \$2,643.00 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller

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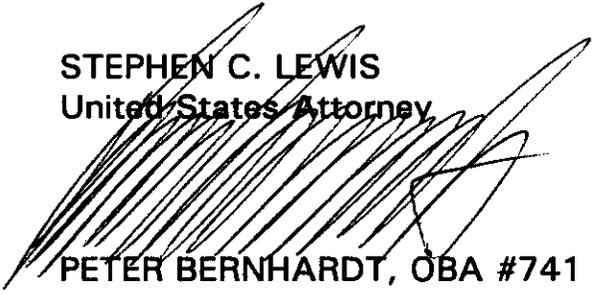
award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 1 day of NOVEMBER 1999.


SAM A. JOYNER
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

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

98 CV 671 H (M)

FILED
OCT 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
NOV 01 1999
DATE _____

**ORDER AWARDING LITIGATION EXPENSES FOR
PLAINTIFF'S WILLFUL, FRAUDULENT AND BAD FAITH CONDUCT**

NOW on this 29TH day of ~~September~~ October, 1999, comes for hearing the defendant, GEICO General Insurance Company's Motion for Attorney's Fees and Costs against the plaintiff, Charles Raus. The parties appear by counsel. After hearing the arguments of counsel, review of the Court file and the briefs submitted by the parties, the Court finds that the Plaintiff, Charles Raus's actions are willful, malicious, perjurious, fraudulent and in bad faith. Based on these findings, the Court finds that the Motion for Attorneys' Fees and Costs should be and is hereby granted.

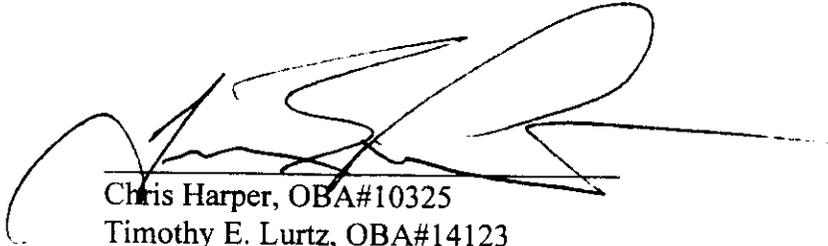
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant GEICO General Insurance Company is hereby granted judgment against the Plaintiff, Charles Raus in the amount of \$ 94,254.17, due to Plaintiff, Charles Raus's actions which were willful, malicious, ~~perjurious~~, fraudulent and in bad faith.

~~IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment granted herein to the Defendant GEICO General Insurance Company and against Plaintiff, Charles Raus, is non-dischargeable pursuant to 11 U.S.C. 523(a)(2)(4) & (6).~~

Dated this 29th day of ~~September~~ ^{October}, 1999.



THE HONORABLE SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA



Chris Harper, OBA#10325
Timothy E. Lurtz, OBA#14123
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Attorneys for Defendant
GEICO General Insurance Company

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

DAVID GEROLD RUNNELS,)
)
 Petitioner,)
)
 vs.)
)
 RON WARD; and)
 THE ATTORNEY GENERAL OF)
 THE STATE OF OKLAHOMA,)
 DREW EDMONDSON,)
)
 Respondents.)

No. 97-CV-210-K

ENTERED ON DOCKET

DATE NOV 01 1999

FILED

OCT 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his convictions in Creek County District Court, Case No. CRF-91-278. Respondent has filed a Rule 5 response (Docket #11) to which Petitioner has replied (#14). As more fully set out below the Court concludes that this petition should be denied.

BACKGROUND

Petitioner was convicted by a jury of Robbery With a Firearm, After Former Conviction of a Felony (Counts I and II); Knowingly Concealing Stolen Property, After Former Conviction of a Felony (Count III); and Feloniously Carrying a Firearm (Count IV), in Creek County District Court, Case No. CRF-91-278. Petitioner was sentenced to fifty (50) years imprisonment on each of counts I, II, and III, to be served concurrently, and to ten (10) years imprisonment on Count IV, to be served consecutively to the sentences for Counts I, II, and III. Judgment and Sentence were imposed on

April 6, 1992. On April 8, 1992, Petitioner, appearing *pro se*, filed a motion for a new trial.¹ Written Notice of Intent to Appeal and Designation of Record were filed on April 13, 1992 by Petitioner's court-appointed trial counsel who was allowed to withdraw on April 14, 1992. Thereafter, the appellate public defender was appointed to represent Petitioner on appeal. On April 27, 1992, Petitioner argued his *pro se* motion for a new trial. The trial court summarily denied the requested relief.

Petitioner perfected his appeal and, on May 18, 1995, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions and sentences in an unpublished summary opinion (#11, Ex. C). Petitioner did not seek state post-conviction relief.

On March 7, 1997, Petitioner filed the instant petition for writ of habeas corpus. He asserts the same four (4) propositions of error raised on direct appeal before the OCCA. Specifically, Petitioner asserts that: (1) the trial court erred in not determining that Petitioner had actually confessed and that the confession was reliable, (2) the trial court erred in not conducting a hearing outside the presence of the jury regarding the voluntariness of Petitioner's statements to police, (3) the improper comments of the prosecutor during closing arguments denied Petitioner a fair and impartial trial, and (4) the trial court erred in not appointing an attorney to represent Petitioner in the presentation of his motion for a new trial.

¹According to the brief filed by the State during Petitioner's direct appeal, one of the issues raised by Petitioner in his motion for new trial was ineffective assistance of trial counsel. (#11, Ex. B at 18). Thus, it would appear that Petitioner chose to proceed *pro se* on his motion for new trial.

ANALYSIS

A. Exhaustion and Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b). Respondent concedes and the Court finds Petitioner has presented each of his claims to the OCCA on direct appeal and meets the exhaustion requirement of § 2254(b). See Rose v. Lundy, 455 U.S. 509, 510 (1982).

In addition, the Court finds Petitioner is not entitled to an evidentiary hearing on his claims. Nothing in the record indicates that Petitioner was denied an evidentiary hearing on his claims in state court. As a result, this Court cannot hold an evidentiary hearing unless Petitioner satisfies the showing prescribed by 28 U.S.C. § 2254(e)(2).² After reviewing Petitioner's claims and the relevant record, the Court finds Petitioner has failed to make the necessary showing and is not entitled to an evidentiary hearing under § 2254(e)(2).

²28 U.S.C. § 2254(e)(2) provides as follows:

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

(A) the claim relies on --

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

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

B. Analysis of Petitioner's Claims

1. Standard of review under the AEDPA

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court cannot grant habeas corpus relief on Petitioner's claims adjudicated by the Oklahoma Court of Criminal Appeals either on direct appeal or on post-conviction appeal unless the adjudication of the claims –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner filed his petition on March 7, 1997, more than ten (10) months after enactment of the AEDPA. Therefore, the AEDPA's provisions apply to this case.

Each of Petitioner's claims was considered on the merits and rejected by the OCCA on direct appeal. See #11, Ex. C. Therefore, unless the Court of Criminal Appeals's adjudication of these claims was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was an unreasonable determination of the facts in light of the evidence presented, this Court must deny the requested habeas relief. 28 U.S.C. § 2254(d).

2. Review of Petitioner's claims

a. Propositions I and II -- admission of petitioner's "confession" and failure to conduct voluntariness hearing outside the presence of the jury

Both of Petitioner's first two propositions of error concern the admission of an inculpatory

statement given by Petitioner to a Creek County law enforcement officer, Detective Duncan. As his first proposition of error, Petitioner argues that "the trial court erred in not determining that Petitioner had actually confessed and that the confession was reliable." (#1 at 5). As his second proposition of error, Petitioner argues that the trial court erred in not conducting a hearing outside the presence of the jury regarding the voluntariness of his statement to Detective Duncan.

In support of his first argument, Petitioner cites to a portion of his brief filed on direct appeal to the OCCA. In that brief, appellate counsel argued that the state failed to carry its burden of showing that there was a confession at all and that as a result, the trial court committed fundamental error in allowing the testimony of Detective Duncan concerning the purported confession. See #11, Ex. A at 3-9. After reviewing the record, this Court finds nothing to indicate that the state court's resolution of Petitioner's claim that the trial court erred in admitting his confession either contradicts or was an unreasonable application of Supreme Court precedent. The Tenth Circuit Court of Appeals has discussed Supreme Court rulings on admission of a defendant's confession or statement as follows:

'[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction.' Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908 (1964) (citation omitted); see also United States v. Janoe, 720 F.2d 1156, 1164 (10th Cir. 1983)

In Jackson v. Denno, the Supreme Court held that a defendant who objects to the admission of a confession on voluntariness grounds has a constitutional right to a fair hearing and an independent and reliable determination of voluntariness before the confession is allowed to be heard by the jury. See 378 U.S. at 376-77, 84 S.Ct. at 1780-81. At this hearing, 'both the underlying factual issues and the voluntariness of [the] confession [must be] actually and reliably determined.' Id. at 380, 84 S.Ct. at 1782.

. . . A habeas petitioner is not, however, automatically entitled to a new hearing 'merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts.' Procunier v. Atchley, 400 U.S. 446, 451, 91 S.Ct. 485, 488, 27 L.Ed.2d 524 (1971). Instead, to be entitled to a new hearing on the voluntariness issue, petitioner 'must also show his version of events, if true, would require the conclusion that his confession was involuntary.' Id.

'A defendant's confession is involuntary if the government's conduct causes the defendant's will to be overborne and 'his capacity for self-determination critically impaired.' United States v. McCullah, 76 F.3d 1987, 1101 (10th Cir. 1996) . . . In determining whether the defendant's will was overborne in a particular case, the court examines 'the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation.' Id. . . . Relevant factors 'include the age, intelligence, and education of the suspect; the length of the detention and questioning; the use or threat of physical punishment; whether Miranda safeguards were administered; the accused physical and mental characteristics; and the location of the interrogation.' United States v. Perdue, 8 F.3d 1455, 1466 (10th Cir. 1993). In addition, the court must 'consider the conduct of the police officers.' Id.

Lucero v. Kerby, 133 F.3d 1299, 1310-11 (10th Cir. 1998).

In the instant case, the record indicates that Petitioner's inculpatory statements to police were not involuntarily given. Petitioner had been given Miranda warnings and had signed a written statement and waiver of his constitutional rights. (Trans. at 125-127). Nothing in the record suggests that the law enforcement officials used violence or improper threats or promises to elicit Petitioner's inculpatory statements. Furthermore, nothing in the record indicates Petitioner requested an attorney prior to giving his statement to Detective Duncan. Therefore, the Court concludes that Petitioner's statements were voluntary and were properly admitted at trial. The OCCA's rejection of this claim on direct appeal was consistent with Supreme Court precedent and was not an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. As a result, pursuant to 28 U.S.C. § 2254(d), habeas corpus relief on Petitioner's claim related to the admission of his statement to police should be denied.

Petitioner argues as his second proposition of error that the trial court erred in not conducting a hearing outside the presence of the jury regarding the voluntariness of his statements to police. During Petitioner's trial, defense counsel raised the issue of voluntariness through an objection and requested to *voir dire* the witness, Detective Duncan. (Trans. at 130). The trial judge allowed counsel to question the detective as to the voluntariness of Petitioner's confession but the questioning was conducted in the presence of the jury. Defense counsel did not object to the questioning in front of the jury. (Trans. 130-133). At the conclusion of the *voir dire* questioning, the trial court overruled defense counsel's objection to admission of the statement based on voluntariness. Petitioner now argues, as he did on direct appeal, that the trial court's failure to conduct the questioning on voluntariness outside the presence of the jury was a violation of due process and conflicted directly with Jackson v. Denno, 378 U.S. 368 (1964).

When faced with similar facts, the Supreme Court held that where counsel consents to the hearing in the presence of the jury and where the trial court finds the confession to be voluntary, no deprivation of constitutional rights has occurred. Pinto v. Pierce, 389 U.S. 31 (1967). Because a confession found to be involuntary by the trial judge is not to be heard by the jury which determines guilt or innocence, it would have been better practice to conduct the hearing outside the presence of the jury. See id. at 193. However, where, as in this case, the confession is found to be voluntary and is admitted for the jury's consideration, no constitutional deprivation occurs if the questioning is conducted in the presence of the jury. Id. As a result, the Court finds that the OCCA's rejection of Petitioner's claim was consistent with Supreme Court precedent. Pursuant to 28 U.S.C. § 2254(d), habeas corpus relief on Petitioner's claim related to the Jackson v. Denno hearing should be denied.

b. Proposition III -- prosecutorial misconduct

As his third proposition of error, Petitioner asserts that the improper comments of the prosecutor during closing arguments denied Petitioner a fair and impartial trial. Petitioner again refers to his direct appeal brief in support of this allegation of error. Specifically, Petitioner complains that during his closing argument, the prosecutor referred to Petitioner as "an extremely dangerous armed robber and a totally amoral person" (Trans. at 179), stated that Petitioner "lied to the Judge" and otherwise impugned Petitioner's honesty and truthfulness (Trans. at 182). Furthermore, Petitioner asserts that the prosecutor improperly interjected his personal opinion concerning Petitioner and the sentence he should receive. Defense counsel did not voice an objection during the prosecutor's closing argument.

A prosecutor's improper comment or argument will require reversal of a state conviction only where the remarks sufficiently infect the trial so as to make it fundamentally unfair and, therefore, a denial of due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 643, 645 (1974); see also Darden v. Wainwright, 477 U.S. 168, 181 (1986); Moore v. Gibson, --- F.3d ---, 1999 WL 765893, *16 (10th Cir. 1999); Hoxsie v. Kerby, 108 F.3d 1239, 1243 (10th Cir.1997). In the instant case, the evidence of Petitioner's participation in the crimes presented at trial was overwhelming. Thus, even if the prosecutor's remarks were improper, they did not render Petitioner's trial fundamentally unfair and Petitioner was not denied due process. As a result, the Court finds that the OCCA's rejection of Petitioner's claim on direct appeal was consistent with Supreme Court precedent and was not an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Pursuant to 28 U.S.C. § 2254(d), habeas corpus relief on Petitioner's claim related to prosecutorial misconduct should be denied.

c. **Proposition IV -- failure to appoint counsel for hearing on motion for new trial**

As his fourth proposition of error, Petitioner argues that the trial court erred in not appointing an attorney to represent Petitioner in the presentation of his motion for new trial. Petitioner again adopts his direct appeal brief in support of this claim. In rejecting this claim on direct appeal, the OCCA correctly stated that "the Sixth Amendment protects the right to counsel in every 'critical stage' of a criminal prosecution." (#11, Ex. C at 2 (citing Coleman v. Alabama, 399 U.S. 1 (1970))). The OCCA recognized that some states, specifically, Alabama and Illinois, consider a motion for a new trial to be a "critical stage" requiring appointment of counsel. However, unlike Oklahoma, those state require certain issues to be raised in a motion for a new trial in order to be preserved for appellate review. In contrast, the *Rules of the Oklahoma Court of Criminal Appeals* provide that "[a] motion for new trial is not required in order to commence an appeal in this Court." Rule 2.1(B)(1). As a result, the OCCA found that in Oklahoma, a motion for a new trial was not a critical stage of criminal proceedings because a defendant does not lose any significant rights by the failure to pursue strategies or remedies at the hearing for new trial. (#11, Ex. C at 2-4). In addition, the OCCA reviewed Petitioner's motion for a new trial and found it contained no viable issues. Thus, the state appellate court concluded that no error occurred when the trial court failed to appoint counsel to represent Petitioner at the hearing on his motion for new trial.

After reviewing the record, this Court finds the decision of the OCCA was consistent with Supreme Court precedent. As pointed out by the OCCA, a motion for new trial is not required to preserve any issue for appeal in Oklahoma and Petitioner lost no rights due to the trial court's failure to appoint counsel for the hearing on the motion for new trial. Furthermore, Petitioner has failed to

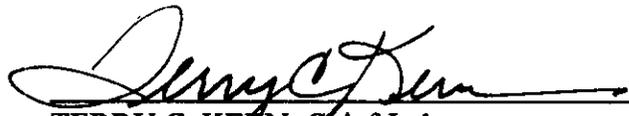
demonstrate that he was prejudiced by the trial court's failure to appoint counsel. Even in a state where a motion for new trial is considered a "critical stage" for purposes of the Sixth Amendment right to counsel, a habeas petitioner must show that he was prejudiced by the lack of representation, including a showing that the outcome of a new trial motion or appeal would have been different, to succeed on a claim that counsel should have been appointed. See Johnston v. Mizell, 912 F.2d 172, 178 (7th Cir. 1990). In the instant case, the trial court considered and rejected the claims raised in Petitioner's motion for new trial and, although only one of the claims was raised on direct appeal, the OCCA noted that none of the issues raised in the *pro se* motion for new trial was viable. There is nothing alleged in the present petition to indicate that those findings were unreasonable determinations. As a result, this Court finds that Petitioner is not entitled to habeas corpus relief on this claim. 28 U.S.C. § 2254(d).

CONCLUSION

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

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 27 day of October, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET

DAVID GEROLD RUNNELS,)
)
Petitioner,)
)
vs.)
)
RON WARD; and)
THE ATTORNEY GENERAL OF)
THE STATE OF OKLAHOMA,)
DREW EDMONDSON,)
)
Respondents.)

DATE NOV 01 1999

No. 97-CV-210-K

FILED

OCT 28 1999

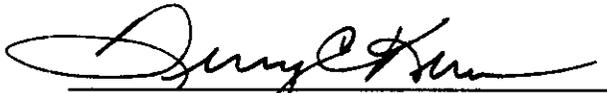
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 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 judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 27 day of October, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUNIOR E. MINNEY,
SSN: 448-32-6387

Plaintiff,

v.

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

Defendant.

ENTERED ON DOCKET
DATE NOV 01 1999

Case No. 98-CV-866-J

FILED

OCT 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

It is so ordered this 29 day of October 1999.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUNIOR E. MINNEY,
SSN: 448-32-6387

Plaintiff,

v.

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

Defendant.

FILED

OCT 29 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-866-J

ENTERED ON DOCKET

DATE NOV 01 1999

ORDER^{1/}

The Commissioner of the Social Security Administration ("Commissioner") has found Plaintiff to be disabled, and Plaintiff is receiving disability insurance benefits. The Commissioner has determined, however, that Plaintiff's disability insurance benefits should be reduced because Plaintiff is also receiving disability payments pursuant to a Civil Service Retirement System ("CSRS") annuity. The Administrative Law Judge ("ALJ"), Jeffrey S. Wolfe, held that the offset was improper, but the Social Security Appeals Council reversed ALJ Wolfe, finding that the offset for CSRS payments was appropriate. Plaintiff has appealed the Commissioner's decision to offset his disability insurance benefits ("DIB"). The Court has meticulously reviewed the entire record and for the reasons discussed below the Court **REVERSES** the Commissioner's decision and **REMANDS** this case for further administrative action consistent with this Order.

^{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.

I. DISCUSSION

A. FACTUAL/PROCEDURAL HISTORY

The Commissioner previously determined that Plaintiff was disabled and entitled to Title II disability insurance benefits as of June 1974. The Commissioner terminated those benefits in September 1981, finding that Plaintiff was no longer disabled. Plaintiff did not appeal the Commissioner's decision to terminate his benefits. Plaintiff again filed an application for disability benefits in 1995, which the Commissioner granted, finding Plaintiff disabled as of September 1984 based on the same disability that was present in 1974. Thus, Plaintiff has received Title II disability insurance benefits from June 1974 to September 1981 and from September 1984 to the present (i.e., no benefits were received from October 1981 to August 1984).

Plaintiff worked for the United States Postal Service from 1960 to 1968. As a postal service employee, he was eligible to receive Civil Service Retirement System benefits. Plaintiff injured his back in 1954 while in the United States Army. This injury progressively worsened to the point when in 1968, he was no longer able to work as a postal employee. In 1968 Plaintiff began receiving CSRS disability benefits. It is undisputed that Plaintiff's CSRS disability benefit is not a workmen's compensation benefit, and it is not based on an injury which Plaintiff sustained while a postal employee. The impairments relating to Plaintiff's 1954 back injury have been the basis for the CSRS disability determination and the 1974 and 1984 Social Security Administration disability determinations.

After the Commissioner found in 1995 that Plaintiff was entitled to disability insurance benefits from September 1984 forward, the Commissioner determined that Plaintiff's disability insurance benefits should be offset by his CSRS benefits pursuant to 42 U.S.C. § 424a and 20 C.F.R. § 404.408. Plaintiff requested review of the Commissioner's offset decision by an Administrative Law Judge. The ALJ held that Plaintiff's DIB should not be offset by Plaintiff's CSRS benefits. The Social Security Appeals Council reviewed the ALJ's decision on its own motion, and reversed the ALJ, finding that pursuant to 20 C.F.R. § 404.408(a)(2), Plaintiff's DIB should be offset by his CSRS benefit. Plaintiff has now appealed the Appeals Council's decision to this Court.^{2/}

B. THE SOCIAL SECURITY ACT REQUIRES THAT DISABILITY INSURANCE BENEFITS BE REDUCED IN CERTAIN CASES.

The Social Security Act ("the Act") requires that a social security claimant's disability insurance benefits be reduced in certain situations. See 42 U.S.C. § 424a.^{3/}

^{2/} Generally, if § 424a applies, the claimant's total monthly income from workmen's compensation or other public disability benefits and his/her DIB cannot exceed 80% of the claimant's "average current earnings" before the claimant became disabled. If the combination of benefits exceeds 80% of the claimant's "average current earnings," the claimant's monthly DIB will be reduced by the amount in excess of the 80% limit. See 42 U.S.C. § 424a(a)(5).

^{3/} Section 424a(a) of Title 42 of the United States Code provides as follows:

If for any month prior to the month in which an individual attains the age of 65-

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month to-

(A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States

(continued...)

Prior to 1981, the Act required a reduction in DIB only when the claimant was also receiving benefits under a "workmen's compensation law or plan of the United States or a State" Id. at § 424a(a)(2)(A). Congress amended § 424a in 1981. The 1981 amendment requires a reduction in DIB whenever a claimant receives "periodic benefits on account of his or her total or partial disability . . . under any [non-Social Security] plan of the United States [or] a State" Id. at § 424a(a)(2)(B). Thus, prior to 1981, DIB was to be offset only by workmen's compensation benefits. After 1981, DIB was to be offset by any public benefit based on disability.

^{3/} (...continued)

or a State, or

(B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision (as that term is used in section 418(b)(2) of this title), or an instrumentality of two or more States (as that term is used in section 418(g) of this title), other than (i) benefits payable under Title 38, (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Commissioner of Social Security under section 418 of this title, and (iv) benefits under a law or plan of the United States based on service all or substantially all of which is employment as defined in section 410 of this title,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced

42 U.S.C. § 424a.

The Commissioner has adopted regulations, which are codified at 20 C.F.R. § 404.408, which implement § 424a of the Act. The regulations provides as follows:

(a) When reduction required. Under [42 U.S.C. § 424a], a disability insurance benefit to which an individual is entitled [to DIB] for a month . . . is reduced . . . by an amount determined under paragraph (c) of this section if:

(1) The individual first became entitled to disability insurance benefits after 1965 but before September 1981 based on a period of disability that began after June 1, 1965, and before March 1981, and

(i) The individual entitled to the disability insurance benefit is also entitled to periodic benefits under a workers' compensation law or plan of the United States or a State for that month for a total or partial disability (whether or not permanent), and

(ii) The Commissioner has, in a month before that month, received a notice of the entitlement, and

(iii) The individual has not attained age 62, or

(2) The individual **first** became entitled to disability insurance benefits after August 1981 based on a disability that began after February 1981, and

(i) The individual entitled to the disability insurance benefit is also, for that month, concurrently entitled to a periodic benefit (including workers' compensation or any other payments **based on a work relationship**) on account of a total or partial disability (whether or not permanent) under a law or plan of the United States, a State, a political subdivision, or an instrumentality of two or more of these entities, and

(ii) The individual has not attained age 65.

20 C.F.R. 404.408(a) (emphasis added). Subsection (a)(1) of the regulation implements the pre-1981 version of the Act, which requires an offset only for workmen's compensation benefits. Subsection (a)(2) of the regulation implements the post-1981 version of the Act, which requires an offset for any public benefit

based on disability. It is undisputed that Plaintiff has never received a workmen's compensation benefit. Thus, neither 42 U.S.C. § 424a(a)(2)(A) nor 20 C.F.R. § 404.408(a)(1) apply in this case.

It is the ambiguity in the language of regulation § 404.408(a)(2), emphasized above, which has caused the ALJ and the Appeals Council to reach different conclusions about the need to offset Plaintiff's DIB with his CSRS disability benefit. The ambiguities are discussed separately below.

C. WHEN DID PLAINTIFF "FIRST" BECOME ENTITLED TO DISABILITY BENEFITS?

Relying on the language of § 404.408(a)(2), Plaintiff argues that he "first" became entitled to disability benefits in 1974. Consequently, Plaintiff argues that § 404.408(a)(2) does not apply to him because it only applies to claimants who became entitled to disability insurance benefits after 1981. Plaintiff argues that the fact that his benefits were terminated in 1981, and not reestablished until 1984, is irrelevant. The Commissioner argues that Plaintiff has had two separate periods of disability, and the second period did not begin until 1984. Regarding his second period of disability, the Commissioner argues that Plaintiff "first" became disabled in 1984. Consequently, the Commissioner argues that § 404.408(a)(2) does apply to Plaintiff's DIB from the second period of disability.

The Court's "review of an agency's interpretation of a statute or regulation it administers is highly deferential. Such an interpretation is given controlling weight unless it is arbitrary, capricious, or contrary to law." McNamar v. Apfel, 172 F.3d 764, 766 (10th Cir. 1999) (citing Thomas Jefferson Univ. Shalala, 512 U.S. 504, 512

(1994)). The Court finds that the Commissioner's interpretation of the word "first" in § 404.408(a)(2) is not arbitrary, capricious, or contrary to law. The Commissioner's interpretation is consistent with the Act (i.e., § 424a) and it implements Congress' intent to prevent duplicate disability benefits from public sources. See Giattina v. Chater, 916 F. Supp. 555, 556-57 (E.D. Va. 1996), aff'd, 125 F.3d 848, 1997 WL 592740, at *1 (4th Cir. Sept. 26, 1997) (rejecting precisely the same argument Plaintiff is advancing here). Thus, § 404.408(a)(2) applies to those disability insurance benefits Plaintiff began receiving in 1984 for his second period of disability.

D. IS PLAINTIFF'S CSRS BENEFIT BASED ON A WORK RELATIONSHIP?

Plaintiff also argues that his CSRS disability benefit is not a benefit "based on a work relationship" as required by § 404.408(a)(2). Plaintiff argues that because the injury which caused his disability was not job-related (i.e., did not occur while he was a postal employee), his CSRS disability benefit is not "based on a work relationship." The Commissioner argues that it is the nature of the benefit and not the nature of the injury which is determinative. The Commissioner argues that a CSRS disability benefit, regardless of the nature or source of the disability, is a benefit which is based on a work relationship.

Again, the Court's review of the Commissioner's interpretation is highly deferential, and the Commissioner's interpretation will be given controlling weight unless it is arbitrary, capricious, or contrary to law. McNamar, 172 F.3d at 766. The Court finds that the Commissioner's interpretation of the phrase "based on a work

relationship" in § 404.408(a)(2) is not arbitrary, capricious, or contrary to law. The Commissioner's interpretation is consistent with the Act (i.e., § 424a) and it implements Congress' intent to prevent duplicate disability benefits from public sources.

The Act states that a claimant's DIB shall be reduced if he is receiving "periodic benefits on account of his or her . . . disability under any other law or plan of the United States" 42 U.S.C. § 424a(2)(B). Plaintiff's CSRS benefits are periodic benefits; they are being received on account of Plaintiff's disability; and CSRS is a plan of the United States. The Act is clearly focused on the source of the disability benefit, not the nature or source of the disability. The Act would, therefore, require a reduction in DIB when a claimant is receiving a CSRS disability benefit.

The Commissioner's regulation does not limit the breadth of the Act. The regulation provides as follows:

[DIB shall be reduced when the claimant] is also . . . concurrently entitled to a periodic benefit (including workers' compensation or any other payments based on a work relationship) on account of a total or partial disability . . . under a law or plan of the United States

20 C.F.R. § 404.408(a)(2). The regulation also requires a reduction whenever a disability benefit is being received from the United States under a non-Social Security plan. The "based on a working relationship" phrase is simply explanatory, not limiting. It is intended to explain further what type of periodic benefit, not what type of disability, will trigger a reduction.

Absent some other provision of law, the Court finds that the Commissioner's determination that 42 U.S.C. § 424a(a)(2)(B) and 20 C.F.R. § 404.408(a)(2) require that Plaintiff's DIB be offset by his CSRS disability benefit is not arbitrary, capricious, or contrary to law.

E. MAY PLAINTIFF TREAT HIS 1995 APPLICATION FOR DIB AS AN UNTIMELY APPEAL OF THE COMMISSIONER'S 1981 DECISION TO TERMINATE HIS PRIOR BENEFITS AWARD?

Plaintiff argues in the alternative that his DIB should never have been terminated in 1981. Had Plaintiff's DIB not been terminated in 1981, he would have had one continuous period of disability beginning in 1974. Section 404.408(a)(2) would not then apply to Plaintiff because § 404.408(a)(2) applies only to a claimant who first becomes entitled to DIB after 1981.

Plaintiff had 60 days from the date of the Commissioner's 1981 termination decision to appeal that decision. Plaintiff did not appeal from the Commissioner's 1981 termination decision. Plaintiff argues that his subsequent application in 1995 for disability insurance benefits should have been treated by the Commissioner as an untimely appeal of the 1981 termination decision. The Commissioner rejected Plaintiff's argument, finding that Plaintiff had not established good cause for his failure to timely appeal. Plaintiff argues that he has met the good cause requirement because he was suffering from physical and mental impairments which prevented him from seeking review of the Commissioner's 1981 termination decision.

The Commissioner's regulations regarding untimely appeals are codified at 20 C.F.R. § 404.911, which provides as follows;

- (a) In determining whether you have shown that you had good cause for missing a deadline to request review we consider-

.....

- (4) Whether you had any physical, mental, educational, or linguistic limitations . . . which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

- (b) Examples of circumstances where good cause may exist include, but are not limited to, the following situations:

- (1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.

.....

- (9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph (a)(4) of this section, which show that you could not have known of the need to file timely, or which prevented you from filing timely.

20 C.F.R. § 404.911(a) and (b). See also Social Security Ruling 91-5p, 1991 WL 208067 (July 1, 1991).

Applying § 404.911 and SSR 91-5p, the Appeals Council found that Plaintiff did not have an "impairment of such severity that it would have prevented him from understanding and timely exercising his appeal rights." *R. at 101-11*. The Appeals Council based this conclusion on the medical evidence and Plaintiff's actions with

regard to the appeal of the Commissioner offset decision. However, neither the Appeals Council, nor any of the ALJs to date, have adequately discussed or evaluated the record evidence, from Plaintiff's treating physicians, which suggests that in the 1980's, Plaintiff was suffering from dementia and severe memory lapses. *See R. at 146, 154, 165, 185-86, 188-95, 201, 233-36, 297-98.* The Court remands this case to the Commissioner for further development of this issue. The Commissioner must discuss his reasons for rejecting the medical evidence referenced above. The Appeals Council's conclusory statements are not sufficient.

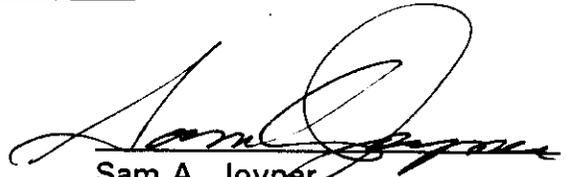
The Court is not suggesting an outcome. The Commissioner must first evaluate Plaintiff's impairments at the time of the 1981 termination to determine if he was capable of appealing the termination decision. If the Commissioner determines that Plaintiff's impairments prevented him from appealing the 1981 termination, then the Commissioner must review the termination decision to determine if it was supported by the evidence. If the Commissioner determines that the 1981 termination was not appropriate, then Plaintiff would have had a continuous period of disability since 1974, and his DIB would not be subject to offset by his CSRS disability benefit pursuant to either 42 U.S.C. § 424a or 20 C.F.R. § 404.408. If the Commissioner determines that Plaintiff could have appealed the 1981 termination or that the 1981 termination was proper, then Plaintiff will have had two periods of disability, with the second beginning in September 1984. Plaintiff's DIB for this second period of disability will have to be offset by his CSRS disability benefit pursuant to § 424a and § 404.408.

CONCLUSION

The Commissioner's interpretation of its offset regulation, 20 C.F.R. § 404.408(a), is affirmed. The Commissioner's determination that Plaintiff did not have an impairment of such severity that it would have prevented him from understanding and timely exercising his right to appeal the 1981 termination is reversed. This case is remanded to the Commissioner for further administrative action consistent with this Order.

IT IS SO ORDERED.

Dated this 29 day of October 1999.


Sam A. Joyner
United States Magistrate Judge

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

DAVID BAUMAN and STELLA
WHITTEN,

Plaintiffs,

v.

SMITH & NEPHEW RICHARDS,
INC.,

Defendant.

ENTERED ON DOCKET

DATE NOV 01 1999

Case No. 97-CV-364-K (E) D

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendant's suggestion that an order of dismissal be entered as to Plaintiff, David Bauman ("Bauman"), in the above-captioned suit. In May 1998, the Court granted the application of The West Law Firm for leave to withdraw as counsel for Bauman. The Court ordered Bauman to cause new counsel to enter an appearance or file a statement expressing his wish to proceed *in propria persona* within twenty days. Bauman has neglected to do either of these for well over a year.

IT IS THEREFORE ORDERED that Defendant's Suggestion of Order of Dismissal (# 13) is GRANTED and Plaintiff David Bauman's causes of action against Defendant are DISMISSED WITHOUT PREJUDICE.

ORDERED THIS 27 DAY OF OCTOBER, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

GEORGE C. SMITH and JERRY
BRUCE,

Plaintiffs,

vs.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

ENTERED ON DOCKET

DATE NOV 01 1999

No. 99-CV-247-K

FILED

OCT 23 1999 SA

ADMINISTRATIVE CLOSING ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ORDERED this 27 day of October, 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

F I L E D

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

OCT 28 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

P.K. EBERT,)
)
 Plaintiff,)
 vs.)
)
 THE STATE OF OKLAHOMA, ex rel,)
 THE BOARD OF REGENTS OF)
 OKLAHOMA COLLEGES,)
 a state agency,)
)
 Defendant.)

Case No. 99-CV-94-BU(M)

ENTERED ON DOCKET

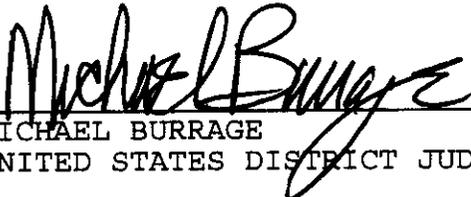
DATE NOV 01 1999

J U D G M E N T

This matter came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that Plaintiff, P.K. Ebert's sex was a motivating factor in the employment decision of Defendant, The State of Oklahoma, ex. rel., The Board of Regents of Oklahoma Colleges, a state agency, and that Defendant, The State of Oklahoma, ex. rel., The Board of Regents of Oklahoma Colleges, a state agency, would have made the same employment decision regarding Plaintiff, P.K. Ebert, in the absence of the discriminatory motive.

DATED at Tulsa, Oklahoma, this 20th day of October 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

P.K. EBERT,

Plaintiff,

vs.

THE STATE OF OKLAHOMA, ex rel,
THE BOARD OF REGENTS OF
OKLAHOMA COLLEGES,
a state agency,

Defendant.

DATE ~~NOV 01 1999~~

Case No. 99-CV-94-BU(M) ✓

FILED

OCT 28 1999 SA

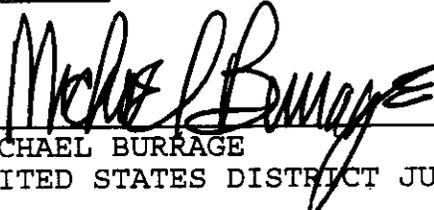
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon Plaintiff's Motion to Settle Judgment on Special Jury Verdict. Defendant has responded to the motion and upon due consideration of the parties' submissions, the Court finds that the motion should be granted.

Accordingly, Plaintiff's Motion to Settle Judgment on Special Jury Verdict (Docket Entry #35) is GRANTED. The Court contemporaneously herewith, enters a judgment on the jury verdict.

ENTERED this 28th day of October 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

41

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

TOM LESTER PUGH,)
)
Petitioner,)
)
vs.)
)
RON WARD, Warden, Oklahoma)
State Penitentiary, DREW)
EDMONDSON, Attorney General of)
the State of Oklahoma,)
)
Respondents.)

ENTERED ON DOCKET
DATE NOV 1 1999
Case No. 96-CV-976-K ✓

FILED
NOV 2 3 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the 28 U.S.C. § 2254 petition for writ of habeas corpus filed by Petitioner, Tom Lester Pugh ("Petitioner" or "Pugh"). Petitioner challenges his conviction and sentence entered in Tulsa County District Court, Case No. CRF-71-2169. Being fully advised in the matter, the Court finds an evidentiary hearing would not be of material assistance and the matter is therefore decided on the written record. After careful consideration of the record and applicable legal authorities, the Court finds that for the reasons discussed below, this petition should be denied.

BACKGROUND

An accurate recitation of the facts surrounding Petitioner's first degree murder conviction in Tulsa County District Court can be found in Pugh v. State, 528 P.2d 719, 720-724 (Okla. Crim. App. 1974). Petitioner was sentenced to life imprisonment. The procedural background of petitioner's exhaustion of State court remedies is set forth at Exhibit A to Pugh's Consolidated Brief In Support Of Petition For Writ Of Habeas Corpus And Reply To Attorney General's Response ("Reply") (Docket #24). For purposes of brevity, the undersigned herein adopts and incorporates by reference

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the facts as recited by the Oklahoma Court of Criminal Appeals and the procedural background as represented by Pugh's counsel at Exhibit A to the Reply.

ANALYSIS

A. Applicability of the AEDPA

As the instant Petition was filed on October 24, 1996, and Pugh's previous Petition For A Writ Of Habeas Corpus having been dismissed without prejudice, on his motion, on April 7, 1994,¹ and thus no longer pending, the Court applies the standards set forth at 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320 (1997).

B. Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b) and (c)

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes and this Court finds, after careful review of the record, that Petitioner has exhausted his instant claims as they were fairly presented to the highest state court either on direct appeal or in a post-conviction proceeding.

C. Petitioner's substantive claims are without merit

Pugh asserts six substantive grounds for relief in his petition. The Court will review each claim in the order presented by Petitioner.

¹Northern District of Oklahoma Case No. 93-C-1042-E.

1. *Denial of right to fair and impartial jury*

As his first substantive ground for relief, Pugh contends the denial of his change of venue motion violated his Sixth and Fourteenth Amendment rights to a fair and impartial trial and due process of law. Juror impartiality is a mixed question of fact and law,² and is analyzed under 28 U.S.C. § 2254(d)(1).³

28 U.S.C. § 2254(d)(1) states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The undersigned finds the Oklahoma Court of Criminal Appeals' decision denying post-conviction relief to Pugh on this issue was not contrary to clearly established Federal law as determined by the Supreme Court of the United States. The Oklahoma Court of Criminal Appeals followed the state standard in analyzing the jury impartiality issue. The standard was consistent with, and predicated on, the Supreme Court standard set forth in Irvin. See Pugh v. State, 528 P.2d 719, 727 (Okla. Crim. App. 1974).

The undersigned further finds the Oklahoma Court of Criminal Appeals' adjudication of this issue did not involve an unreasonable application of clearly established Federal law, as enunciated by the United States Supreme Court. The record reflects the Oklahoma Court of Criminal Appeals

²See Irvin v. Dowd, 366 U.S. 717, 723 (1961).

³See Drinkard v. Johnson, 97 F.3d 751 , 767-68 (5th Cir. 1996).

unsuccessfully scoured the record for evidence the jury did not reach a verdict based solely on the evidence presented. Id. Pugh has failed to demonstrate a violation of the constitutional guarantee of a fair trial by an impartial jury and is not entitled to habeas relief on this claim. Therefore, habeas corpus relief on this basis should be denied.

2. *Suppression of evidence concerning promises of immunity*

For his second substantive ground for relief, Pugh argues his Sixth and Fourteenth Amendments rights to a fair and impartial trial were violated by the State prosecutor withholding evidence concerning promises of immunity from prosecution to State witnesses Sipes and Jenkins. Applying the standard of 28 U.S.C. § 2254 (d)(1), the Court finds Pugh has failed to show the adjudication of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.

Clearly established Federal law at the time of Pugh's conviction, as determined by the Supreme Court of the United States, held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith of the prosecution. Brady v. Maryland, 373 U.S. 83 (1963). In affirming Pugh's conviction on direct appeal, the Oklahoma Court of Criminal Appeals analyzed the issue to determine whether the State withheld information from the jury that was material to the guilt or punishment assessed. That question was answered in the negative. The Oklahoma Court of Criminal Appeals found ample evidence in the record that the jury was well aware of the circumstances surrounding witnesses Sipes and Jenkins, as related to any immunity and/or favorable consideration for their testimony. A reading of the record convinces the Court that

the Court of Criminal Appeals did not reach a decision contrary to Federal law, nor did that court unreasonably apply the facts to the law, on this issue. Therefore, habeas corpus relief on this basis should be denied.

3. *Suppression of evidence concerning existence and identity of exculpatory witness*

Pugh's third substantive ground for relief is based on State suppression of an exculpatory witness, one Karl Tiger, in violation of Pugh's Sixth and Fourteenth Amendment rights to a fair and impartial trial. This claim was raised, heard, and denied in Pugh's Application For Post-Conviction Relief, filed in Tulsa County District Court. On appeal, the Oklahoma Court of Criminal Appeals, citing Okla. Stat. tit. 22, §§ 1080 and 1086 and Hale v. State, 807 P.2d 264 (Okla. Crim. App. 1991), found Petitioner had procedurally defaulted this claim and imposed a procedural bar.

The doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's third claim

is barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeals' procedural bar as applied to Petitioner's claim first presented in his state application for post-conviction relief was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

Because of his procedural default, this Court may not consider Petitioner's third claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In his reply to Respondent's response, rather than demonstrating "cause and prejudice" or a fundamental miscarriage of justice, Petitioner instead argues that the state appellate court considered this claim on the merits and did not impose a procedural bar. This Court disagrees. Absent the showing necessary to overcome the procedural bar, the Court is precluded from considering this

claim. The Court notes that Pugh has failed to demonstrate that Karl Tiger was not reasonably available to his defense or that interference by the prosecutor made it impracticable for Tiger to have been called as a witness at trial. See Murray v. Carrier, 477 U.S. 478, 488 (1986). As the Court of Criminal Appeals noted, Tiger was known to defense counsel at the time of trial. Further, Pugh has failed to show his failure to raise such issues on direct appeal cannot be fairly attributed to him. Id. The Court concludes Pugh has failed to demonstrate "cause" to excuse his procedural default.

Petitioner's only other means of gaining federal habeas review of this claim is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner does not claim that he is actually innocent of the underlying crime. Therefore, the fundamental miscarriage of justice exception has no applicability to this case.

Because Petitioner has failed to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice," the Court concludes his third claim is procedurally barred and should be denied on that basis.

4. *Prosecutorial misconduct*

Pugh's fourth substantive ground for relief alleges the inflammatory and prejudicial closing argument of the prosecutors violated his Fifth, Sixth, and Fourteenth Amendment rights. According to Petitioner, during closing argument, prosecutors argued that "a conviction of Mr. Pugh was necessary to 'teach a lesson' to the 'underworld,' and conversely, that if jurors failed to convict, future criminal activities in Tulsa County would be their collective responsibility." (#24 at 21.) Petitioner argues that the prosecutors' statements constituted fundamental error and denied him a fair trial and

due process of law. (#1 at 9.) Petitioner presented this claim to the Oklahoma Court of Criminal Appeals as part of his direct appeal. In affirming Petitioner's conviction, the state appellate court, citing Sam v. State, 510 P.2d 978 (Okla. Crim. App. 1973), *overruled on other grounds by* Buis v. State, 792 P.2d 427 (Okla. Crim. App. 1990); and Walters v. State, 455 P.2d 702 (Okla. Crim. App. 1969), rejected the claim on the basis that defense counsel waived the issue when he either failed to object to the comment or objected but failed to request that the jury be admonished to disregard the comment.

When a prisoner challenges his state conviction in a federal habeas corpus proceeding on the basis of alleged prosecutorial misconduct, this Court may not exercise any supervisory power, but instead must confine its review to whether the prosecutor's remarks violated a constitutional right or "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Duvall v. Reynolds, 131 F.3d 907, 933 (10th Cir. 1997) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). To make this determination, this Court must review the record to evaluate both "the strength of the evidence against the defendant and . . . whether the prosecutor's statements plausibly 'could have tipped the scales in favor of the prosecution.'" Fero v. Kerby, 39 F.3d 1462, 1473-74 (10th Cir. 1994) (quoting Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989)).

After reviewing the record in the instant case, the Court finds that although the prosecutors' comments in closing argument may have been improper, they did not so infect the trial as a whole to render the proceeding fundamentally unfair. Prior to the closing argument, the trial judge read numerous instructions to the jury. The jury was specifically instructed that "[y]ou should not let sympathy, sentiment or prejudice enter into your deliberations, but should discharge your duties as jurors impartially, conscientiously, and faithfully under the oaths, and return such verdict as the

evidence warrants when measured by these instructions." (Tr. Trans. at 1391). In addition, defense counsel did not object to each of the allegedly improper remarks made by the prosecutor. (See, e.g., Tr. Trans. at 1397). When defense counsel did object, the trial court sustained the objections to the allegedly improper comments, but defense counsel did not ask the trial court to admonish the jury or move for a mistrial on the basis of the allegedly improper remarks at issue in this case.⁴ See Johnson v. Gibson, 169 F.3d 1239, 1249-50 (10th Cir. 1999) (finding that failure to object to prosecutor's remarks is relevant to analysis of fundamental fairness or unfairness of the entire trial under Donnelly); see also Logan v. Lockhart, 994 F.2d 1324, 1330 (8th Cir. 1993) (finding that although a prosecutor's remarks during closing argument were highly improper, defense counsel's failure to seek a corrective instruction or to move for a mistrial was critical to conclusion that petitioner had not been denied due process by the objectionable comments); see also Malley v. Manson, 547 F.2d 25, 28 (2d Cir. 1976). The Court concludes Petitioner's right to due process was not violated and finds Petitioner's claim of prosecutorial misconduct is without merit. As a result, habeas corpus relief on this ground should be denied.

5. *Ineffective assistance of trial counsel*

Pugh's fifth substantive ground for relief is a claim of ineffective assistance of counsel. Contrary to Respondent's argument, Pugh's failure to raise a claim of ineffective assistance of counsel on direct appeal does not necessarily preclude federal review of the claim. See English v.

⁴Defense counsel did move for a mistrial following closing argument, but only on the basis of the prosecutors' references to "uncontradicted testimony" as improper comment upon the failure of the defendant to take the stand. (Trial Trans. at 1436-37.) Defense counsel did not seek a mistrial based on the comments challenged in this habeas corpus proceeding.

Cody, 146 F.3d 1257 (10th Cir. 1998); Brewer v. Reynolds, 51 F.3d 1519, 1522 (10th Cir. 1995); Brechen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994). When the underlying claim is ineffective assistance of counsel, the Tenth Circuit Court of Appeals has recognized that countervailing concerns justify an exception to the general rule. Brechen, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English, 146 F.3d 1257. In that case, the circuit court found that:

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

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes Petitioner's claim of ineffective assistance of trial counsel is procedurally barred. As to the first English factor, the record demonstrates that at trial, Petitioner was represented by attorney George Briggs. On appeal, Professor Joe Moore joined Mr. Briggs in representing Petitioner. Thus, although trial counsel entered an appearance on appeal, Petitioner nonetheless had the opportunity to confer with separate counsel, Prof. Moore, on appeal. Therefore, the Court

concludes the first factor identified in English is satisfied.

As to the second English factor, Petitioner alleges his trial counsel provided ineffective assistance when he failed to investigate, prepare and present the testimony of witness Karl Tiger. However, as indicated by the Oklahoma Court of Criminal Appeals, documents in the trial record indicated Tiger was a material witness and could have testified at trial to the matters now raised by Petitioner. Because the identity of Tiger as a witness is contained within the trial record, any issue concerning trial counsel's failure to utilize Tiger's information could have been developed and raised by appellate counsel on direct appeal. Petitioner also claims that his trial counsel rendered ineffective assistance when he failed to object both to the admission of improper evidence and to inflammatory comments made by the prosecutor during closing argument. However, these allegations of ineffective assistance are clearly contained within the trial record and could have been developed on direct appeal. As a result, the Court finds the second factor identified in English, 146 F.3d at 1264, has also been satisfied and concludes Petitioner's claim of ineffective assistance of trial counsel is procedurally barred.

As discussed in Part 3 above, because of his procedural default, this Court may not consider Petitioner's ineffective assistance of trial counsel claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. In his reply to Respondent's response, Petitioner does not attempt to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice" to overcome the procedural bar. As a result, the Court finds that Petitioner's claim does not fall within a recognized exception to the procedural default doctrine and concludes this claim should be denied.

6. *State's refusal to afford a timely mandatory parole consideration hearing*

Pugh's sixth and final substantive ground for relief is a claim his due process rights were violated by the failure of the State of Oklahoma to afford a timely mandatory parole consideration hearing. The relevant state statute, Okla. Stat. tit. 57, § 332.7 (1947), provides to a person confined in a penal institution in the State a mandatory parole consideration date upon completion of one-third of the inmate's sentence. In this case, the mandatory parole consideration date would be after Pugh has completed fifteen years of his life sentence.

Pugh began serving his life sentence on December 14, 1972. After a transfer to the State of Arizona in February, 1973, and then to the State of Missouri sometime in 1975, Pugh was transferred to the State of Kentucky in 1976. On October 25, 1976, Pugh departed from the Kentucky Penitentiary without authorization. Pugh was arrested in Texas on June 6, 1977, on an Arizona fugitive warrant and on current Texas charges and remained in the custody of the Texas Department of Corrections until August, 1986, when he was extradited to Oklahoma and re-confined on his sentence in Case No. CF-71-2169. It is undisputed Pugh received credit on his Oklahoma life sentence from December 14, 1972, through October 25, 1976. Pugh remains in custody of the Oklahoma Department of Corrections.

The Oklahoma Pardon and Parole Board originally scheduled Pugh for a mandatory parole consideration hearing in December, 1987, fifteen years after his conviction. That date was modified to sometime in 1997 after the Pittsburgh County District Court issued a Memorandum Opinion finding Pugh interrupted his Oklahoma sentence by his own actions, that he was not serving his Oklahoma sentence during his incarceration in Texas, and the Oklahoma Department of Corrections was not required to give Pugh credit for time served during his time in the Texas penal system. Pugh

received a mandatory parole consideration hearing in July, 1997, and was denied parole.

Pugh argues herein that his due process rights have been violated by the Pardon and Parole Board's refusal to hold a mandatory parole consideration hearing after Pugh had completed one-third of his Oklahoma life sentence, i.e. December 1987. The Oklahoma Court of Criminal Appeals considered and rejected Petitioner's claim on the merits in its March 12, 1993 Order denying Petitioner's petition for writ of mandamus. See #6, Petitioner's "Expanded Record of State Court Proceedings, Vol. 2, no. 27. The issue now before this Court is whether adjudication of Pugh's due process claim by the State of Oklahoma's highest court was contrary to, or an unreasonable application of, clearly established Federal law. The United States Constitution does not provide any prisoner a right to be considered for parole. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979). However, the State of Oklahoma has statutorily created an interest for inmates in receiving a parole consideration hearing date. See Okla. Stat. tit. 57, § 332.7. The denial or untimely holding of the parole consideration hearing infringes the due process rights of the inmate eligible for the hearing. Thus, if Pugh had completed one-third of his Oklahoma life sentence in 1987, his due process rights have been violated.

Although a prisoner has a right to serve his sentence continuously, a continuous sentence may be interrupted by some fault of the prisoner. See United States v. George Gordon Liddy, 510 F.2d 669, 674 (D.C. Cir. 1974) (citing McDonald v. Lee, 217 F.2d 619, 623 (5th Cir. 1954), vacated as moot, 349 U.S. 948 (1955)). Although a factual determination that Pugh escaped from the Kentucky Penitentiary has not been made at the state level, it has been determined that Pugh was not without fault in departing said institution. Pugh has not provided the Court with documentation showing his departure from the Kentucky Penitentiary was lawful and authorized. Absent such

showing, and as found by the Oklahoma Court of Criminal Appeals, the effect of the above-stated rule is that Pugh's Oklahoma life sentence was suspended from the time of his departure from the Kentucky Penitentiary in October, 1976, until his return to Oklahoma from Texas almost ten (10) years later, in August, 1986. As a result of the ten year suspension of his life sentence, Pugh had no right to a mandatory parole consideration hearing prior to 1997. Therefore, his due process rights have not been violated by the Pardon and Parole Board's calculation of time served and, consequently, scheduling of parole consideration hearing. The adjudication of this claim by the Oklahoma Court of Criminal Appeals is not contrary to, or an unreasonable application of, clearly established Federal law. Habeas corpus relief on this basis should be denied.

CONCLUSION

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

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is denied.

SO ORDERED THIS 27 day of October, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

TOM LESTER PUGH,

Petitioner,

vs.

RON WARD, Warden, Oklahoma
State Penitentiary, DREW
EDMONDSON, Attorney General of
the State of Oklahoma,

Respondents.

ENTERED ON DOCKET

DATE NOV 1 1999

Case No. 96-CV-976-K ✓

FILED
NOV 23 1999

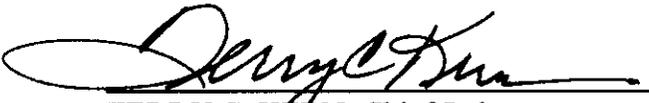
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 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 judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 27 day of October, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DWAYNE L. SHEPHERD,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social
Security Administration,

Defendant.

ENTERED ON DOCKET

DATE NOV 1 1999

Case No. 97-CV-146-JN

FILED

OCT 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On September 14, 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's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$6,424.25 for attorney fees and \$155.76 in costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$6,424.25 and \$155.76 in costs for a total award of \$6,580.01 under EAJA. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller

270

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

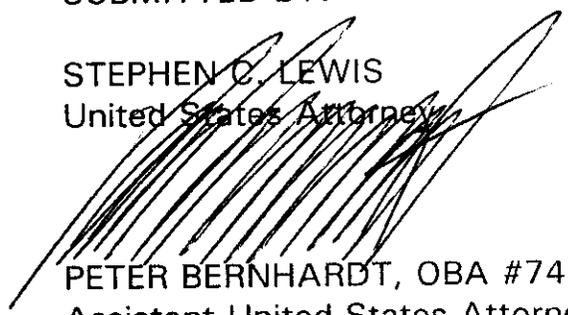
It is so ORDERED THIS 29 day of October, 1999.



SAM A. JOYNER
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

11/26/99
Date 99

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

RMP CONSULTING GROUP, INC.)
and RMP SERVICE GROUP, INC.,)

Plaintiffs,)

vs.)

DATRONIC RENTAL CORPORATION,)
an Illinois corporation,)

Defendant and)
Third-Party Plaintiff,)

vs.)

BANK OF OKLAHOMA, N.A.,)
a National Banking Association, and)
HENRY E. DOSS, an individual,)

Third-Party Defendants.)

ENTERED ON DOCKET
DATE NOV 1 1999

No. 91-C-295-H(J) ✓

FILED

OCT 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF REMAND

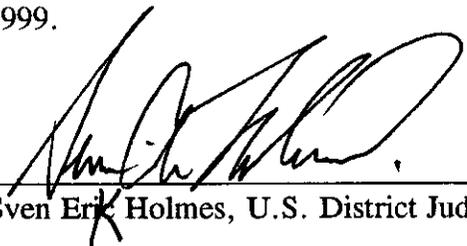
Pursuant to the Order and Judgment of the United States Court of Appeals for the Tenth Circuit dated August 16, 1999, this Court finds that this case should be remanded to the State Court from which it was removed. The "Case" to be remanded includes Datronic Rental Corporation's Counterclaim against RMP Consulting Group, Inc. and RMP Service Group, Inc. but does not include Datronic Rental Corporation's Third Party Complaint against Bank of Oklahoma, N.A. and Henry E. Doss.

A certified copy of this Order of Remand shall be mailed by the Clerk of this Court to the Clerk of the State Court. Upon receipt, the State Court may thereupon proceed with such case.

2/3/99)

IT IS SO ORDERED.

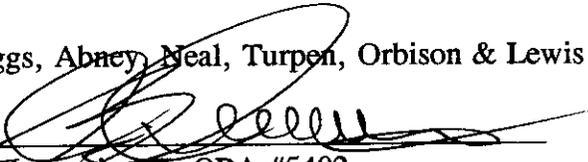
Entered this 29TH day of October, 1999.


Sven Erik Holmes, U.S. District Judge

Approved as to Form:

Bradford S. Baker, OBA #440
Attorney For Datronic Rental Corporation

Riggs, Abney, Neal, Turpen, Orbison & Lewis

By 
C. S. Lewis, III, OBA #5402
Attorneys for Bank of Oklahoma, N.A.

James L. Menzer, OBA #12406
Attorney for RMP Consulting Group, Inc.,
RMP Service Group, Inc. and Henry E. Doss

10/001-20-1997 4-11 PM 8:10 AM SIGA KING & BIRNBOIM & CO. LLP ABNEY ET AL 10/10/99 11:00

IT IS SO ORDERED.

Entered this _____ day of October, 1999.

Sven Erik Holmes, U.S. District Judge

Approved as to Form:

Brad Baker
Bradford S. Baker, OBA #440
Attorney For Datronic Rental Corporation

Riggs, Abney, Neal, Turpen, Orbison & Lewis

By _____
C. S. Lewis, III, OBA #5402
Attorneys for Bank of Oklahoma, N.A.

James L. Menzer, OBA #12406
Attorney for RMP Consulting Group, Inc.,
RMP Service Group, Inc. and Henry E. Doss

IT IS SO ORDERED.

Entered this _____ day of October, 1999.

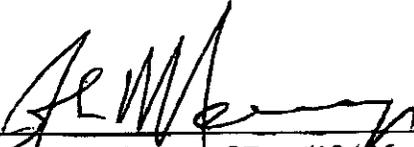
Sven Erik Holmes, U.S. District Judge

Approved as to Form:

Bradford S. Baker, OBA #440
Attorney For Datronic Rental Corporation

Riggs, Abney, Neal, Turpen, Orbison & Lewis

By _____
C. S. Lewis, III, OBA #5402
Attorneys for Bank of Oklahoma, N.A.



James L. Menzer, OBA #12406
Attorney for RMP Consulting Group, Inc.,
RMP Service Group, Inc. and Henry E. Doss

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

FILED

OCT 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKEY RANDLEMAN)
)
Plaintiff,)
)
vs.)
)
HORACE MANN INSURANCE CO. And)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY)
)
Defendants.)

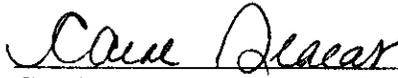
NO. 99-CV-119(C)-J

ENTERED ON DOCKET
DATE NOV 01 1999

**RULE 41 STIPULATION OF DISMISSAL WITH PREJUDICE AS TO
PLAINTIFF'S CLAIM AGAINST DEFENDANT, HORACE MANN INSURANCE COMPANY
AND CROSSCLAIM OF DEFENDANT, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY AS AGAINST
DEFENDANT, HORACE MANN INSURANCE COMPANY**

The Plaintiff and Defendants, pursuant to Rule 41(a)(1) F.R.C.P., stipulate to the dismissal of the above-styled and numbered cause of action of Plaintiff as against Defendant, Horace Mann Insurance Company with prejudice, and the dismissal of Defendant, State Farm Mutual Automobile Insurance Company's, Crossclaim as against the Defendant, Horace Mann Insurance Company, with prejudice. Each party to bear their own costs.

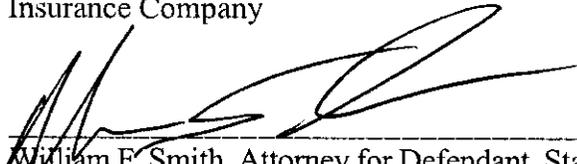
It is the intent of this Stipulation to dismiss all claims of the parties as against one another with prejudice.



Carol Seacat, Attorney for Plaintiff



John R. Woodard, III, Attorney for Defendant, Horace Mann Insurance Company



William F. Smith, Attorney for Defendant, State Farm Mutual Automobile Insurance Company

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C15

IN THE UNITED STATES COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
vs.)
)
WESLEY SMITH;)
WARREN W. SMITH & ASSOCIATES;)
WAYNE NUNEMAKER;)
NUNEMAKER ARCHITECTS;)
GUY DONOHUE;)
DONOHUE SERVICE COMPANY, INC.;)
And DOUGLAS R. HAYNES,)
)
Defendants.)
_____)

ENTERED ON DOCKET
DATE NOV 01 1999

Case No. 99-CV-52-BU(E)

F I L E D

OCT 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

On this 28 day of October, 1999, the Joint Motion for Dismissal filed herein by the plaintiff, United States of America ("U.S.A."), and the defendant, Douglas R. Haynes ("Haynes"), pursuant to FED. R. CIV. P. 41(a)(2), comes on before the Court. For good cause shown, the Court finds that the Joint Motion for Dismissal should be granted.

IT IS THEREFORE ORDERED that all claims for relief asserted by the U.S.A. against Haynes in the captioned matter are hereby dismissed with prejudice, with the parties to bear their respective costs and attorney's fees herein.

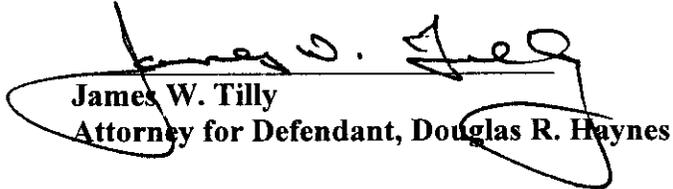


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

Approved as to form and content:



Steven K. Mullins
Assistant United States Attorney
Attorney for Plaintiff, United States
of America



James W. Tilly
Attorney for Defendant, Douglas R. Haynes

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

FILED

OCT 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL FRANK GREENE,)
)
 Plaintiff,)
)
 vs.)
)
 OSAGE COUNTY JAIL,)
)
 Defendant.)

No. 99-CV-284 B (J)

ENTERED ON DOCKET
DATE NOV 01 1999

ORDER

On April 16, 1999, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By order filed April 26, 1999, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he either paid the \$150 filing fee or submitted a motion for leave to proceed *in forma pauperis*. Plaintiff was also ordered to submit an amended complaint, using the court-approved form, naming appropriate defendant(s), as well as completed summonses and USM-285 forms for service upon the named Defendants. In addition, the Clerk of Court was directed to mail to Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by May 28, 1999, and that "[f]ailure to comply with this Order could result in dismissal without prejudice and without further notice."

The Court's April 26, 1999 Order was mailed to Plaintiff at his last known address. However, the envelope containing the Order was returned to the Clerk of Court, marked "NOT HERE." To date, Plaintiff has failed to provide the Court with his current address. Because

Plaintiff has failed to notify the Court of his current address, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 28th day of Oct., 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD GRAY STORCH,)
)
Plaintiff,)
)
vs.)
)
JAMES SAFFLE; PAROLE OFFICER)
MATTHEWS; and UNKNOWN)
PROBATION AND PAROLE PERSONNEL,)
all in their individual capacity,)
)
Defendants.)

No. 99-CV-693-B (J)

ENTERED ON DOCKET
DATE NOV 01 1999

ORDER

On August 19, 1999, Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, filed this action pursuant to 42 U.S.C. § 1983, against James Saffle, Director of the Oklahoma Department of Corrections; Parole Officer Matthews; and other unknown Probation and Parole Personnel. For the reasons discussed below, the Court finds that this Complaint should be dismissed.

BACKGROUND

In his complaint, Plaintiff asserts two claims: (1) that his due process rights were violated when he was removed from the "Specialized Supervision Program" ("SSP") by the Department of Corrections under procedures which did not comport with the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); and Young v. Harper, 520 U.S. 143 (1997) for Oklahoma inmates on parole-like programs; and (2) that he was removed from SSP in violation of State statutes. Plaintiff seeks "declaratory relief, compensatory and punitive damages." (#1).

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ANALYSIS

A. Dismissal under 28 U.S.C. § 1915A

The Prison Litigation Reform Act of 1996 added a new section to the *in forma pauperis* statute entitled “Screening.” See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and to “dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. *Id.* For the reasons discussed below, the Court finds that, pursuant to 28 U.S.C. § 1915A, both of Plaintiff’s claims in this civil rights action should be dismissed for failure to state a claim upon which relief may be granted.

B. Dismissal for Failure to State a Claim

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of state law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff’s complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. *Id.*;

Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

C. Plaintiff's Complaint fails to state a claim upon which relief may be granted

1. Plaintiff's due process claim has not accrued

"[A] state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,' unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 1585 (1997) (quoting Heck v. Humphrey, 512 U.S. 477, 487 (1994)). This rule of law applies not only when the prisoner challenges his judgment as a substantive matter but also when he challenges "procedures . . . such as necessarily to imply the invalidity of the judgment," id. at 1587, and extends to revocations and denials of parole. See Littles v. Board of Pardons and Paroles Div., 68 F.3d 122, 123 (5th Cir. 1995)

(revocation of parole); Schafer v. Moore, 46 F.3d 43, 44-45 (8th Cir. 1995) (denial of parole).

In this case, Plaintiff states that in October, 1995, he was placed on SSP, a parole-like program. However, he was removed from the program and returned to prison in May, 1997, after a positive urinalysis result. Plaintiff claims that his due process rights were violated during revocation proceedings when he was not advised of his right to a preliminary hearing, of his right to a final revocation hearing, of his rights to have counsel present at both hearings, and of his right to cross-examine witnesses. Plaintiff also asserts that there was no provision for a final revocation hearing by a "neutral and detached" body. Plaintiff claims that had Defendant Matthews advised him of the full range of rights required by due process, he would have put on a defense rather than enter a plea of guilty. Plaintiff states that he had not been using drugs and that the testing procedures were flawed and the results invalid.

The Court finds that a judgment in favor of Plaintiff on his due process claim would "necessarily imply the invalidity of [the revocation of his parole-like status]." Heck, 512 U.S. at 487. Furthermore, Plaintiff has not shown that the revocation of his SSP status has been invalidated. As a result, any claim for damages under 42 U.S.C. § 1983 has not yet accrued and Plaintiff's claim for compensatory and punitive damages must be dismissed without prejudice for failure to state a claim upon which relief may be granted.

2. *Plaintiff's second claim does not involve a denial of a constitutional right*

As stated in Part B above, in order to state a claim under 42 U.S.C. § 1983, Plaintiff must allege that defendants deprived him of a right secured by the Constitution and laws of the United States, and that defendants acted under color of state law. Plaintiff's second claim asserts only that

defendants violated laws of the State of Oklahoma in revoking his SSP status. Because Plaintiff has failed to allege that defendants deprived him of a right secured by the Constitution and laws of the United States, his second claim must be dismissed for failure to state a claim upon which relief may be granted.

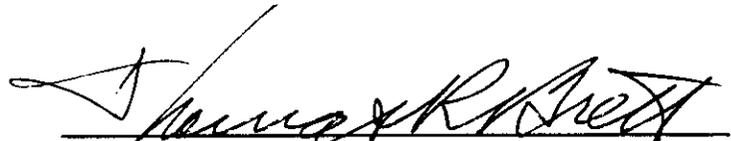
CONCLUSION

Until Plaintiff can demonstrate that the revocation of his SSP status has been invalidated, no 42 U.S.C. § 1983 claim has accrued and his due process claim asserted in this action should be dismissed without prejudice pursuant to Heck v. Humphrey, 512 U.S. 477 (1994). Plaintiff's claim that he was removed from SSP in violation of State statutes fails to state a claim upon which relief may be granted under 42 U.S.C. § 1983 and should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's due process claim is **dismissed without prejudice** pursuant to Heck v. Humphrey, 512 U.S. 477 (1994).
2. Plaintiff's claim that he was removed from SSP in violation of State statutes fails to state a claim upon which relief may be granted under 42 U.S.C. § 1983 and is **dismissed with prejudice**.
3. This is a final Order terminating this action.

SO ORDERED THIS 29th day of Oct., 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT