

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

FILED

Paul Lombardi, Clerk
U.S. DISTRICT COURT

CONNIE FRIEDL,)
)
Plaintiff,)
)
vs.)
)
PACIFICARE OF OKLAHOMA, INC.,)
an Oklahoma corporation,)
)
Defendant.)

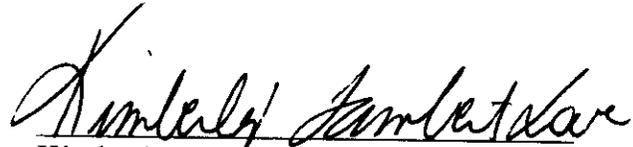
Case No. 98-CV-590K(E)

ENTERED ON DOCKET
DATE JUN 9 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), F.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice because the parties have settled the case.

Respectfully submitted



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Attorneys for the Plaintiff, Connie Friedl

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

F I L E D

JUN 9 2000

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THREE THOUSAND SEVEN HUNDRED)
DOLLARS AND NO/100 (\$3,700.00) IN)
UNITED STATES CURRENCY; et al.)
)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 09 2000

NO. 99-CV-840-B(E)

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture as to the defendant properties, except State of Oklahoma Official Depository Oklahoma State Penitentiary Trust Fund Check 009452 in the amount of One Hundred Thirty Dollars and no/100 (\$130.00) which was previously dismissed from this action by stipulation, and all entities and/or persons interested in the defendant properties, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 6th day of October 1999, alleging that the defendant properties are subject to forfeiture pursuant 21 U.S.C. § 881(a)(6) because they are moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in exchange for a controlled substance or listed chemical or are proceeds traceable to such an exchange, or because they are moneys, negotiable instruments or securities used or intended to be used to facilitate any violation of the drug controls of the United States.

A Warrant of Arrest and Notice *In Rem* was issued by the Clerk of this Court on the 13th day of October 1999 by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant properties and for publication in the Northern District of Oklahoma.

The United States Marshals Service served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant properties as follows:

- a) THREE THOUSAND SEVEN HUNDRED DOLLARS AND NO/100 (\$3,700.00) IN UNITED STATES CURRENCY:
Served: January 27, 2000;
- b) STATE OF OKLAHOMA OFFICIAL DEPOSITORY OKLAHOMA STATE PENITENTIARY TRUST FUND CHECKS IN THE TOTAL AMOUNT OF THREE THOUSAND THREE HUNDRED TWENTY-TWO DOLLARS AND NO/100 (\$3,322.00):
Served: January 27, 2000;
- c) ONE .22 IMPERIAL HANDGUN, SERIAL NUMBER 81895:
Served: February 23, 2000;
- d) ONE .40 BERETTA HANDGUN, SERIAL NUMBER 031360MC:
Served: February 23, 2000;
- e) ONE .45 WITNESS HANDGUN WITH LASER, SERIAL NUMBER AE41910:
Served: February 23, 2000;
- f) ONE .22 RG HANDGUN, SERIAL NUMBER L672321:
Served: February 23, 2000;
- g) ONE .99 mm PARABELLUM HANDGUN, SERIAL NUMBER R27685, WITH EXTRA .38 BARREL AND SLIDE:
Served: February 23, 2000; and
- h) ONE .22 H&R HANDGUN, MODEL 949, NO SERIAL NUMBER:
Served: February 23, 2000.

William Altizer, Charles Arron, William Berger, Efrain Bojorzuez, David Burch, Willie Curtis, Joseph Dennis, Terry Flatt, Ricky Fletcher, Jerry Fuentes, Shannon Goosby, Gary Guy, Anthony Hall, Derrick Hayes, Lonnie Hunt, Edmond Itson, David Joiner, Nygel Martin, Dangelo McCorvey, Timothy Rauh, Raul Rodriguez, Johnny Smith, Ricky Stephens, Jon Streat, Gary Thompson, Jr., Ong Vue, John Webster, Lee Wilkerson, Christopher Williams, Tom Trey Pugh, and Tom Lester Pugh were determined to be the only individuals with possible standing to file a claim to the defendant properties, and, therefore the only individuals to be served with process in this action. USMS 285 forms reflecting service upon the defendant properties and the known potential claimants are on file herein reflecting service on potential claimants as follows:

William Altizer:
served November 19, 1999;

Charles Arron:
served December 15, 1999;

William Berger:
served November 9, 1999;

Efrain Bojorzuez:
served November 9, 1999;

David Burch:
served November 9, 1999;

Willie Curtis:
served November 9, 1999;

Joseph Dennis:
served November 9, 1999;

Terry Flatt:
served November 9, 1999;

Ricky Fletcher:
served November 9, 1999;

Jerry Fuentes:
served November 9, 1999;

Shannon Goosby:
served November 9, 1999;

Gary Guy:
served November 18, 1999;

Anthony Hall:
served December 7, 1999;

Derrick Hayes:
served November 9, 1999;

Lonnie Hunt:
served November 9, 1999;

Edmond Itson:
served November 29, 1999;

David Joiner:
served November 9, 1999;

Nygel Martin:
served November 9, 1999;

Dangelo McCorvey:
served November 9, 1999;

Timothy Rauh:
served November 9, 1999;

Raul Rodriguez:
served November 9, 1999;

Johnny Smith:
served November 9, 1999;

Ricky Stephens:
served November 9, 1999;

Jon Streat:
served November 9, 1999;

Gary Thompson, Jr.:
served November 9, 1999;

Ong Vue:
served November 9, 1999;

John Webster:
served December 2, 1999;

Lee Wilkerson:
served November 9, 1999;

Christopher Williams:
served November 9, 1999;

Tom Trey Pugh:
served November 19, 1999; and

Tom Lester Pugh:
served November 9, 1999.

All persons and/or entities interested in the defendant properties were required to file their claims herein within ten (10) days after service upon them of the Complaint for Forfeiture *In Rem* and Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant properties, save and except the Claims and Answers

filed herein by Jerry Fuentez, Gary R. Thompson and Jon Streat, and no persons or entities have plead or otherwise defended in this suit as to said defendant properties, and the time for presenting claims and answers, or other pleadings, has expired, except the Claims and Answers filed herein by Jerry Fuentez, Gary Thompson and Jon Streat; and, therefore, default exists as to the defendant properties and all persons and/or entities interested therein, save and except Jerry Fuentez, Gary Thompson and Jon Streat.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and where some of the defendant properties were seized, on November 26, December 2 and 9, 1999, and in the McAlester News-Capital and Democrat a newspaper of general circulation in the district where the remaining defendant properties were seized, on December 9, 16 and 23, 1999. Proof of Publication was filed May 26, 2000.

Jerry Fuentez filed his Claim and Answer herein on November 16, 1999. The Claim of Jerry Fuentez was dismissed by the March 16, 2000 Order of the Court.

Gary R. Thompson filed his Claim and Answer herein on November 17, 1999. The Claim of Gary R. Thompson was dismissed by the March 16, 2000 Order of the Court.

Jon Streat filed his Claim and Answer herein on November 16, 1999. Claimant Jon Streat and the Government executed a Stipulation of Partial Dismissal which was filed herein on the 15th day of May, 2000, wherein the parties stipulated to the dismissal of the following defendant property:

State of Oklahoma Official Depository Oklahoma State Penitentiary Trust Fund Check 009452 in the amount of One Hundred Thirty Dollars and no/100 (\$130.00)

and Claimant Jon Streat stipulated and agreed that he has no claim to any of the other defendant properties which are subject to this forfeiture action.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant properties:

- a) THREE THOUSAND SEVEN HUNDRED DOLLARS AND NO/100 (\$3,700.00) IN UNITED STATES CURRENCY);
 - b) STATE OF OKLAHOMA OFFICIAL DEPOSITORY OKLAHOMA STATE PENITENTIARY TRUST FUND CHECKS IN THE TOTAL AMOUNT OF THREE THOUSAND THREE HUNDRED TWENTY-TWO DOLLARS AND NO/100 (\$3,322.00), **SAVE AND EXCEPT STATE OF OKLAHOMA OFFICIAL DEPOSITORY OKLAHOMA STATE PENITENTIARY TRUST FUND CHECK 009452 IN THE AMOUNT OF ONE HUNDRED THIRTY DOLLARS AND NO/100 (\$130.00) WHICH WAS PREVIOUSLY DISMISSED;**
 - c) ONE .22 IMPERIAL HANDGUN, SERIAL NUMBER 81895;
 - d) ONE .40 BERETTA HANDGUN, SERIAL NUMBER 031360MC;
 - e) ONE .45 WITNESS HANDGUN WITH LASER, SERIAL NUMBER AE41910;
 - f) ONE .22 RG HANDGUN, SERIAL NUMBER L672321;
 - g) ONE .99 mm PARABELLUM HANDGUN, SERIAL NUMBER R27685, WITH EXTRA .38 BARREL AND SLIDE;
- and
- h) ONE .22 H&R HANDGUN, MODEL 949, NO SERIAL NUMBER;

be, and they are hereby forfeited to the United States of America for disposition according

to law.

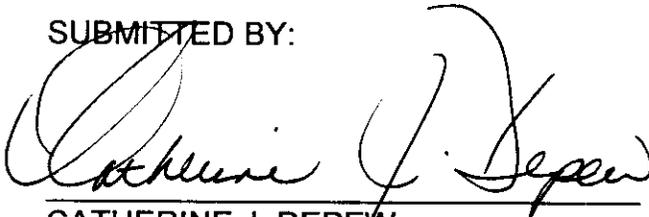
Entered this 9th day of June, 2000.



THOMAS R. BRETT

Senior Judge of the United States District Court
for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW

Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 8 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN BRADFORD, on behalf of
TANDY L. BRADFORD,

Plaintiff,

v.

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

Defendant.

No. 99-CV-1064-E(J)

ENTERED ON DOCKET
DATE JUN 09 2000

ORDER DISMISSING ACTION WITHOUT PREJUDICE

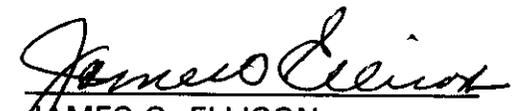
Pursuant to the Federal Rules of Civil Procedure, Plaintiff must serve Defendant with a copy of the complaint "within 120 days after the filing of the complaint" Fed. R. Civ. P. 4(m). Plaintiff's Complaint was filed December 14, 1999. Plaintiff has not filed a return of service indicating that Defendant has been served. Plaintiff has, therefore, failed to timely serve Defendant under Fed. R. Civ. P. 4(m).

By Order dated April 21, 2000, the Magistrate Judge ordered Plaintiff to either file a return of service or explain the failure to serve Defendant by May 29, 2000. Plaintiff did not file or otherwise respond to the April 21, 2000 Order.

Plaintiff's action is hereby **DISMISSED without prejudice** for Plaintiff's failure to serve Defendant, failure to prosecute this action, and failure to otherwise respond to Orders of the Court.

IT IS SO ORDERED.

Dated this 2nd day of June 2000.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

LAVEITA OSBORN OGDEN,)
)
Petitioner,)
)
vs.)
)
NEVILLE MASSEY, Warden,)
)
Respondent.)

Case No. 95-CV-957-H

FILED
JUN 8 2000
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUN 09 2000

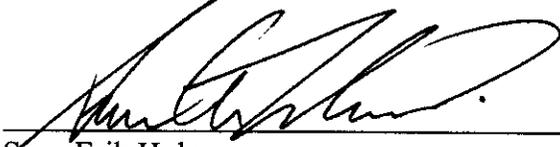
JUDGMENT

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.

IT IS SO ORDERED.

This 8TH day of JUNE, 2000.



Sven Erik Holmes
United States District Judge

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

LAVEITA OSBORN OGDEN,

Petitioner,

vs.

NEVILLE MASSEY, Warden,

Respondent.

Case No. 95-CV-957-H ✓

ENTERED ON DOCKET

DATE JUN 09 2000

FILED

JUN 8 2000

CLERK OF DISTRICT COURT
LAVONIA OSBORN

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, represented by counsel, is currently confined in the Oklahoma Department of Corrections. She challenges her conviction entered in Craig County District Court, Case No. CRF-84-25, asserting five (5) grounds of error. Based on the record before the Court, and as more fully set out below, the Court concludes that this petition should be denied.

BACKGROUND

On August 8, 1983, Petitioner's husband, Owen Ogden, was found dead inside the cab of a pickup truck which had been burned in a high intensity fire. Several aerosol spray cans, two containers of paint thinner, and a large quantity of shredded paper were also inside the cab. A two-gallon gasoline can, with its cap removed, was found in the bed of the truck. Following an investigation, Petitioner was charged by Information in the District Court of Craig County, State of Oklahoma, with the crime of First Degree Murder, Case No. CRF-84-25. Petitioner entered a plea of not guilty and proceeded to jury trial.

Petitioner, represented at trial by retained counsel Tony Jack Lyons and Charles Ramsey, was convicted of First Degree Murder. On November 30, 1984, she was sentenced in accordance

with the jury's recommendation to life imprisonment. Petitioner appealed the conviction and sentence. On direct appeal, Petitioner, represented by Lisbeth L. McCarty, an Assistant Appellate Public Defender, raised the following issues:

1. The jury panel was tainted.
 - A. Trial by a jury panel which included a blind juror denied appellant her constitutional and statutory right to judgment by twelve competent, qualified jurors.
2. The trial court erred by not granting appellant's motion in limine.
3. The trial court erred by admitting prejudicial evidence which was designed to inflame the passion and prejudice of the jury.
4. Improper instructions and lack of proper instructions denied appellant a fair trial.
 - A. The trial court erred by using an instruction which improperly shifted the burden of proof to appellant.
 - B. The trial court committed reversible error in not giving any lesser-included instructions.
5. The trial judge made improper references to the possibility of parole.
6. Prosecutorial misconduct deprived appellant of a fair trial.
7. Appellant was denied effective assistance of counsel.
 - A. Introduction
 - B. The trial attorney appeared to have a conflict of interest.
 - C. Defense counsel failed to recognize competency and/or insanity as a legal issue in appellant's case.
 - D. Defense counsel seated a blind man on the jury and failed to exercise basic skills.
8. The State erred in failing to preserve important evidence.

9. The State erred by apprising the jurors of a conversation between appellant and a police officer at the hospital when the evidence shows that appellant was not mirandized at the time of the conversation.
10. The cumulation of errors denied appellant a fair trial.

(#3, Ex. A). On December 8, 1988, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the judgment and sentence in an unpublished opinion (#3, Ex. B).

Petitioner, represented by counsel, filed an application for post-conviction relief in the trial court. The requested relief was denied on October 15, 1993 (#3, Ex. C-1). Petitioner appealed, raising the following grounds for relief in the OCCA:

1. There was insufficient evidence to convict Petitioner of first degree murder.
2. Petitioner was denied effective assistance of counsel.
3. Petitioner was denied due process of law due to a "botched" investigation.
4. Petitioner was denied due process in that her competency was never questioned.
5. Prosecutorial misconduct deprived Petitioner of a fair trial.

(See #3, Ex. C-2). On December 2, 1993, the OCCA affirmed the trial court's denial of post-conviction relief finding that the issues either had been raised on direct appeal and were barred by *res judicata*, or could have been but were not raised on direct appeal and were waived. (#3, Ex. C-2).

Petitioner, represented by attorney Cliff Briery, originally filed the instant petition for writ of habeas corpus on November 22, 1994, in the United States District Court for the Western District of Oklahoma. On January 5, 1995, that District Court transferred the petition to this Court where it was received for filing on September 21, 1995. Petitioner is currently represented by attorney Tony R. Burns. In her petition, Petitioner alleges the following five grounds of error:

1. Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

2. There was insufficient evidence to convict Petitioner of murder in the first degree. As a result, Petitioner was denied due process of law as guaranteed by the Fifth And Fourteenth Amendments to the United States Constitution.
3. The admission of 'two color slides' depicting the autopsy of the victim's head was prejudicial and deprived Petitioner of a fair trial.
4. Petitioner was denied due process of law due to a "botched" investigation.
5. Petitioner was denied due process of law due to improper comments and arguments by the prosecutor.

(#1-2, Petitioner's brief in support of petition for writ of habeas corpus). Respondent filed a Rule 5 response, stating that Petitioner had exhausted her state remedies and arguing that all of Petitioner's claims were procedurally barred (#3). Petitioner filed a reply (#4). On August 23, 1996, this Court entered its Order (#5) finding that Petitioner's ineffective assistance of trial counsel claim was not procedurally barred and directing Respondent to address the claim on the merits. Respondent requested permission to appeal pursuant to 28 U.S.C. § 1292(b). The Court granted Respondent's request. On June 30, 1998, after considering Respondent's interlocutory appeal, the Tenth Circuit Court of Appeals defined the conditions requiring a district court to impose a procedural bar on ineffective assistance of trial counsel claims and remanded the issue in this case for further review consistent with its findings (#19). On August 20, 1998, the Court directed the parties to address the considerations relevant to the ineffective assistance of trial counsel/procedural bar issue (#22). Both parties submitted supplemental briefs in compliance with the Court's directive (#s 23 and 24). On February 19, 1999, the Court heard legal argument on the issue of whether Petitioner's ineffective assistance of counsel claims "concern matters wholly manifest in the direct appeal record." See English v. Cody, 146 F.3d 1257, 1264 (10th Cir. 1998).

By Order dated September 30, 1999 (#27), the parties were directed to provide supplemental briefs on remaining issues. The parties have complied and the petition is now before the Court.

ANALYSIS

A. Applicability of the Antiterrorism and Effective Death Penalty Act

Petitioner filed her habeas corpus petition on November 22, 1994, prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Because this action was pending when the AEDPA was enacted, pre-AEDPA law will be applied to Petitioner's claims.

See Lindh v. Murphy, 521 U.S. 320, 117 S.Ct 2059, 2068 (1997). In analyzing the AEDPA's impact on the deference owed to a state court's resolution of questions of constitutional law, Justice O'Connor recently wrote that prior to the 1996 enactment of the AEDPA, a federal court was obligated to "exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (i.e., application of constitutional law to fact)." Williams v. Taylor, --- U.S. ---, 120 S.Ct. 1495, 1516 (2000) (citing Miller v. Fenton, 474 U.S. 104, 112 (1985)).

Thus, this Court reviews issues of law and issues of mixed law and fact *de novo* under pre-AEDPA standards. See Wright v. West, 505 U.S. 277, 300-301 (1992) (White, J., concurring). In contrast, a determination by a state court of competent jurisdiction after a hearing on the merits of a factual issue will be presumed to be correct, unless the petitioner demonstrates that the state courts failed to resolve the claims on the merits. Id. at 300-306; Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972).

B. Exhaustion/Evidentiary Hearing

The Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved

on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part on other grounds*, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

C. Petitioner's claims

The Court will consider each of Petitioner's claims, in the order presented by Petitioner in her brief in support of petition for writ of habeas corpus (#1-2):

1. *Ineffective Assistance of Counsel*

(a) *Claims raised on direct appeal*

As one of her claims of ineffective assistance of trial counsel, Petitioner asserts that her trial counsel was operating under a conflict of interest. Petitioner presented this claim to the OCCA on direct appeal. In her brief presented on direct appeal, Petitioner explained that prior to her murder trial, the firm of Lyons & Lyons had represented her as administrator of the deceased's estate. At least one of Petitioner's trial attorneys, Tony Jack Lyons, was a member of the Lyons & Lyons law firm. However, Petitioner states that Lyons withdrew from representation during her criminal trial. After Petitioner was convicted, Lyons's firm represented the deceased's sister as administrator of the estate. See #3, Ex. A at 36-37.

It is well-established that the Sixth Amendment's right to the effective assistance of competent counsel includes the right to conflict-free representation and is rooted in "the fundamental right to a fair trial." Stouffer v. Reynolds, 168 F.3d 1155, 1161 (10th Cir. 1999) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)); Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). "Lawyers in criminal cases . . . are the means through which the other rights of the person on trial are secured." United States v. Cronin, 466 U.S. 648, 653 (1984). "The vital guarantee of the Sixth Amendment

would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection." Cuyler, 446 U.S. at 344. When counsel operates under an actual conflict of interest, the Court presumes the adversarial balance has been altered and prejudice inures to the defendant, affecting the adequacy of representation. Edens v. Hannigan, 87 F.3d 1109, 1114 (10th Cir.1996).

In this case, because Petitioner did not object at trial to her representation by either Mr. Lyons or Mr. Ramsey, she must demonstrate an actual conflict of interest which adversely affected her attorneys' performance by pointing to specific instances of actions adverse to her interests. United States v. Alvarez, 137 F.3d 1249, 1251 (10th Cir.1998). However, Petitioner has advanced no particular "instances in the record which suggest an impairment or compromise of [her] interests for the benefit of another party." Id. at 1252 (citation and internal quotation marks omitted). Furthermore, the record fails to support the existence of any actual conflict of interest due to counsel's involvement in the probate of the deceased's estate. Therefore, the Court concludes Petitioner's ineffective assistance of counsel claim premised on the allegation that counsel acted under a conflict of interest is without merit.

(b) Claims first raised in post-conviction application are procedurally barred

Petitioner also argues that her trial counsel provided ineffective assistance of counsel when (1) they failed to take reasonable steps to procure both an expert witness to rebut the state's testimony that the victim's blood alcohol and drug levels precluded him from lighting a cigarette and an accident reconstruction expert, and (2) they failed to preserve error for appellate review. Respondent asserts that these claims are procedurally barred from federal habeas corpus review due to Petitioner's procedural default of the claims in state court.

The doctrine of procedural default generally 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, 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 claim[] 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.); 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)).

Ineffective assistance of trial counsel claims raise special concerns in the procedural bar context. The Tenth Circuit Court of Appeals has recognized that countervailing concerns justify an exception to the general rule. Brecheen v. Reynolds, 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)). In considering the interlocutory appeal filed in the instant case, the Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally. English v. Cody, 146 F.3d 1257 (10th Cir. 1998). The circuit court concluded that:

Kimmelman, Osborn, and Brecheen 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).

Petitioner concedes that the first requirement identified by the Tenth Circuit Court of Appeals is satisfied because she was represented by separate counsel at trial and on direct appeal. As stated above, at a hearing held February 19, 1999, the Court allowed the parties to present legal argument on the issue of whether Petitioner's claims could be resolved upon the trial record alone. The parties also submitted briefs addressing the issue. (#s 20 and 21). Although Petitioner concedes that her claims related to counsel's failure to preserve issues for appellate review are apparent from the trial record, she argues that her claims related to counsel's failure to present expert testimony are not embraced by the trial record since the omitted witnesses' testimony is "not in the record." Respondent in turn urges the Court to reject Petitioner's standard and argues that the proper standard should be whether the ineffective assistance of trial counsel claim was apparent to appellate counsel based on a review of the entire record.

The Court finds that the second requirement identified by the Tenth Circuit is satisfied if appellate counsel could, upon conducting a routine review of the trial record, identify the deficiencies that arguably rise to the level of ineffective assistance of counsel under the Sixth Amendment. In this case, Petitioner's allegations of ineffective assistance of trial counsel based on counsel's failure to introduce testimony of expert witnesses, both to rebut the state's evidence of incapacity and to reconstruct the accident scene, embrace matters in the trial record. As a result, no further fact-finding was necessary in order for the issues to be developed and raised on direct appeal. Therefore, the Court finds that in this case the procedural bar imposed by the state appellate court

was an adequate ground¹ and Petitioner's ineffective assistance of trial counsel claims first raised in post-conviction proceedings are barred by the procedural default doctrine.

Because of her procedural default, this Court may not consider Petitioner's ineffective assistance of trial counsel claims first raised in post-conviction proceedings unless she is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if her 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). A "fundamental miscarriage of justice" instead 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).

Petitioner does not attempt to overcome the procedural bar by demonstrating "cause and prejudice" for her default of the claim. Instead, she argues that she "has always maintained her innocence" and that "to refuse to hear this claim on a procedural bar would be tantamount to a fundamental miscarriage of justice." (#4 at 4). However, in response to the Court's September 30, 1999 Order, Petitioner states that she is "unable to make any sort of affirmative showing of innocence due to the fact that no such evidence exists." (#28 at 1). She further states that her "conviction was wholly premised on a prosecution that did not prove her guilty beyond a reasonable doubt." However, the Court finds that Petitioner has failed to make a showing of "actual innocence"

¹As a result of this finding, the Court need not evaluate in this case the adequacy of Oklahoma's remand procedure. See English v. Cody, 146 F.3d 1257, 1264-65 (10th Cir. 1998).

sufficient to fall within the narrow fundamental miscarriage of justice exception to the procedural default doctrine. See McCleskey v. Zant, 499 U.S. 467, 493-94 (1991). As stated by the Supreme Court, where a habeas petitioner “presents evidence of innocence so strong that a court cannot have confidence in the outcome of the [proceedings resulting in the petitioner’s conviction] unless the court is also satisfied that the [proceedings were] free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims . . . [T]he evidence must establish sufficient doubt about his guilt to justify the conclusion that [serving his sentence] would be a miscarriage of justice unless his conviction was the product of a fair trial.” Schlup v. Delo, 513 U.S. 298, 316 (1995). Petitioner in this case has presented no evidence to support her claim of actual innocence. In the absence of any evidence supporting her claim of actual innocence, the Court concludes that Petitioner does not fall within the “fundamental miscarriage of justice” exception to the procedural bar doctrine. As a result, Petitioner’s claims of ineffective assistance of trial counsel first raised in post-conviction proceedings are procedurally barred and should be denied on that basis.

2. Challenge to the sufficiency of the evidence to support First Degree Murder conviction

As her second proposition of error, Petitioner asserts that there was insufficient evidence to convict Petitioner of murder in the first degree. As a result, Petitioner claims to have been denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In response, Respondent argues that this claim is procedurally barred from this Court’s review.

Petitioner defaulted her challenge to the sufficiency of the evidence when she failed to raise the claim on direct appeal. Petitioner did challenge the sufficiency of the evidence in her application

for post-conviction relief. However, the OCCA imposed a procedural bar, finding Petitioner had waived claim by failing to raise it on direct appeal. As to this claim, the procedural bar is both "independent" and "adequate" and must be respected by this Court. Thus, as discussed above, unless Petitioner demonstrates either "cause and prejudice" to overcome the default or that a fundamental miscarriage of justice will result if this claim is not considered, this Court is precluded from considering the claim. Coleman, 501 U.S. at 724.

As indicated above, Petitioner does not attempt to demonstrate "cause and prejudice" for her default of this claim. Instead, she asserts that because she has always maintained that she is innocent, a fundamental miscarriage of justice will occur if her claims are not considered. However, Petitioner has failed to make the showing of actual innocence required to fall within the narrow fundamental miscarriage of justice exception to the procedural bar doctrine. Therefore, the Court concludes Petitioner's challenge to the sufficiency of the evidence is procedurally barred and should be denied on that basis.

3. Admission of prejudicial evidence denied Petitioner a fair trial

As her third proposition of error, Petitioner asserts that the admission of two color slides depicting the autopsy of the victim's head was prejudicial and deprived Petitioner of a fair trial. The OCCA considered and rejected this claim in affirming Petitioner's conviction on direct appeal.

Evidentiary rulings by a state court cannot serve as the basis for habeas corpus relief unless the ruling rendered the petitioner's trial fundamentally unfair resulting in a violation of due process. Fox v. Ward, 200 F.3d 1286, 1296-97 (10th Cir. 2000) (stating that to justify habeas relief, trial court's evidentiary error must be "so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process"); Smallwood v. Gibson, 191 F.3d 1257,

1274-75 (10th Cir. 1999); Jackson v. Shanks, 143 F.3d 1313, 1322 (10th Cir. 1998) ("[D]ue process arguments relating to the admissibility of the victims' . . . autopsy photos . . . will not support habeas relief 'absent fundamental unfairness so as to constitute a denial of due process of law.'"); Duvall v. Reynolds, 139 F.3d 768, 789 (10th Cir. 1997); Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir. 1989) (citing Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979)).

After reviewing the transcript from Petitioner's entire trial, the Court finds that the trial court's admission of the color slides of the deceased's head at autopsy, even if improper, was not significant enough to influence the jury's decision in light of the other evidence supporting Petitioner's conviction. For example, the jury heard Jeff Speer testify that he was awakened in the early morning hours of August 8, 1983, by Petitioner knocking on his door and asking him to call the fire department because her truck was on fire (#32 at 215-223). The jury also heard testimony from the Fire Marshal confirming that accelerants were involved in the fire based on its intensity (#32 at 355-56). Dennis Reimer, an agent for the Oklahoma State Bureau of Investigation, testified that debris taken from in front and under the driver's side of the truck contained paint thinner, a flammable liquid (#32 at 378), and that debris taken from in front and under the passenger's side of the truck contained gasoline mixed with some other substance (#32 at 378). Several witnesses who arrived at the scene shortly after the accident testified that there was no evidence of spinning tires or any other evidence suggesting the truck was stuck (#32 at 235, 253, 272, 306, 327, 333), in direct contradiction to Petitioner's version of the events leading up to the fire (#32 at 728-30). The jury also heard Margaret Viers, a neighbor of the Ogdens, testify that Petitioner had indicated she wanted to kill her husband (#32 at 401) and that she had two or three ways of getting rid of him (#32 at 403). Dale Monroe, Petitioner's former brother-in-law, testified that Petitioner had discussed killing her husband (#32 at 462) and that shortly after the fire, Petitioner had told him that before leaving

her husband in the truck, she had lit a cigarette, put it in his hand, threw the match or lighter behind the seat of the truck and walked to the nearby house (#32 at 465). The State Medical Examiner testified that the victim was alive, but unconscious or at least in a stupor, when the fire started (#32 at 528-29) and that he would have been unable to drive (#32 at 530). In light of this evidence, any prejudicial impact of the color slides on the jury was not significant enough to render Petitioner's trial fundamentally unfair. The Court also notes the color slides supported testimony concerning initial impressions of the cause of death and the resulting investigation. Because Petitioner has failed to demonstrate that her trial was rendered fundamentally unfair by the admission of the color slides, habeas corpus relief on this claim should be denied.

4. Loss of evidence and "botched" investigation by the State

As her fourth proposition of error, Petitioner argues that she was denied due process of law due to the fact that the state lost crucial evidence (see #1) and otherwise "botched" the investigation (see #2 at 34). Specifically, Petitioner complains that the state "lost" a two gallon gasoline can found in the bed of the pickup truck and implicated during Petitioner's trial as a possible cause of the fire. Petitioner does not identify anything specific about the missing gas can that was exculpatory in nature; she merely states "it might have revealed evidence favorable to the defense." (#1-2 at 35-36). In addition, Petitioner complains that no physical evidence was collected at the scene by law enforcement authorities. However, Petitioner again fails to identify with specificity any evidence exculpatory in nature that was not collected at the scene of the accident.

If the exculpatory significance of the lost evidence is indeterminate and all that can be confirmed is that the evidence was "potentially useful" for the defense, than a defendant must show that the government acted in bad faith in destroying the evidence in order to establish a due process

violation. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); United States v. Pedraza, 27 F.3d 1515, 1527 (10th Cir. 1994); United States v. Fleming, 19 F.3d 1325, 1331 (10th Cir. 1994). In the instant case, Petitioner does not even allege that the law enforcement officials acted in bad faith in failing to preserve the evidence at the scene of the accident. Therefore, the Court finds that Petitioner's due process claim is without merit and habeas corpus relief should be denied.

5. *Misconduct by the Prosecutor*

As her fifth proposition of error, Petitioner asserts that she was denied due process of law due to improper comments and arguments by the prosecutor. Specifically, Petitioner complains that (1) while she was testifying, the prosecutor asked if any of her other husbands had died a "violent death," (2) during closing argument, the prosecutor implied that Petitioner's family had lied to protect her, and (3) during closing argument, the prosecutor made comments designed to invoke "societal alarm." (#1-2 at 37-38).

Habeas corpus relief is available for prosecutorial misconduct only when the prosecution's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-648 (1974); Cummings v. Evans, 161 F.3d 610, 618 (10th Cir.1998), *cert. denied*, --- U.S. ----, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999). Inquiry into the fundamental fairness of a trial requires examination of the entire proceedings. Donnelly, 416 U.S. at 643. "To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly could have tipped the scales in favor of the prosecution." Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted); see also Smallwood v. Gibson, 191 F.3d 1257, 1275-76 (10th Cir. 1999).

After reviewing the entire trial transcript, this Court finds that none of the prosecutor's

comments were of sufficient magnitude to influence the jury's decision even assuming that the specific instances of alleged misconduct were improper. As to Petitioner's claim concerning the prosecutor's question regarding the deaths of Petitioner's other husbands, the transcript indicates that the trial court sustained defense counsel's objection to the question and admonished the jury to disregard the question. (Trans. at 710-711). Thus, any error resulting from the prosecutor's question was cured by the trial court's admonishment. Duval v. Reynolds, 139 F.3d 768, 794 (10th Cir. 1998). In addition, the Court finds no reasonable probability that the prosecutor's comments during closing argument concerning the credibility of Petitioner's witnesses affected the verdict in this case in light of the evidence and testimony presented at trial, as discussed above. Therefore, the Court concludes that the proceedings against Petitioner were not rendered fundamentally unfair by prosecutorial misconduct. Petitioner is not entitled to habeas relief on this claim.

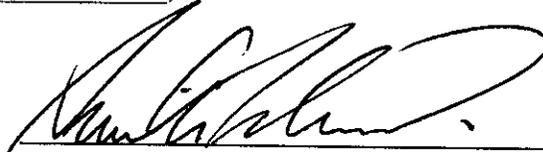
CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that she is in custody in violation of the Constitution or laws of the United States.

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

IT IS SO ORDERED.

This 8TH day of JUNE, 2000.



Sven Erik Holmes
United States District Judge

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

ROBERT J. GETCHELL, TRUSTEE,)
)
Plaintiff,)
)
v.)
)
LEE CHEW and PAUL STUMPF,)
)
Defendants.)

ENTERED ON DOCKET
DATE JUN 09 2000

Case No. 98-CV-624-K (J)

FILED
JUN 08 2000

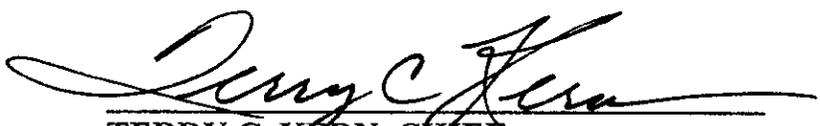
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by the parties on June 7, 2000, that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED THIS 8 DAY OF JUNE, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE JUN 09 2000

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
NANCY C. HOLT-MENSFORTH)
aka NANCY C. DORY, NANCY)
C. HOLT, NANCY HOLT MENSTUTER,)
N. CELESTE HOLT MENSFORTH,)
NANCY CELESTE HOLT-MENSFORTH)
AND NANCY CELESTE DORY,)
)
Defendant.)

Case No. 00-CV-58-BU(J) ✓

F I L E D

JUN 8 2000 ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment. Based upon the parties' submissions, the Court makes its determination.

On January 20, 2000, Plaintiff filed a Complaint seeking to collect upon defaulted student loans. In the Complaint, Plaintiff alleged that Defendant was indebted to Plaintiff in the principal amounts of \$34,368.71, \$6,396.36, and \$7,000.00, plus administrative charges in the amounts of \$7.02 and \$27.50, plus accrued interest in the amounts of \$17,247.05, \$3,448.31 and \$2,534.22, at the rates of 8%, 9.13% and 5% per annum. Defendant filed an Answer on April 6, 2000, stating that she was without information or knowledge sufficient to admit or deny the allegations of indebtedness in Plaintiff's Complaint. No affirmative defenses were raised by Defendant. On April 25, 2000, Defendant filed an Amended Answer, raising various affirmative

11

Phoned

defenses, including statute of limitations.

In its motion, Plaintiff contends that it is entitled to summary judgment on its claim to recover upon the defaulted student loans, claiming that no genuine issue of material fact exists and that Plaintiff is entitled to judgment as a matter of law. In response, Defendant contends that genuine issues of material fact exist as to Plaintiff's claim. Defendant contends that the promissory note, attached to Plaintiff's motion as Exhibit F-1, is a manufactured document. In regard to the other promissory notes, Defendant stipulates that she executed the promissory notes and that they are in default; however, she asserts that discovery is necessary to verify the remaining allegations of Plaintiff. Defendant, in her cross-motion for summary judgment, contends that Plaintiff's claim for recovery on the promissory notes is barred by the six-year statute of limitations set forth in 28 U.S.C. § 2415.

Upon review, the Court finds that Plaintiff is entitled to summary judgment on its claim to recover on the defaulted student loans. Defendant has not established a genuine issue of fact in regard to Plaintiff's claim. As to Plaintiff's Exhibit F-1, Defendant has not presented sufficient evidence to raise a genuine issue as the authenticity of the original promissory note, and therefore, the duplicate of the promissory note is admissible under Fed. R. Evid. 1003. Exhibit F-1 contains the requisite certification to prove its genuineness as a true and correct copy of the original. See, 28 U.S.C. § 1746(2). While Defendant contends that Exhibit F-1 is manufactured, Defendant does not deny

her signature on the document. Plaintiff's Exhibit F-1 and Defendant's Exhibit A-1 appear to relate to the same loan transaction. Defendant has not presented any evidence to raise a genuine issue of material fact as to whether she is indebted to Plaintiff for the amount represented by Plaintiff based upon the subject loan transaction. The Court therefore concludes that summary judgment is appropriate.

As to the other promissory notes, the Court finds that Defendant has not raised a genuine issue of fact to defeat summary judgment. While Defendant has stated that discovery is necessary to verify the allegations of Plaintiff other than the allegations regarding execution and default of the promissory notes, Defendant has not complied with Rule 56(f), Fed. R. Civ. P., in order to obtain a deferral of a summary judgment ruling pending completion of discovery. In order for a nonmovant to seek deferral pursuant to Rule 56(f), the nonmovant must furnish an affidavit explaining "why facts precluding summary judgment cannot be presented." Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992). The nonmovant must identify the "probable facts not available and what steps have been taken to obtain these facts." Id. "The purpose of the affidavit is to ensure that the nonmoving party is invoking the protections of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition." Id. In the instant case, Defendant has not submitted a Rule 56(f) affidavit in opposition to Plaintiff's motion. The Court finds that Defendant's failure to

comply with Rule 56(f) waives the discovery issue. Id. Because Defendant has failed to raise a genuine issue of material fact as to Plaintiff's claim for recovery under the subject promissory notes, the Court finds that summary judgment is appropriate.

As to Defendant's cross-motion for summary judgment, the Court finds that summary judgment is not appropriate. The six-year statute of limitations, provided in 28 U.S.C. § 2415, does not bar Plaintiff's claim on the student loans at issue. 20 U.S.C. § 1091a(a) provides in pertinent part:

(1) It is the purpose of this subsection to ensure that obligations to repay loans . . . are enforced without regard to any Federal . . . limitation on the period within which debts may be enforced.

(2) Notwithstanding any other provision of statute . . . , no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by--

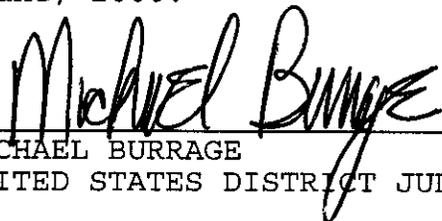
(D) the Secretary, the Attorney General . . . for the repayment of the amount due from a borrower on a loan made under this title

The "History; Ancillary Laws and Directives" following § 1091a provides that "This title" refers to "Title IV of Act Nov. 8. 1965, P.L. 89-329, [the Higher Education Act of 1965], which appears as 20 U.S.C.S. §§ 1070, et. seq., and 42 U.S.C.S. §§ 2751 et seq." The loans at issue were made under "This title" as referred to in § 1091a(a)(2)(D), as they were made under Part B and Part E of Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1071 et seq. and 20 U.S.C. § 1087aa et seq. Therefore, the statute of limitations does not bar Plaintiff's suit against Defendant. Accordingly, the Court finds that Defendant's cross-motion for

summary judgment must be denied.

Based upon the foregoing, Plaintiff's Motion for Summary Judgment (Docket Entry #5) is **GRANTED**. Defendant's Cross Motion for Summary Judgment (Docket Entry #8) is **DENIED**. Plaintiff is **DIRECTED** to submit a proposed judgment for the Court's approval on or before June 20, 2000. The case management conference currently scheduled for June 9, 2000 at 10:10 a.m. is **STRICKEN**.

ENTERED this 8th day of June, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

TOM AND BRENDA DYER, as parents and)
next friend of their minor daughter, KANDIS)
DYER; TOM AND BRENDA DYER, as)
parents and next friend of their minor daughter,)
TAMARA DYER; ROGER AND VICKI)
WHEELER, as parents and next friend of their)
minor daughter, JILLIAN WHEELER;)
ROGER AND VICKI WHEELER, as parents)
and next friend of their minor daughter,)
RACHAEL WHEELER; GREG AND)
SHELLY BILLEN, as parents and next)
friend of their minor daughter, HEATHER)
BILLEN;)

Plaintiffs,)

v.)

INDEPENDENT SCHOOL DISTRICT)
NO. 38 OF OSAGE COUNTY, a/k/a)
HOMINY PUBLIC SCHOOLS;)
GERALD CHRISTY, individually and in)
his official capacity as Superintendent; and)
Does 1 through 50)

ENTERED ON DOCKET
DATE JUN 09 2000

Case No. 99-CV-0816 BU(E)
CLASS ACTION

FILED

JUN 8 2000

F. J. Lombardi, Clerk
U.S. DISTRICT COURT

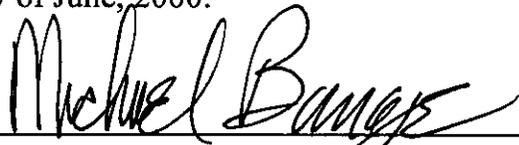
**ORDER GRANTING JOINT MOTION REQUESTING
THE ENTRY OF AN ADMINISTRATIVE CLOSING ORDER**

This matter comes before the Court on the Parties' Joint Motion Requesting the Entry of an Administrative Order. In the Motion, the Parties request that the Court direct the clerk to close the above-captioned matter administratively, pursuant to Northern District Local Rule 41.0, subject to reopening for good cause shown based on the imminent settlement of this case.

Based upon the information provided in the Motion, as well as the fact that the Motion is presented as a joint request of the Parties, this Court finds that the request should be granted.

IT IS THEREFORE ORDERED that the Joint Motion Requesting the Entry of an Administrative Order filed by the parties in the above-captioned matter on the 2nd day of June, 2000, is hereby GRANTED.

IT IS SO ORDERED this 8th day of June, 2000.



THE HONORABLE MICHAEL BURRAGE
UNITED STATES DISTRICT COURT JUDGE

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

TOM AND BRENDA DYER, as parents)
and next friend of their minor)
daughter, KANDIS DYER; TOM)
AND BRENDA DYER, as parents and)
next friend of their minor)
daughter, TAMARA DYER; ROGER)
AND VICKI WHEELER, as parents)
and next friend of their minor)
daughter, JILLIAN WHEELER;)
ROGER AND VICKI WHEELER, as)
parents and next friend of)
their minor daughter, RACHAEL)
WHEELER, GREG AND SHELLY BILLEN,)
as parents and next friend of)
their minor daughter, HEATHER)
BILLEN;)

Plaintiffs,)

vs.)

INDEPENDENT SCHOOL DISTRICT)
NO. 38 OF OSAGE COUNTY, a/k/a)
HOMINY PUBLIC SCHOOLS; GERALD)
CHRISTY, individually and in)
his official capacity as)
Superintendent; and Does 1)
through 50,)

Defendants.)

FILED

JUN 8 2000 *A*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-816-BU(E) *✓*

ENTERED ON DOCKET
DATE JUN 09 2000

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 60 days of

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

Entered this 8th day of June, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUANITA GILLIAM, guardian of)
MAYME GARLAND HUDSON,)

JUN - 6 2000

Plaintiff,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

v.)

Case No. 99-CV-1121 BU(E)

THE JAY HEALTHCARE AUTHORITY)
d/b/a MONROE MANOR, and)
DARRELL MEASE, M.D.,)

ENTERED ON DOCKET
DATE JUN 8 2000

Defendants.)

REPORT AND RECOMMENDATION

On May 8, 2000, defendant Jay Healthcare Authority d/b/a Monroe Manor filed a Motion to Dismiss and Brief in Support (Dkt. # 20) for lack of diversity and lack of subject matter jurisdiction, pursuant to 28 U.S.C. § 1332. On May 19, 2000, defendant Darrell Mease, M.D., filed a Motion to Dismiss (Dkt. # 23) which adopted the reasons, arguments, and authority set forth in Monroe Manor's motion and brief. The Court referred defendants' motions to the undersigned for a report and recommendation. See 28 U.S.C. § 636. For the reasons set forth below, the undersigned recommends that defendants' motions be **DENIED**.

BACKGROUND

The parties have set forth the following facts. In 1992, Juanita Gilliam was appointed legal guardian for her mother, Mayme Garland Hudson, in Adair County, Oklahoma. Adair County borders Arkansas. At the time of the guardianship proceedings, Mrs. Hudson and her husband were living in Westville, a town in Adair County, and Mrs. Gilliam was living in Texas. Shortly after Mrs. Gilliam was appointed Mrs. Hudson's guardian, Mrs. Hudson entered a nursing home in Westville, and then moved to a nursing home in West Siloam Springs, Oklahoma, a town on the

Arkansas-Oklahoma border. Mrs. Gilliam and Mrs. Hudson had previously lived together in Arkansas, and Mrs. Gilliam moved to Mayesville, Arkansas in 1996. Mrs. Gilliam is Mrs. Hudson's only child. Mr. Hudson is now deceased, and Mrs. Hudson has Alzheimer's Disease and dementia. Mrs. Hudson is now 88 years of age; Mrs. Gilliam is 69.

Mrs. Hudson became a resident of Monroe Manor in Jay, Oklahoma in September 1998. Monroe Manor is a nursing facility located in Delaware County, Oklahoma owned by the Jay Healthcare Authority and the City of Jay, Oklahoma. The Jay Healthcare Authority is a public trust subject to the limitations set forth in the Governmental Tort Claims Act, Title 51 O.S. § 151 *et seq.* ("GTCA"). Dr. Mease was her physician as well as the medical director of Monroe Manor and a member of its Board of Directors.

In March 1999, Mrs. Hudson was admitted to the Grove General Hospital in Grove, Oklahoma. Mrs. Gilliam claims that Mrs. Hudson was suffering severe decubitus ulcers, sepsis, osteomyelitis, severe malnutrition, severe dehydration, severe anemia, and fecal impaction as a result of neglect by Monroe Manor and Dr. Mease. After surgery, Mrs. Hudson was released to Grand Lake Villa, a nursing home next to the hospital. Grove, Oklahoma is approximately 30 miles from Mayesville, Arkansas, where Mrs. Gilliam resides.

In accordance with the GTCA, counsel for Mrs. Hudson and Mrs. Gilliam notified the City of Jay in May 1999 of Mrs. Hudson's claim that the City of Jay, and/or the Jay Healthcare Authority was responsible for extreme neglect. Arkansas, approximately 10 miles from Mayesville, in October 1999. She was also transferred to the Arkansas Medicare program. This action was filed on December 28, 1999.

REVIEW

Standard of Review

A motion to dismiss is properly granted when it appears beyond doubt that a plaintiff could prove no set of facts entitling her to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); Calderon v. Kansas Dept. of Social & Rehabilitative Services, 181 F.3d 1180, 1183 (10th Cir. 1999). For purposes of making this latter determination, a court must “accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.” Calderon, 181 F.3d at 1183; see also Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir. 1998).

Domicile

Diversity actions in federal court are governed by 28 U.S.C. § 1332. Diversity jurisdiction under 28 U.S.C. § 1332(a)(1) requires an amount in controversy in excess of \$75,000 and a matter in controversy between citizens of different states. Significantly, it also provides that “the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same state as the infant or incompetent.” 28 U.S.C. § 1332(c)(2). Thus, Mrs. Gilliam is deemed to be a citizen of the same state as Mrs. Hudson for diversity purposes.

Citizenship and domicile are one and same for purposes of diversity. Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir. 1983). “To effect a change in domicile, two things are indispensable: First, residence in a new domicile, and second, the intention to remain there indefinitely.” Mrs. Hudson resides in a new domicile (Arkansas) and it appears that she will remain there indefinitely. Defendants argue that diversity is lacking in this matter because defendants were domiciled in Oklahoma “at the time this cause of action was initiated,” and Mrs. Hudson was also domiciled in

Oklahoma at that time. (Motion to Dismiss, Dkt. # 20, at 2.) Defendants contend that the date the action was commenced, or initiated, was May 23, 1999, the date of the GTCA notice to the City of Jay. Mrs. Hudson lived in Grove, Oklahoma at that time. Defendants point out that, under Oklahoma law, compliance with the notice provisions of the GTCA is a condition precedent to suit against a political subdivision.

As plaintiff points out, however, the GTCA does not require notice to Dr. Mease. More importantly and more specifically, the time for determining citizenship or domicile for purposes of diversity jurisdiction is the date that the complaint is filed in a lawsuit. E.g. Freeport- McMoRan, Inc. v. KN Energy, Inc., 498 U.S. 426, 428 (1991); Penteco Corp. Ltd. Partnership --1985A v. Union Gas System, Inc., 929 F.2d 1519, 1522 n. 2 (10th Cir. 1991). "A civil action is commenced by filing a complaint with the court." Fed. R.Civ. P. 3. The statutory notice provisions of the GTCA do not alter federal law applicable to federal jurisdiction. Mrs. Hudson was domiciled in Arkansas on December 28, 1999. It is irrelevant that Oklahoma Medicare continued to pay her medical bills for a time after she moved to Arkansas and before she obtained coverage under Arkansas Medicare.

Change of Domicile

Best Interests

Defendants also argue that Mrs. Gilliam could not legally change Mrs. Hudson's domicile without demonstrating that it was in Mrs. Hudson's best interest. The general rule is that an incapacitated person is presumed incapable of changing her domicile. See Copperedge v. Clinton, 72 F.2d 531, 533 (10th Cir. 1934). However, guardians of a permanently incapacitated person may change the domicile of their ward if they are acting in the best interest of the ward. Rishell v. Jane

Phillips Episcopal Memorial Medical Center, 12 F.3d 171, 174 (10th Cir. 1993). Defendants do not dispute that Mrs. Hudson is permanently incapacitated.

Defendants argues that Mrs. Gilliam was not acting in Mrs. Hudson's best interests when she moved her mother to Arkansas. Instead, they argue, Mrs. Gilliam was forum-shopping and moved her mother to Arkansas simply to create diversity jurisdiction. They also suggest that Mrs. Gilliam comes to the Court with "unclean hands" because she "considered filing this case in Delaware County"¹ and because she considered what was more convenient for her -- not what was in the best interests of her mother.

Mrs. Gilliam testified that she was not dissatisfied with the care given to Mrs. Hudson at Grand Lake Villa, but it was less expensive and more convenient for her to have Mrs. Hudson at the nursing home in Gravette. Mrs. Gilliam testified that she moved her mother to Arkansas so "[s]he'd be closer to me, to my home, and should something happen, I could get there in a hurry." (Deposition of Juanita Gilliam, attached as Ex. C to the Motion to Dismiss, Dkt. # 20, and Ex. B to the Resp. Br., Dkt. # 25, at 23, ll. 20-21.) She said that distance was the reason for her mother moving to Arkansas, "and I could watch over her better." (Id. at 24, l. 1.)

Mrs. Gilliam is a former nurse who has worked in a nursing homes or in home health care. (Id. at 45, ll. 1-25, and 46, ll. 1-5.) She is now 69 years old and her mother's only child. There is no evidence that Mrs. Hudson has any other family to take care of her or look after her. The distance between Mrs. Gilliam's home in Mayesville and Gravette is only 20 miles closer that the distance

¹ Defendants also point to the heading of one discovery pleading filed by plaintiffs which incorrectly shows that the case was filed in Delaware County, Oklahoma. Attorneys for Mrs. Gilliam contend that the heading was a typographical error and, at any rate, it has no substantive bearing on Mrs. Hudson's domicile. The undersigned agrees.

between Mayesville and Grove, but the difference is appreciable to Mrs. Gilliam. That she wanted her mother to be closer to her and to avoid the inconvenience and expense of a farther drive does not constitute an improper motive or “unclean hands” in any manner. If the allegations against Monroe Manor are true, it is understandable that Mrs. Gilliam would want to keep a closer watch over her mother to ensure that she is given proper care. There is no evidence to suggest that Mrs. Hudson required specialized care that the Gravette nursing home was unable to provide. Her physician (who is also Mrs. Gilliam’s family doctor) offices nearby as well.

28 U.S.C. § 1359

There is no indication that Mrs. Gilliam moved her mother to Arkansas solely in an attempt to obtain diversity jurisdiction. Defendants allege that plaintiff purposefully attempted to create diversity of citizenship in violation of 28 U.S.C. § 1359, which provides: “A District Court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.” That statute is inapplicable here because there is no claim or allegation that Mrs. Gilliam’s appointment as guardian was improper or collusive.

Further, defendants’ reliance on Gilchrist v. Strong, 299 F. Supp. 804 (W.D. Okla. 1969), which addresses 28 U.S.C. § 1359, is misplaced. In that case, the court granted the defendant’s motion to dismiss for lack of jurisdiction in a wrongful death action filed on behalf of the decedent’s estate by an out-of-state administrator. The court held that the out-of-state appointment was manufactured for the purpose of invoking federal jurisdiction and in violation of 28 U.S.C. § 1359. Gilchrist, 299 F. Supp. at 807. This case does not involve appointment of an out-of-state administrator; it involves the domicile of a ward who is moved out of state. It is true that the cause

of action arose in Oklahoma, that the defendants are located in Oklahoma, and that Mrs. Hudson was a resident of Oklahoma at the time of the events giving rise to the cause of action. However, she was a resident of Arkansas when her guardian filed suit.² Her guardian lived in Arkansas and, for legitimate reasons, moved her nearer the guardian's home.

Plaintiff argues that "it is just this type of 'local' controversy for which diversity jurisdiction was designed" and essentially admits that she wanted a federal forum because defendants are well-known and prominent citizens in Delaware County. (Resp. Br., Dkt. # 25, at 10.) The Gilchrist court recognized that diversity jurisdiction provides an out-of-state litigant with a forum free from local prejudices, but declared that the case was in all respects a local controversy without the slightest federal "flavor." 299 F. Supp. at 807. There is a federal "flavor" to this lawsuit because of the residence of Mrs. Hudson and her daughter in Arkansas. There is no evidence that Mrs. Hudson's move to Arkansas was made to "manufacture" diversity.

² Defendants contend that the guardian must obtain court approval to change the domicile of her ward, and Mrs. Gilliam has failed to obtain approval from the Adair County court that appointed her guardian of Mrs. Hudson. (See Reply Br., Dkt. # 27). Rishell posits that domicile may be changed "unless an appointing court holds to the contrary" and specifically directs that "state law governs whether the substituted intent of the ward is to be executed under the limited and controlled authority of a personal representative or by operation of law." 12 F.3d at 173-74. Under Oklahoma law, "[e]xcept as provided by Section 3-113 of this title, [a guardian] may fix the place of abode of the ward at any place within the county, but not elsewhere, without permission of the court" Okla. Stat. tit. 30, § 1-120(A). Section 3-113 provides that an order appointing a guardian "shall set forth . . . 4. any authority granted a guardian of the person of the ward to change the place of abode of the ward outside of the state or county without the prior permission of the court" Id. § 3-113.

The order appointing Mrs. Gilliam as Mrs. Hudson's guardian did not set forth any authority for changing the place of Mrs. Hudson's abode. (See Letters of Guardianship, attached to the Motion to Dismiss, Dkt. # 20, as Ex. A.) Even permission to place an incompetent ward in another state for treatment does not equate with permission to change the domicile of the incompetent ward. In re Gray's Estate, 250 P.422, 423-24 (1926). Nonetheless, Mrs. Gilliam's failure to obtain permission from the Adair County court for moving her mother is not controlling for diversity purposes. It is for this Court to determine where Mrs. Hudson resided when she filed suit; it is for the Adair County court to address, if raised, whether her guardian violated Oklahoma guardianship law by moving her without permission.

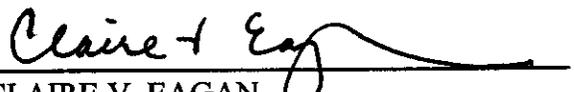
CONCLUSION

Based upon the foregoing, the undersigned recommends that the Motion to Dismiss and Brief in Support (Dkt. # 20) filed by defendant Jay Healthcare Authority d/b/a Monroe Manor and the Motion to Dismiss (Dkt. # 23) filed by defendant Darrell Mease, M.D., be **DENIED**.

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); 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 6th day of June, 2000.



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

2nd Day of June, 192000.
Patricia J. [Signature], Deputy Clerk

F I L E D
JUN 7 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

TAMARA ZILAR,)
)
Plaintiff,)
)
vs.)
)
INDEPENDENT SCHOOL DISTRICT)
NO. 1, DR. RON CAIN, in his individual)
and professional capacity, MS. CARLA)
TANNER, in her individual and professional)
capacity, and MS. MARGRETTE)
DOOLITTLE, in her individual and)
professional capacity,)
)
Defendants.)

Case No. 99 CV-0787E (E) /

ENTERED ON DOCKET
DATE JUN 08 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
OF THE INDIVIDUAL DEFENDANT, MS. CARLA TANNER**

On this 7th day of June, 2000, the parties in the above-captioned action hereby jointly stipulate, pursuant to FED. R. CIV. P. 41(a)(1), that the individual defendant, Ms. Carla Tanner, be dismissed from the instant action, with prejudice. Pursuant to this Stipulation of Dismissal, the individual defendant, Ms. Carla Tanner, and the plaintiff, Ms. Tamara Zilar, agree to bear their own costs, fees and expenses arising out of the instant litigation.

WHEREFORE, the parties stipulate that Ms. Carla Tanner is dismissed from the above-captioned matter, with prejudice.

Respectfully submitted,
By David R. Blades
David R. Blades, OBA #15187
Jo Anne Pool, OBA #14362
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Attorneys for the Defendants

SM

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

FILED

JUN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRYSIS CONSTRUCTION SERVICES,)
INC., a Canadian corporation,)

Plaintiff,)

vs.)

Case No. 00-CV-352E (E) ✓

SABRE INTERNATIONAL, INC.,)
a Washington corporation,)

Defendant.)

ENTERED ON DOCKET
DATE JUN 08 2000

DISMISSAL WITH PREJUDICE PURSUANT TO FED. R. CIV. P. 41

COMES NOW the Plaintiff and pursuant to Fed. R. Civ. P. 41 dismisses this action with prejudice.

Respectfully submitted,

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

By: Graydon Dean Luthey, Jr.
Graydon Dean Luthey, Jr., OBA #6568
Pamela H. Goldberg, OBA #12310
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(918) 594-0400; (918) 594-0505 (Fax)

ATTORNEYS FOR PLAINTIFF

CL5

CERTIFICATE OF SERVICE

I, the undersigned do hereby certify that on this 7th day of June, 2000, a true and correct copy of the foregoing document sent via facsimile and also hand-delivered to:

J. Thomas Mason, Esq.
Carpenter, Mason & McGowan
1516 South Boston Avenue, Suite 205
Tulsa, Oklahoma 74119-4013

Raydon Dean Lethers.

FILED

JUN 8 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MELISSA PHILLIPS)

Plaintiff,)

v.)

Case No. 99-CV-0302-B (M) /

MAVERICK RESTAURANT CORP.,)
INC., d/b/a COTTON PATCH CAFÉ,)
a Kansas corporation,)

Defendants.)

ENTERED ON DOCKET

DATE JUN 08 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff and Defendant, by and through their respective counsel, and pursuant to Fed.R.Civ.P. 41(a)(1) hereby stipulate that Plaintiff's claims against Defendant should be, and they hereby are, dismissed with prejudice. With respect to such claims, Plaintiff shall bear her own attorney fees, litigation expenses, and costs. Also with respect to such claims, Defendants shall bear their own attorney fees, litigation expenses, and costs.

SO STIPULATED.

Respectfully submitted,

Charles E. Jarvi

Charles E. Jarvi, OBA #17651

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ATTORNEY FOR PLAINTIFF MELISSA PHILLIPS

33

CLC



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ATTORNEYS FOR DEFENDANT MAVERICK
RESTAURANT CORP., INC. d/b/a COTTON
PATCH CAFÉ, a Kansas corporation.

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

F I L E D

JUN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN WAYNE STAFFORD,)
)
Plaintiff,)
)
vs.)
)
LEROY BRYANT, Pawnee County)
Sheriff,)
)
Defendant.)

No. 97-CV-725-B (M) /

ENTERED ON DOCKET
JUN 08 2000

ORDER

DATE _____

Plaintiff, a state prisoner appearing pro se, brings this action pursuant to 42 U.S.C. § 1983, alleging that he was denied adequate medical care while in custody at the Pawnee County Jail in violation of the Eighth and Fourteenth Amendments. Defendant Leroy Bryant, Sheriff of Pawnee County, has filed a motion for summary judgment (Docket #20). Defendant has also submitted a Special Report (#21, Ex. 1) as ordered by the Court. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). Plaintiff has filed an objection to Defendant's motion (#26). Defendant has filed a reply to Plaintiff's objection (#31). In addition, Plaintiff has filed a motion for appointment of counsel (#22). For the reasons stated below, the Court concludes that Plaintiff's motion for appointment of counsel should be denied and Defendant's motion for summary judgment should be granted.

BACKGROUND

The following facts are undisputed: (1) Plaintiff was arrested on February 10, 1995, and held in custody at the Pawnee County Jail; (2) on August 1, 1995, following his conviction on a plea of *nolo contendere*, entered July 24, 1995, Plaintiff was transferred to the custody of the Oklahoma

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Department of Corrections ("ODOC"); (3) while incarcerated at the Pawnee County Jail, Plaintiff experienced a medical condition for which he received medical treatment; (4) on August 8, 1997, the Clerk of Court received for filing Plaintiff's 42 U.S.C. § 1983 civil rights complaint; (5) Plaintiff seeks compensatory and punitive damages from Leroy Bryant, in his official capacity as Sheriff of Pawnee County.

In his motion for summary judgment (#21), Defendant asserts that (1) there is no evidence that a policy or custom of the Sheriff's Office deprived Plaintiff of a constitutional right or was deliberately indifferent to Plaintiff's medical needs; (2) Plaintiff's claim is barred by the statute of limitations; (3) Plaintiff's claim for punitive damages is not proper; and (4) Plaintiff's allegations concerning any injury or distress to his mother is not a recognized cause of action and therefore should be dismissed. Defendant also provides the Special Report (#21, Ex. 1) as ordered by the Court. In support of his motion for summary judgment, Defendant provides the Affidavit of Larry Kitchel, Deputy Sheriff of Pawnee County (#21, Ex. 2); the intake record prepared for Plaintiff by the Pawnee County Sheriff's Department (#21, Ex. 3); "Plea of Guilty Summary of Facts" filed in Pawnee County District Court on July 24, 1995 (#21, Ex. 4); ODOC's Receipt of Prisoner, dated August 1, 1995 (#21, Ex. 5); Prisoner Medication Log for John Stafford, March 9, 1995 to July 29, 1995 (#21, Ex. 6); Pawnee County Jail Log, April 25, 1995 to July 24, 1995 (#21, Ex. 7); Affidavit of Sandra Howell, dispatcher/jailer for the Pawnee County Sheriff's Department (#21, Ex. 8); Property Narrative Supplement, dated June 26, 1995 (#21, Ex. 9); Plaintiff's medical records from relevant time period (#21, Ex. 10); and "Jail Standards," Oklahoma State Department of Health (#21, Ex. 11).

In response to Defendant's motion, Plaintiff asserts that a genuine issue of material fact remains concerning the medical care he received while in custody at the Pawnee County Jail.

Plaintiff claims that the Special Report is incomplete and that Defendant withheld documentation from the Special Report. He asserts that there is evidence that a policy and/or custom of the Sheriff's Office deprived him of his constitutional right to receive adequate medical care and that the Sheriff's Office was deliberately indifferent to his medical needs. Plaintiff also argues that because he mailed his complaint from prison on August 1, 1997, this action falls within the applicable two (2) year limitations period and is not time barred. He also argues that his claim should not be barred by the statute of limitations because his health problems continued after his transfer to ODOC custody, thereby extending the limitations period, because he "could not have known about the injury until his entry into the DOC," and because his lack of legal training "hindered" his ability to pursue his claim. Lastly, Plaintiff concedes that his mother is not a party to this lawsuit.

ANALYSIS

A. Motion for appointment of counsel

In the case of an indigent plaintiff, the Court has discretion to appoint an attorney to represent the plaintiff where, under the totality of circumstances of the case, the denial of counsel would result in a fundamentally unfair proceeding. McCarthy v. Weinberg, 753 F.2d 836, 839-40 (10th Cir. 1985). The Tenth Circuit Court of Appeals has stated that "if the plaintiff has a colorable claim then the district court should consider the nature of the factual issues raised in the claim and the ability of the plaintiff to investigate the crucial facts." Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir. 1995) (quoting McCarthy, 753 F.3d at 838).

After reviewing the merits of Plaintiff's case, the nature of the factual issues involved, Plaintiff's ability to investigate the crucial facts, the probable type of evidence, Petitioner's capability to present his case, and the complexity of the legal issues, see Rucks, 57 F.3d at 979 (cited cases

omitted); see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981), the Court finds Plaintiff's motion for appointment of counsel should be denied.

B. Statute of Limitations

No statute of limitations is expressly provided for claims under § 1983, but the Supreme Court has held that a court must look to state law for the appropriate period of limitations in § 1983 cases. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The Tenth Circuit Court of Appeals has stated that the appropriate period of limitations for § 1983 actions brought in the State of Oklahoma is two years, pursuant to Okla. Stat. Ann. tit. 12, § 95(3). Meade, 841 F.2d at 1522-24. While state law governs limitations and tolling issues, federal law determines the accrual of § 1983 claims. Fratu v. Deland, 49 F.3d 673, 675 (10th Cir. 1995); Baker v. Board of Regents, 991 F.2d 628, 632 (10th Cir.1993). A civil rights action accrues when "facts that would support a cause of action are or should be apparent." Fratu, 49 F.3d at 675 (quoting Blumberg v. HCA Management Co., 848 F.2d 642, 645 (5th Cir.1988); see also Johnson v. Johnson County Comm'n Bd., 925 F.2d 1299, 1301 (10th Cir.1991). Thus, a plaintiff must bring an action within two years of the date when facts that would support a cause of action are or should be apparent.

In the instant case, the events giving rise to Plaintiff's claim against Defendant occurred during the time he was incarcerated at the Pawnee County Jail, or from February 10, 1995 to August 1, 1995. Based on the record submitted by the parties, the Court finds that the latest date Plaintiff's claim could have accrued was August 1, 1995, the day he was received into the custody of ODOC. After August 1, 1995, Defendant was no longer responsible for providing medical care to Plaintiff. Thus, Plaintiff had two (2) years from August 1, 1995, or until August 1, 1997, to file his civil rights complaint.

Although Plaintiff's complaint was not received for filing by the Clerk of Court until August 8, 1997 (#1), or seven (7) days beyond the deadline, evidence in the record also demonstrates that Plaintiff mailed his complaint from prison on August 1, 1997 (see #26, attachment). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a *pro se* prisoner's notice of appeal is "filed" at the moment of delivery to prison authorities for forwarding to the district court. The Supreme Court's reasoning has been extended to the filing of civil complaints by *pro se* prisoners by several courts. See, e.g., Tapia-Ortiz v. Doe, 171 F.3d 150, 152 (2d Cir. 1999); Cooper v. Brookshire, 70 F.3d 377 (5th Cir. 1995); Garvey v. Vaughn, 993 F.2d 776, 783 (11th Cir. 1993); Faile v. Upjohn Co., 988 F.2d 985, 987-88 (9th Cir. 1993); Lewis v. Richmond City Police Dep't, 947 F.2d 733, 735-36 (4th Cir. 1991). This Court finds that the Houston v. Lack "mailbox rule" for filings by prisoners should apply in this case. The Court further finds that Plaintiff's complaint was "filed" on August 1, 1997, the date he mailed the complaint from prison. As a result, the complaint was filed within the two (2) year limitations period and is not time barred.

C. Defendant is entitled to Summary Judgment

1. Summary judgment standard

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings

but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a *pro se* plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn *pro se* prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's *pro se* pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

2. *Constitutional standards for medical care claims*

To state a § 1983 claim for a violation of a convicted prisoner's Eighth Amendment rights due to inadequate medical care, the prisoner must allege facts evidencing a deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Although Plaintiff was a pretrial detainee during most of his period of incarceration at the Pawnee County Jail, his right to receive adequate medical care is nonetheless protected by the Fourteenth Amendment and the standard for evaluating his claim under the Fourteenth Amendment is the same -- Plaintiff must demonstrate "deliberate indifference to serious medical needs." Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985).

"Deliberate indifference" is defined as knowing and disregarding an excessive risk to an inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 827, 114 S.Ct. 1970 (1994). In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Supreme Court clarified that the deliberate indifference standard under Estelle has two components: (1) an objective requirement that the pain or deprivation be sufficiently serious; and (2) a subjective requirement that the offending officials act with a sufficiently culpable state of mind. Id. at 298-99. Negligence does not state a claim under § 1983 for deliberate indifference to medical needs. Hicks v. Frey, 992 F.2d 1450, 1455 (6th Cir. 1993). In addition, differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis or treatment are not enough to state a deliberate indifference claim. Westlake v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976).

In the instant case, Plaintiff has sued only one defendant, Leroy Bryant, in his official capacity as Sheriff of Pawnee County. Claims against a government officer in his official capacity are actually claims against the government entity for which the officer works. Kentucky v. Graham, 473 U.S. 159, 167 (1985). Thus, Plaintiff's claim against Leroy Bryant, in his official capacity as

Sheriff of Pawnee County, is actually a claim against Pawnee County. In order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. *Respondeat superior* does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also Jenkins v. Wood, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)).

3. *Plaintiff's claim*

Plaintiff claims that while he was incarcerated at the Pawnee County Jail, he became seriously ill and suffered many seizures. He further alleges that the Sheriff knew he was in need of medical care and failed to provide medical assistance to him. In considering Defendant's motion for summary judgment, the Court has examined the medical records and affidavits submitted by the parties. As discussed in more detail below, although Plaintiff has responded to the motion, he has presented no evidence to refute or controvert the facts in defendant's motion. Plaintiff's response merely contains conclusory allegations that the medical treatment provided was inadequate and was not the treatment he desired. Therefore, because Plaintiff has not presented conflicting evidence, the court accepts the statement of facts provided by Defendant. See Hall, 935 F.2d at 1111.

Defendant has submitted admissible evidence demonstrating that the Pawnee County Jail follows the Minimum Jail Standards of the State of Oklahoma in providing medical care to persons in custody at the jail. In addition, the medical records and jail logs provided by Defendant indicate the jail and its personnel complied with the Minimum Jail Standards in providing medical care to

Plaintiff. According to the records, Plaintiff completed a written request to see a doctor on April 25, 1995. (#21, Ex. 7). The records show that Plaintiff was seen by a physician, Dr. Clymer, on April 28, 1995, June 21, 1995, and July 6, 1995. See #21, Exs. 2, 7, 8, and 9. In addition, the records demonstrate that on June 2, 1995 and June 3, 1995, Plaintiff was taken to the Pawnee Municipal Hospital after Emergency Medical Technicians were dispatched to the Pawnee County Jail where they rendered medical assistance to Plaintiff. See #21, Exs. 2 and 10. On June 2, 1995, the treating physician entered a diagnosis of "acute anxiety attack" and directed that Plaintiff "return if further episode. Be sure to take meds routinely." (#21, Ex. 10). The jail logs demonstrate that the jail personnel complied with the physician's orders. Plaintiff was returned the following day for further treatment. (#21, Ex. 10). In addition, Plaintiff was given Alprozalam (Xanax) daily from April 28, 1995 to July 29, 1995 while in custody at the Pawnee County Jail. (#21, Ex. 6) Plaintiff was also taken to the hospital on June 10, 1995. (#21, Ex. 10). Absent conflicting evidence, this record refutes Plaintiff's contention that county officials acted with deliberate indifference in denying adequate medical care.

In response to the evidence provided by Defendant, Plaintiff provides only his own self-serving affidavits (#26, Exs. 1, 2, and 3), stating that he "started having seizures on a regular basis" while incarcerated at the Pawnee County Jail and that he was forced to go without prescribed medication "for days." Plaintiff does not deny that he received treatment from Dr. Clymer or that he was taken to Pawnee Municipal Hospital after being treated by Emergency Medical Technicians at the jail. In support of his claim, Plaintiff does attach a letter from Cindy Roberts, a former jailer at the Pawnee County Jail, as well as telephone records from the relevant time period. However, the Court finds these records fail to support Plaintiff's claim that he received inadequate medical care despite his argument to the contrary. The letter from Ms. Roberts merely indicates that she has

Plaintiff in her prayers and the telephone records indicate frequent telephone calls between Mannford, Oklahoma, and Pawnee, Oklahoma. Thus, the only evidence presented by Plaintiff supporting his claim are his own self-serving affidavits. (#26, Exs. 1, 2 and 3). As stated above, conclusory or self-serving affidavits are not sufficient to withstand entry of summary judgment. Hall, 935 F.2d at 1111. After reviewing the evidence in the light most favorable to Plaintiff, the Court finds there is no genuine issue of material fact as to the adequacy of the medical care provided to Plaintiff. Because Plaintiff has failed to demonstrate that he suffered a constitutional deprivation, he has not demonstrated the existence of a § 1983 claim against Pawnee County. As a result, Defendant is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250. Therefore, the Court concludes Defendant's motion for summary judgment should be granted.

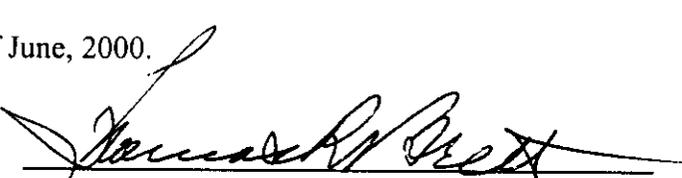
CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendants have made a showing negating all disputed material facts, that Plaintiff has failed to controvert Defendant's summary judgment evidence, and that Defendant is entitled to judgment as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion for appointment of counsel (Docket #22) is **denied**.
- (2) Defendant's motion for summary judgment (Docket #20) is **granted**.

SO ORDERED THIS 7th day of June, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN - 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN WAYNE STAFFORD,)
)
 Plaintiff,)
)
 vs.)
)
 LEROY BRYANT, Pawnee County)
 Sheriff,)
)
 Defendant.)

No. 97-CV-725-B (M)

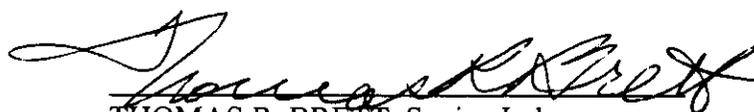
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JUDGMENT

This matter came before the Court upon Defendant's motion for summary judgment. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 7th day of June, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN - 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEANNE M. PEASE,)
)
Plaintiff,)
)
vs.)
)
INDEPENDENT SCHOOL DISTRICT)
NO. 721002 a/k/a SAND SPRINGS)
PUBLIC SCHOOLS,)
)
Defendant.)

No. 00-CV-0098-B(J)

ENTERED ON DOCKET
DATE JUN 08 2000

ORDER

Before the Court for decision is Defendant's Motion to Dismiss (Docket # 8) in which Defendant seeks dismissal of Counts Two and Three of Plaintiff's Complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim upon which relief can be granted and Fed. R. Civ. Pro. 12(b)(1) and 12(b)(2) for lack of subject matter jurisdiction and jurisdiction over the person.

Plaintiff has alleged three causes of action arising from Defendant's decision not to hire Plaintiff as a Deaf Education Teacher: disability discrimination in violation of the Americans With Disabilities Act; disability discrimination in violation of the Rehabilitation Act; and, handicap discrimination in violation of Oklahoma statute. Defendant's motion seeks dismissal of the last two claims listed.

Factual Background

1. On October 1, 1996, Defendant posted the position of Deaf Education Teacher at Central Elementary School in Sand Springs, Oklahoma.

2. Plaintiff and others were interviewed for the position and on October 8, 1996, Plaintiff

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was informed that another applicant had been hired.

3. Plaintiff filed a complaint of discrimination with the Equal Employment Opportunity Commission (“EEOC”) on October 25, 1996, alleging the person hired did not have a disability and was not an experienced teacher.

4. Defendant responded to the complaint.

5. After the EEOC made its determination, Plaintiff timely filed this action on February 4, 2000, as to her ADA claims although it is disputed whether the additional claims are timely filed.

6. Plaintiff did not file any other administrative complaint or charge and, in particular, did not file notice under the Oklahoma Governmental Tort Claims Act.

Argument and Authority

Defendant first urges Plaintiff has not pursued her state tort claim under the Oklahoma Governmental Tort Claims Act (“Act”), a jurisdictional prerequisite to suit. Defendant asserts that Plaintiff’s failure to comply cloaks Defendant with immunity.

Plaintiff admits she did not pursue her state tort claim by making demand and delivering it to the School Board Clerk as required by 51 O.S. §156. Plaintiff states that the Act is preempted with respect to employment discrimination claims based on “handicap” brought under 25 O.S. §1901 of the Oklahoma Anti-Discrimination Statute.¹ In support of this position, Plaintiff cites *Duncan v. City of Nichols Hills*, 913 P.2d 1303 (Okla.1996).

Defendant counters that *Duncan* is limited to the specific issue of whether the one year statute of limitation period prescribed in the Act can be asserted to bar a claim for handicap discrimination brought within the two year statute of limitations period provided by 25 O.S. §1101. In *Duncan*, the plaintiff had filed a complaint with the Oklahoma Human Rights

¹Okla. Stat. tit. 25 §1101 *et seq.*

Commission (“OHRC”) but had not provided notice to Nichols Hills (“City”) under the Act.

On the issue of statute of limitations, the Oklahoma Supreme Court found Plaintiff had complied with, and was entitled to, the longer two year time within which to file under 25 O.S. §1101 *et seq.* In resolving the apparent conflict between the two Oklahoma statutes, the court concluded such a result would serve to satisfy the remedial purpose of federal civil rights legislation. The court reasoned that because governmental entities were included within the definition of persons who were subject to suit for discrimination under 25 O.S. §1901(A), the legislature intended for an aggrieved party to have the same private right of action against governmental entities as against any other person. This could only happen if the longer statute of limitations was applied in all cases.

The plaintiff in *Duncan* also argued that by filing his claim with the OHRC, he had substantially complied with the notice requirements of the Act. However, the court did not reach this issue because it concluded plaintiff was not required to comply with the notice provisions of the Act. This Court likewise need not address the issue because Plaintiff in this case filed her action outside the two year statute of limitations.²

Plaintiff argues the time within which her ADA claim was being investigated by the EEOC should be equitably tolled to allow her to now file her state claim as well as her claim brought under 29 U.S.C. §701 *et seq.* (“Rehabilitation Act”), which also has a two year statute of limitations. In essence, she argues that by not deciding her ADA claim and issuing a right to sue letter within the limitations period provided for any state law claims or other federal claims, the

²In so finding, this Court does not adopt Defendant’s conclusion that *Duncan* is inapplicable based upon Plaintiff’s failure to specifically articulate her intent to proceed under both state and federal law. Notice was given to the OHRC of the underlying facts constituting Plaintiff’s claim for handicap discrimination when her claim was processed through that agency by the EEOC.

EEOC prevented her from proceeding on those claims. The Court does not agree.

Plaintiff relies upon *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed. 2d 196 (1984) in support of her assertion that equitable tolling should apply. However, in *Brown*, the Supreme Court reviewed the doctrine of equitable tolling and concluded the plaintiff had not established any basis for its applicability. Specifically, the Supreme Court determined she had not received inadequate notice, did not have a pending motion for appointment of counsel upon which she was waiting for a court to rule, no court had led her to believe she had done everything required of her, and there was no affirmative misconduct on the part of the defendant which lulled her into inaction. Likewise, this Court finds none of these grounds is available to Plaintiff in the instant case.

The fact that the time was running on state and other federal claims while her ADA claim was being processed by the EEOC could have only been ascertained by Plaintiff. Even though the same set of operative facts may form the basis for claims under other statutes, both state and federal, Plaintiff is responsible for meeting the statute of limitations requirements for each.

Gates v. Georgia-Pacific Corp., 492 F.2d 292, 295 (9th Cir.1974), cited in *Baldwin* as authority for the inadequate notice exception, held the exception is very limited. Plaintiff in this case is relying on the EEOC's letter dated February 13, 1997, which states Plaintiff could request her Notice of Right to Sue at anytime if she was making a charge under Title VII of the Civil Rights Act. The EEOC's letter adequately advises Plaintiff of certain of her rights under Title VII and there is no duty by EEOC to inform Plaintiff of the limitations periods which could apply in pursuing other potential causes of action which will vary from case to case and state to state. Accordingly, the Court finds this correspondence does not fit into the narrow exception of inadequate notice.

The Court further finds Plaintiff's pro se status is irrelevant to equitable tolling. Plaintiff did not have a pending motion for appointment of counsel upon which she was waiting for a court to rule.

The Court next concludes that participation by Sand Springs in the EEOC investigation cannot be reasonably equated with "affirmative misconduct" by Defendant to lull Plaintiff into inaction. Nor did any court lead Plaintiff to believe she had done everything required of her.

The Court concludes Plaintiff did not comply with the two year statute of limitations period for two of her claims and equitable tolling does not apply to extend those limitations periods. Accordingly, Defendant's Motion to Dismiss Counts Two and Three of Plaintiff's Complaint for disability discrimination in violation of the Rehabilitation Act and handicap discrimination in violation of Oklahoma statute should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss Counts Two and Three of Plaintiff's Complaint (Docket #8) is granted.

DONE THIS 7th DAY OF JUNE, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN - 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL R. HEATH,)

Plaintiff,)

vs.)

JOHN CHRISTNER TRUCKING, INC.,)
an Oklahoma corporation,)

Defendant.)

No. 99-CV-791-B ✓

ENTERED ON DOCKET
JUN 08 2000
DATE _____

ORDER

The Court has for decision Defendant's Motion for Summary Judgment (Docket #26) pursuant to Fed. R. Civ. Pro. 56.

Plaintiff Michael R Heath ("Heath") filed this action seeking damages against Defendant, John Christner Trucking, Inc., ("JCT") for wrongful termination from his employment as an over-the-road truck driver. Heath asserts he was fired in retaliation for refusing to transport loads on August 27 and August 28, 1998 that would have required him to violate the maximum driving time regulations set by the Department of Transportation ("DOT") and incorporated into Oklahoma law in the Oklahoma Motor Carrier Safety and Hazardous Materials Transportation Act, 47 O.S. §230.1 *et. seq.* ("Act"). Heath was terminated seven days after his alleged August 28 load refusal.

JCT denies Heath was fired in violation of the public policy of the state of Oklahoma as set forth in the Act. JCT states Heath was fired for allowing the fuel to run low on a refrigerated load of meat which caused the temperature of the load to rise from the

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pt 45 pmt.

required zero degrees to sixty degrees before it could be refueled. This incident occurred on the first dispatch Heath was given after the two load refusals. JCT states this alone was grounds for immediate dismissal and in Heath's case, it was the last of a pattern of violation of company policies over the period of his employment.¹

JCT moves for summary judgment urging four grounds. First, JCT states Heath was an at-will employee and could be terminated for any reason or no reason under Oklahoma law so long as the reason was not a violation of public policy. Second, JCT states Heath's termination does not violate public policy. Third, JCT urges there is no private remedy provided for alleged violation of the Act. Finally, JCT asserts Heath has failed to exhaust his administrative remedies.

Summary Judgment Standard

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

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish

¹ Heath first worked for JCT from April 28, 1997 through January 5, 1998, at which time Heath voluntarily quit to "take a break from trucking." Three months later however, Heath returned to work for JCT and worked from March 31, 1998 through the date his employment was terminated, September 4, 1998.

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 has reviewed the statement of facts submitted by both counsel and the evidentiary material submitted in support and concludes the following constitute the undisputed

facts for purpose of summary judgment consideration:²

1. JCT is a trucking company that hires truck drivers to deliver goods throughout the United States.

2. Heath was originally hired as a truck driver by JCT on April 28, 1997. Heath voluntarily quit JCT on January 5, 1998 because he wanted a few months' break from truck driving.

3. Company documentation states Heath would be eligible for rehire "upon review." If rehired, he would have to "go back through orientation or, at least, company policy on repairs, bobtailing, and communication." These were areas about which he had been previously counseled.

4. Heath was rehired on March 31, 1998. He went through orientation again. At the time of his rehire, Heath revisited a bobtailing incident which had occurred in Key Largo during his first employment term in a conversation with Keith Sally and was reminded that he could not leave tractors in unsecured locations.

5. Subsequent to his rehire, Heath left a trailer at the entrance to a Texas state park, an unsecured location, overnight. Heath also had a preventable backing accident, a driving complaint from another driver, and allowed a refrigerated trailer to run out of fuel.

6. A dispatcher at JCT secures loads from customers and dispatches drivers on those loads to get them delivered. Dispatchers communicate to the driver when the load is to be delivered. Delivery time is communicated either verbally or across the satellite communication system. The satellite communication information regarding delivery time would be available to

²Not all the listed agreed facts are material to the determination of the summary judgment issues. Those facts which are deemed to be material are referenced in the discussion which follows.

the driver on a computer printout, which also indicates whether the delivery time is fixed appointment, meaning a specific time, or window delivery, meaning the driver has flexible time parameters within which the load must be delivered.³ On August 25, 1998, Heath was assigned a load from California to Columbus, Ohio. En route, Heath calculated that he could not get the load to Ohio without violating his driving hours under the DOT regulations. Heath based this on his belief that the dispatch was a fixed appointment delivery. Heath notified JCT dispatching that completing the delivery would violate his hours. JCT directed Heath to drop the load in Sapulpa, Oklahoma on August 27, 1998 where it would be assigned to another driver to finish the transport of that load to Ohio. This was normal procedure for JCT. Two hours after dropping the August 27th load, Heath requested a new westbound load. Virgil McPherson ("McPherson") worked the Oklahoma dispatch for JCT.⁴ Heath was told by McPherson that he could get back under the Ohio load, which had not yet been reassigned, but Heath refused.⁵

7. On August 28, 1998 Heath reappeared for assignment and was given a new dispatch to Columbus, Ohio by McPherson, which he refused, asking for a slower load.⁶ Heath did not

³When a driver was on site in Sapulpa, the delivery time was communicated verbally by the dispatcher, who always wrote the delivery time on the front of the trip packet envelope. When communicated verbally, the dispatcher would indicate whether the delivery time was fixed or whether there was a window.

⁴McPherson was not the dispatcher who had originally assigned Heath the load on August 25.

⁵It is clear from the record that McPherson interpreted this request as indicating Heath could have completed the original Ohio run. McPherson was aware "driving hours" was the reason Heath had given for dropping the load. McPherson did not question Heath regarding his driving hours, nor did he independently evaluate Heath's hours. He assumed that Heath's request for another dispatch meant Heath had the hours to take one. McPherson does not recall discussing delivery time and when asked: "Did you make no reference then as to delivery time to him?" he replied: "No." (McPherson depo., pg. 65.)

⁶Heath did not dispute the characterization of this submitted fact. However, in prior proceedings Heath took the position that this was not a refusal and that he would have taken the load if he couldn't get

reference time constraints in refusing the load. Drivers on site at JCT in Sapulpa wanting to be dispatched out reported to McPherson and he remained their dispatcher until the load was delivered.

8. Heath stated that a "hot load would mean that you still want to make the delivery on time, I guess. It's tight. You got to run it to the legal limit, but you could do it." A load was "too hot" if it could not be completed legally. Heath had informed JCT that the August 25 dispatch he was given in California was "too hot." Keith Sally, JCT employee, stated in his deposition that a hot load was one where "you wouldn't have time to do your own pleasures on the road."

9. A "slow" load meant a delivery that gave a driver a lot of down time that he could use for personal reasons and still make the delivery on time. Plaintiff states that, when used in the context of requesting a different load than one being assigned, the phrase "slow" load was also used as a code word to discreetly reveal that an assigned load was illegal. There is nothing in the record to indicate the term was used in this manner by anyone but Plaintiff.

10. JCT dispatchers make load assignments without regard to DOT driving regulations. It is the drivers who raise the issue and when they do, loads are reassigned.

11. At no time after his termination, including during and through his Oklahoma Employment Security Commission ("OESC") unemployment hearing, nor in any documentation submitted at the OESC hearing, did Heath mention that he thought the August 28, 1998 Columbus, Ohio load would violate his driving hours.

another. The record does not state if this is the same load Heath brought in the day before but it appears to be a different load to the same location.

12. Heath, as a driver, was responsible for checking to see if assigned loads would violate DOT driving hours.

13. The delivery time to the applicable Columbus, Ohio facility is flexible and no appointment (fixed time) is needed between 6:00 a.m. and 2:30 p.m. Heath would not have violated his driving time because of this. The load could have legally been transported if the delivery time was 9:00 a.m. or later. It could not have been legally run with a 6:00 a.m. fixed appointment delivery time.

14. Heath admits he would not have violated his driving hours time had he been informed he was being given a flexible delivery time. The record does not address any discussion between Heath and the dispatcher, McPherson, regarding this issue. McPherson testified it is common knowledge in the industry that the Ohio dispatch is a flexible delivery. A driver could consult with the dispatcher over confusion about the delivery time, but it is reasonable behavior for a driver to assume a fixed delivery time when presented with information suggesting a fixed delivery time.

15. Heath did not directly tell the dispatcher, McPherson, that the August 28, 1998 Columbus, Ohio dispatch would violate his hours under DOT regulations, although he claims to have used "code words" requesting a "slow load" to convey this.

16. Heath initialed and signed the company policy prohibitions regarding out of route miles, using company vehicles for personal reasons, and acknowledging that "there is no explainable reason to ever run out of fuel."

17. In a test Heath took on March 30, 1998, one day prior to his rehire, he acknowledged that he was responsible for fueling the refrigerated trailer at the same facility where he pumped diesel for the cab.

18. On August 31, 1998 Heath allowed the refrigerated unit he was pulling to run out of fuel. This occurred despite the fact that he refueled twice on that particular run and was responsible for checking the refrigerated unit as well as the cab fuel.

19. The refrigerated trailer, which contained meat, was to be kept at a temperature of zero degrees or below. By the time the unit was repaired, the temperature of the refrigerated trailer had reached sixty degrees.

20. Plaintiff admits that he was discharged on September 4, 1998, by John Christner, when he returned to the Sapulpa yard after allowing the refrigeration unit to run out of fuel, and that the stated reason at the time of firing was that he allowed a refrigeration unit to run out of fuel. At the time Heath was terminated, John Christner was not aware that Heath had refused loads within the week prior to the refrigeration incident.⁷ The documentation completed by JCT on that date indicates Heath was terminated for violation of company policy and in the remarks section, there is a notation which states "talked to Mike on several occasions, never late, safe driver, just would not adhere to company policies. Bobtailing, calling O.S.D. customers, etc." There is no direct reference to running out of fuel or to refusing loads.

21. Allowing a refrigeration unit to run out of fuel is grounds for termination. Other drivers have been fired for allowing a refrigeration unit to run out of fuel. "Probably no more than two or three [employees] over a fifteen year period" were fired for this offense.

22. Heath received a copy of the JCT Driver handbook.

23. The Driver Handbook provides examples of misconduct that are not intended to be all inclusive. They include, "willful or wanton loss, abuse or destruction of company property,"

⁷See deposition of John Christner, Defendant's Ex. W.

“violation of security, safety or personnel policies of the Company,” “unauthorized use of company property,” and “any other action which could have a detrimental effect on the operation of the business, its employees, or customers.”

24. The Driver Handbook states that it is not a contract of employment and provides that “management retains the prerogative to skip all steps of the progressive discipline policy upon review of the circumstances.”

25. Leaving trailers in unsecured locations and allowing a refrigerated unit to run out of fuel were both actions which subjected JCT to property loss and were violations of company policy.⁸

26. Refusing a load that could be legally delivered is a violation of company policy.

27. A job perk associated with being an over-the-road truck driver is being able to sightsee while on “slow loads.”

28. Heath preferred, and usually requested, westbound routes.

29. There was not a central location where records on all drivers were maintained by JCT. JCT maintained some records on a computer system from which both positive and negative information could be obtained, however, some records could only be found in a paper file. As a result, Heath’s driving record was not contained solely on the computer. Some of the items missing were those on which he admitted having been counseled in the past, including three incidents of bobtailing.

30. The entries on the computer regarding Heath that identify specific dates and events

⁸Heath attempts to argue that allowing a refrigeration unit to run out of fuel does not constitute property loss to JCT. However, if this can result in loss of cargo legally owned by another but in the custody, care and control of JCT, any loss is the responsibility of JCT.

refer only to the August 27, 1998, and August 28, 1998, refusal of loads.

31. During Plaintiff's first period of employment with JCT, he was never threatened with termination over a bobtail incident in Dragoon, Arizona, an out-of-route incident, or a bobtail incident in Key Largo, Florida, and he received a per mile increase in his pay. The raise was given before Heath's bobtailing incident in Key Largo. JCT expressed displeasure about that event, in light of the raise.

32. Heath was not counseled about receiving a citation for a log book violation or for moving violations.

33. During Plaintiff's second period of employment with JCT, he was never threatened with termination over the bobtail incident at a Texas state park, or for a "call-in report" from another trucking company complaining of his driving, which was never conveyed to him.

34. Subsequent to Heath's termination, JCT resisted his application for unemployment compensation benefits.

Arguments and Authority

The parties agree that Heath was an at-will employee subject to termination at any time and for any reason except in violation of public policy. Heath does not present any argument or authority to counter JCT's assertion that there is no contract of employment, implied or otherwise. The Court, therefore, need not address this issue.

The essential elements which Heath must be able to establish in order to prove his prima facie case of wrongful termination in violation of public policy are set forth in *White v. American Airlines, Inc.*, 915 F.2d 1414 (10th Cir.1990). They are: 1) Heath was requested to accept one or more dispatches which caused him to be in violation of DOT regulations; 2) Heath refused the

dispatches and John Christner knew of the refusal; and 3) Heath's termination was significantly motivated by his refusal. In this case, Heath has failed to establish a genuine issue of fact as to any of the three elements and summary judgment is therefore appropriate.

First, there is no dispute that when Heath advised dispatch that delivering the August 25 load from California to Ohio would cause him to violate DOT driving hours regulations, he was relieved of that dispatch and directed to drop it in the Sapulpa yard for redispach.⁹ Heath admits the dispatchers worked with the drivers to get them home for holidays and to accomodate personal requests.

JCT offered testimony that it was common knowledge in the industry that the Ohio destination was a flexible delivery time and not a fixed appointment. Heath offers no testimony to refute this.¹⁰ Heath had made deliveries to the Ohio locations on at least two prior occasions, at least one of which took several hours to unload. Nevertheless, he did not question whether this was a fixed or window appointment but stated he always treated deliveries as if they were appointments, meaning fixed time.¹¹ Heath admits that if it is a flexible delivery time he would not have been in violation of DOT regulations and therefore could not have been fired for refusing to take a dispatch in violation of public policy. It is also admitted that Heath as the driver had the

⁹In fact, because of a failure of communication regarding the delivery time, Heath would not have been in violation of DOT regulations had he continued with the August 25 dispatch. Had Heath not gone back to the dispatcher and requested a slow westbound load two hours after dropping the load in Sapulpa, without any explanation of why that request would not cause him to be in violation of his hours, this would have been considered business as usual. McPherson testified that by showing up to request another dispatch, Heath represented he had the hours to take it.

¹⁰Although Heath objects to JCT's Ex. R as being undated, the time frame for this is established by McPherson's deposition testimony.

¹¹ See Heath depo. pg. 43.

responsibility to calculate his hours and advise JCT if he would be in violation of DOT regulations in accepting a load. When he did so, although mistakenly, in regard to the California dispatch, he was relieved of the load.

Heath admits he did not raise violation of DOT driving times in regard to the August 28 dispatch at the time of the dispatch except by allegedly using a code word which has another meaning to the industry as a whole, which meaning was not disputed by Heath. Heath provides no explanation of why he felt it necessary to use a code word in this instance when he did not do so only a few days earlier. Heath further admits he did not raise this issue during his OESC unemployment appeal.

As to the second element, the record is totally lacking in any admissible evidence or testimony that the person who fired Heath, John Christner, had any knowledge of the two refusals of loads which had occurred within the past week. Heath cannot rely on the fact that others within the company were aware of the two refusals of dispatch or that the refusals were inputted into the company computer in responding to a summary judgment. There must be some evidence raising a fact question that John Christner knew of the load refusals. *Zenith*, supra.

The issue of the scope of the knowledge of the person within a company who actually terminates an employee was specifically addressed in *White*. The court, in reviewing the sufficiency of jury instructions, concluded that knowledge of the terminated employee's refusal to violate public policy must be held by the corporate representative who actually terminates the employee. It is not sufficient that others not connected with the termination were aware of it. There is no testimony that John Christner was aware of the prior refusals of dispatch by Heath.

Heath has failed to present evidence that his refusals of the two loads played a substantial

role, or any role, in the decision to terminate him. In *White*, the appeals court held that an at-will employee attempting to establish a claim for public policy wrongful termination must prove his discharge was significantly motivated by the employee's refusal to violate an established public policy, rather than the refusal merely being one motivation for the discharge. The only person who was apparently agitated with Heath for refusing loads was McPherson, who was not consulted and had no role in his termination.¹²

The evidence does establish that JCT had very poor internal communications and that record keeping was haphazard at best. Computer entries were erratic and unreliable and there was no system in place to insure uniform information either on the computer or in the paper files. This was undoubtedly a primary source for Heath's sincere but erroneous conclusion that he was terminated for unstated and illegal reasons. Employees assigned to respond to the OESC appeal inquired into the matter but did not go to the source of the termination to gather information regarding the termination. John Christner confirmed this in his deposition testimony by stating he played no role in providing responses to the OESC.

Heath admitted he allowed a refrigerated unit to run out of fuel, causing repairs to be required on the unit in order to restart it and potentially exposing the company to loss of the cargo. John Christner asked Heath only about this incident when Heath returned to the Sapulpa yard and stated to Heath that he was fired for this reason. The documentation of the termination lists violation of company policy, which this was. It was the culmination of a history of violations of company policies. Heath's position apparently is that because JCT didn't fire him before, even though he had committed several violations of company policy and, in fact, rehired him with

¹² See McPherson depo. pg. 44, John Christner depo. pg 12.

knowledge of prior violations, JCT couldn't fire him for this violation because he was a good producer.¹³ However, Heath had never allowed a refrigerated unit to run out of fuel before. As an at-will employee and absent a public policy prohibition against termination, JCT could fire him for this violation or for a combination of cumulative violations in the past.

White, recognizing an absence of Oklahoma law in this area, analyzed claims brought for wrongful discharge based upon a refusal to violate an established public policy in the same way the Oklahoma courts have treated retaliatory discharge claims brought under Oklahoma's workmen's compensation statute and for violation of the provisions of the Fire and Police Arbitration Act. The court concluded a discharge must be significantly motivated by an employee's attempt to engage in statutorily protected conduct even though other legitimate reasons exist to justify the termination. JCT could not have been significantly motivated in Heath's termination by Heath's refusal to accept dispatches which would result in a violation of DOT hours regulations when the terminator, John Christner, was not aware of the refusals. Moreover, the evidence does not establish the subject offending loads violated DOT hours regulations.

Heath has attempted to breathe continued life into his claim through the circumstance of the proximity in time between the load refusals and the termination. However, this is insufficient to create a fact issue regarding motivation in light of the undisputed ignorance of John Christner regarding the refusals. A similar argument was rejected by the Sixth Circuit Court of Appeals in reviewing the denial of a truck driver's claim of retaliatory discharge by the Department of Labor

¹³The Court need not determine whether Heath's rehire was conditional, as urged by JCT. It is clear from the record that JCT was concerned that Heath understand and abide by the company policies upon his return.

in *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987). In *Moon*, two weeks passed between the driver reporting safety violations and his termination for preparing improper logs. The court found, in light of the company's policy of encouraging safety concerns to be raised and the fact that driver had improperly prepared logs, the proximity in time did not raise an inference sufficient to create a causal connection. Likewise, in this case, the evidence was that the company reassigned drivers who advised problems with DOT hours regulations, including Heath. There was no evidence that JCT retaliated against them and Heath admitted allowing the refrigeration unit to run low on fuel.

The Court's conclusions herein render it unnecessary to address Defendant JCT's additional, remaining propositions.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment (Docket #26) is granted. The parties are ordered to pay their respective attorney's fees and costs. A separate Judgment shall be entered contemporaneously with this Order.

DONE THIS 7th DAY OF JUNE, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

MARIO GARCIA-EMANUEL,)

Defendant.)

No. 90-CR-092-B
99-CV-669-B

ENTERED ON DOCKET
DATE JUN 08 2000

**ORDER TRANSFERRING 28 U.S.C. § 2255 MOTION TO
TENTH CIRCUIT COURT OF APPEALS**

On August 12, 1999, Defendant, a federal prisoner appearing *pro se*, filed a 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence (Docket #67). Defendant challenges his conviction entered in this Court, Case No. 90-CR-092, on the basis of allegedly inadequate jury instructions. The government filed a response to the § 2255 motion (#69), arguing that the motion should be transferred to the Tenth Circuit Court of Appeals because it is Defendant's second § 2255 motion and was filed in this Court without the certification of the circuit court. The government also asserts that the instant motion is barred by the one-year statute of limitations applicable to § 2255 motions. Lastly, the government contends that Defendant's claim is not cognizable on collateral review and also cannot be sustained in light of the Tenth Circuit's decisions rendered in Defendant's prior appeals. On October 5, 1999, Defendant filed his reply to the government's response (#72), requesting that his § 2255 motion be dismissed without prejudice so that he can request certification from the Tenth Circuit Court of Appeals.

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A review of Defendant's previous filings in this case reveals that he has in the past filed another § 2255 motion in this Court challenging this same conviction.¹ The Antiterrorism and Effective Death Penalty Act ("AEDPA") instituted a "gatekeeping" procedure for second or successive § 2255 motions. Pursuant to 28 U.S.C. §§ 2255, 2244(b)(3)(A), as amended by the AEDPA, a defendant must first seek authorization from the Court of Appeals before filing a second or successive § 2255 motion in the District Court. See United States v. Gallegos, 142 F.3d 1211 (10th Cir. 1998); United States v. Avila-Avila, 132 F.3d 1347, 1348-49 (10th Cir. 1997).

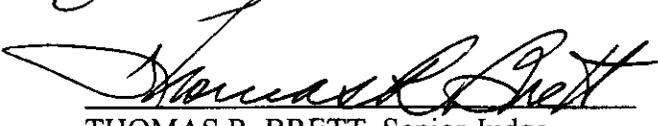
Because the instant § 2255 motion was filed after April 24, 1996, the effective date of the AEDPA, Defendant is required to comply with the Act and obtain prior authorization from the circuit court before filing his second or successive § 2255 motion in the district court. However, Defendant has failed to seek certification from the Court of Appeals before filing his motion in this Court. See 28 U.S.C. §§ 2255, 2244(b)(3)(A). As a result, this Court lacks subject matter jurisdiction to decide the instant motion. Gallegos, 142 F.3d at 1212. When a § 2255 movant fails to comply with the gatekeeping requirement, the District Court should transfer the § 2255 motion to the Court of Appeals in the interest of justice pursuant to 28 U.S.C. § 1631. Coleman v. United States, 106 F.3d 339 (10th Cir. 1997).

Therefore, in the interest of justice and pursuant to 28 U.S.C. §§ 1631, 2244(b)(3)(A) and 2255, the Court finds that Defendant's § 2255 motion should be transferred to the Tenth Circuit Court of Appeals for authorization.

¹See Docket #45 (Case No. 96-CV-762-B).

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence (#67) is **TRANSFERRED** to the Tenth Circuit Court of Appeals for authorization. Defendant's request that his § 2255 motion be dismissed without prejudice is moot.

SO ORDERED THIS 7th day of June, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MARIO GARCIA-EMANUEL,)
)
Defendant.)

No. 90-CR-092-B
00-CV-252-B

ENTERED ON DOCKET

DATE JUN 08 2000

**ORDER TRANSFERRING 28 U.S.C. § 2255 MOTION TO
TENTH CIRCUIT COURT OF APPEALS**

On March 27, 2000, Defendant, a federal prisoner appearing *pro se*, filed a 28 U.S.C. § 2255 motion to vacate, set aside or modify sentence (Docket #78). Defendant challenges his conviction entered in this Court, Case No. 90-CR-092, alleging that (1) his conviction on the 21 U.S.C. § 848 count (Continuing Criminal Enterprise) was upheld in error, and (2) he was constructively denied counsel in violation of the Sixth Amendment. The government has not been directed to respond to the § 2255 motion because it is clear from Defendant's previous filings in this case that the instant motion is a second or successive § 2255 motion filed in this Court without the required certification from the Tenth Circuit Court of Appeals.

A review of Defendant's previous filings in this case reveals that he has in the past filed two other § 2255 motions in this Court challenging this same conviction.¹ The Antiterrorism and Effective Death Penalty Act ("AEDPA") instituted a "gatekeeping" procedure for second or successive § 2255 motions. Pursuant to 28 U.S.C. §§ 2255, 2244(b)(3)(A), as amended by the AEDPA, a defendant must first seek authorization from the Court of Appeals before filing a second

¹See Docket #45 (Case No. 96-CV-762-B); and Docket #67 (Case No. 99-CV-669-B).

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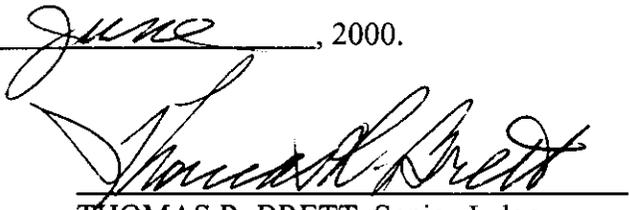
or successive § 2255 motion in the District Court. See United States v. Gallegos, 142 F.3d 1211 (10th Cir. 1998); United States v. Avila-Avila, 132 F.3d 1347, 1348-49 (10th Cir. 1997).

Because the instant § 2255 motion was filed after April 24, 1996, the effective date of the AEDPA, Defendant is required to comply with the Act and obtain prior authorization from the circuit court before filing his second or successive § 2255 motion in the district court. However, Defendant has failed to seek certification from the Tenth Circuit Court of Appeals before filing his motion in this Court. See 28 U.S.C. §§ 2255, 2244(b)(3)(A). As a result, this Court lacks subject matter jurisdiction to decide the instant motion. Gallegos, 142 F.3d at 1212. When a § 2255 movant fails to comply with the gatekeeping requirement, the District Court should transfer the § 2255 motion to the Court of Appeals in the interest of justice pursuant to 28 U.S.C. § 1631. Coleman v. United States, 106 F.3d 339 (10th Cir. 1997).

Therefore, in the interest of justice and pursuant to 28 U.S.C. §§ 1631, 2255 and 2244(b)(3)(A), the Court finds that Defendant's § 2255 motion should be transferred to the Tenth Circuit Court of Appeals for authorization.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence (#78) is **TRANSFERRED** to the Tenth Circuit Court of Appeals for authorization.

SO ORDERED THIS 7th day of June, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 07 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT McCULLOUGH,)
SSN: 444-62-0706)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner)
of Social Security Administration,)
)
Defendant.)

No. 99-CV-348-K(J)

ENTERED ON DOCKET
DATE JUN 08 2000

REPORT AND RECOMMENDATION

Plaintiff, Robert McCullough, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts that the Commissioner erred because (1) the ALJ erred in his Step Three evaluation, (2) the ALJ improperly evaluated Plaintiff's "medical improvement" and ignored Plaintiff's subjective complaints, (3) the medical evidence does not support a conclusion that Plaintiff regained his ability to work, and (4) the ALJ's determination is not supported by substantial evidence. For the reasons discussed below, the undersigned United States Magistrate Judge recommends that the District Court **REVERSE AND REMAND** the Commissioner's decision for further proceedings.

^{1/} Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled on July 11, 1997. [R. at 27]. Plaintiff appealed to the Appeals Council. The Appeals Council declined Plaintiff's request for review on March 3, 1999. [R. at 5].

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I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff testified that he completed tenth grade and obtained his GED. [R. at 58]. The record additionally indicates that Plaintiff completed approximately 30 hours of college courses. [R. at 141]. Plaintiff testified that he is six foot two inches tall and weighed 250 pounds. [R. at 51]. According to Plaintiff, he lost approximately 30 pounds during the year preceding the hearing.

Plaintiff's primary impairments are difficulty with his knee, hip, back, neck, chest, and lungs. [R. at 61-64]. Plaintiff believes he could walk approximately one-half of a block before his hip would hurt, and that he could sit or stand for fifteen minutes, and carry approximately five to eight pounds. [R. at 62]. Plaintiff testified that he carries groceries with no problems. [R. at 68].

According to Plaintiff, his pain is generally a six on a scale from one to ten. Additionally, Plaintiff testified that his pain, at its worse was a ten, and that he sometimes had that degree of pain four times each day for 15 - 20 minutes, and that he sometimes had that degree of pain for several hours. Plaintiff takes Tylenol 3 when he has that type of pain. [R. at 68]. However, Plaintiff additionally testified that he takes Tylenol 3 approximately three times each week. [R. at 68]. Plaintiff stated that he drove approximately three or four times each week to the store. [R. at 60].

Plaintiff was in a motor vehicle accident in August of 1990, and was severely injured. Plaintiff was hospitalized from August 29, 1990 until November 13, 1990, and underwent several corrective surgeries during his hospitalization. [R. at 97]. Plaintiff had several months of physical therapy following his release from the hospital.

Rex J. Howard, M.D., reviewed Plaintiff's medical record on February 5, 1991. [R. at 99]. He noted that Plaintiff was injured on August 29, 1990, that Plaintiff had weight bearing of thirty pounds by January 3, 1991, and that more information was needed. Plaintiff was eventually granted disability benefits.

Plaintiff's disability status was reviewed on December 1, 1994, and Plaintiff's period of disability was terminated on February 1, 1995. [R. at 103]. The explanation of Plaintiff's change of status noted that at the time of the determination of Plaintiff's disability, improvement was expected and that Plaintiff's broken bones had healed. Plaintiff was described as being able to walk without the aide of assistive devices.

An RFC completed by Thurma Fiegel on November 23, 1994 indicated that Plaintiff could occasionally lift ten pounds, could frequently lift five to ten pounds, could stand two hours, sit six hours, and push or pull an unlimited amount. [R. at 105]. A second RFC completed by Paul Woodcock on September 17, 1995, listed the same limitations for Plaintiff. [R. at 125].

Plaintiff had a hearing before the Disability Hearing Officer on October 10, 1995. [R. at 139]. The officer noted that Plaintiff testified that he had not healed since he had been found disabled, and that Plaintiff claimed to use a cane approximately 50% of the time. According to Plaintiff he took 200 aspirins each week and experienced sharp pain when standing or walking. Plaintiff stated that when he went fishing he had to continually change his position. [R. at 140]. The hearing officer concluded that Plaintiff had experienced medical improvement. Previously, Plaintiff had been unable to ambulate without crutches, and, according to the officer

Plaintiff met Listing^{2/} 1.03A. The officer noted that Plaintiff could currently walk without crutches. The officer concluded that Plaintiff no longer met the Listings, that Plaintiff was capable of performing sedentary work, and that Plaintiff was not disabled. [R. at 142].

In his application for benefits dated June 23, 1994, Plaintiff noted that he required a cane to walk approximately 50% of the time, and that he had been unable to fish for the previous year. [R. at 169].

Plaintiff was hospitalized for 12 weeks, beginning in August 1990, due to complications following a high speed motor vehicle accident. [R. at 194]. Plaintiff had several surgeries during his hospitalization. [R. at 202-211]. Plaintiff's doctors reported, during the 1990 and 1991 time frame reported that Plaintiff was unable to ambulate without crutches, could put only 30 pounds of weight on his legs, had significant impairments, and had decreased ranges-of-motion. [R. at 210-214].

Plaintiff was found disabled as of August 29, 1990. The social security officer subsequently reviewed Plaintiff's disability status. The record indicates that after 1991, Plaintiff did not return to his doctors for treatment or medication. The social security office sent Plaintiff to several examining physicians to evaluate Plaintiff's status.

^{2/} At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

On August 17, 1994, Plaintiff was described as complaining of joint pain, impaired breathing, high blood pressure, and heart problems. The examiner noted Plaintiff's prior August 1990 accident and injuries, and wrote that Plaintiff had been hospitalized for three months and had undergone physical therapy for two additional months. Plaintiff was described as unable to walk for a period of time. The doctor noted that Plaintiff stated he had difficulty sleeping at night, that he could drive ten to fifteen miles at a time, that he could carry groceries, that he could fish "some," that he watched television and visited, and that he sometimes coughed so hard he lost consciousness. Plaintiff's blood pressure was elevated at 180/120, and Plaintiff exhibited marked tenderness of his chest. The doctor noted that Plaintiff's upper extremities were normal, that Plaintiff's had a full range-of-motion in his right knee and a 45 degree range-of-motion in his left knee.

A second examination on August 29, 1995, noted Plaintiff had bony fragments over his left hip and right knee. The examiner noted that Plaintiff could ambulate without assistance, but that Plaintiff complained of increasing pain in his left hip and numbness in his left leg. Plaintiff was noted to take Tylenol 3. [R. at 232]. Plaintiff was diagnosed as having osteoarthopathy of his left hip with limitation of range-of-motion and gait disturbance, osteoarthopathy of his left knee with no instability, osteoarthopathy of his right shoulder with some limitation of range-of-motion, and multiple rib fractures and lung contusions with chronic obstructive pulmonary disease accentuated by smoking. [R. at 235].

Plaintiff had an orthopaedic examination on January 3, 1997. [R. at 239]. Plaintiff complained of problems related to his lower back, left hip, left knee, and pelvis. Plaintiff was described as 6 foot two inches tall and weighing 270 pounds. [R. at 239]. The doctor noted that Plaintiff had a normal gait for speed and stability but that Plaintiff limped on his left leg. The doctor noted that Plaintiff's heel/toe walks were questionable, and that Plaintiff was able to get on and off of the examination table easily. The doctor noted that, in his opinion, Plaintiff was exaggerating his complaints. In addition, the doctor noted that Plaintiff exhibited poor cooperation. Specifically, the doctor noted that range-of-motion results which tested the same range-of-motion but in different positions were different (50 degrees and 30 degrees compared to 90 degrees and 70 degrees). The doctor noted that when these measures do not agree "the reports by the claimant are questionable." [R. at 242]. The doctor concluded, "The summary has already been given up above, in which we said that the only evidence that we have reveals that the many subjective complaints of this claimant are not supported except for the left hip and the low back where the old compression fracture as. Otherwise, all of his many complaints are not supported and it would appear that this claimant then has exaggerated his subjective complaints far beyond the objective findings that have just been mentioned. [R. at 243]. The doctor noted that Plaintiff would be limited to sedentary work, and would be limited in his ability to walk and stand, and should not lift more than ten pounds frequently. The doctor additionally noted that sitting would not be a problem. [R. at 243]. He concluded that Plaintiff could sit one to two hours at a time, stand ten to thirty

minutes at a time, and walk ten to thirty minutes at a time. In an eight hour day, Plaintiff can sit five to eight hours, stand two to four minutes, and walk one to two hours. [R. at 244].

X-rays of Plaintiff showed degenerative joint disease and bony fragments. [R. at 227].

Plaintiff has maintained that he cannot work and has not worked. However, in his motion to proceed for *in forma pauperis*, Plaintiff notes that, at the time of the signing of the affidavit (May 1999), Plaintiff was employed as a machine operator at a salary of \$200.00 per week. Plaintiff additionally indicated that he had been employed for the previous 18 months. The decision by the Appeals Council was dated March 3, 1999. The current record indicates that Plaintiff was employed at the time the Appeals Council issued its decision.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work

experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).^{3/}

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

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

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

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

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

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform sedentary work. The ALJ briefly noted that Plaintiff had achieved medical improvement "as evidenced by healed fractures and the cessation of medical treatment." [R. at 35]. Based on the testimony of a vocational expert, the ALJ concluded that a significant number of jobs existed in the national economy which Plaintiff could perform. [R. at 38].

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

IV. REVIEW

Plaintiff was found disabled by the Social Security Administration beginning August 29, 1990. The Administration determined that Plaintiff had achieved "medical improvement," and as of February 5, 1995, Plaintiff was found not disabled. See 20 C.F.R. § 404.1594.

THE LISTINGS

Plaintiff initially notes that Plaintiff was previously found disabled because Plaintiff's impairment met Listing 1.03A. Listing 1.03A provides:

Arthritis of a major weight-bearing joint (due to any cause):

With history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination. With:

- A. Gross anatomical deformity of hip or knee (e.g., subluxation, contracture bony or fibrous ankylosis, instability) supported by X-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand;

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.03.

Plaintiff asserts that the Social Security Administration previously found that Plaintiff met this Listing. Plaintiff states that the ALJ did not provide any reasons or explanation to support the ALJ's conclusion that Plaintiff no longer met Listing 1.03A. Defendant does not address Plaintiff's argument in Defendant's brief.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is

equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. In his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

In this case, Plaintiff was previously found disabled pursuant to Listing 1.03A. Plaintiff asserts that he is still disabled pursuant to Listing 1.03A. Although the ALJ did discuss Plaintiff's medical improvement,^{5/} the ALJ's decision contains no discussion with regard to whether or not Plaintiff met a Listing. The ALJ writes:

At step 3, the Administrative Law Judge must determine if the claimant's severe impairments meet or equal the severity of any impairment listed in Appendix 1 to Subpart P, Regulations No. 4. Although the claimant's impairments are "severe" by Social Security definition, they either singularly or in combination, do not meet or equal the severity of any impairment listed in Appendix 1 to Subpart P, Regulations No. 4. Specific emphasis has been given to Listing 1.03A – Arthritis of a Major Weight-Bearing Joint. Disability, therefore, cannot be established under 20 CFR 404.1520(d).

[R. at 33]. The ALJ does not explain why Plaintiff no longer meets the Listing. The ALJ merely states that Plaintiff does not meet the Listing and the ALJ specifically considered Listing 1.03A. This type of summary disposition is exactly what the Tenth Circuit Court of Appeals disapproved in Clifton. In addition, given that this Plaintiff

^{5/} The ALJ notes that Plaintiff ceased medical treatment and that Plaintiff's fractures healed.

was previously found disabled pursuant to Listing 1.03A, it only makes sense that the ALJ should specifically consider that Listing. The Magistrate Judge recommends that the District Court reverse the decision of the Commissioner and order the Commissioner to make specific Step Three findings.^{6/}

EVALUATION OF PLAINTIFF'S MEDICAL IMPROVEMENT

Plaintiff asserts that in evaluating whether or not Plaintiff had attained medical improvement the ALJ ignored Plaintiff's subjective complaints of pain and focused solely on the evidence which supported the ALJ's conclusion. Plaintiff notes that he testified that his pain was becoming progressively worse, that he was required to take Tylenol 3, that he could only stand 15 minutes, sit 15 minutes, walk one-half of one block, and carry one gallon of milk. Plaintiff refers to x-rays indicating some disc problems and bony fragments near his left hip.

Plaintiff refers primarily to his own testimony and seems to argue that the ALJ erred in not fully crediting the Plaintiff's testimony. An ALJ is not required to accept a claimant's subjective complaints as true. Rather, if an individual's subjective complaints are supported by objective medical evidence, and ALJ should analyze the claimant's subjective complaints. In this case, the ALJ adequately analyzed Plaintiff's

^{6/} Listing 1.03A requires that the claimant's ability to walk be markedly affected. Plaintiff, when Plaintiff was found disabled, required crutches to ambulate. According to Plaintiff's own testimony, Plaintiff can currently walk, and requires the assistance of a cane only 50% of the time. The record additionally reflects that although Plaintiff may walk with a limp his gait and station are unaffected. The record could support a finding that Plaintiff's ability to walk is no longer "markedly" affected, and therefore Plaintiff does not meet Listing 1.03A. However, this is not a decision that this Court can make. The ALJ must make this decision and his decision should contain findings at the administrative level which are sufficient to support his decision.

subjective complaints. The ALJ summarized the medical evidence. The ALJ noted that Plaintiff has not seen a doctor for several years, and the doctors which Plaintiff visited pursuant to requests from the Social Security office placed limitations on Plaintiff consistent with Plaintiff being able to perform a specified range of sedentary work. The ALJ noted that one of the examining doctors indicated that Plaintiff was probably exaggerating his subjective complaints because the Plaintiff's complaints were not supported by objective medical evidence and because Plaintiff's ranges-of-motion were inconsistent. The record additionally contains two RFC assessments consistent with the ALJ's findings. The ALJ's conclusions are supported by substantial evidence.

Plaintiff references Dr. McGovern's report and suggests that the ALJ did not consider Dr. McGovern's "report in its entirety." Plaintiff suggests that the subjective complaints related to Plaintiff's hip and back pain were not included in Dr. McGovern's conclusion as to Plaintiff's RFC. Plaintiff's arguments are simply not supported by the record. Dr. McGovern wrote that Plaintiff had a normal gait for speed and stability but that he limped. He observed that Plaintiff's heel/toe walks were "questionable." In Dr. McGovern's opinion, Plaintiff was exaggerating his complaints, and exhibited poor cooperation. "The summary has already been given up above, in which we said that the only evidence that we have reveals that the many subjective complaints of this claimant are not supported except for the left hip and the low back where the old compression fracture as. Otherwise, all of his many complaints are not supported and it would appear that this claimant then has exaggerated his subjective complaints far

beyond the objective findings that have just been mentioned." [R. at 243]. The doctor concluded that Plaintiff would be limited to sedentary work, and would be limited in his ability to walk and stand, and should not lift more than ten pounds frequently. [R. at 243]. The doctor concluded that Plaintiff could sit one to two hours at a time, stand ten to thirty minutes at a time, and walk ten to thirty minutes at a time. In an eight hour day, Plaintiff can sit five to eight hours, stand two to four minutes, and walk one to two hours. [R. at 244]. Contrary to Plaintiff's representation, nothing suggests that the doctor did not include subjective complaints which were supported by the medical evidence in his RFC determination.

Plaintiff additionally suggests that two other doctors suggested that Plaintiff would have significant restrictions, and one doctor noted "please see back sheet for details." Plaintiff suggests that this "back sheet" is not included in the record on appeal. Plaintiff, however, does not inform the Court as to the contents of the "missing back sheet," and does not provide a copy for the Court's review. A review of the record on appeal indicates that the conclusions by the ALJ with regard to Plaintiff's RFC are supported by substantial evidence.

ABILITY TO PERFORM SUBSTANTIAL GAINFUL ACTIVITY

Plaintiff asserts that "no physician" has concluded that Plaintiff has achieved medical improvement that would allow him to perform work. However, the record contains two RFC assessments, and the opinions of at least three examining physicians which support the conclusions reached by the ALJ as to Plaintiff's RFC.

Plaintiff additionally asserts that the vocational expert concluded, based on Plaintiff's testimony, that Plaintiff would be unable to work. However, the ALJ is not required to accept all of Plaintiff's testimony as true. In this case, as noted above, Plaintiff specifically found that Plaintiff was not credible and rejected several of Plaintiff's professed limitations. Plaintiff's RFC, as determined by the ALJ, is supported by substantial evidence. The ALJ is permitted to present to the vocational expert only those limitations which the ALJ concludes are accurate and supported by substantial evidence. See Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

SUBSTANTIAL EVIDENCE

Plaintiff additionally asserts that the ALJ's decision is not supported by substantial evidence. Plaintiff generally references Listing 1.03A. As discussed above, the ALJ's decision does not adequately discuss this Listing, and the Magistrate Judge recommends that this action be remanded to permit the ALJ to provide specific reasons to support the decision that Plaintiff does not meet a Listing.

Plaintiff also states that Plaintiff "has not engage in substantial gainful activity since the CPD." In Plaintiff's *in forma pauperis* application, Plaintiff asserts that he worked for at least eighteen months prior to the date of the application for \$200 per week. On remand the Social Security Office of Hearings and Appeals should additionally evaluate whether or not Plaintiff has obtained gainful employment. In addition, whether or not Plaintiff did work and the job duties which Plaintiff performed

may be evaluated in considering whether or not Plaintiff was capable of working during the time period that he claims he was disabled.

V. RECOMMENDATION

The United States Magistrate Judge recommends that this action be reversed to permit the Commissioner to provide a reason to support the Commissioner's Step Three decisions.

VI. OBJECTIONS

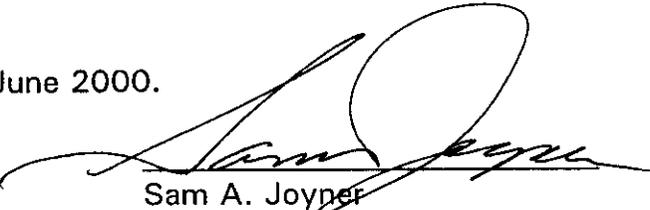
The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation 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 Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 7th day of June 2000.

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

8 Day of June 2000, 10


Sam A. Joyner
United States Magistrate Judge

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

FILED

JUN 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN AMBRUS, an Individual.)
)
Plaintiff)
vs.)
)
CLAY D. THOMPSON and CALISE)
R. THOMPSON, husband and wife.)
)
Defendants.)

Case No. 99 CV 0537 K (J)

Judge Kern

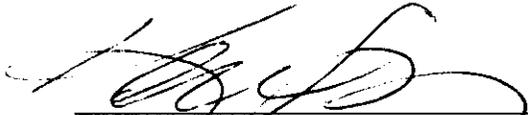
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DATE JUN 6 2000

JOINT STIPULATION OF DISMISSAL

The Plaintiff, John T. Ambrus, by and through his attorney, Kenneth E. Wagner and The Defendants, Clay D. and Calise R. Thompson, by and through their attorney, Robert E. Jamison, Jr. hereby stipulate to the dismissal of all causes of action with prejudice to refile by virtue of a mutual settlement agreement reached by the parties.

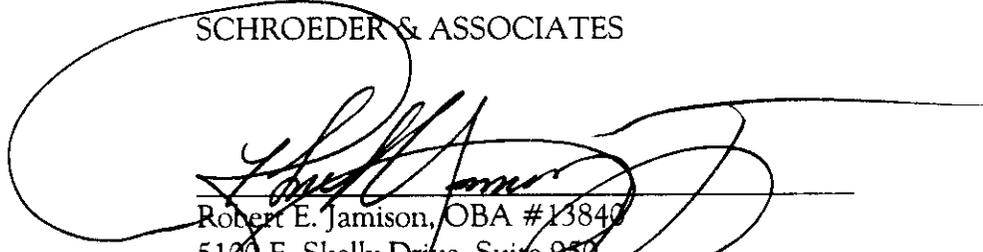
Respectfully submitted,

LATHAM, STALL, WAGNER & STEELE, P.C.



Kenneth E. Wagner, OBA #16049
1437 S. Boulder, Suite 820
Tulsa, OK 74119
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Attorney for Plaintiff

SCHROEDER & ASSOCIATES



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Attorney for Defendants

clt

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of ^{June}~~May~~, 2000, a true and correct copy of the foregoing instrument with the correct and proper postage thereon fully prepaid was mailed to the following:

Robert E. Jamison, Jr.
Schroeder & Associates
5100 E. Skelly Drive
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Tulsa, OK 74135

Attorney for Defendants

LATHAM, STALL, WAGNER & STEELE, P.C.
Kenneth E. Wagner
1437 S. Boulder, Suite 820
Tulsa, OK 74119

Attorney for Plaintiff

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

FILED

JUN 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TAMARA THOMAS, an individual,)
)
Plaintiff,)
)
vs.)
)
AMERICAN AIRLINES, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. 99-CV-0098-K(J) ✓

ENTERED ON DOCKET

DATE JUN 7 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff Tamara Thomas and Defendant American Airlines, Inc. by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

BRIDGER-RILEY & ASSOCIATES, P.C.

By: _____

N. Kay Bridger-Riley
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TAMARA THOMAS

28

DAVID R. CORDELL, OBA #11272

By: 

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OF COUNSEL:

CONNER & WINTERS
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15 East 5th Street
Tulsa, Oklahoma 74103-4344

Attorneys for Defendant,
AMERICAN AIRLINES, INC.

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

FILED

JUN 05 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AUGUST JULY GARRETT,

Petitioner,

vs.

TOM MARTIN,

Respondent.

Case No. 97-CV-747-H (M)

ENTERED ON DOCKET

DATE JUN 06 2000

REPORT AND RECOMMENDATION

Petitioner, August July Garrett, an Oklahoma state inmate, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. Petitioner entered a plea of guilty to the crime of: "Sexual Child Abuse, 21 O.S. § 843." [Dkt. 4, Ex. A]. He was sentenced to a 30-year term of imprisonment, with all but the first 15 years suspended. In his petition for writ of habeas corpus, Petitioner claims that: (1) the trial court's instructions to him at his plea hearing improperly placed the obligation to appeal on him, rather than on his counsel; (2) he was denied effective assistance of counsel within the 10-day time frame during which he could move to withdraw his guilty plea; and (3) he was thereby denied the right of direct appeal. Respondent argues that the petition should be dismissed as procedurally barred.

For reasons stated below, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED as procedurally barred.

BACKGROUND

Petitioner entered his plea of guilty on May 18, 1995. He did not move to withdraw his plea, nor did he appeal his sentence. On March 31, 1997, Petitioner filed an Application for Post-Conviction Relief in the District Court of Craig County. The Court denied relief on April 9, 1997. On April 30, 1997, petitioner appealed the denial to the Oklahoma Court of Criminal Appeals (OCCA) in case No. PC-97-597. On appeal he alleged: that in accepting his guilty plea, the trial court did not properly advise him of his rights concerning appeal and that trial counsel did not properly represent him during the 10-day period following sentencing, the time during which he was required to commence an appeal by filing a request to withdraw his guilty plea.

On July 30, 1997, the OCCA entered an order affirming denial of post-conviction relief. In affirming the denial, the OCCA stated that because Petitioner failed to provide it with a copy of his District Court pleadings, it was "without a record sufficient to review petitioner's claims or hold that the District Court erred in denying Petitioner's Application for Post-Conviction Relief." [Dkt. 10, Ex.C, p.2]. Applying Rule 5.2(C), *Rules of the Court of Criminal Appeals*, 22 O.S. Supp. 1996, ch. 18 app.,¹ and *Brown v. State*, 933 P.2d 316, 324-25 (Okl.Cr. 1997),² the OCCA denied relief.

¹ At the time the OCCA entered its order, Rule 5.2(C)(3) provided in relevant part: "The record on appeal of a denial of post conviction relief shall be filed by the petitioner."

² In *Brown* the OCCA held: "There is a presumption of regularity in the trial court proceedings. As a consequence, it becomes the burden of the convicted defendant on appeal—whether on direct appeal or post-conviction—to present to this Court sufficient evidence to rebut this presumption." (citations omitted).

ANALYSIS

Respondent concedes and this court finds that Petitioner meets the exhaustion requirements under the law. 28 U.S.C. §2254(b) and (c).³ In accordance with Rule 8(a) of the Rules Governing Section 2254 Cases, the undersigned has determined that an evidentiary hearing is not required.

Procedural Default on Independent and Adequate State Grounds

Federal courts will not consider issues on habeas review "that have been defaulted in state court on an independent and adequate state procedural ground, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice." *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir.1998) (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). For a state procedural ground to be independent, it must rely on state law, rather than federal law. *See Id.* The procedural rule applied by the OCCA is rooted solely in Oklahoma state law and is thus independent. A state ground will be considered adequate only if it is "'strictly or regularly followed' and applied 'evenhandedly to all similar claims.'" *Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir.) (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982)), *cert. denied*, 119 S.Ct. 345 (1998). Although the prosecution has the

³ Respondent states that Petitioner's third ground for relief is technically not exhausted, but argues that the state court would likely have barred that proposition on the same grounds as the other two. This court finds that Petitioner's third ground was fairly included in his Petition-In-Error to the OCCA. The OCCA stated that since Petitioner failed to provide a copy of District Court pleadings, it was unable to determine "whether the District Court was ever asked to determine if Petitioner was denied his right to appeal." [Dkt. 10, Ex. C., p. 2].

ultimate burden of proving the adequacy of a state procedural bar, "[o]nce the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner." *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). To satisfy this burden, petitioner is, at a minimum, required to set forth specific factual allegations as to the inadequacy of the state procedure. *See Id.* Petitioner has not challenged the adequacy of Oklahoma's procedural default rule. Consequently, under *Hooks*, Petitioner has failed to carry his burden, and the court may presume that the state procedural rules at issue in this case are adequate grounds for barring habeas review of his federal claims. *Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999). Furthermore, the Tenth Circuit has recognized Rule 5.2(C) to be "adequate" as a procedural bar. *Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir. 1998).

Cause and Prejudice

Since Petitioner has defaulted in state court on an independent and adequate state procedural ground, the Court must determine whether cause and prejudice or a fundamental miscarriage of justice is shown. "Cause" must be "something external to the petitioner, something that cannot fairly be attributed to him" *Coleman*, 501 U.S. at 753. Petitioner has not asserted any reason for his failure to comply with Rule 5(C). The "cause and prejudice" rule is conjunctive, requiring proof of both cause and prejudice. *Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995). Because Petitioner has not demonstrated "cause" the court need not address the prejudice component of the inquiry. *Id.*

The fundamental miscarriage of justice exception is available only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence. *Steele v. Young*, 11 F.3d 1518, 1522 (10th Cir. 1993)(quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993)). Petitioner has not made any showing or claim that he is factually innocent. Accordingly, the fundamental miscarriage of justice exception is in applicable.

CONCLUSION

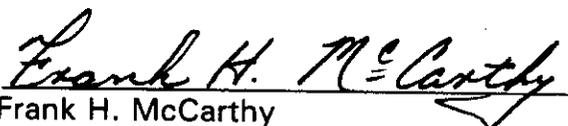
The undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED as procedurally barred.

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

DATED this 5th Day of June, 2000.

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 6 Day of June, 2000, 192


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUN - 5 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

In the Matter of
James Ralph Whitsell

)
)
)
)
)
)

Case No. 00-MC-14-K ✓

ENTERED ON DOCKET

DATE JUN 06 2000

REPORT AND RECOMMENDATION

On January 4, 2000, Chief Judge Terry C. Kern entered an order imposing the two following conditions on James Ralph Whitsell related to his entry into the two Federal courthouses in the Northern District of Oklahoma: (i) he is prohibited from entering either building if he is intoxicated or carrying a weapon; and (ii) at all times he is to be escorted to and from the office of the Court Clerk or any court appearance in either building. See 2000-GO-1. On March 20, 2000, Mr. Whitsell filed a handwritten motion for hearing related to reports of security violations by him. See Dkt. #1. Chief Judge Kern referred the motion to the undersigned, and a hearing was set for May 2, 2000, at 10:30 a.m. Although notice of the hearing was mailed to him, Mr. Whitsell failed to appear. See Transcript of Hearing dated May 2, 2000 at 2, 3.

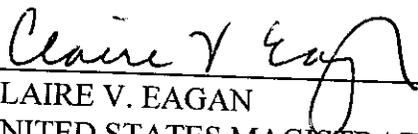
At the hearing held on May 2, 2000, the undersigned heard testimony from three employees of the office of the Court Clerk, from the supervisor of court security officers, and from a deputy United States Marshal. A transcript of that hearing is filed of record in this matter. Mr. Whitsell has filed nothing of record in this matter since the hearing date.

Based on the evidence presented, the undersigned proposes a finding that the reports of persistent security violations by Mr. Whitsell have merit and justified the action of this Court, and recommends that the General Order, 2000-GO-1, remain in effect.

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); 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 5th day of June, 2000.

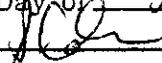


CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

6 Day of June 2000, ~~19~~



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

JUN 05 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PHILLIP GREELEY,

Petitioner,

vs.

Case No. 99-CV-237-BU (M)

RAY LITTLE, Warden,

Respondent.

ENTERED ON DOCKET

DATE JUN 06 2000

REPORT AND RECOMMENDATION

Petitioner, Phillip Greeley, an Oklahoma state inmate, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. Petitioner entered a plea of guilty to the crime of: "Unlawful Possession of Marihuana With Intent To Distribute After Former Conviction of A Felony, 63 O.S. § 2-401 (B-2)." [Dkt. 10, Ex. B]. He was sentenced to a 10-year term of imprisonment. In his petition for writ of habeas corpus, Petitioner claims that the state court applied the wrong statute to enhance his sentence, which resulted in a void sentence, a violation of his rights to due process and equal protection, constituted double jeopardy, and violated separation of powers. Petitioner's claims have been fully exhausted and his petition was timely filed. In accordance with Rule 8(a) of the Rules Governing Section 2254 Cases, the undersigned has determined that an evidentiary hearing is not required.

For reasons stated below, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED as procedurally barred.

BACKGROUND

Petitioner entered his plea of guilty on October 1, 1997. He did not move to withdraw his plea, nor did he appeal this sentence. On September 9, 1998, Petitioner filed a "Motion for Modification of Sentence" in the Washington County District Court. The Court denied the motion on September 15, 1998.

On October 27, 1998, Petitioner filed a petition for writ of habeas corpus in the state court claiming "he is being unlawfully held because his sentence was enhanced by 21 O.S. Section 51 and should have been enhanced by 63 O.S. Section 2-401." [Dkt. 10, Ex. B]. The court denied habeas corpus relief, stating: "The Court file clearly reflects that none of Petitioner's prior convictions were Title 63 offenses. Accordingly, there is no basis for his only argument set forth in his 'Writ of Habeas Corpus.'" *Id.* The order denying habeas corpus was dated November 25, 1998, but was filed December 2, 1998. Petitioner did not receive the order until December 7, 1998.

Petitioner filed his appeal of the denial of habeas corpus relief with the Oklahoma Court of Criminal Appeals (OCCA) on December 30, 1998. On February 5, 1999, the OCCA dismissed the appeal, finding that Petitioner failed to follow court rules which require that an appeal be filed within 30 days from the date the trial court denied relief. [Dkt. 10, Ex. D].

DISCUSSION

Default on Independent and Adequate State Grounds

Federal courts will not consider issues on habeas review "that have been defaulted in state court on an independent and adequate state procedural ground, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice." *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir.1998) (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). For a state procedural ground to be independent, it must rely on state law, rather than federal law. *See Id.* The procedural rules applied by the OCCA are rooted solely in Oklahoma state law and are thus independent. A state ground will be considered adequate only if it is "'strictly or regularly followed' and applied 'evenhandedly to all similar claims.'" *Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir.) (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982)), *cert. denied*, 119 S.Ct. 345 (1998). Although the prosecution has the ultimate burden of proving the adequacy of a state procedural bar, "[o]nce the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner." *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). To satisfy this burden, petitioner is, at a minimum, required to set forth specific factual allegations as to the inadequacy of the state procedure. *See Id.* Petitioner has not challenged the adequacy of Oklahoma's procedural default rule. Consequently, under *Hooks*, Petitioner has failed to carry his burden, and the court may presume that the state procedural rules at issue in this case

are adequate grounds for barring habeas review of his federal claims. *Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999).

Cause and Prejudice

Petitioner has defaulted in state court on an independent and adequate state procedural ground. Therefore the Court must determine whether cause and prejudice or a fundamental miscarriage of justice is shown. "Cause" must be "something external to the petitioner, something that cannot fairly be attributed to him" *Coleman*, 501 U.S. at 753.

Petitioner claims that he failed to meet the 30-day filing deadline to appeal denial of his state application for post-conviction relief because the order of denial was "entered" on November 25, but was not filed until December 2 and was not received by him until December 7, leaving only 17 days to perfect his appeal. Assuming, *arguendo*, that this delay constitutes cause, Petitioner must also demonstrate "actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Petitioner has not demonstrated actual prejudice as a result of the alleged violation of federal law. Petitioner claims that 21 Okla. Stat. § 51 was applied to enhance his sentence rather than 63 Okla. Stat. § 2-401. In its order denying writ of habeas corpus, the state court stated: "none of Petitioner's prior convictions were Title 63 offenses." [Dkt. 10, Ex. B]. Under Oklahoma law, when the predicate offenses used for enhancement purposes are non-drug offenses, the general habitual offender

statute in Title 21 of the Oklahoma Statutes is employed rather than the provisions of the Uniform Controlled Dangerous Substance Act in Title 63. *Jones v. State*, 789 P.2d 245, 247 (Okla. Crim. 1990). Therefore it appears that Petitioner has not suffered prejudice as a result of the alleged violation of federal law.

The fundamental miscarriage of justice exception is available only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence. *Steele v. Young*, 11 F.3d 1518, 1522 (10th Cir. 1993)(quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993)). Petitioner has not made any showing or claim that he is factually innocent. Accordingly the fundamental miscarriage of justice exception is in applicable.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED as procedurally barred.

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

DATED this 5th Day of June, 2000.

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

CERTIFICATE OF SERVICE

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

6 Day of June, 2000, to
[Signature]

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

UNITED STATES OF AMERICA,
Plaintiff,

vs.

A TRACT OF LAND IN SECTION 17
TOWNSHIP 23 NORTH, RANGE 22
EAST OF THE I.B.M., DELAWARE
COUNTY, OKLAHOMA, CONTAINING
4.0 ACRES, MORE OR LESS, WITH
ALL BUILDINGS APPURTENANCES,
AND IMPROVEMENTS THEREON,

Defendant.

JUN 05 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 93-CV-38-B (M)

ENTERED ON DOCKET

DATE JUN 06 2000

REPORT AND RECOMMENDATION

This case is before the undersigned United States Magistrate Judge for report and recommendation on Plaintiff's Motion for Summary Judgment [Dkt. 45]. Through its motion, the government seeks forfeiture of the defendant real property pursuant to 21 U.S.C. § 881(a)(7) as property used to facilitate a violation of federal narcotics laws. Claimants in this action, Homer Parmley and Elaine Parmley, have responded and oppose the government's motion. For the reasons stated below, the undersigned recommends that the government's motion be granted.

I. SUMMARY JUDGMENT STANDARDS

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A

genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue of material fact" and "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, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986). However, the factual record and reasonable inferences to be drawn therefrom must be construed in the light most favorable to the non-movant. *Gullickson v. Southwest Airlines Pilots' Ass'n.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

II. FACTUAL BACKGROUND

The following summarizes the pertinent facts set out by the government and supported by affidavits and appropriate documentation in accordance with N.D.LR 56.1 A. Although claimants response brief contains a list of facts they claim are controverted, these allegedly controverted facts are not supported by materials in the record as required to demonstrate the existence of a material factual dispute. Thus, the facts summarized are those admitted by both parties and those deemed admitted based on the claimants' failure to specifically controvert them. See N.D.LR. 56.1 B., Fed.R.Civ.P. 56(e).

Under the terms of a Contract For Deed filed November 16, 1987, Homer Lee Parmley purchased the defendant property for \$52,000.

On July 16, 1992, a State Search Warrant was served at the defendant property. The following items were among the items recovered during the execution of that warrant: 69 marijuana plants; papers containing drug notations; Zig Zag rolling papers; drug paraphernalia; electronic scales; 3,695.13 grams of green leafy substance which tested positive as marijuana.

On November 6, 1996, in the District Court of Delaware County, Oklahoma, Claimants Homer Lee Parmley and Mary Elaine Parmley, after waiver of jury trial, were found guilty of Unlawful Possession of marijuana With Intent to Distribute in CFR-92-137. They were each sentenced to a term of 4 years, suspended, and were each ordered to pay a \$500 fine. Also, on November 6, 1996, in the District Court of Delaware County, Oklahoma, Claimant Mary Elaine Parmley plead *nolo contendere* to the charge of Unlawful Possession of Marijuana in CRM-92-798. She was sentenced to a term of one year, suspended, and was ordered to pay a \$500 fine.

The government has alleged that criminal acts were conducted on the defendant property and that the property was used to facilitate the drug crimes that claimants were convicted of. Claimants argue that summary judgment should be denied because: the forfeiture action is based on illegally seized evidence; forfeiture of the property would violate the Eighth Amendment prohibition against excessive fines; forfeiture would impose a corruption of blood; and forfeiture would impose double jeopardy.

III. DISCUSSION

Civil forfeiture is governed by federal statute. 21 U.S.C. § 881(a)(7) provides in relevant part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(7) All real property, including any right, title and interest (including and leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or commission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The government contends that forfeiture in this case is warranted because the claimants' criminal acts were conducted on the defendant property.

In a civil forfeiture proceeding the government bears the initial burden and must establish probable cause that the property was involved in a criminal activity. The existence of probable cause is a legal determination. Probable cause exists when there is a reasonable ground for belief of guilt supported by less than prima facie proof, but more than mere suspicion. *United States v. \$149,442.43*, 965 F.2d 868, 876 (10th Cir. 1992). In the instant case, Claimants do not argue that probable cause is lacking. Therefore the undersigned finds that the government has established probable cause that the defendant property was used to facilitate drug transactions.

Once probable cause for forfeiture has been established, claimants may recover the defendant property only by establishing a defense to forfeiture by a preponderance of the evidence. *Id.* at 877. Accordingly, the government is entitled to summary judgment unless claimants establish a defense to forfeiture.

(a) Allegedly Illegal Search as a Defense to Forfeiture

The Court rejects Claimants' argument that forfeiture should be denied because searches and seizures which produced the evidence relied upon by the government violated the Fourth and Fourteenth Amendments to the United States Constitution. In connection with their convictions on Oklahoma state criminal charges, Claimants had a full and fair opportunity to litigate, and in fact did litigate the search and seizure issues they raise here. *See* Claimants' Brief in Support of Joint Appeal From Judgments and Sentences of the Delaware County District Court and Summary Opinion of Oklahoma Court of Criminal Appeals [Dkt. 56, Ex. A and B]. The Oklahoma courts rejected their search and seizure claims.

Federal courts accord preclusive effect to issues decided by state courts as a matter of comity between state and federal courts and as a matter of Congressional mandate. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 415-416, 66 L.Ed.2d 308 (1980); 28 U.S.C. § 1738 ("[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . ."). In Oklahoma, evidence of prior judgments of convictions is admissible in civil actions and such judgments of convictions have collateral estoppel effect as to all

issues properly determined thereunder. *Lee v. Knight*, 771 P.2d 1003, 1005-6 (Okla. 1989); 12 O.S. § 2803(22).

The undersigned has determined that the criteria required for application of the doctrine of collateral estoppel have been met with regard to Claimants' Fourth and Fourteenth Amendment claims. *See United States v. Rogers*, 960 F.2d 1501, 1508 (10th Cir. 1992) (issue previously decided is identical with the one presented in the action in question; prior action has been finally adjudicated on the merits; party against whom the doctrine is invoked was a party to the prior adjudication; and party against whom doctrine is invoked had a full and fair opportunity to litigate the issue in the prior action).

(b) Eighth Amendment Prohibition against Excessive Fines as a Defense

Claimants argue that forfeiture of the defendant property would violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The United States Supreme Court has held that a forfeiture under 21 U.S.C. § 881(a)(7) constitutes "payment to a sovereign as punishment of some offense" and is therefore subject to the Eighth Amendment's Excessive Fines Clause. *Austin v. United States*, 509 U.S. 602, 622, 113 S.Ct. 2801, 2812, 125 L.Ed.2d 488 (1993). Therefore, a proportionality analysis is required in civil in rem forfeiture proceedings. *United States v. 829 Calle de Madero*, 100 F.3d 734, 738 (10th Cir. 1996). The first step in the analysis is the instrumentality test, requiring the government to show a connection between the forfeited property and the criminal offense. *Id.* "If the instrumentality test is satisfied, the forfeiture will not be considered excessive unless

the ... claimant then shows that the forfeiture is grossly disproportionate in light of the totality of the circumstances." *Id.* Factors relevant to the proportionality inquiry are the severity of the offense with which the property was involved, including the extent of the claimant's and the property's involvement, the nature and scope of the underlying illegal operation, the personal benefit the claimant received, the value of the contraband involved, and the maximum sanction authorized by Congress for the offense. *Id.* Also to be considered is the culpability of the claimant, and the harshness of the sanction imposed, including the value of the forfeited property, its function, and other sanctions imposed on the claimant. *Id.*

The undersigned has determined that the undisputed facts satisfy the instrumentality test, which is a connection between the defendant property and the criminal offense. The evidence of the crime, 69 marijuana plants; papers containing drug notations; Zig Zag rolling papers; drug paraphernalia; electronic scales; and 3,695.13 grams of green leafy substance which tested positive as marijuana, were all found on the defendant property.

Next, the Court considers the sanctions imposed. Claimants were each sentenced to a term of 4 years, suspended, and were each ordered to pay a \$500 fine. According to the government, the market value of the defendant property in 1996 was \$63,000. In 1987 it was purchased for \$52,000. "Against these sanctions, [the Court] consider[s] the serious nature of the offense with which [claimants] and the forfeited property were involved." *United States v. One Parcel Property Located at Lot 85*, 100 F.3d 740, 744 (10th Cir.1996). Claimants were convicted of possession of

marijuana with intent to distribute. A significant amount of marijuana was found on the defendant property. The maximum fine authorized by Congress for each conviction was \$250,000. 21 U.S.C. § 841(b)(1)(D). In view of the seriousness of the offenses and the sanctions imposed, the undersigned finds that forfeiture of the defendant property is not disproportionate and does not violate the Excessive Fines Clause.

(c) Corruption of blood as a defense.

Claimants acknowledge that their analysis has not been adopted by the Supreme Court. [Dkt. 53, p.10 n. 5]. Applicable case law rejects corruption of blood as a defense to the civil forfeiture sought by the government in this case.

(d) Double jeopardy as a defense.

The Tenth Circuit has ruled that the Supreme Court holding in *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 2149, 135 L.Ed.2d 549 (1993) has foreclosed the question of whether a civil forfeiture following a criminal conviction constitutes double jeopardy. *United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1391 (10th Cir. 1997). In *Ursery* the United States Supreme Court held that civil forfeitures under § 881(a)(7) are not punishment for purposes of the Double Jeopardy Clause. *Ursery*, 116 S.Ct. at 2149.

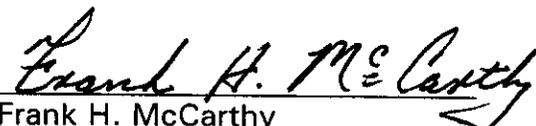
IV. CONCLUSION

The undersigned United States Magistrate Judge finds that the government has met its burden to establish probable cause that the defendant property was involved in criminal activity. The undersigned further finds that claimants have not established

a defense to forfeiture by a preponderance of the evidence. It is therefore recommended that the government's motion for summary judgment [Dkt. 45] be GRANTED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the 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 5th Day of June, 2000.


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 their attorneys of record on the 6th June 2000, FA

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

JUN 02 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE HOME INDEMNITY COMPANY,)
)
Third-Party Plaintiff,)
)
vs.)
)
THE HOLMES ORGANISATION, INC., and)
KENT A. BOGART,)
)
Third-Party Defendants.)

Case No. 94-CV-901-Bu(J) ✓

ENTERED ON DOCKET

DATE JUN 5 2000

REPORT AND RECOMMENDATION

The Holmes Organisation, Inc.'s ("Holmes") motion to dismiss is now before the Court. [Doc. No. 271]. Holmes' motion has been referred to the undersigned for a Report and a recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The undersigned heard oral argument on Holmes' motion at a hearing on May 15, 2000. With its motion, Holmes seeks dismissal of Counts III and IV in Plaintiff's Second Amended Third-Party Complaint. [Doc. No. 260]. For the reasons discussed below, the undersigned recommends that Holmes' motion to dismiss be **DENIED**.

**I. RULE 12(b)(6) MOTION TO DISMISS OR
RULE 56 MOTION FOR SUMMARY JUDGMENT?**

Holmes has titled its motion a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). However, attached to the motion are four documents which are not part of the Second Amended Third-Party Complaint, and in the motion Holmes lists five facts which it alleges are undisputed. In response to Holmes' motion, Home

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understandably noted its confusion as to whether Holmes' motion was a Rule 12(b)(6) motion to dismiss or in fact a Fed. R. Civ. P. 56 motion for summary judgment. Consequently, Home responded by attaching four exhibits of its own, which also contained material not in the Second Amended Third-Party Complaint. In its reply brief, Holmes reaffirmed its desire to have its motion treated as a motion to dismiss and not a motion for summary judgment. Inexplicably, Holmes then proceeded to attach six more exhibits to its reply brief for the Court's consideration. The undersigned is, therefore, as confused as Home regarding the true nature of the motion Holmes has filed.

Holmes insists that its motion is a motion to dismiss and should be treated as such. The undersigned will, therefore, permit Holmes to be the master of its own motion, and treat the motion as a motion to dismiss under Rule 12(b)(6). The undersigned will, therefore, examine the allegations in Home's Second Amended Third-Party Complaint to determine whether, taken as true, they state a cause of action against Holmes. Consequently, the undersigned will ignore the evidentiary materials attached to the parties' briefs, except to the extent that they establish the termination of the agency agreement between Home and Holmes on April 7, 1988 - a fact which is undisputed and which can be inferred from the Second Amended Third-Party Complaint.

II. RULE 12(b)(6) STANDARDS

The purpose of a motion to dismiss is to test the sufficiency of the complaint under Fed. R. Civ. P. 8, not decide the merits of a case. Dismissal of a cause of action for failure to state a claim is appropriate only where it appears beyond a doubt that the plaintiff can prove no set of facts in support of its theory of recovery or where an issue of law is dispositive. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Neitzke v. Williams, 490 U.S. 319, 326 (1989); Fuller v. Norton, 86 F.3d 1016, 1020 (10th Cir. 1996). All well-pled facts in the pleadings, as opposed to conclusory allegations, are to be accepted as true. The pleadings are to be liberally construed, and all reasonable inferences which can be drawn from the well-pled facts are to be viewed in favor of the plaintiff. Jojola v. Chavez, 55 F.3d 488, 494 n.8 (10th Cir. 1995). The issue is not whether the plaintiff will ultimately prevail, but whether it is entitled to offer evidence to support its claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

III. SUMMARY OF WELL-PLED FACTS IN HOME'S SECOND AMENDED THIRD-PARTY COMPLAINT

The parties and Court are directed to the Report and Recommendation filed by the undersigned in connection with Holmes' motion for summary judgment on Counts I and II of Home's Second Amended Third-Party Complaint for a detailed description of this litigation's history. The undersigned will not rehash that history here. Rather,

the undersigned will summarize Home's well-pled allegations as they relate to Counts III and VI of its Second Amended Third-Party Complaint.

Home is a New Hampshire corporation in the business of underwriting insurance policies. Holmes is an Oklahoma corporation in business as a broker for the purchase and sale of insurance policies. Holmes was an authorized broker/agent for Home. Holmes acted as Home's agent in connection with the sale, payment, performance, cancellation and other matters regarding insurance policies written by Home in Oklahoma.

At all relevant times, Kent A. Bogart was the president of Holmes. Beginning in 1979, Holmes became an insurance agent for Cooper Manufacturing Corporation ("Cooper"), providing Cooper with insurance coverage from Home. As Cooper's agent, Holmes routinely received notices and demands from Cooper and transmitted them to Home in connection with Cooper's insurance policies.

As a result of defective steel used to manufacture its workover rigs, Cooper found itself facing many product liability lawsuits. Cooper eventually filed for bankruptcy and was liquidated. In September 1994, during its bankruptcy, Cooper filed an adversary proceeding against Home. Cooper asserted claims for common law bad faith and violations of the Texas Insurance Code. Cooper alleged that Home's failure to investigate and defend Cooper with regard to the claims resulting from the defective rigs forced Cooper into bankruptcy and caused Cooper's death as a company. Cooper also alleged that once Home actually began to defend Cooper, Home committed several acts of bad faith. As damages for its "death of the

company" claim Cooper sought \$55 million to \$86 million in damages, which were subject to trebling, prejudgment interest, and punitive damages.

Home alleges that but for Mr. Bogart's conduct as Holmes' president, Home would have had an affirmative defense to Cooper's claim that Home's failure to defend Cooper caused Cooper's bankruptcy, liquidation and death. Home initially defended against Cooper's claim by arguing that Home never had a duty to defend Cooper because Cooper never tendered any defective rig claims to Home for defense. In response, Cooper argued that Home was estopped from asserting a "no tender" defense because Mr. Bogart, acting as Home's agent, had previously told Cooper that Cooper's policies with Home did not provide coverage for the claims being asserted against Cooper for its use of defective steel in its workover rigs. Cooper argued that the reason it never tendered any claims to Home was because of Mr. Bogart's "no coverage" opinion.

Cooper alleged that Mr. Bogart rendered his "no coverage" opinion to Mr. Hug, Cooper's CFO, at a pre-bankruptcy meeting on May 18, 1984 at which Mr. Hug and Mr. Bogart discussed Cooper's defective steel problems. Cooper also alleged that Mr. Bogart confirmed his "no coverage" opinion in subsequent conversations he had with Mr. Barton, Cooper's president. What was or was not said by Mr. Bogart at the May 18th meeting is disputed, and it is the alleged evolution of Mr. Bogart's testimony about what happened at this meeting which forms the basis of the claims Home has alleged in Counts III and IV of its Second Amended Third-Party Complaint.

Before Cooper filed its bad faith case against Home, it had filed a "coverage" case against Home in the bankruptcy court to determine whether any policies issued by Home covered any of the claims being asserted against Cooper as a result of the defective steel Cooper had used in its rigs. Mr. Bogart gave his deposition in the coverage case on July 5, 1994 and he testified at the trial of the coverage case on February 14, 1995. Home alleges that in the later-filed bad faith case, it relied on this testimony from Mr. Bogart in the coverage case when it determined that it should settle with Cooper for \$7.5 million because Home would lose on its affirmative "no tender" defense.

Home alleges that in his deposition and at the trial of the coverage action, Mr. Hug, Cooper's CFO, testified that he remembered having a lengthy conversation with Mr. Bogart in May 1984 and that during the meeting Mr. Bogart told him that there was no coverage under the Home policies. Home also alleges that Mr. Barton, Cooper's president, testified during the trial of the coverage case that he had himself spoken directly to Mr. Bogart and that Mr. Bogart confirmed his statement to Mr. Hug that there was no coverage.

Home alleges that Mr. Bogart's deposition testimony and trial testimony in the coverage case "was characterized by a persistent asserted lack of memory and a continual deference to Mr. Hug's account of the May 18, 1984 events." Doc. No. 260, ¶ 14. When asked whether he and Mr. Hug ever discussed coverage under the Home policies, Mr. Bogart testified as follows: "I am sure we had discussions of that type, but I cannot recall when and where and the crux of the exact discussion. I

can't recall that." Id. at ¶ 16. Home alleges that "[i]n reliance on Mr. Bogart's testimony that he lacked memory of the May 18, 1984 events and his continual deference to Mr. Hug's account of those events, Home believed it had no factual defense to [Cooper's estoppel argument]." Id. at 22. Home proceeded, therefore, to settle with Cooper for \$7.5 million.

Home then filed this action against Holmes, originally asserting only indemnity and contribution claims against Holmes. During discovery on its indemnity and contribution claims, Home took Mr. Bogart's deposition on November 15, 1999. Home makes the following allegations as a result of the testimony Mr. Bogart gave in November 1999:

At [his November 1999] deposition, Mr. Bogart no longer suffered from lack of memory regarding the events occurring on or about May 18, 1984. Nor did he now defer to Mr. Hug's account of those events. Mr. Bogart testified that, even though his November 15, 1999 deposition was taken over five years after his July 5, 1994 deposition and over four and a half years after his February 14, 1995 testimony in the coverage case . . . he now had a much clearer recollection of the events of May 1984 than he did either in July 1984 or February 1995.

. . . .

[At his November 1999 deposition], Mr. Bogart unequivocally contradicted and rejected Mr. Hug's testimony that Mr. Bogart had given Mr. Hug an opinion that there was no coverage under the Home policies

Mr. Bogart further testified in his November 1999 deposition that his memory of the May 18, 1984 events had first been refreshed when he received a telephone call from Mr. Hug after Mr. Bogart's testimony in the coverage case in February 1995 [and before Home had settled with

Cooper for \$7.5 million]. Mr. Bogart testified that, during this telephone conversation, Mr. Bogart and Mr. Hug discussed the May 18, 1984 events and Mr. Bogart's memory became clear regarding them. This refreshing of Mr. Bogart's memory rendered his July 1994 deposition testimony and February 1995 trial testimony materially inaccurate and misleading in respects that were directly relevant to . . . whether The Holmes Organisation, through Mr. Bogart, had given a no-coverage opinion to Cooper on or about May 18, 1984. Mr. Bogart nonetheless never informed Home of his telephone conversation with Mr. Hug and Mr. Bogart's newly refreshed memory. . . . Home was thus deprived, when it settled with [Cooper], of this factual defense to [Cooper's] estoppel argument.

Doc. No. 260, ¶¶ 29-31.

Based on the alleged evolution of Mr. Bogart's testimony, Home asserts the following claims against Holmes in its Second Amended Third-Party Complaint:

Count III (Breach of Fiduciary Duty) – Home alleges that Holmes, as Home's agent, owed Home an agent's duty of care and loyalty, including the duty to give Home information relevant to the subject matter of the agency. Home alleges that Holmes breached this fiduciary duty to Home when it failed to inform Home about Mr. Bogart's telephone conversation with Mr. Hug and the consequent "refreshing" of Mr. Bogart's memory regarding the events of May 18, 1984. Home alleges that had Holmes timely informed Home of Mr. Bogart's refreshed memory, Home would have had a factual defense to Cooper's estoppel argument and it would either not have settled with Cooper or not have settled for \$7.5 million.

Count IV (Negligence) – Home alleges that given (a) the magnitude and nature of its exposure to Cooper, (b) Cooper's reliance on the fact that Mr. Bogart had allegedly given a no-coverage opinion, and (c) the fact that Holmes knew or should have known that the refreshing of Mr. Bogart's memory rendered his prior testimony inaccurate and misleading, Holmes had a duty to inform Home about Mr. Bogart's conversation with Mr. Hug and Mr. Bogart's refreshed memory regarding the events of May 18, 1984. Home alleges that Holmes breached this duty by failing to notify Home of Mr. Hug's conversation and Mr. Bogart's refreshed memory. Home alleges that Holmes is liable to Home in tort for any damages resulting from this breach of duty.

Holmes moves to dismiss Home's breach of fiduciary duty claim, arguing that the agency relationship between Home and Holmes was terminated on April 7, 1988, seven years before Mr. Bogart spoke with Mr. Hug and his memory was allegedly refreshed. Holmes argues, therefore, that at the time Mr. Bogart's memory was allegedly refreshed, it owed no fiduciary duties as an agent to Home. Holmes moves to dismiss Home's negligence claim, arguing that the claim accrued on the date Home settled with Cooper and that the claim is now barred by the two year statute of limitations.

IV. COUNT III – HOME HAS PLED FACTS SUFFICIENT TO STATE A BREACH OF FIDUCIARY DUTY CLAIM AGAINST HOLMES.

The agency agreement between Home and Holmes terminated on April 7, 1988. Home alleges that Mr. Bogart's memory was refreshed some seven years later when he had a conversation with Mr. Hug sometime after February 14, 1995 – the date Mr. Bogart testified in the coverage action. Holmes argues that Home's breach of fiduciary duty claim should be dismissed because, as a matter of law, Holmes owed Home no fiduciary duties after the termination of the agency agreement between them.

In Quinlan, the Tenth Circuit warned district courts not to resolve fiduciary duty questions as strict questions of law. In fact, the Tenth Circuit specifically held that "[u]nder Oklahoma law, the existence of a fiduciary relationship is a question of fact which must be proven by the party asserting the relationship." Quinlan v. Koch Oil

Co., 25 F.3d 936, 942 (10th Cir. 1994). The existence or non-existence of a fiduciary duty depends on the factual circumstances surrounding the parties' relationship and transactions. First Nat'l Bank and Trust Co. of Vinita v. Kissee, 859 P.2d 502, 510-11 (Okla. 1993). A fiduciary relationship includes all legal relationships "such as guardian and ward, attorney and client, principal and agent and the like" Lowrance v. Patton, 710 P.2d 108, 111 (Okla. 1985). Fiduciary relationships are not, however, limited to specific legal relationships. The relationship may be legal, "moral, social, domestic or merely personal." Id. at 111-12. Under Oklahoma law, a fiduciary relationship arises anytime the facts and circumstances surrounding a relationship would allow a reasonably prudent person to repose confidence and trust in another person. Id. at 111; In re Estate of Beal, 769 P.2d 150, 155 (Okla. 1989); Panama Processes, S.A. v. Cities Service Co., 796 P.2d 276, 290 (Okla. 1990); Quinlan, 25 F.3d at 942. "[A] fiduciary relationship springs from an attitude of trust and confidence and is based on some form of **agreement**, either express or implied, from which it can be said the **minds have been met** to create a mutual obligation." Quinlan, 25 F.3d at 942 (emphasis original) (quoting from Lowrance, 710 P.2d at 112). As the Oklahoma Supreme Court recognized in Beal, in each case where it has recognized a fiduciary duty, the Court has "looked at the facts and found a relationship which would allow a reasonably prudent person to repose confidence in the other." Beal, 769 P.2d at 155.

The question presented by Holmes' motion to dismiss is whether it appears beyond doubt that Home can prove no set of facts which would establish the

existence of a fiduciary duty by Holmes after the termination of the parties' formal agency relationship. In light of Quinlan, the undersigned is reluctant at the motion to dismiss stage to find that Home will be completely unable, given the allegations in its complaint, to prove facts which would establish a post-"agency agreement" relationship between itself and Holmes which would have permitted a reasonably prudent person in Home's position to repose confidence in Holmes and rely on Holmes to report to Home information relevant to matters which arose out of their formal agency relationship. It is for the jury to decide whether, as Holmes argues, it was unreasonable under the facts of this case for Home to trust that Holmes would convey information to Home about matters arising out of the formal agency relationship more than seven years after their formal relationship ended. The undersigned finds, therefore, that Home has stated a claim for breach of fiduciary duty which is sufficient to satisfy Fed. R. Civ. P. 8's requirements and withstand a Rule 12(b)(6) motion to dismiss.

The undersigned's conclusion is supported by the Restatement (Second) of Agency cited by Home and the negligence "duty" cases cited by Holmes. The parties agree with the general rule stated in § 381 of the Restatement (Second) of Agency, which imposes a duty on all agents "to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him" The parties disagree, however, as to whether this duty can ever survive the termination of the parties' formal agency relationship. Home cites comment "f" to § 381 in support of an agent's post-termination duty to provide information.

Comment "f" provides as follows:

After termination. . . . [(I]f the agency terminates without the fault of the principal, the agent is under a duty thereafter to give to the principal relevant information received by the agent when acting as such.

Restatement (Second) of Agency, § 381 cmt f. Comment f is not a model of clarity. One reading of the comment, and the one Holmes asserts, is that it only requires an agent to give pre-termination information to a principal post-termination. In other words, Holmes argues that comment f does not require an agent to give information to his former principal which he learns post-termination, even if that post-termination information would be relevant to other information or matters which the agent was involved with pre-termination. The undersigned finds this to be too narrow a reading of comment f. Comment f at least recognizes that under certain circumstances, an agent may have a post-termination duty to give his principal information. This is consistent with the approach to fiduciary duties taken by Oklahoma, which requires an examination of the parties' entire relationship to determine whether a fiduciary duty exists. The end of the parties' formal agency relationship is not necessarily dispositive, which is the only proposition Holmes has asserted in its motion to dismiss.

Holmes cites to several cases where the Oklahoma Supreme Court was called upon in a negligence case to determine whether the defendant owed a duty of care to the plaintiff. These cases hold that "whether or not a duty exists depends on the relationship between the parties and the general risks involved in the common

undertaking." Delbrel v. Doenges Bros. Ford, Inc., 913 P.2d 1318, 1320 (Okla. 1996). Duty is only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. Wofford v. Eastern State Hosp., 795 P.2d 516, 519 (Okla. 1990) (citing Prosser, Law on Torts pp. 332-333 (3d ed. 1964)). The most important consideration in establishing duty is foreseeability. Delbrel, 913 P.2d at 1321; Wofford, 795 P.2d at 519. "As a general rule, a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous.'" Wofford, 795 P.2d at 519 (citing Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 342 (Cal. 1976)).

The undersigned finds that Quinlan, Kissee, Lowrance and Beal, all cited above, are more directly on point regarding the existence of a fiduciary duty than are Delbrel and Wofford which deal with duties in negligence cases. Delbrel and Wofford are, however, consistent with Quinlan, Kissee, Lowrance and Beal. Whether Holmes owed Home a post-termination duty depends on all of the facts and circumstances of their relationship, which includes the fact that the transaction about which Home wishes to impose a duty to inform was ongoing both before and after the termination of the parties' formal agency relationship. If one were to recast the fiduciary duty inquiry in traditional negligence terms, the question would become: Was it foreseeable to Holmes that Home would be relying on Holmes, more than seven years after the termination of their formal agency relationship, to inform Home about Mr. Bogart's allegedly refreshed memory in order to prevent harm to Home in the Cooper litigation?

Given the allegations in Home's Second Amended Third-Party Complaint, the undersigned cannot find that all reasonable jurors would have to answer no to this inquiry - a reasonable juror could answer yes. Consequently, Holmes' motion to dismiss must be denied and Home should be given the opportunity to offer evidence in support of its fiduciary duty claim.

IV. COUNT IV - HOME HAS PLED FACTS SUFFICIENT TO STATE A NEGLIGENCE CLAIM AGAINST HOLMES.

The parties agree that the two year statute of limitations in 12 Okla. Stat. § 95(3) applies to Home's negligence claim in Count IV of the Second Amended Third-Party Complaint. The parties also agree that, absent application of some tolling principle, Home's negligence claim accrued more than two years before it filed the Second Amended Third-Party Complaint on March 24, 2000. Home argues that Oklahoma's discovery rule applies to its negligence claim, and that the discovery rule tolled the statute of limitations until November 15, 1999 when Home allegedly learned for the first time at Mr. Bogart's deposition that Mr. Bogart's memory had been "refreshed" by a 1995 phone call from Mr. Hug. Home argues that its negligence claim is timely because it was filed within two years of November 15, 1999 - the date when Home first knew of Holmes' alleged negligence.

The "discovery rule" allows statutes of limitations in tort cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury. The discovery rule tests the evidence for lack of diligence by

the injured party to discover the injury. Holmes does not dispute that Oklahoma's discovery rule is applicable to Home's negligence claim. The undersigned finds, therefore, that the discovery rule is applicable to Home's negligence claim. See McVay v. Rollings Construction, Inc., 820 P.2d 1331, 1332-33 (Okla. 1991).

Holmes argues that the discovery rule does not save Home's negligence claim because Home "should have known" about any alleged changes to Mr. Bogart's recollection regarding the events of May 1984 more than two years before Home filed the Second Amended Third-Party Complaint. Holmes then launches into a fact-intensive discussion in an attempt to demonstrate why it is undisputed that Home should have known more than two years before it filed its negligence claim about Mr. Bogart's refreshed memory. Such a factual inquiry is inappropriate at the motion to dismiss stage.

Home alleges in its Second Amended Third-Party Complaint that it was not aware that Mr. Bogart had experienced a refreshing of his memory until it took his deposition in November 1999. Home also argues that there is no reason it should have known prior to Mr. Bogart's deposition that his memory had been refreshed, because Home was entitled to rely on Mr. Bogart's prior sworn testimony without continually asking him if his recollection had changed. Whether the discovery rule applies is a fact intensive question which will have to be resolved at trial or pursuant to a motion for summary judgment. The undersigned cannot, therefore, find that Home will be unable to prove a set of facts which will entitle it to rely on the discovery rule. The undersigned finds, therefore, that Home has stated a claim for

negligence sufficient to satisfy Fed. R. Civ. P. 8's requirements and withstand a Rule 12(b)(6) motion to dismiss.

RECOMMENDATION

Home's Second Amended Third-Party Complaint contains allegations sufficient to state a claim against Holmes under Fed. R. Civ. P. 8 for breach of fiduciary duty and negligence. Consequently, the undersigned recommends that Holmes' motion to dismiss Counts III and IV of Home's Second Amended Third-Party Complaint be **DENIED**. [Doc. No. 271].

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 his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation 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 Moore

v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 2 day of June 2000.


Sam A. Joyner
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

5th Day of June, 192000.
C. Paul Kelly, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 02 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE HOME INDEMNITY COMPANY,)

Third-Party Plaintiff,)

vs.)

THE HOLMES ORGANISATION, INC., and)

KENT A. BOGART,)

Third-Party Defendants.)

Case No. 94-CV-901-Bu(J)

ENTERED ON DOCKET

DATE JUN 5 2000

REPORT AND RECOMMENDATION

Boyd

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The Holmes Organisation, Inc.'s ("Holmes") motion for summary judgment is now before the Court. [Doc. No. 247]. Holmes' motion has been referred to the undersigned for a Report and a recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The undersigned heard oral argument on Holmes' motion at a hearing on May 15, 2000. With its motion, Holmes seeks summary adjudication of Counts I and II in Plaintiff's "Second Amended Third-Party Complaint."^{1/} [Doc. No. 260]. For the reasons discussed below, the undersigned recommends that Holmes' motion for summary judgment be **DENIED**.

I. FACTUAL/PROCEDURAL SUMMARY^{2/}

A. THE RELATIONSHIP BETWEEN HOME, HARBOR, HOLMES AND COOPER

Home is a New Hampshire corporation in the business of underwriting insurance policies. Holmes is an Oklahoma corporation in business as a broker for the purchase and sale of insurance policies. At all relevant times, Holmes was an authorized broker/agent for Home. See Doc. No. 277, Exhibit "14." Holmes acted as Home's agent in connection with the sale, payment, performance, cancellation and other matters regarding insurance policies written by Home in Oklahoma.

At all relevant times, Kent A. Bogart was the president of Holmes. Beginning in 1979, Holmes became an insurance agent for Cooper Manufacturing Corporation ("Cooper"), providing Cooper with various forms of insurance coverage. As Cooper's agent, Holmes routinely received notices and demands from Cooper and transmitted them to Home in connection with Cooper's insurance policies. All parties agree that during the relevant period, Holmes was the dual agent of Cooper and Home.

By the late 1970's and early 1980's, Cooper had established itself as a prominent manufacturer and supplier of workover drilling rigs. A workover drilling rig consists of a steel derrick or mast, mounted on a mobile truck or carrier. From 1979

^{1/} Holmes' motion for summary judgment was originally directed to Counts I and II of Plaintiff's "First Amended Third Party Complaint." [Doc. No. 188]. After briefing on Holmes' motion for summary judgment was complete, Judge Michael Burrage granted The Home Indemnity Company's ("Home") motion for leave to amend, and Home filed its Second Amended Third Party Complaint on March 24, 2000. The second amended complaint adds Kent Bogart as a named party and adds two new counts - Counts III and IV - against Holmes and Mr. Bogart. The first two counts in the Second Amended Third Party Complaint are, however, the same as the two counts originally pled in the First Amended Third Party Complaint. The undersigned finds, therefore, that Holmes' motion for summary judgment is now directed at the first two counts in Home's Second Amended Third Party Complaint. This Report and Recommendation will, therefore, only address Counts I and II of the Second Amended Third Party Complaint. Counts III and IV in the Second Amended Third Party Complaint will not be addressed herein.

^{2/} The undersigned finds no genuine issue of material fact with regard to the facts summarized in this section. See Fed. R. Civ. P. 56(d).

through October 1984, George Hug was the Chief Financial Officer and Risk Manager for Cooper, and Jon Barton was Cooper's President and Chief Executive Officer. Mr. Hug handled Cooper's insurance matters.

Cooper's primary insurance coverage consisted of comprehensive general liability ("CGL") policies purchased from Home through Holmes, Home's authorized agent.^{3/} Cooper obtained secondary insurance coverage through umbrella and excess liability ("UEL") policies purchased from Harbor Insurance Company ("Harbor") through Holmes. When a claim arose against Cooper which was potentially covered by one of its CGL or UEL policies, Mr. Hug would routinely forward the relevant claim information to Holmes with a transmittal letter.

B. COOPER DISCOVERS DEFECTIVE STEEL IN ITS WORKOVER RIGS.

In early 1984 Cooper discovered that certain of its workover rigs had been manufactured with defective steel purchased from several suppliers, including Babcock & Wilcox ("B&W").^{4/} This discovery immediately raised the issue of whether Cooper had insurance coverage for any potential claims related to defective workover rigs sold by Cooper. On May 18, 1984, Mr. Barton, as Cooper's President, sent a letter to Cooper's customers advising them of the defective steel in Cooper's rigs. See Doc. No. 249, Exhibit "10." This May 18th letter has become known as the "Dear Customer" or "Warning" letter.

On the same day that Cooper mailed its Dear Customer letter, Mr. Hug, Cooper's risk manager, met with Mr. Bogart, Holmes' president, to discuss the defective workover rigs. What was or was not said, at this meeting is disputed. It is undisputed, however, that Mr. Hug provided Mr. Bogart with a copy of Cooper's Dear Customer letter.

A day or two after meeting with Mr. Hug, Mr. Bogart met with Mike Heard, a Tulsa-based underwriter for Home. Mr. Bogart gave Mr. Heard a copy of Cooper's Dear Customer letter and they discussed it. Mr. Heard had further questions regarding the situation, so, in Mr. Bogart's presence, Mr. Heard called Mr. Hug and spoke further with him about Cooper's predicament. Mr. Heard then gave a copy of Cooper's Dear Customer letter to Glenn Hogg, Home's Tulsa-based claims supervisor. Sometime during 1984, William Flynn, a claims manager for Holmes in Tulsa, and Wayne

^{3/} In 1979, Mr. Bogart, Cooper's insurance agent, presented to Mr. Hug, Cooper's risk manager, a new type of insurance coverage described as product recall and/or product warranty coverage. Cooper considered purchasing the new insurance, but ultimately decided against purchasing it.

^{4/} See Judge Wilson's May 29, 1996 Order, Doc. No. 249, Exhibit "24," pp. 7-8, for a description of the steel defect.

Fletcher, a claims manager for Home in Tulsa, also discussed Cooper's Dear Customer letter.

C. COOPER, FACING NUMEROUS PRODUCT LIABILITY LAWSUITS FOR SELLING DEFECTIVE WORKOVER RIGS, FILES FOR BANKRUPTCY.

Cooper's warning letter provoked numerous claims against Cooper. On June 15, 1984, WellTech, Inc. ("WellTech"), a major buyer of Cooper's rigs, filed suit against Cooper and B&W in Texas. Due to the defective rigs it had purchased from Cooper, WellTech sought damages for lost profits, transportation costs, storage costs, equipment costs, loss of business, loss of market share and loss of good will. Doc. No. 249, Exhibit "19." On June 21, 1984, Pride Oil Well Service Company ("Pride"), another major purchaser of Cooper's rigs, also sued Cooper and B&W in Texas and sought damages similar to those sought by WellTech. *Id.* at Exhibit "22." The WellTech and Pride lawsuits were eventually consolidated and the parties commonly refer to these lawsuits as the Texas litigation. Throughout 1984 and 1985, Cooper and B&W were sued numerous other times by numerous other purchasers of Cooper's workover rigs. *See* Doc. No. 249, Exhibit "24," pp. 11-15 for a list of claims eventually filed against Cooper.

On July 13, 1984, Cooper filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in this district. The bankruptcy court found that Cooper filed for bankruptcy protection due to the contingent liability posed by all potential claims related to the defective workover rigs it had sold.^{5/} On July 16, 1984, the claims managers in Tulsa for Home and Holmes, Mr. Flynn and Mr. Fletcher respectively, became aware of Cooper's bankruptcy filing. Cooper's bankruptcy filing received media coverage in the Tulsa area, and Mr. Heard, Home's Tulsa-based underwriter, recalls seeing articles about Cooper's bankruptcy. On July 24, 1984, Michael R. Sander, a claims representative for Home, prepared and forwarded an internal memo to Mr. Fletcher, discussing Cooper's bankruptcy and enclosing a newspaper article discussing the fact that Cooper had elected to file bankruptcy because of numerous claims and lawsuits.

On December 4, 1985, the bankruptcy court confirmed Cooper's Plan of Reorganization, which provided for the liquidation of Cooper through a liquidating trust. Assets of the trust included Cooper's claims against B&W, and any rights Cooper had

^{5/} Doc. No. 249, Exhibit "24," p. 15. Cooper also sent a letter to its vendors notifying them of Cooper's bankruptcy filing. The letter contained the following language: "A number of Cooper's customers have sought remedy through litigation. We expect others to follow. It is virtually impossible to determine the overall magnitude of potential claims or the legal expense associated with them." Doc. No. 249, Exhibit "23." The bankruptcy judge found that Cooper had forwarded a copy of this letter to Holmes, and that Holmes in turn forwarded a copy of the letter to Home and Harbor or Harbor's broker.

under any insurance policies with Home or Harbor. "The gist of the plan [was] that any recovery of money from these assets [would] be distributed to Cooper's creditors, consisting principally of Pride, WellTech, and the other [defective mast] claimants." Doc. No. 249, Exhibit "24," p. 16. On January 29, 1986, Mr. Barton, Cooper's former president, was appointed as trustee of the liquidating trust.

In 1987 WellTech and Pride amended their petitions in the Texas actions to allege claims for loss of use of, or damage to, collateral property (i.e., property other than the Cooper rig itself). See Doc. No. 250, Exhibit "35." Ultimately, Pride and WellTech sought damages for mast inspection costs, rig stacking and unstacking costs, mast repair costs, replacement rig costs, loss of use of stacked masts, loss of use of stacked carriers, loss of use of collateral property, loss of gross margin, administrative costs, attorney's fees and punitive damages. Later in 1987, WellTech and Pride settled their lawsuits by taking money from B&W and assigning their claims against Cooper to B&W. Pursuant to the assignment agreement, B&W was permitted to enforce its Pride and WellTech claims against Cooper only to the extent of Cooper's insurance coverage, if any.

Cooper and B&W then moved toward settlement of the claims as between themselves. On October 28, 1987, Mr. Barton, as Cooper's trustee, signed a settlement agreement with B&W. This agreement was approved by the bankruptcy court at a hearing on December 22, 1987. Doc. No. 249, Exhibit "24," pp. 19-20. Pursuant to the agreement, Cooper's liquidating trust received \$18 million, which was distributed to Cooper's creditors pursuant to the Plan of Reorganization.

D. COOPER'S COVERAGE CASE IN THE BANKRUPTCY COURT

On November 12, 1993, Mr. Barton, as bankruptcy Trustee for Cooper, filed an adversary proceeding in the bankruptcy court against Home and Harbor. As Trustee, Mr. Barton sought a declaratory judgment that Cooper's CGL and UEL policies were property of the liquidating trust; that the policies provided Cooper with coverage for any claims arising out of the design, manufacture or sale of the workover rigs; and that Home and Harbor had a duty to defend Cooper against any such claims. Doc. No. 250, Exhibit "39."

In March 1994, the bankruptcy court determined by summary judgment that the Home and Harbor policies were owned by Cooper at the commencement of Cooper's bankruptcy; that the policies were property of Cooper's bankruptcy estate; and that by the terms of Cooper's confirmed plan, the policies were transferred to, and were a part of, the liquidating trust established by the plan. The bankruptcy court then held a bench trial in February 1995 to determine whether any of the policies in Cooper's liquidating trust provided coverage for any claims relating to Cooper's defective workover rigs. The bankruptcy court concluded that, except for damages relating to

replacing the mast itself (excluded pursuant to an "own product" exclusion), the Home and Harbor policies provided coverage for the types of damages Pride and WellTech had been seeking in their lawsuits. Doc. No. 249, Exhibit "24," p. 37.

E. THE UNDERLYING BAD FAITH CASE IN THIS COURT

On September 12, 1994, Mr. Barton, as Cooper's bankruptcy trustee, filed an adversary proceeding in the bankruptcy court against Home and Harbor. Cooper asserted claims for common law bad faith and violations of the Texas Insurance Code. The Court's standing reference to the bankruptcy court was withdrawn and Cooper's complaint was transferred to this Court's docket. Cooper alleged that Home's and Harbor's failure to investigate and defend Cooper with regard to the claims resulting from the defective rigs forced Cooper into bankruptcy and caused Cooper's death as a company. As damages, Cooper sought the lost value of Cooper as a going concern, punitive damages, treble damages for the statutory violations, interest and attorney's fees. Cooper's damages expert valued Cooper's "death of the company" claim, plus interest, from \$55 million (applying Oklahoma law) to \$86 million (applying Texas law), without considering trebling or punitive damages. See Doc. No. 277, Exhibit "4." Cooper also alleged that once Home and Harbor actually began to defend Cooper in the Pride and WellTech cases, Home and Harbor committed several acts of bad faith. See Doc. Nos. 105 and 106 (for a description of the underlying Cooper/Home litigation).

On February 18, 1997, Cooper and Home settled all of Cooper's claims against Home, and a settlement agreement was executed on March 4, 1997. Pursuant to the settlement agreement, Home paid Cooper \$7.5 million. See Doc. No. 277, Exhibit "26." The \$7.5 million settlement was approved by the bankruptcy court on March 18, 1997. As part of the settlement, Home obtained a release from Cooper which not only released Home from all liability to Cooper, but also released Holmes from all liability to Cooper. The \$7.5 million settlement settled all of Home's liability which remained in the coverage case before Bankruptcy Judge Wilson; all liability for Home's alleged delay in defending Cooper against the defective rig claims, which Cooper alleged was the cause of Cooper's bankruptcy and liquidation; and all liability for Home's alleged bad faith conduct once it began to defend Cooper against the defective rig claims in the Texas litigation.

F. HOME'S INDEMNITY AND CONTRIBUTION CLAIMS AGAINST HOLMES

In October 1996, several months prior to Home's \$7.5 million settlement with Cooper, Home filed a motion for leave to amend its Answer in this case to allege a third party claim for indemnity and contribution against Holmes. Doc. No. 123. In March 1997, a month after Home's settlement with Cooper, the Court granted Home's motion and Home filed its original Third Party Complaint against Holmes, which has been amended twice. See Doc. Nos. 156, 157, 188 and 260. Home asserts the

following claims against Holmes in Counts I and II of its Second Amended Third Party Complaint:

Count I - Home alleges that Holmes was its agent and that by its acts and omissions Holmes caused Home to be vicariously liable to Cooper. Home alleges that any breach of its duty to defend Cooper was caused by the "the active, primary negligence and breach of duties to Home by [Holmes]." Doc. No. 260, p. 14. Consequently, Home demands **indemnity** from Holmes for all amounts paid by Home to Cooper.

Count II - Alternatively, Home alleges that with respect to Cooper, Holmes is a joint tortfeasor. Home alleges that, through its acts and omissions, Holmes breached duties it owed to Cooper, which rendered Holmes liable in tort to Cooper. Home alleges, therefore, that Holmes is liable to Cooper for the same injuries and losses for which Home was liable to Cooper. Because Home settled Cooper's claims, extinguishing Home and Holmes' liability to Cooper, Home demands **contribution** from Holmes "in the proportion of [Holmes'] fault and liability, for all amounts paid by Home to settle [Cooper's] claims against Home" Doc. No. 260, p. 15.

1. **Prior Appeal to the Tenth Circuit**

The Court previously granted summary judgment in favor of Holmes on Home's original Third Party Complaint. Doc. No. 175. Regarding Home's indemnity claim, the Court held that to recover for indemnity from Holmes under Oklahoma law, Home would have to show that Holmes was directly liable to Cooper. The Court then found that because Holmes owed no direct duties to Cooper, and because Home could not delegate to Holmes the duties it owed to Cooper, Home could not establish that Holmes was directly liable to Cooper. Doc. No. 175.

Home appealed the Court's dismissal of its indemnity claim, arguing that the Court construed the law of indemnity too narrowly. The Tenth Circuit agreed and reversed. Home v. Holmes, No. 98-5080, 1999 WL 360173, at *2 (10th Cir. Jun. 4, 1999). The Tenth Circuit held that in order to recover indemnification, an indemnitee (Home) need not establish direct liability between the indemnitor (Holmes) and the party to whom the indemnitee (Home) was liable (Cooper). According to the Tenth Circuit, an indemnitee (Home) may seek indemnification by establishing that the indemnitor's (Holmes') acts directly caused the indemnitee (Home) to become liable

to a third party (Cooper). Id. Noting that Home was alleging that Holmes' acts and omissions directly caused Home's potential liability to Cooper, the Tenth Circuit held that Home's indemnity claim should not have been dismissed. Id.

Regarding Home's contribution claim, this Court previously held that contribution in Oklahoma is premised on a finding that two parties are joint tortfeasors with respect to an injured party, and that one joint tortfeasor has paid more than his *pro rata* share. Following its holding with regard to Home's indemnity claim, the Court held that Holmes could not be a joint tortfeasor because Holmes could not be directly liable to Cooper. Doc. No. 175.

Home appealed the Court's dismissal of its contribution claim, and the Tenth Circuit reversed. Home, 1999 WL 360173, at *2. The Tenth Circuit held that Holmes could potentially be liable to Cooper on a dual agency theory. That is, Home alleged Holmes was an agent of both Cooper and Home, and that Holmes violated duties it owed to Cooper as Cooper's agent. Citing Home Ins. Co. v. Southern Motor Coach Corp., 41 P.2d 870 (Okla. App. 1935), the Tenth Circuit found that such a dual agency was not precluded by Oklahoma law on the facts of this case. The court concluded, therefore, that Home's contribution claim should not have been dismissed.

2. Current Motion for Summary Judgment

This case was remanded by the Tenth Circuit in July 1999. Since that time, discovery has proceeded on Home's indemnity and contribution claims against Holmes. Holmes again moves for summary judgment on Home's indemnity and contribution claims. Holmes now argues that Home's indemnity claim must fail as a matter of law because Home, as a party seeking indemnity, must be without actual fault, and Home was directly liable to Cooper, not just vicariously liable to Cooper. Holmes also argues that Home, as a party seeking contribution, is only entitled to recover the amount which it paid in excess of its *pro rata* share of liability to Cooper, and Home is not permitted to recover for any amount paid which was in excess of what was reasonable. Holmes argues that Home's contribution claim fails as a matter of law because there is no evidence that Holmes was at fault (i.e., Home's *pro rata* share is 100% and Holmes is 0%) , and because the \$7.5 million settlement paid to Cooper was *per se* unreasonable.

II. SUMMARY JUDGEMENT STANDARDS

A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court will find no genuine issue of triable fact if it determines that the summary judgment record taken as a whole could not lead a rational trier of fact to find for Plaintiff. Because

Plaintiff will bear the burden of proof at trial, Plaintiff must go beyond its pleadings and identify specific facts which establish the existence of each element essential to its case. Defendant need only point to an absence of evidence to support a single element of Plaintiff's case. The court must, however, resolve all doubts in favor of Plaintiff, the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

III. CHOICE OF LAW

In briefing Holmes' motion for summary judgment, the parties have relied primarily on Oklahoma's law of indemnity and contribution. However, in its brief, Holmes states that it "does not intend to waive its argument that Texas law may ultimately apply in this case." Doc. No. 248, p. 28 n. 23. At the May 15th hearing on Holmes' motion, the undersigned asked Holmes to either present its arguments regarding the application of Texas law to this case or cease reliance on the application of Texas Law. Counsel for Holmes stated at the hearing that Holmes now agrees that Oklahoma, and not Texas, law should be applied to Home's indemnity and contribution claims. The undersigned will, therefore, apply Oklahoma law to Counts I and II of Home's Second Amended Third Party Complaint. See, e.g., Home v. Holmes, No. 98-5080, 1999 WL 360173, at *1 (10th Cir. Jun. 4, 1999) (where the Tenth Circuit applied Oklahoma law to Home's indemnity and contribution claims); and Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F. Supp. 710, 714 (W.D. Okla. 1981) (applying Oklahoma law to claims similar to those asserted by Home in this case).

IV. COUNT I - THERE ARE MATERIAL QUESTIONS OF DISPUTED FACT WHICH PRECLUDE THE ENTRY OF SUMMARY JUDGMENT ON HOME'S INDEMNITY CLAIM.

There is no evidence in the record of an express indemnity contract running from Holmes to Home. Holmes argues that Home's indemnity claim is premised on the agency agreement entered into by Home and Holmes in April 1981. See Doc. No. 277, Exhibit "14." The only indemnification obligation in the agency agreement runs from Home to Holmes. That is, paragraph 13 of the agency agreement contractually obligates Home to indemnify Holmes in certain circumstances. Id. The agreement imposes no express obligation on Holmes to indemnify Home. The undersigned finds, therefore, that Home's indemnity claim is based on the common law, and not on an express contractual agreement.

A quasi-contract, constructive contract, or an implied-in-law contract should not be confused with an implied contract. An implied contract is an actual contract created by the parties' own conduct which establishes a mutual intent to form a contract - one implied by the facts. A quasi-contract or a contract implied-in-law is no contract or promise at all. Quasi-contracts are obligations imposed by operation of law regardless of the parties' conduct or true intent. These legal obligations are often imposed by courts through the fiction of an involuntary promise. It is the use of such a fiction that creates confusion between quasi-contracts and implied contracts. See Booker v. Sears Roebuck & Company, 785 P.2d 297, 300-303 and 308 n. 13 (Okla. 1989) (Summers, J., concurring, and Opala, J., dissenting) "A quasi contract is not a contract, and the substantive law of contracts is not applicable because liability is not based on an agreement between the parties. Instead, liability is based on a duty which is imposed by law." Id. at 301 n. 3 (citing G. Fraser, Contracts, Quasi Contracts, and Pleadings, 27 Okl. L. Rev. 440, 441 (1974)). The undersigned finds that Home's indemnity claim is based on a quasi-contract, not an implied contract, theory.

"The right to indemnity is not limited to cases where there is an express agreement to that effect. A right to implied indemnity may arise out of a contractual or a special relationship between parties and from equitable considerations." Daugherty v. Farmers Cooperative Ass'n, 790 P.2d 1118, 1120 (Okla. App. 1989). Holmes does not dispute that an implied-in-law indemnity obligation could arise out of the agency relationship between itself and Home. See, e.g., Braden v. Hendricks, 695 P.2d 1343, 1349-50 (Okla. 1985) (recognizing manufacturer's implied indemnity obligation to its dealer); National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc., 784 P.2d 52, 54 (Okla. 1989); and Central Nat. Bank of Poteau v. McDaniel, 734 P.2d 1314, 1316 (Okla. 1987). Rather, Holmes attacks the elements of Home's implied indemnity claim under Oklahoma law.

A. HOME'S FAULT

The parties agree that in Oklahoma "[i]n the case of implied or noncontractual indemnity, the right rests upon fault of another which has been imputed or constructively fastened upon he who seeks indemnity." Daugherty, 790 P.2d at 1120. Oklahoma recognizes "a right of indemnity when one - who was only *constructively* liable to the injured party and was in no manner responsible for the harm - is compelled to pay damages because of the tortious act by another." Braden, 695 P.2d at 1349 (citing several cases) (emphasis original). Thus, to seek indemnification, a party cannot have been actively at fault. Travelers Ins. v. L.V. French Truck Service, 770 P.2d 551, 555 n. 16 (Okla. 1988); Norton-Sturat Pontiac-Cadillac of Enid, 405 P.2d 109, 111 (Okla. 1965).

Holmes argues that it is entitled to summary judgment on Home's implied indemnity claim because the record contains undisputed evidence which establishes that at least some portion of the \$7.5 million settlement is attributable to Home's own, active fault. Holmes' argument is similar to that made by the defendant in Biggs v. Surrey Broadcasting Co., 811 P.2d 111, 114-15 (Okla. App. 1991). In Biggs, a Mr. Biggs and a Ms. Kelly worked for a radio station in Oklahoma City. Ms. Kelly sued the radio station, seeking to hold it liable for alleged sexual harassment by her fellow employee, Mr. Biggs. The radio station eventually settled Ms. Kelly's sexual harassment claim. The radio station then sued Mr. Biggs for indemnity. Mr. Biggs moved for summary judgment on the station's indemnity claim, arguing that the station was partially at fault because the station management was affirmatively involved in the wrongful acts complained about by Ms. Kelly. The court reviewed the record and disagreed with Mr. Biggs. The court found that the station had no active fault because the station management had promptly responded to Ms. Kelly's complaints and reprimanded Mr. Biggs. Because the station had no active fault, the court held that the station was entitled to pursue an implied-in-law indemnity claim against Mr. Biggs. Id.

This Court must perform the same analysis as the court in Biggs. The Court must review the record to determine if there is any evidence from which a reasonable jury could conclude that Home was not at fault with regard to the liability for which it seeks indemnification. If a reasonable jury could conclude that Home was without active fault as to Cooper, then summary judgment on Home's implied indemnity claim is not appropriate. If, however, the record evidence is so one sided that no reasonable jury could conclude that Home was without fault, summary judgment is appropriate.

As was discussed above, the \$7.5 million settlement paid by Home to Cooper extinguished three types of liability which Home faced: (1) the liability Home faced in the bankruptcy coverage case, (2) the liability Home faced for delaying its defense of Cooper and causing Cooper's bankruptcy and liquidation, and (3) the liability Home faced for its bad faith conduct once it began to defend Cooper in the Texas litigation. Home admits that at least some portion of the \$7.5 million settlement is attributable to each liability category (i.e., coverage, failure to defend and bad faith). Home argues, however, that the largest share of the settlement is properly attributable to the liability it faced for allegedly causing Cooper's bankruptcy and liquidation by delaying its defense of Cooper.

In its Second Amended Third Party Complaint, Home seeks indemnity from Holmes "for all amounts paid by Home to [Cooper] to settle [Cooper's] claims against Home" Doc. No. 260, p. 14. However, in its response to Holmes' motion for summary judgment, Home now limits its indemnity claim to that portion of the \$7.5 million settlement which is attributable to Home's liability to Cooper for causing Cooper's bankruptcy and liquidation by delaying its defense of Cooper against the

defective rig claims. Holmes has offered no argument as to why Home should not be permitted to limit its indemnity claim in this manner.

Home admits that it will have the burden at trial of establishing precisely how the \$7.5 million settlement should be apportioned. See, e.g., Gay, 550 F. Supp. at 716. Home also admits that it is not entitled to indemnification from Holmes for any portion of the \$7.5 million which is attributable to liability for coverage and liability for Home's own bad faith once it began to defend Cooper. Home argues, however, and the undersigned agrees, that how the \$7.5 million settlement should ultimately be apportioned as between liability for coverage, failure to defend prior to Cooper's bankruptcy and bad faith after Cooper's bankruptcy is a question for the jury. There is insufficient evidence in the summary judgment record, let alone undisputed evidence, from which the Court could, as a matter of law, make such an apportionment.

Home argues that with respect to any liability it faced for delaying its defense of Cooper and causing Cooper's bankruptcy and liquidation, that liability was passive. Home argues that it was without fault for failing to defend Cooper prior to Cooper's bankruptcy, and that it was only liable to Cooper because of the conduct of its agent, Holmes. Home argues that Holmes is at fault for Home's pre-bankruptcy failure to defend Cooper because Holmes breached its duty as Home's agent to discover and notify Home that there were claims against Cooper which needed to be defended, and because Holmes, through Mr. Bogart, gave Cooper an unauthorized "no coverage" opinion.

**1. Holmes' Alleged Failure to Notify
Home of Claims Against Cooper**

Home argues that after Cooper issued its May 18, 1984 Warning letter, Holmes failed to monitor the situation with Cooper and report to Home claims like those asserted in the Pride and WellTech cases. Holmes argues that if it is at fault for failure to identify claims against Cooper, Home is also at fault because it was privy to the same information to which Holmes was privy. Home argues in response that, while this may ordinarily be true, in this case Home had an agreement with Holmes that Holmes would monitor the situation and forward additional claims information to Home. Home cites to testimony from William Flynn to support its argument. See Doc. No. 277, Exhibit "18."

It is undisputed that sometime in 1984 Mr. Flynn, a claims supervisor for Holmes, and Wayne Fletcher, a claims manager for Home, received a copy of and discussed Cooper's May 18th Warning letter. Home argues that during their conversation about the May 18th Warning letter, Mr. Fletcher from Home communicated to Mr. Flynn from Holmes that he did not understand the May 18th

letter to be a claim because the letter simply notified Cooper's customers that they might have defective steel in their workover rigs. According to Home, Mr. Flynn and Mr. Fletcher agreed during their conversation that Holmes would monitor the situation for Home and let Home know if true claims did arise out of the May 18th Warning letter. Home argues that it relied on this agreement and waited to be notified of claims by either Cooper or Holmes, and it is undisputed that neither Cooper nor Holmes notified Home of any defective rig claims prior to Cooper's bankruptcy. Home argues, therefore, that it had no fault for failing to defend Cooper prior to Cooper's bankruptcy because Home had no notice of any claims prior to Cooper's bankruptcy.

The undersigned finds that factual issues permeate Home's "failure to notify" theory of liability. There are disputed issues regarding what Home and Holmes knew and when each knew what they did know about claims against Cooper. There are also questions of fact about the "agreement," if there was one, between Mr. Fletcher and Mr. Flynn. In short, the undersigned finds that a reasonable jury could find that it was Holmes' failure to monitor the situation and bring claims to Home's attention which caused Home to fail to defend Cooper prior to Cooper's bankruptcy.

2. Holmes'/Mr. Bogart's "No Coverage" Opinion

Home argues that but for Mr. Bogart's conduct as Holmes' president, Home would have had an affirmative defense to Cooper's claim that Home's failure to defend Cooper caused Cooper's bankruptcy and liquidation. Home initially defended against Cooper's claim by arguing that Home never had a duty to defend Cooper because Cooper never tendered any defective rig claims to Home for defense. In response, Cooper argued that Home was estopped from asserting a "no tender" defense because Mr. Bogart, acting as Home's agent, had previously told Cooper that Cooper's policies with Home did not provide coverage for the claims being asserted against Cooper for its use of defective steel in its workover rigs. Cooper argued that the reason it never tendered any claims to Home was because of this "no coverage" opinion rendered by Home's own agent. Home argues that it was due in significant part to the potential loss of its affirmative "no tender" defense that it decided to settle with Cooper for \$7.5 million. Thus, Home argues that its liability to Cooper was wholly caused by Mr. Bogart's unauthorized "no coverage" opinion. Home argues that had Mr. Bogart's "no coverage" opinion not been rendered, Home would have had a complete "no tender" defense to liability for failing to defend Cooper.

According to Home, Mr. Bogart rendered his "no coverage" opinion to Mr. Hug, Cooper's CFO, during their May 18, 1984 meeting at which Mr. Hug and Mr. Bogart discussed Cooper's Warning letter. Home also argues that Mr. Bogart confirmed his "no coverage" opinion in subsequent conversations he had with Mr. Barton, Cooper's president. The undersigned finds that it is undisputed that Mr. Bogart rendered some

form of "no coverage" opinion. What is hotly disputed by the parties is the scope of the no coverage opinion actually rendered by Mr. Bogart.

Holmes argues that the only coverage opinion rendered by Mr. Bogart was an opinion similar to that issued by Bankruptcy Judge Wilson – that warranty-type claims for damage to the workover rigs themselves would not be covered (i.e., product liability coverage similar to that which was offered to and rejected by Cooper in 1979), but that claims for personal injuries or damage to other property would be covered in the event of a rig collapse. Home argues that Mr. Bogart's coverage opinion was much more open-ended.

The entire "no coverage" opinion issue revolves entirely around the testimony of Mr. Hug, Cooper's CFO, Mr. Bogart, Holmes' president, and Mr. Barton, Cooper's president. Holmes argues that the Court must not consider Mr. Barton's testimony because if a no coverage opinion was rendered by Mr. Bogart it was rendered at his May 18th meeting with Mr. Hug and Mr. Barton was not present. Holmes argues, therefore, that Mr. Barton cannot testify about any coverage opinion rendered by Mr. Bogart. The undersigned does not agree. Mr. Barton has testified that he had conversations with Mr. Bogart himself in which Mr. Bogart confirmed his "no coverage" opinion, whatever that opinion was. Mr. Bogart's own testimony on this issue has itself "evolved" over time from a "no specific recollection" during the bankruptcy coverage case to a "specific recollection" in this case. Needless to say, there are credibility assessments which must be made with regard to Mr. Bogart's testimony.

The undersigned finds, therefore, that there are material questions of disputed fact throughout the Bogart "no coverage" opinion issue. The undersigned finds that a reasonable jury could conclude that by issuing a coverage opinion of any kind, which he was not authorized to do,^{6/} Mr. Bogart created the opportunity for confusion regarding the coverage issue and opened the door for a claim such as Cooper ultimately made – that a general no coverage opinion had been rendered. A reasonable jury could find, therefore, that it was Holmes' unauthorized "no coverage" opinion which deprived Home of a valid "no tender" defense and caused Home to be liable to Cooper for failing to defend Cooper prior to its bankruptcy.

^{6/} Citing to ¶ 11 of the parties' agency agreement, Home argues that Holmes was not authorized by Home to render coverage opinions with regard to any of Home's policies. See Doc. No. 277, Exhibit "14." Holmes was authorized to solicit business, collect premiums and forward claims. According to Home, Holmes violated its agency agreement with Home when Mr. Bogart issued a coverage opinion of any kind.

3. Conclusion

The only legal, as opposed to fact-based, argument Holmes makes against its liability for indemnity to Home is that Holmes' acts, as an agent of Home, cannot be imputed to Home to establish bad faith. Holmes cites Hays v. Jackson National Life Ins. Co., 105 F.3d 583 (10th Cir. 1997), which applies Oklahoma law, in support of its argument. Holmes argues that pursuant to the holding in Hays, Cooper would have been precluded in the underlying bad faith case from using Holmes' conduct as the basis of an estoppel against Home. The undersigned does not agree.

In Hays a life insurance company denied a claim filed by an insured's beneficiaries. The company denied the claim because it believed the insured's application contained material omissions about his medical history. The beneficiaries sued the insurance company for breach of contract and bad faith denial of their claim, arguing in part that the employee that solicited the policy was aware of the omitted medical information. The insurance company moved for and was granted summary judgment on the bad faith claim. The beneficiaries defended the motion by arguing that there were questions of fact about how the company's employee solicited the policy from the insured and what the employee knew or did not know about the insured's medical condition. Hays, 105 F.3d at 583-590.

On appeal, the Tenth Circuit in Hays held that the conduct of the employee that solicited the policy was not relevant to the beneficiaries' bad faith claim. The court held the beneficiaries' bad faith claim was necessarily based on the company's wrongful denial of the claim, and not on the company's conduct in selling the policy. The Court concluded, therefore, that how the employee acted when he solicited the policy was not relevant to whether the company acted tortiously when it disputed the beneficiaries' claim. The court concluded its analysis by holding that "[u]nder Oklahoma law, the alleged knowledge and acts of the agent at the time of the application is not imputed to the principal for purposes of determining whether the principal acted in bad faith." Hays, 105 F.3d at 590. This is the holding upon which Holmes relies.

The undersigned finds that the Tenth Circuit's holding in Hays does not provide a basis upon which to grant summary judgment on Home's implied indemnity claim. Initially, the undersigned is not convinced that Hays, and the cases on which it relies, are applicable outside of their specific factual situations (i.e., attempts by insureds to impute to the insurer an agent's subjective knowledge about a medical condition of the insured which is not on the insurance application). More importantly, there is nothing in Hays which suggests that an insured may not use the conduct of an insurer's agent

to estop the insurer from asserting an otherwise valid defense.⁷¹ Estoppel is based on the rules of equity and Hays in no way addresses itself to equitable concerns.

Holmes' exclusive reliance on Hays is also misplaced in light of Judge Burrage's previous determination that Texas law would apply to the bad faith action between Home and Cooper. See Doc. No. 106. Citing Oklahoma law on the issue of what Cooper would or would not have been able to assert in the underlying bad faith case is not controlling. As revealed by the previous footnote, the undersigned's cursory review of Texas law reveals that Texas does permit insureds to use the conduct of an insurer's agent as the basis for an estoppel. See, e.g., Cook v. Volney, 673 S.W.2d 232, 235 (Tex. App. 1984). At a minimum, the legal viability of Cooper's estoppel claim was uncertain enough to permit a jury to conclude that it was reasonable for Home to settle in the face of the potential loss of an otherwise valid "no tender" defense.

The undersigned finds that Home has presented at least some evidence from which a reasonable jury could conclude that Holmes, and not Home, was responsible for Home's pre-bankruptcy failure to defend Cooper. Consequently, summary judgment on Home's implied indemnity claim on the basis of Home's fault is not appropriate.

⁷¹ See, e.g., Celina Mutual Ins. Co. v. Citizens Ins. Co. of America, 349 N.W. 2d 547, 551 (Mich. App. 1984); Florio v. General Acc. Fire & Life Ass. Corp., 396 F.2d 510, 514 (2nd Cir. 1968); Cook v. Volney, 673 S.W.2d 232, 235 (Tex. App. 1984); Roberts v. Marine Bonding and Cas. Co., 404 A.3d 238, 242-43 (Me. 1979); Nationwide Mut. Ins. Co. v. Regional Elec. Contractors, Inc., 680 A.2d 547 (Md. App. 1996); and Patriol General Ins. Co. v. Mills, 506 S.E.2d 145, 147-48 (Ga. App. 1998). In all of these cases, the court permitted the insured to use the conduct of the insurer's agent to estop the insurer from asserting an otherwise valid defense (e.g., statute of limitations, no coverage, etc.).

V. COUNT I - HOME NEED ONLY ESTABLISH POTENTIAL, NOT ACTUAL, LIABILITY TO COOPER FOR ITS ALLEGED PRE-BANKRUPTCY FAILURE TO DEFEND COOPER.

A. THE RULE - AN INDEMNITEE MAY SETTLE THE INJURED PARTY'S CLAIM AND SEEK INDEMNIFICATION FROM A PUTATIVE INDEMNITOR WITHOUT HAVING TO ESTABLISH ITS ACTUAL LIABILITY TO THE INJURED PARTY AS LONG AS THE INDEMNITOR WAS ON NOTICE OF THE INJURED PARTY'S CLAIM AND GIVEN AN OPPORTUNITY TO PARTICIPATE IN SETTLEMENT NEGOTIATIONS AND OBJECT TO THE SETTLEMENT.

The parties disagree as to the elements of Home's indemnity claim under the facts of this case. Home argues that in order to prevail on its indemnity claim it need only establish three facts: first, that it was potentially liable to Cooper; second, that its potential liability to Cooper was caused by Holmes' conduct; and third, that its settlement of the potential liability for \$7.5 million was reasonable. Holmes argues, on the other hand, that Home must, in effect, step into Cooper's shoes and prove that Home was actually liable to Cooper for a specified sum. The issue presented by the parties' arguments is this: Must Home establish that it was actually liable to Cooper, or is Home only required to establish that it was potentially liable to Cooper?

Based on the undersigned's independent research and a review of all of the cases cited by the parties, the undersigned finds that requiring proof of actual liability is the general rule, from which a "potential liability exception" may be made after weighing the policy interests in encouraging settlements against considerations of fairness to putative indemnitors. See, e.g., Frederick v. Hess Oil V.I. Corp., 642 F.2d 53, 56 (3d Cir. 1981) (Seitz, C.J., dissenting).^{8/} Many courts have elaborated on the circumstances under which a potential liability exception should apply.^{9/} Generally,

^{8/} As recognized by Chief Judge Seitz, the decision whether to require actual liability in all situations or to recognize a potential liability exception is an important one. On the one hand, if actual liability is always required, settlements will be discouraged because of the difficult burden placed upon the indemnitee to establish its right to indemnification. On the other hand, the rule adopted must not be unfair to the indemnitor, who should be able to show that the indemnitee was not under a legal compulsion to pay the settled claim. Frederick, 642 F.2d at 56 (Seitz, C.J., dissenting).

^{9/} See, e.g., Burlington Northern, Inc. v. Hughes Bros., Inc., 671 F.2d 279 (8th Cir. 1982); Missouri Pac. R.R. Co. v. International Paper Co., 618 F.2d 492, 497 (8th Cir. 1980); Central Nat'l Ins. Co. v. Devonshire Coverage Co., 565 F.2d 490, 495-96 (8th Cir. 1977); Parfait v. Jahncke Service, Inc., 484 F.2d 296 (5th Cir. 1973); Whisenant v. Brewster-Bartle Offshore Co., 446 F.2d 394 (5th Cir. 1971); Missouri Pac. R.R. Co. v. Arkansas Oak Flooring Co., 434 F.2d 575, 580 (8th Cir. 1970); Tankrederiet Gefion A/S v. Hyman-Michaels Company, 406 F.2d 1039 (6th Cir. 1969); Hess Oil V.I. Corp. v. Firemen's Fund Ins. Co., 626 F. Supp. 882 (D.V.I. 1986); Dominic v. Hess Oil V.I. Corp., 624 F. Supp. 117 (D.V.I. 1985); Terra Resources, Inc. v. Lake Charles Dredging and Towing, Inc., 555 F.Supp. 406 (W. La. 1981), aff'd, 695 F.2d 828 (5th Cir. 1983); Burke v. Ripp, 619 F.2d 354 (5th Cir. 1980); and M & O Marine, Inc. v. Marquette Co., 730 F.2d 133 (3d Cir. 1984).

proof of actual liability is required where the settling indemnitee does not notify the putative indemnitor of a potential settlement of the underlying litigation, thereby depriving the indemnitor of an opportunity to approve the settlement, participate in the settlement negotiations, or assume the defense of the underlying claim. See Atlantic Richfield Co. v. Interstate Oil Transport, 784 F.2d 106, 110-13 (2nd Cir.1986).

"Notice sufficient to give the indemnitor a meaningful opportunity to defend is the indispensable element to be proven by the party seeking indemnity. If the indemnitor declines either to approve the settlement or to take over the defense, the indemnitee is required to prove only its potential liability to the plaintiff." Atlantic Richfield, 784 F.2d at 110-11. When the indemnitee has not given the indemnitor an opportunity to review, pass upon, or participate in the settlement, due process and equity require the indemnitee to demonstrate actual as opposed to potential liability.^{10/} There are no rigid rules regarding the type of notice which the indemnitee must give to indemnitor. The primary concern is fairness to the indemnitor. A formal tender of defense is not required, rather notice and an opportunity to participate is all that is necessary. See, e.g., Morris v. Schlumberger, 445 So.2d 1242, 1246 (La. App. 1984) (citing Burke, Parfait and Jennings). Thus, "where the party having a duty to indemnify has been notified or been made a party to the underlying proceedings and given an opportunity to participate in its settlement negotiations, courts have concluded that the defendant-indemnitee should not be required to prove the plaintiff's actual ability to recover the amount paid in the settlement. It is sufficient if the defendant-indemnitee proves that he was potentially liable to the plaintiff." Valloric v. Dravo Corp., 357 S.E.2d 207, 211-12 (W. Va. 1987).^{11/}

Neither the Tenth Circuit nor the Oklahoma Supreme Court have directly addressed the issue of what notice a settling indemnitee is required to give a putative indemnitor in order to trigger the "potential liability" exception to the general "actual liability" rule for indemnity actions. The decisions of the Tenth Circuit and Oklahoma Supreme Court which tangentially address the issue are, however, in accordance with the authorities discussed above - that a settling indemnitee need only show potential as opposed to actual liability to the injured party, as long as the putative indemnitor was given adequate notice of the settlement and an opportunity to object and assume defense of the action.

^{10/} Whisenant, 446 F.2d at 403; Parfait, 484 F.2d at 305; Morris v. Federated Mutual Insurance Co., 497 F.2d 538, 543-44 (5th Cir. 1974); and Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1216 (5th Cir. 1986); Atlantic Richfield, 784 F.2d at 112-13; Tankrederiet, 406 F.2d at 1042.

^{11/} See also Burke, 619 F.2d at 356-601; Parfait, 484 F.2d at 305; Tankrederiet, 406 F.2d at 1039; and Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1583-84 (11th Cir. 1992).

The Tenth Circuit has considered the effect of a settlement in a case where there was an express indemnity contract. In that case, the Tenth Circuit held as follows:

Ordinarily, to sustain a claim upon an indemnity contract . . . , it is necessary for the indemnitee to prove legal liability to the injured party. However, in Oklahoma and elsewhere in indemnity cases, where the indemnitor denies liability under the indemnity contract and refuses to assume the defense of the claim, then the indemnitee is in full charge of the matter and may make a good faith settlement without assuming the risk of being able to prove absolute legal liability or the actual amount of the damage. A contrary rule would make the right to settle meaningless in cases where the indemnitor has denied liability. [The only relevant inquiry] is whether the [indemnitee] made a reasonable, prudent and good faith compromise and settlement. In determining whether the settlement was made in good faith, the jury should consider the likelihood of a recovery by [the injured party] against the [indemnitee] and the reasonableness of the amount of the settlement

Chicago R.I. & P.R. Co. v. Dobry Flour Mills, 211 F.2d 785, 787-88 (10th Cir. 1964) (internal citations and footnotes omitted). There is no evidence of a formal tender of defense in Dobry. And while the Court did not discuss exactly what type of notice the indemnitee was required to give the indemnitor prior to settling the injured party's claim, it is clear that notice of the underlying claim and notice of a settlement was sufficient in that case.

The Oklahoma Supreme Court's decision in Booker involved a party who injured when a gas heater exploded. The injured party sued the manufacturer of the wall heater and the distributor of the wall heater. The injured party also sued the refiner, wholesaler and retailer of the natural gas that powered the heater. Prior to trial, the injured party settled his claims with the manufacturer and distributor of the heater. Trial proceeded on a products liability theory against the refiner, wholesaler and retailer of the natural gas, and resulted in a complete defense verdict. Six months prior to trial, the wholesaler had requested that the refiner take over its defense of the action. When the refiner refused to take over the wholesaler's defense, the wholesaler filed an indemnity claim against the refiner. At the conclusion of trial, the wholesaler sought judgment on its indemnity claim in the amount of the fees and costs it had expended in defense of the injured party's claim. The trial court dismissed the wholesaler's indemnity claim, and the wholesaler appealed to the Oklahoma Supreme Court. Booker, 785 P.2d at 298.

The question which the Oklahoma Supreme Court confronted was whether a manufacturer has a duty to indemnify its dealer against the cost of defending claims for loss caused by the manufacturer's defective product, even when the product is ultimately determined not to be defective. The majority recognized that the duty of a manufacturer to indemnify its dealer typically arises when the dealer is held liable because of the manufacturer's defective product. Nevertheless, the majority held that the manufacturer's duty to indemnify against the cost of defending product liability claims was not limited to situations where the product was ultimately determined to be defective. However, so as not to run afoul of the American Rule, pursuant to which everyone is responsible for their own legal fees, the Court held that the dealer must have taken a position at trial which was consistent to that taken by the manufacturer (i.e., the dealer must have conferred some benefit on the manufacturer). Booker, 785 P.2d at 298-99.

The majority's opinion in Booker sheds little light on the issue faced by the Court in this case (i.e., actual versus potential liability). However, the concurring opinion by Justices Summers and Doolin does provide some assistance. The concurring Justices wrote separately to clarify the basis for the indemnity claim recognized by the majority. They wrote to make it clear that the manufacturer's indemnity obligation was not based on a contract, but implied by law (i.e., a quasi contract). Booker, 785 P.2d at 300-301. While discussing the nature of the manufacturer's indemnity obligation, the concurring Justices discussed what type of notice the dealer would be required to give the manufacturer before it would be able to seek indemnity from the manufacturer. The concurring Justices held that the dealer "must notify the manufacturer and give him an opportunity to defend . . ." Id. at 304. The Justices held, however, that "[a] formal tender is not required if the manufacturer is given notice of the underlying action 'particularly if the indemnitor is a party to the action and the indemnitee's claim of indemnity is part of that action.'" Id. at 304 n.6 (citing Hanover Limited v. Cessna Aircraft Co., 758 P.2d 443, 450 (Utah App. 1988)). The concurrence in Booker does not address the case of a settling indemnitee like we have in this case. There is, however, no suggestion in the concurring opinion that dealers would have to establish their actual liability to the injured party before they could seek indemnification from manufacturers, as long as the manufacturer has adequate notice of the underlying lawsuit by the injured party.

Holmes' relies principally on 15 Okla. Stat. § 427^{12/} for its argument that to recover against Holmes for indemnity, Home must prove that it was actually liable, as opposed to potentially liable, to Cooper. Holmes argues that this statute establishes that Oklahoma requires a formal tender of the defense of an action to the putative indemnitor before an indemnitee may seek indemnification based only on his potential, as opposed to actual liability, to the injured party. The undersigned does not agree.

The undersigned finds that § 427 is not directly applicable to Home's indemnity claim. The reason § 427 is not applicable "is that section 427 begins with the language: 'In the interpretation of a contract of indemnity the following rules are to be applied, unless a contrary intention appears.' Since 'contracts' in Title 15 are express or implied in fact, and since indemnity sought in the present case must arise, if at all, in quasi-contract, section 427 does not apply." Booker, 785 P.2d at 302 (Summer, J. and Doolin, J., concurring). Section 427 also describes the effect of a "judgment" in the underlying action on a subsequent indemnity claim. Section 427(6) does not

^{12/} Section 427 provides as follows:

In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.
2. Upon an indemnity against claims or demands, or damages or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.
3. An indemnity against claims or demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands or liability incurred in good faith, and in the exercise of reasonable discretion.
4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity; but the person indemnified has the right to conduct such defense, if he chooses to do so.
5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former.
6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action of proceedings against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.
7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is applicable if he had a good defense upon the merits, which, by want of ordinary care, he failed to establish in the action.

address the effect of a "settlement" in the underlying action on a subsequent indemnity claim. For these reasons, the undersigned finds that § 427 is not sufficiently on point to overcome the weight of applicable authority discussed above, which holds that when a putative indemnitor has been notified of the underlying lawsuit and given an opportunity to participate in its settlement negotiations, the indemnitee may settle the case without fear of having to prove actual ability to the injured party in a subsequent indemnity action.

B. APPLICATION OF THE RULE – HOME NEED ONLY PROVE THAT IT WAS POTENTIALLY LIABLE TO COOPER BECAUSE HOLMES WAS ON NOTICE OF COOPER’S CLAIM AND HOLMES HAD AN OPPORTUNITY TO PARTICIPATE IN SETTLEMENT NEGOTIATIONS AND TO OBJECT TO THE SETTLEMENT.

At oral argument, the parties agreed that the issue of whether Home was required to establish actual or potential liability to Cooper was a question for the Court to decide. The undersigned agrees that the actual versus potential liability issue should be decided by the Court. Leaving the issue for the jury essentially requires Home to put on its case as if it were required to establish actual liability because Home would not know until the end of trial whether it was required to prove actual or potential liability. Having reviewed the evidence in the summary judgment record, the undersigned finds that there is sufficient evidence in the record for the Court to decide the actual versus potential liability issue without the need for an evidentiary hearing.

A brief history of this litigation is appropriate to put the discussion of Holmes’ notice into context. Cooper filed this lawsuit against Home in the bankruptcy court in September 1994. After extended briefing on the issue, the reference to the bankruptcy court was withdrawn and the case was transferred to this Court’s docket in March 1995. Doc. No. 16. Cooper moved for reconsideration of the order withdrawing the reference and after extended briefing, the motion to reconsider was denied in May 1995. Doc. No. 29. The first case management conference was held in late July 1995. Throughout September, October and November 1995, the parties filed a series of dispositive motions directed at each other’s claims and defenses. These motions were ruled on in April and May of 1996. The case was stayed from April 1996 to July 1996 to permit the parties to pursue settlement discussions. When the case did not settle in July 1996, the first Scheduling Order was entered in August 1996, which set a discovery deadline in February 1997 and a trial date in May 1997. Doc. No. 114. In October 1996, Home filed its motion for leave to amend its answer to add its third party indemnity and contribution claims against Holmes. Doc. No. 123. In January 1997, a settlement conference was set before Judge Lee West for February 1997. It was at this February 1997 settlement conference that Cooper and Home settled the underlying lawsuits for \$7.5 million. The Court granted Home’s request for leave to amend to add indemnity and contribution claims on March 7, 1997, and the

bankruptcy court approved the \$7.5 million settlement on March 18, 1997. Doc. No. 156.

It is undisputed that Holmes was aware of Cooper's claims against Home almost from the inception of this lawsuit. It is also undisputed that in October 1996, shortly after Home filed its application for leave to assert indemnity and contribution claims against Holmes, Holmes was aware that Home was asserting an indemnity claim against Holmes. Shortly after Home's motion for leave to amend its Answer was filed, Dan Wagner, an attorney for Home, had a telephone conversation with Jim Sturdivant, an attorney for Holmes. Mr. Wagner and Mr. Sturdivant briefly discussed Home's indemnity claim and set a date for a meeting between Home's lawyers and Mr. Sturdivant. At the end of October 1996, lawyers for Home met with Mr. Sturdivant in person for approximately two hours to discuss Cooper's claims and Home's claim of indemnity against Holmes. Home's lawyers also made overtures to Mr. Sturdivant about Holmes participating with Home in the defense of and discovery in the underlying Cooper case. Mr. Sturdivant expressed his shock that Home would attempt to seek indemnity from Holmes. At the meeting, Mr. Sturdivant vehemently denied that Holmes had any indemnity liability to Home, and Mr. Sturdivant essentially told Home's lawyers that Holmes would see them at the courthouse. See Doc. No. 277, Exhibits "21-23;" and Doc. No. 301, Exhibit "48."

After the October 1996 meeting, Home began sending deposition transcripts, other discovery materials and pleadings to Holmes for its review and to keep Holmes apprized of the underlying litigation with Cooper. Home also notified Holmes prior to the February 18, 1996 settlement conference that a settlement conference would be held before Judge West. Within days of the settlement conference, Holmes was notified that a settlement with Cooper had been reached. It is also undisputed that Holmes was aware of the settlement before it was approved by the bankruptcy court, and that Holmes interposed no objections to approval before the bankruptcy judge.

The undersigned finds that Holmes was given an opportunity to "participate"^{13/} in the underlying case. Holmes was also able, if it so chose, to participate in the February 1997 settlement conference. Holmes declined to do either as it had not yet been joined as a formal party because Judge Burrage had not granted Home's motion

^{13/} The Restatement of the Law of Judgments § 107, Comment e, contains the following statement: "There must also be a tender of control either joint or full. In order to bind the indemnitor in a subsequent action against him, the indemnitee is not obligated necessarily to surrender the entire control of the defense; he must, however, request the indemnitor to participate, and if judgment is given against the indemnitee he must permit the indemnitor to take appellate proceedings. Such tender is not essential if the indemnitor indicates that he would not participate and on the other hand it is not essential if in fact the indemnitor does participate." It is undisputed that Home asked Holmes to participate and that Holmes indicates that it would not participate. Thus, under the rule of the first restatement of judgments, Home was not required to make a more formal "tender" to Holmes than it did at its October 1996 meeting with Mr. Sturdivant.

for leave to amend. The undersigned finds further that Holmes had notice of the underlying claims by Cooper many months prior to the settlement conference. Holmes also had notice that Home was asserting an indemnity claim against Holmes approximately four months before the settlement conference and five months before the settlement was approved by the bankruptcy court. Given the fact that Holmes was on notice of the underlying claim and Home's indemnity claim, and the fact that Holmes had an opportunity to participate in settlement negotiations, and object to the settlement if it so chose, the undersigned finds that Home was entitled to settle the underlying Cooper case without fear of having to prove actual ability to Cooper in an indemnity action against Holmes. The undersigned finds, therefore, that to recover on its indemnity claim against Holmes, Home need only establish that it was potentially liable to Cooper and that the \$7.5 million was a reasonable settlement of that potential liability.

VI. COUNT II - THERE ARE MATERIAL QUESTIONS OF FACT WHICH PRECLUDE THE ENTRY OF SUMMARY JUDGMENT ON HOME'S CONTRIBUTION CLAIM.

The parties agree that Home's contribution claim is governed by 12 Okla. Stat. § 832 - Oklahoma's version of the Uniform Contribution Among Tortfeasors Act. Home has asserted its contribution claim in the alternative to its indemnity claim. Home argues that Holmes is entirely at fault for Home's \$7.5 million liability to Cooper. However, if the jury disagrees, Home argues that Holmes is at least partially at fault (i.e., a joint tortfeasor), and Home is entitled, pursuant to § 832, to contribution from Holmes in the amount of Holmes' *pro rata* share of fault.

A. PRO RATA SHARE

Section 832 states that

[t]he right of contribution exists only in favor of a tort-feasor who has paid more than their *pro rata* share of the common liability, and the total recovery is limited to the amount paid by the tort-feasor in excess of their *pro rata* share. No tort-feasor is compelled to make contribution beyond their *pro rata* share of the entire liability.

12 Okla. Stat. § 832(B).

Holmes argues that it is entitled to summary judgment on Home's contribution claim because Home's *pro rata* share of the common liability is 100% and Holmes' *pro rata* share of the common liability is 0%. In other words, Holmes argues that it had no fault at all with regard to Cooper. This argument is similar to the fault argument

Holmes made in connection with Home's indemnity claim. However, all Holmes had to establish to defeat Home's indemnity claim was that Home was partially at fault. To defeat Home's contribution claim, Holmes has to show that Home was totally at fault with regard to Cooper. For the same reasons the undersigned found material questions of fact precluding summary judgement in connection with Home's indemnity claim, the undersigned finds material factual issues on Home's contribution claim. Questions as basic as who knew what and when; who did what and when; and who agreed to do what and when, permeate the entire summary judgment record with regard to the conduct of Home and Holmes, their relationship with Cooper and their handling of the litigation which sprang from Cooper's March 1984 Warning letter. The undersigned finds, therefore, that the Court should not grant summary judgement on Home's contribution claim on the basis that Holmes has 0% fault as to Cooper.

B. REASONABLENESS OF THE \$7.5 MILLION SETTLEMENT

Section 832 states that

[a] tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor . . . in respect to any amount paid in a settlement which is in excess of what was reasonable.

12 Okla. Stat. § 832(B).

Holmes argues that it is entitled to summary judgment on Home's contribution claim because the \$7.5 million settlement is *per se* unreasonable. Holmes does not, however, suggest a settlement amount that it believes would have been reasonable. The undersigned finds that Holmes has not presented a valid basis upon which to grant summary judgment.

Even if Holmes were correct and it is was undisputed that the \$7.5 million settlement is unreasonable, that fact alone would not support a total summary judgment against Home's contribution claim. Holmes is free at trial to establish, for example, that the settlement was for \$3.5 million dollars more than was reasonable. That "unreasonable" amount would be taken off the top, leaving \$4 million that was reasonable. The jury would then apportion the \$4 million according to its finding regarding Home's and Holmes' relative fault as joint tortfeasors. The fact that some portion of the settlement is unreasonable is relevant to Holmes' ultimate liability, but not dispositive.

Cooper was seeking approximately \$86 million in actual damages, which could have been trebled to in excess of \$250 million, without taking into account Cooper's punitive damage claims. The \$7.5 million settlement was, therefore, a fraction of the

potential liability Home faced. Bankruptcy Judge Wilson approved the settlement. Judge Lee West was the settlement judge at the settlement conference which resulted in the settlement. Cooper's president, Mr. Barton, and the lawyers who negotiated the settlement believe that it was a reasonable settlement. The undersigned finds that a reasonable jury could conclude from the evidence currently in the summary judgment record that the \$7.5 million settlement was reasonable. Summary judgment on the basis of the *per se* unreasonableness of the settlement is, therefore, not appropriate.

VII. WHAT EVIDENCE MAY HOLMES' PRESENT AT TRIAL IN AN ATTEMPT TO ESTABLISH THE UNREASONABLENESS OF THE \$7.5 MILLION SETTLEMENT?

The parties agree that an element of Home's indemnity and contribution claim is the reasonableness of the \$7.5 million settlement of Cooper's claims. What the parties do not agree on is the type and scope of evidence which is relevant to such an inquiry. The parties' briefs on this issue are more in the nature of a motion *in limine*. The undersigned declines, therefore, to issue a definitive ruling on the issue. The undersigned finds that the issue is more appropriately resolved in a final fashion at a pre-trial conference when the Court will be able to evaluate the parties' arguments in relation to a particular piece of evidence or line of inquiry. Nevertheless, the undersigned offers the following observations.

To evaluate the reasonableness of a particular settlement, one must place themselves in the position of the parties at the time settlement was being discussed. The reasonableness of the settlement should be evaluated considering what information was available to the parties at the time a settlement was being contemplated. As a general proposition, second guessing and Monday-morning quarter-backing should not be permitted when evaluating a settlement at some future date - hindsight is nearly always 20/20. The undersigned believes, however, that it is permissible to show that a party contemplating settlement did not conduct the type or manner of investigation a reasonable person would have conducted before determining to settle a claim. It is within this framework that Holmes should be able to attack the reasonableness of Home's settlement with Cooper.

The undersigned has previously determined that Home should not be required to prove its actual liability to Cooper. Holmes should, therefore, be precluded from litigating or re-litigating the merits of the underlying claims asserted by Cooper against Home. Holmes is, however, permitted to attack the reasonableness of the settlement of those claims. Depending on the scope of such a reasonableness attack, it could easily devolve into a re-litigation of all of the underlying claims. The issue is, therefore, one of degree. The Court must balance Holmes' right to attack the reasonableness of the settlement against Home's right to be free from having to litigate the merits of the underlying claims in order to establish Holmes' indemnity obligation. Again, the undersigned declines to strike that balance in this Report and Recommendation. The

undersigned leaves the balance to be struck by the trial judge who will be in a much better position to evaluate specific evidentiary proffers.

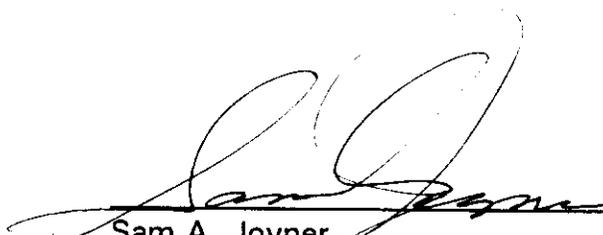
RECOMMENDATION

The undersigned recommends that Holmes' motion for summary judgment be **DENIED**. [Doc. No. 247]. The undersigned finds material question of disputed fact permeate the summary judgment record and warrant the denial of summary judgment.

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 his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation 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 Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 2 day of JUNE 2000.


Sam A. Joyner
United States Magistrate Judge

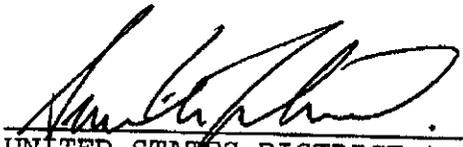
CERTIFICATE OF SERVICE

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 5th Day of June, 192000

C. Portello, Deputy Clerk

\$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$4,437.83 and \$2,196.09, plus accrued interest in the amount of \$2,491.26 and \$1,099.65, plus interest thereafter at the rate of 9.13% and 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 6.315% until paid, plus the costs of this action.

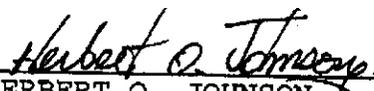

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


PHIL PINNELL
Assistant United States Attorney


HERBERT O. JOHNSON

PEP/alh

JKS/dkc

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

YUNDRA HOOPER,

Plaintiffs,

vs.

APAC-OKLAHOMA, INC.; and
BEARCON, INC.,

Defendants.

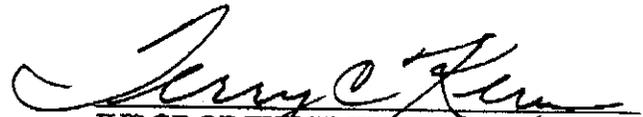
Case No. 99-CV-663K(E) ✓

ENTERED ON DOCKET

DATE JUN 5 2000

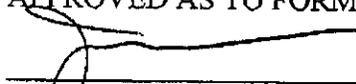
ORDER OF DISMISSAL WITH PREJUDICE

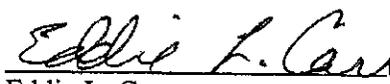
NOW on this 2 day of June, 2000, for good cause shown, the above-entitled action is hereby ordered dismissed, with prejudice.



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

APPROVED AS TO FORM:


James K. Secrest, II
Attorney for Defendants


Eddie L. Carr
Attorney for Plaintiff

of \$1,523.41, 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 6.375 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/llf

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

F I L E D

JUN 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN HOPSON,

Plaintiff,

vs.

K. STAATS, J. POWELL,
J.T. SPITLER, and R. OWENS,

Defendants.

)
)
)
)
) Case No. 95-CV-670-C ✓
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ENTERED ON DOCKET
DATE JUN 05 2000

JUDGMENT

This matter came before the Court for non jury trial on plaintiff's claim under Title 42, United States Code, Section 1983 for excessive force incident to his arrest on February 9, 1995. The issues having been duly considered and a decision having been rendered in accordance with the Findings of Fact and Conclusions of Law filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiff Marvin Hopson and against the defendants Kevin Staats, John Ray Powell, Joel Spitler and Roy Lee Owens jointly and severally and plaintiff Marvin Hopson is awarded damages in the sum of Thirty Thousand Dollars (\$30,000).

IT IS SO ORDERED this 2nd day of June, 2000.



H. DALE COOK
Senior United States District Court

48

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

F I L E D

JUN 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN HOPSON,)
)
Plaintiff,)
)
vs.)
)
)
K. STAATS; J. POWELL;)
J.T. SPITLER; and R. OWENS,)
)
Defendants.)

Case No. 95-CV-670-C ✓

ENTERED ON DOCKET
DATE JUN 05 2000

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Marvin Hopson brings this action pro se pursuant to Title 42, United States Code, Section 1983 alleging the individual defendants, Tulsa Police Officers, Kevin Staats, John Ray Powell, Joel Spitler and Roy Lee Owens, violated his Fourth and Fourteenth Amendment rights by use of excessive force against him during an arrest on February 9, 1995. Marvin Hopson sustained a broken left collar bone incident to the arrest. Hopson was charged and his case was tried to a jury in the District Court of Tulsa County where he was found guilty of possession of a controlled substance and acquitted of resisting arrest. Prior to sentencing, Hopson plead guilty to a separate offense of receiving proceeds derived from illegal drug activity. Hopson's criminal cases were combined for sentencing, wherein he received a prison term of ten years in each case, to run concurrent.

In support of his claim of excessive force, Hopson contends that incident to an arrest on February 9, 1995, the defendant police officers grabbed him for no reason, handcuffed him, and knocked him to the ground. In the struggle, plaintiff claims the officers choked him, struck him once on the clavicle and once on the head with a flashlight, and sprayed him with pepper spray. It is undisputed that as a result of the incident Hopson's collar bone was fractured in two places.

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In response to these allegations, the defendant police officers contend that they observed the plaintiff stuff a plastic baggie containing suspected illegal drugs in his mouth. As Officer Staats tried to handcuff Hopson he attempted to flee, and in the momentum caused Hopson and Staats to fall to the ground. Hopson was sprayed in an effort to subdue him and the baggie was forcefully extracted from his mouth. The defendants deny that they used excessive force during plaintiff's apprehension and arrest and deny that Hopson showed any visible signs of pain or injury.

In this case, plaintiff carries the burden of proof to establish his claim of excessive force by a preponderance of the evidence.

After considering the pleadings, testimony, exhibits, briefs and arguments, and in consideration of applicable law, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Jurisdiction and Venue

1. Plaintiff Marvin Hopson is a citizen of the State of Oklahoma.
2. Defendants Kevin Michael Staats, John Ray Powell, Joel Spitler and Roy Lee Owens are police officers employed by the City of Tulsa, Oklahoma.
3. The Court has jurisdiction pursuant to Title 28, United States Code, Section 1331 because the action is civil in nature and arises under the Constitution, laws, or treaties of the United States. Specifically, this action arises under the Fourth and Fourteenth Amendments to the United States Constitution.

B. Background

4. On February 9, 1995, at approximately 8:15 p.m., Tulsa Police Officer Joe Spitler received a call at the Uniform Division North Precinct from a confidential informant that a black male

wearing a brown jacket and blue jeans was selling crack cocaine on the premises of Johnny's Quick Stop, located at 2100 North Cincinnati in Tulsa, Oklahoma. Johnny's Quick Stop is a location known for illegal drug trafficking. Defendant Officers Spitler, Powell, Staats and Owens responded to the call. Spitler gave the description to Staats and advised him that he suspected the subject to be Mickey Dee, an individual known to deal in drugs at this location. Mickey Dee had recently been at Johnny's Quick Stop waving around an Uzi and selling drugs.

5. Spitler was the first officer to enter Johnny's Quick Stop at approximately 8:40 p.m. He immediately went to the back of the store and to the bathroom where drug transactions were known to occur. Owens followed Spitler into the store. As Powell was entering the store, he observed a black male leaving the store. The male was wearing blue jeans and a brown jacket. Upon inquiry by the officers of the store clerk whether Hopson was the only individual in or near the store, the store clerk indicated that Hopson was the only one around. Powell and Staats left the store first, followed by Spitler and Owens.

6. In the parking lot approximately ten feet from Hopson, Staats addressed Hopson requesting him to stop to speak to them. All four police officers were carrying flashlights and continued to approach Hopson. Powell was equipped with a 15,000 candlepower flashlight which illuminated Hopson. Powell observed Hopson pop something in his mouth that appeared to be wrapped in clear cellophane. Powell advised Staats that Hopson was attempting to swallow a baggie containing crack cocaine. All four officers approached Hopson. Two of the officers restrained Hopson as Staats placed handcuffs on him. Hopson struggled. One of the officers struck Hopson with his flashlight, once on the collar bone and once on the side of his face. Simultaneously Owens sprayed Hopson in the face with OC or pepper spray. Hopson fell to the ground, hit his head on

impact and was rendered unconscious. While unconscious Hopson's mouth fell open and the content was retrieved by Powell.

7. Powell testified that the plastic baggie that Hopson was carrying looked as if it contained crack cocaine. Powell is a member of the Uniform Division North street crime unit. Powell testified that he has observed crack cocaine on several occasions and from his experience he could identify crack cocaine by its appearance. A distance of five to ten feet was not a barrier to his observation due to the intensity of his flashlight.

8. Hopson was transported in a semi-conscious state to the Uniform Division North Precinct arriving at the precinct at approximately 9:15 p.m. Within the hour Hopson was fully conscious and complained of pain in his shoulder Hopson was seated handcuffed in the same room as the four defendant officers. The officers were completing the arrest report and the incident report. Hopson complained of pain in his left shoulder. Owens responded by repeatedly telling Hopson to shut up. Hopson's complaints of injury and pain were ignored by the defendants. Hopson remained handcuffed with a broken left collar bone for two hours at the Uniform Division North Precinct from approximately 9:15 p.m. until 11:15 p.m.

9. At that time, Officer Gene Watkins entered the precinct and was asked by one of the arresting officers to transport Hopson to the Tulsa County Jail. Watkins observed that Hopson had been in a scuffle. Hopson remained handcuffed as Watkins put Hopson in his patrol car. Hopson complained to Watkins of the pain in his shoulder and of his belief that his collar bone was broken. Watkins, following standard department procedure and protocol, took Hopson directly to Tulsa Regional Medical Center for a diagnosis of the injury knowing the Tulsa County Jail would not accept Hopson for booking without a medical release.

10. Hopson arrived at the emergency room of Tulsa Regional Medical Center, at 11:48 p.m. X-rays showed that Hopson sustained a fracture in two locations in his left collar bone. The bone fractures are separated about the width of a flashlight. Hopson's collar bone is permanently angled up and protrudes out from his shoulder. Hopson has lost at least a quarter-inch in length on the left side of his shoulder. Hopson's shoulder is chronically painful.

11. After being advised of the nature and extent of Hopson's injury, Watkins placed a telephone call. Following the telephone call, Watkins requested an executed medical release from the emergency room physician indicating that he was to take Hopson to the Tulsa County Jail for booking. Watkins obtained the medical release. The emergency room physician placed a sling on Hopson's arm for support and Watkins then transported Hopson to the Tulsa County Jail for booking.¹ Hopson did not receive any additional medical treatment.

CONCLUSION OF LAW

1. The Court has jurisdiction over the parties and the claims for constitutional violations under Title 42, United States Code, Section 1983 pursuant to Title 28, United States Code, Sections 1331 and 1343(a). Venue is proper in that the events involved herein occurred within the Northern District of Oklahoma.

¹ Upon the Court inquiring of defense counsel whether defendants had a copy of the medical release for Hopson obtained by Officer Watkins on February 10, 1995, counsel advised that the medical release was apparently not available in that all records available had been requested and received by counsel. The Court inquired of Department policy regarding the retention of records. Being advised of a three year record retention policy, the Court was concerned that Hopson's medical release was apparently not available even though the Department had notice of the filing of this lawsuit on July 21, 1995, approximately five months following the events at issue, and notice that the central issue in the case was the injury received by plaintiff.

2. The Fourth Amendment provides the source of constitutional protection from excessive force after a warrantless arrest, but before a judicial determination of probable cause. See, Graham v. Connor, 490 U.S. 386, 397 (1989). In addressing an excessive force claim, the Court must determine whether the arresting officers' actions were objectively reasonable in light of the facts and circumstances confronting the officers. Id. In Graham, the Supreme Court explained:

The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force. . . [n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers. . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second-judgments-in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. at 396-97.

The "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Id.

3. The Court finds and concludes that the defendant officers' use of force incident to the arrest in this case was unreasonable and excessive under the totality of the circumstances and violated Hopson's constitutional right to be free from excessive force by government officials. The right to arrest an individual carries with it the right to use some physical coercion to effect the arrest. See, e.g. Thompson v. City of Lawrence, Ks., 58 F.3d 1511, 1516 (10th Cir. 1995). This right entails only the use of reasonable force to effectuate the arrest, but it does not authorize the officers to employ excessive or unreasonable force in violation of an individual's Fourth Amendment rights. Martinez v. City of Albuquerque, 184 F.3d 1123, 1126 (10th Cir. 1999).

4. This case is decided upon the exhibits and the credibility of the witnesses presented at trial. The facts of the events leading to Hopson's arrest are in dispute. Hopson presented his version of the events. With some exceptions, not relevant to the claim of excessive force, Hopson's story regarding the events which occurred immediately before and after the arrest was credible and supported by the exhibits. The defendant officers' statements of events were less credible, conflicting, and varied among the four officers and varied on different occasions that the events were presented by them.

5. The rule of witness sequestration was not invoked during the federal trial of this case which occurred on January 26, 2000 and May 2, 2000. Each defendant-officer was able to hear the testimony of the other officers prior to taking the stand. Defense witness, Officer Gene Watkins stated that he had read the testimony of his fellow officers prior to taking the stand to testify in this case.

A. Discrepancy in Testimony

6. The discrepancy in the officers' testimony is illustrated by comparing (1) Staats' testimony at trial on January 26 and May 2, 2000, with statements by Staats in his Arrest Report, Narrative Supplemental prepared on February 10, 1995, and the Narrative Supplemental prepared on February 13, 1995; (2) Powell's federal trial testimony of January 26 and May 2, 2000, with his state court testimony at the preliminary hearing in Hopson's state criminal case which occurred on April 28, 1995; (3) Spitler's federal trial testimony on January 26, 2000, with the other defendants' testimony; (4) and Owens' federal trial testimony on January 26 and May 2, 2000.

Regarding the Description of the Suspect and the Approach of the Arresting Officers:

On January 26, 2000, Spitler testified that he received a call indicating there was a unidentified subject selling cocaine on the premises of Johnny's Quick Stop. He was provided only a limited description that the subject was a black male, wearing blue jeans and a brown jacket. The call was received around 8:15 p.m. Spitler testified that he informed the other officers of the description and his belief that the suspect was Micky Dee, an individual known to deal in drugs at that location. Spitler further testified on January 26, 2000, that he did not observe the scuffle between Hopson and the other officers because Hopson was already on the ground when he exited Johnny's Quick Stop.

On January 26, 2000, Powell testified that the four defendant officers responded to the call and arrived at the scene in two patrol cars. Powell stated that he received the description of the suspect from Spitler. At the April 28, 1995, preliminary hearing Powell testified that all four officers arrived at Johnny's Quick Stop together in one patrol car. Powell testified that he did not get a description of the suspect. The description was given to Spitler and Staats. Powell further testified that Spitler and Staats were the first ones that stopped Hopson so he may have matched their description.

On May 2, 2000, Powell testified that he and Staats were the first to approach Hopson but Spitler and Owens followed behind. At the preliminary hearing on April 26, 1995, Powell testified that all four officers approached Hopson together and were actively involved in the scuffle.

In the Narrative Report of February 9, 1995, Staats stated that he received information from a confidential informant that Marvin Hopson was "holding a quantity of crack cocaine."

Regarding the Presence, Use and Size of Flashlights:

On January 26, 2000, Powell testified that he was able to observe that Hopson had a small baggy (about 2" x 1") in his right hand containing crack cocaine from a distance of five feet because he carried a 15,000 candle flashlight. He testified that all the officers had flashlights illuminating Hopson. At the April 28, 1995, preliminary hearing Powell testified that all four officers were carrying flashlights. On May 2, 2000, Powell testified that he was only carrying a "small flashlight," he does not carry a long flashlight, and he did not believe any of the other officers were carrying long flashlights.

On January 26, 2000, Owens testified that he has a flashlight the size of the one described by Hopson but that he could not remember whether he had it with him on that occasion. Owens also could not recall whether any of the officers were carrying flashlights on the night in question.

Regarding the Scuffle/ Retrieving the Cocaine/ Consciousness/ Spraying and Handcuffs:

On January 26, 2000, Powell testified: (1) Staats demanded that Hopson spit out the cocaine, but Hopson refused to do so; (2) Hopson was handcuffed before he went down and after he hit the ground he was sprayed because he continued to kick the officers.

At the April 28, 1995, preliminary hearing Powell testified: (1) while officers were struggling to get Hopson handcuffed, he was sprayed, and then he charged into Staats; (2) Hopson was handcuffed and sprayed before he was brought down; (3) Hopson fell on his back, hit his head, and was knocked unconscious; (4) while Hopson was still unconscious, his mouth fell open and Powell reached in and retrieved two baggies of cocaine so he would not choke on them; (5) all four officers had their hands on Hopson before he went down, and (6) in the fall Hopson broke his collar bone.

On May 2, 2000, Powell testified: (1) Hopson was handcuffed and sprayed after he hit the ground; (2) he escorted Hopson to the patrol car after the scuffle; and (3) he had no recollection of Hopson being unconscious during the time he was in contact with him.

In the February 9, 1995, Arrest Report Staats stated: (1) Hopson put a baggie in his mouth. As he started to choke on it, Hopson opened his mouth and Powell pulled a baggie out; (2) Hopson was handcuffed before he went to the ground; (3) as Hopson was attempting to flee, he was knocked to the ground

In a February 9, 1995, Narrative Supplemental Staats stated: (1) in attempting to handcuff Hopson, he attempted to escape; (2) in getting him under control, Hopson hit his head on the ground and was temporarily rendered dazed; and (3) Hopson spit out a baggie of crack cocaine.

In the February 9, 1995, Narrative Report Owens stated that Powell retrieved two baggies of cocaine from Hopson's mouth.

In the Narrative Supplemental of February 13, 1995, Staats stated: (1) Hopson was handcuffed after he hit the ground; (2) was sprayed after he hit the ground because he continued to resist the officers; and (3) once on the ground, Powell reached in his mouth and retrieved the cocaine as Hopson was choking on it.

Regarding the Tulsa Regional Medical Center and Booking at the Tulsa County Jail:

Hopson was taken to the emergency room by Officer Gene Watkins, arriving at 11:48 p.m. and dismissed at 1:20 a.m. Watkins left the emergency room and 15 minutes later Watkins booked Hopson into the Tulsa County Jail.

In the February 13, 1995, Narrative Supplemental Staats stated: (1) prior to transporting Hopson to jail he complained of pain in his left shoulder; (2) Hopson was taken to the hospital where

he was found to have a fractured left collar bone; (3) the injury had to have occurred when Hopson was attempting to break away and was taken to the ground; (4) Hopson's initial complaints were from the affects of the pepper spray; and (5) Hopson did not appear to be injured.

On January 26, 2000, Powell testified: (1) Hopson started complaining about pain about an hour into the booking process at the Uniform Division North; and (2) probably he and Spittler transported Hopson to the hospital.

On January 26, 2000, none of the defendant officers identified Officer Gene Watkins as the officer who transported Hopson to the Medical Center. The testimony of the defendants was one of the defendants transported Hopson to the Medical Center and to booking. After Hopson took the stand and identified Watkins as the transporting police officer, the defense produced Officer Watkins on the subsequent trial date, May 2, 2000.

Officer Watkins testified that Hopson did not appear to be injured but that he looked upset and as if he had been in a scuffle. Owens does not recall Hopson appearing to be in pain or exhibiting any obvious injuries.

Hopson's testimony of January 26, 2000, was consistent with his testimony of May 2, 2000, Hopson's recitation of events is reasonably consistent with the time and dates shown on the exhibits.

7. The Court concludes it is not credible that Hopson was conscious at all times nor is it credible that Hopson did not complain of shoulder pain until one hour into the booking process. It is undisputed that Hopson's collar bone was fractured in two places during the arrest. Hopson's testimony is credible that he was either unconscious for a period of time after receiving the injury or that he immediately started complaining of pain once he became conscious. In either event, it is clear from the exhibits that Hopson remained at Uniform Division North for over two hours with a broken

collar bone prior to being transported to the hospital by an officer who was not involved in the scuffle.

8. The court further concludes that Hopson received the broken collar bone as a result of being struck by a long flashlight carried by one of the officers. The flashlight's impact was of sufficient force to fracture Hopson's collar bone in two places.

9. In assessing the reasonableness of the force used by police officers making an arrest, the Court is to consider the severity of the crime, whether the subject posed an immediate threat to the officers' safety, and whether the subject was resisting arrest. Wilson v. Meeks 52 F.3d 1547, 1553 (10th Cir. 1995), and Latta v. Keryte, 118 F.3d 693, 701 (10th Cir. 1997) (citing Graham, 490 U.S. at 396-97).

In this incidence, the officers testified that they had a clear view of Hopson as they approached him. Hopson's hands were in view and there was no indication that Hopson was armed or dangerous. Hopson was alone, confronted by four armed police officers. Hopson is a male, thin and of average size and build. All four officers are larger in build than Hopson. Hopson was not in the process of committing a violent crime in view of the officers. At most, the officers were under the belief that Hopson was attempting to swallow a small baggie of cocaine. Even if Hopson was successful in ingesting the cocaine, it would be assessable at a later time as evidence of the non-violent crime. Although the officers testified Hopson charged into Staats, at that instance he was being held by two officers and was immediately over-powered by Staats. When evaluating a claim of unreasonable force a court must consider the amount of force used in relationship to the need presented, the extent of the injury inflicted, and the motives of the officers. Martin v. Board of County Commissioners, 909 F.2d 402, 407 (10th Cir. 1990) (citing Wise v. Bravo, 666 F.2d 1328,

1335 (10th Cir. 1981). Under this scenario, four officers and a can of pepper spray were clearly sufficient to subdue Hopson for apprehension and arrest. Striking Hopson with a large flashlight causing Hopson's collar bone to be broken in two locations and permanent disfigurement is conduct "sufficiently egregious to be of Constitutional dimensions." Id.

B. Award of Damages

The plaintiff Marvin Hopson presented his case to the Court pro se. Hopson did not offer any evidence of compensatory damages such as medical expenses, lost wages or lost earning capacity. The only medical evidence received was the emergency room physician's notes from the Tulsa Regional Medical Center, Hopson's testimony of pain and suffering, and physical evidence of Hopson's permanent disfigurement to his shoulder caused by the broken collar bone. Thus, the Court has limited the award of damages to the evidence presented.²

Accordingly, the Court finds in favor of plaintiff Marvin Hopson and against the defendants Officers Kevin Staats, John Ray Powell, Joel Spitler and Roy Lee Owens jointly and severally. The Court further finds and concludes that Marvin Hopson is awarded the sum of \$30,000 as reasonable compensation for the injury and for the violation of his Constitutional right under the Fourth and Fourteenth Amendments occasioned by the use of excessive force by said defendants resulting in the breakage and permanent disfigurement to his left collar bone.

ORDER

ACCORDINGLY IT IS THE ORDER OF THE COURT that plaintiff MARVIN HOPSON recover the sum of Thirty Thousand and no/100 dollars (\$ 30,000) jointly and severally from the

² Had the Court received evidence of other compensatory loss suffered by Hopson, the amount of the award would have been greater.

defendants KEVIN STAATS, JOHN RAY POWELL, JOEL SPITLER and ROY LEE OWENS on his claim under Tile 42, United States Code, Section 1983 for injury received and for violation of his Constitutional right to be free from excessive force by government agents.

IT IS SO ORDERED this 2nd day of June, 2000.


H. DALE COOK
Senior United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

YALE 21 ASSOCIATES LIMITED)
PARTNERSHIP, an Oklahoma)
limited partnership,)
)
Plaintiff,)
)
v.)
)
THE GUARDIAN LIFE INSURANCE)
COMPANY OF AMERICA, a)
New York corporation,)
)
Defendant,)
)
and)
)
JAMES W. DILL, an individual,)
)
Counterclaim Defendant.)

F I L E D

JUN -2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0999-BU(E)

ENTERED ON DOCKET
DATE JUN 05 2000

REPORT AND RECOMMENDATION

On February 16, 2000, defendant The Guardian Life Insurance Company of America ("Guardian") filed a Motion for Partial Summary Judgment (Dkt. # 13) on two claims asserted by plaintiff, Yale 21 Associates Limited Partnership ("Yale 21"). The Court referred Guardian's motion to the undersigned for a report and recommendation. See 28 U.S.C. § 636. For the reasons set forth below, the undersigned recommends that Guardian's motion be **DENIED**.

FACTS

Yale 21 and Guardian are the members of 2100 Yale L.L.C. ("2100 Yale"), which was formed for the purpose of developing and operating a shopping center at the corner of 21st Street and Yale Avenue in Tulsa, Oklahoma. Delays and cost overruns in construction and development of the shopping center, known as "Centennial Plaza," gave rise to this lawsuit.

On September 13, 1996, Yale 21 and Guardian entered into a contract, known as the "Operating Agreement." Yale 21 was the developer and James W. Dill, President of Yale 21's general partner, was the guarantor. The Operating Agreement provided, among other things, that construction of Centennial Plaza was to be completed by September 13, 1997, that Yale 21 was to fund developer costs in excess of a guaranteed cost, and Yale 21 was to obtain Guardian's approval for sale of any "pad sites," or property to lease for free-standing stores. Construction was not complete by September 13, 1997, and construction costs exceeded the guaranteed cost. Yale 21 caused 2100 Yale to sell three pad sites.

Yale 21 filed suit on November 22, 1999, seeking a declaratory judgment concerning the Operating Agreement and related contracts. Count I(a) and (c) are at issue here. Count I(a) of the complaint sets forth Yale 21's request for a ruling that Yale 21 is not in default of any provision of the Operating Agreement or any other obligation to Guardian and that Guardian's attempt to place Yale 21 in default is ineffective. Count I(c) sets forth Yale 21's request for a ruling that Yale 21 is entitled to purchase the interest of Guardian in 2100 Yale as provided in Section 20.1 of the Operating Agreement. Guardian filed a counterclaim seeking a determination that Yale 21 is in default.

Guardian claims that (1) Yale 21 has defaulted by failing to complete construction of the shopping center within the specified development period; (2) Yale 21 has defaulted by failing to fund developer costs; (3) Yale 21 has defaulted by causing the sale of two pad sites without having obtained the written approval of Guardian; and (4) because Yale 21 has defaulted on its obligations under the Operating Agreement, it is not eligible to purchase Guardian's interest in 2100 Yale. Yale 21 counters that (1) the parties extended the date of completion by contract; (2) the parties extended

funding by contract; (3) Guardian consented in writing to the sale of the pads; and (4) Guardian offered to sell its interest in 2100 Yale to Plaintiff.

Yale 21 has attached documents to its response brief purporting to support its position. These include, among others, a construction loan agreement pursuant to which Stillwater National Bank increased the amount of financing for the project and the maturity date of the agreement, and a commitment for permanent financing from Nationwide Life Insurance Company (“Nationwide”), pursuant to which Nationwide subsequently increased the amount funded and the maturity date of its commitment. Guardian signed these documents. Yale 21 also attached to its response brief an agreement that Guardian and Yale 21 signed on October 29, 1998 (“1998 Agreement”), in an effort to resolve some of their differences. This 1998 Agreement references cost increases, provides for additional capital contributions by Guardian and modifies the interest of the parties, among other things. Yale 21 asserts that this agreement modified the 1996 contracts.

Correspondence attached to the briefs of both parties indicate that the parties consistently disputed whether Guardian approved of actions taken by Yale 21 to develop the project. Yale 21 argues that problems with Associated Wholesale Groceries, Inc. (AWG), one of the Centennial Plaza tenants, caused part of the delay, which Guardian exacerbated by withholding approval for construction plans and by refusing to approve litigation against AWG. Yale 21 argues that Guardian also delayed extending its approval or disapproval for a lease agreement with another tenant, Richmond Gordman ½ Price Stores, Inc. In short, Yale 21 contends that Guardian “did not respond to draw requests in a timely fashion, did not approve leases or disapprove leases in a timely fashion, and consistently engaged in activities to impede the project and to force the managing partner out of the project.” (Resp. Br., Dkt. # 23, at 7, ¶ 14.) Finally, Yale 21 attached a post-litigation letter

that appears to be part of settlement negotiations in which Guardian offered to sell its interest in 2100 Yale.

REVIEW

Standard of Review

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993), cert. denied, 510 U.S. 1120 (1994).

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.

Celotex, 477 U.S. at 317. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). "There mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff. Anderson, 477 U.S. at 252. 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.” Id. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garrett v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998).

Yale 21's legal arguments focus on modification of the Operating Agreement, waiver of its terms, and estoppel due to Guardian's conduct. Although neither party briefed choice of law issues, both parties relied on Oklahoma law in their briefs. The Operating Agreement states that the Delaware Limited Liability Company Act, 6 Del.C. §18-101, applies to the rights and obligations of the members of 2100 Yale, as well as administration and dissolution of the company; the Operating Agreement is silent as to choice of law for a contract action. The parties agreed to jurisdiction and venue in this District. The law of the forum where the contract is made or is to be performed generally governs contract actions in cases where the contract does not include a choice of law provision. Gamble, Simmons & Co., v. Kerr-McGee Corp., 175 F.3d 762, 767 (10th Cir. 1999). For the purposes of this motion, the undersigned recommends that Oklahoma law be applied.

Admission of Facts

Guardian argues that Yale 21 has admitted the facts set forth in Guardian's opening brief by failing to comply with Local Rule 56.1(B). That rule directs the non-moving party to state “if applicable” the number of the movant's facts that the non-moving party disputes. “All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.” N.D. LR 56.1(B); Taylor v. Pepsi Cola Co., 196 F.3d 1106, 1108 n.1 (10th Cir. 1999). Yale 21 has failed to comply with the rule, unless it intended to admit Guardian's statement of undisputed facts. Yale's 21's

admission of the facts as set forth by Guardian, however, does not inevitably lead to the conclusion that Guardian is entitled to partial summary judgment.

Events of Default

Guardian asks the Court to find that Yale 21 is in default of its obligations under the terms of the Operating Agreement, and that such default has specific implications. Section 7.3 of the Operating Agreement requires Yale 21 to “cause construction of the Original Improvements within the Development Period at a total cost not to exceed the Guaranteed Cost” Guardian claims that Yale 21 failed to complete construction of the shopping center within the specified Development Period. Section 7.3 also required Yale 21 to pay for substantial completion in excess of the Guaranteed Cost and to pay for all funding requirements incurred after September 13, 1997, which would be necessary to complete construction. Guardian claims that Yale 21 has failed to fund these costs. Section 22.4(C) of the Operating Agreement requires Yale 21 to obtain Guardian’s approval before selling any part of the property. Guardian argues that Yale 21 caused the sale of two pad sites without having obtained Guardian’s written approval. Section 20.1 provides that, in the Event of Default (a defined term), a non-defaulting member has the right and option to purchase the entire membership interest of the defaulting member in 2100 Yale. Guardian claims that because Yale 21 has defaulted on its obligations under the Operating Agreement, it is not eligible to purchase Guardian’s interest in 2100 Yale.

Guardian argues that the terms of the Operating Agreement are unambiguous, and interpretation of an unambiguous contract is wholly a question of law. Public Service Co. of Oklahoma v. Burlington Northern R.R., 53 F.3d 1090, 1097 (10th Cir. 1995); Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority, 896 P.2d 503, 514 (Okla. 1994). Yet, Guardian is not

entitled to partial summary judgment even if all of the provisions of the Operating Agreement were deemed unambiguous, given that there are genuine issues of material fact as to whether Yale 21 has defaulted and, if so, whether Yale 21 has affirmative defenses which, if proven, excuse any default. The Operating Agreement, by itself, does not govern the entire relationship of these parties as it pertains to Centennial Plaza. Whether the 1998 agreement modified key provisions and whether Guardian's conduct nullified their effect are issues that should be left to the finder of fact.

Modification

The 1998 Agreement

The document crucial to Yale 21's argument is the 1998 Agreement. "A claim under an earlier contract will be governed by a later agreement if the latter operates to supersede or rescind the former." Shawnee Hosp. Authority v. Dow Const., Inc., 812 P.2d 1351, 1353 (Okla. 1990). The 1998 Agreement addressed the need for additional capital contribution to continue the project due to an increase in cost. The parties entered into the agreement to resolve disputes regarding the cause of and responsibility for the cost increase in the amount of \$1,840,000. (See 1998 Agreement, attached as Ex. L to Pl. Resp. Br., Dkt. # 23.) A provision in the agreement entitled "Ratification of Joint Venture Documents" provides that all prior agreements between the parties ("JV Documents") "are hereby modified in a manner consistent with the terms and conditions set forth in this Agreement." The parties also agreed, in the next sentence, to "hereby ratify and affirm the existence, validity and enforceability of the JV Documents and, except as specifically modified in this Agreement, agree that the JV Documents shall remain in full force and effect." (Id. at 4, ¶ 7).

However, the next paragraph, entitled "Entire Agreement/No Waiver," provides:

This Agreement constitutes the entire agreement among the parties with respect to the \$1,840,000 cost issue described above, and all other communications between the parties relating thereto, whether written or oral, are superceded by this Agreement. Furthermore, The Guardian, Developer and the Guarantor, by entering into this Agreement, are not waiving any of their respective rights under the JV Documents as to any cost increases incurred or other issues arising among the Members prior to or since the Effective Date other than those matters expressly addressed in this Agreement. . . .

(Id. at 4, ¶ 8). Yale 21 relies on paragraph seven, the ratification provision; Guardian relies on paragraph eight, the “no waiver” provision. Yale 21 asserts that the September 13, 1997 completion date anticipated in the Operating Agreement is inconsistent with the 1998 agreement. Guardian argues that the 1998 Agreement addressed additional funding needs but said nothing about extension of the Development Period. Regardless of what the 1998 Agreement may or may not say about the completion date, it does address the funding issue, at least in part. The undersigned proposes findings that the 1998 Agreement is sufficiently ambiguous, and Yale 21 has shown sufficient disagreement as to both funding and the completion date, so as to require submission of the issues to a jury.

Other Documents

Yale 21 also argues that the financing agreements, tenant leases, and other contracts with third parties indicate Guardian’s intent to modify, or at least assent to modification of, the Operating Agreement. In essence, Yale 21 contends that subsequent agreements to extend loans and leases reflect a modification of the completion date for construction as set forth in the Operating Agreement. Neither party attached copies of the tenant leases to their briefs,¹ but Yale 21 attached a copy of the construction loan agreement with Stillwater National Bank (Pl. Resp. Br., Ex. F). Yale

¹ Exhibit I to Pl. Resp. Br. is an unsigned letter from Associated Wholesale Grocers, Inc. to 2100 Yale L.L.C. and Guardian which references a lease between 2100 Yale and AWG and indicates AWG’s approval of plans and specifications for a Reasor’s Grocery Store.

21 also attached a letter from Nationwide to 2100 Yale, dated October 13, 1998 (Pl. Resp. Br. Ex. E.) The letter references an Application /Contract for Mortgage Loan, but it is not attached.

Yale 21 cites to case law for the proposition that a written contract may be modified by subsequent writings which refer to that contract, Stebbins v. Lena Lumber Co., 89 Okla. 244, 214 P. 918, 920 (1923), and that multiple written instruments, not executed at the same time, which refer to the same subject matter and show on their face that they were executed with the intent of carrying out the other agreements, must all be construed together. See Bixler v. Lamar Exploration Co., 733 P.2d 410, 411-12 (Okla. 1987); Davis v. Hastings, 261 P.2d 193, 195 (Okla. 1953). The construction loan agreement does not expressly refer to the Operating Agreement, its subject matter, or any intent to carry out the Operating Agreement. Apparently, Yale 21 asks the Court to assume that the financing agreements, tenant leases, and other documents (which Yale 21 did not attach) refer to the Operating Agreement and were meant to be construed together to carry out its intent. This is not an unreasonable assumption, but Yale 21's recitation of case law and conclusory statements about documents, by themselves, do not constitute evidence of modification.

Nonetheless, Guardian does not deny the existence of other documents or its signature on the construction loan agreement with Stillwater National Bank. The construction loan agreement reflects an extended maturity date for the loan. It may or may not reflect Guardian's assent to an extended completion date for construction of the project. Guardian argues that Yale 21 has failed to support any alleged modification by new and independent consideration, as required by case law. See, e.g. Watt Plumbing, Air Conditioning and Elec. Inc. v. Tulsa Rig. Reel & Mfg. Co., 533 P.2d 980, 983 (Okla. 1975). However, whether the parties extended new and independent consideration necessary for a modification of the existing contract has become a question of fact. See Hargrave

v. Canadian Valley Elec. Co-op, Inc., 792 P.2d 50, 56 (Okla. 1990). In summary, whether the construction loan agreement or any other financing agreement, contract, loan, or other document modifies the terms of the Operating Agreement presents a genuine issue of material fact precluding summary judgment.

The Pad Site Sale

Yale 21 also asserts that a written contract may be modified by an executed oral agreement, Okla. Stat. tit. 15, § 237 (1991); Pfeiffer v. Peppers Refining Co., 197 Okla. 603, 173 P.2d 581 (1946), and the parties are bound by changes thus made with the express or implied consent of the parties. Mitchell v. Spurrier Lumber Co., 31 Okla. 834, 124 P. 10, 13 (1912). Yale 21 does not explicitly state what oral agreement was executed or when, but it contends that Guardian's "specific consent to the sale of the pads modified any terms of the contract which might have prohibited that sale." (Resp. Br., at 15.) This statement mischaracterizes the record. Guardian approved the sale of a corner pad site for \$550,000 on February 16, 2000, after Yale 21 transferred two other pad sites for \$433,000 each. Guardian did not give its specific consent to the sale of the two pads sold prior to February 16, 2000. Whether Guardian's approval of the third pad site sale constitutes implied consent of the earlier sales is a question the parties have vigorously disputed, and continue to dispute. Whether a written contract has been modified by subsequent oral agreement is ordinarily a question of fact. See Eugene Whittington & Co. v. Universal Ins. Co. of Newark, N. J., 104 P.2d 425, 426 (Okla. 1946). As such, it is not an appropriate issue for summary judgment.

Waiver

Citing Johnson v. E. V. Cox Construction Co., 620 P.2d 917 (Okla. Ct. App. 1980), Yale 21 contends that Guardian waived contract performance violations by Yale 21. "Contracting parties can

expressly or implicitly waive performance violations and assent to contractually proscribed procedures.” Id. at 920. Yale 21 specifically asserts that parties can waive the materiality of a time requirement and can claim only such damages sustained by reason of the delay if work is allowed to continue past the deadline. See, e.g., Oklahoma State Fair Exposition v. Lippert Bros., Inc., 243 F.2d 290, 292 (10th Cir. 1957). Since Guardian allowed the contract to continue past the deadline and did not promptly declare a breach, Yale 21 argues, Guardian waived its right to treat the contract as breached. See Robberson Steele Co., v. Harrell, 177 F.2d 12, 16 (10th Cir. 1949).

Yale 21 asserts that Guardian knew about changes to tenant contracts that, through no fault of Yale 21, occurred after the completion date set forth in the Operating Agreement. Yale 21 also claims that Guardian approved a delay in completing and leasing the store to be occupied by AWG, and that Guardian knew about tenant and lending institution requirements that led to the delay. Guardian’s approval of leases executed after the date of completion set forth in the Operating Agreement, according to Yale 21, implies that Guardian intended for work to continue and thus, approved modification to the contract. Yale 21 attached correspondence to its brief which provides some support for its argument or at least raises a factual dispute as to this issue.

Yale 21 also attached an affidavit by James W. Dill indicating that Guardian also refused to pursue litigation against AWG when AWG allegedly defaulted on its lease (Resp. Br., Ex. C.) In this manner, Yale 21 asserts, Guardian caused further delay in completion of the project and a loss of rent that would have offset the project cost. A party to a contract cannot prevent performance of conditions of a contract and then claim the benefit of a breach of those conditions. See, e.g. Federal Deposit Ins. Corp. v. Everett A. Holseth & Co., 36 F.3d 1004 (10th Cir. 1994). Whether a party has

prevented the performance of a contract or failed to cooperate with another party is a question of fact for the jury. Id. at 1007-08.

Guardian contends that Yale 21 had an obligation under the Operating Agreement to fund Developer Costs regardless of tenant problems or Guardian's knowledge of them. (Def. Reply Br., Dkt. # 26, at 8-9.) This argument is beside the point. The reason for cost overruns and construction delays, and conduct in response thereto, are directly relevant to the issue of whether Guardian waived contract performance by Yale 21. The alleged waiver is an issue for the trier of fact. Guardian further argues that waiver requires a showing of an "intentional relinquishment of a known right," Robberson Steel Co., 177 F.2d at 15, and Yale 21 has failed to make such a showing. At this stage of the proceedings, Yale 21 does not have to prove waiver. It must merely show that a genuine issue of fact exists as to whether Guardian waived its rights. Construing the record in the light most favorable to Yale 21, there is sufficient evidence presented in the documents and correspondence attached to the parties' briefs which could lead a rational trier of fact to find for Yale 21.

Estoppel

Yale 21's final defense is Guardian's failure to act in such a "reasonable manner" as to inform Yale 21 of its intended claim of breach. See Spurgin v. Bennett, 196 Okla. 673, 168 P.2d 134 (1946). Yale 21 argues that it would have taken steps to force AWG to comply with its lease if it had known that Guardian planned to assert breach of contract against Yale 21. Guardian characterizes this argument as the invocation of equitable estoppel, which requires "(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 that

it be acted upon, and (5) the person to whom it was made acted in reliance upon it to its detriment.”
Indiana Nat'l Bank v. State Dep't of Human Servs., 857 P.2d 53, 64 (Okla. 1993).

Guardian points to a document submitted by Yale 21 as evidence that Yale 21 knew of Guardian's position with respect to developer costs at least by September 8, 1998. (See Letter from Jim Dill to Karen Farnsworth, Esq., attached to Pl. Resp. Br. as Ex. D.) However, Yale 21's knowledge that Guardian deemed cost increases the responsibility of Yale 21 does not necessarily mean that Yale 21 knew Guardian would declare a breach of contract by Yale 21. Guardian's efforts to inform Yale 21 of its position with regard to cost increases does not necessarily equate with efforts to inform Yale 21 of its intent to declare a breach.

At the very least, the evidence presents a sufficient issue of material fact to require submission to a fact-finder as to whether Guardian notified Yale 21 in a timely manner of its intent to declare a breach. Yale 21 has presented evidence, sufficient to withstand summary judgment, that it may be able to establish the elements of estoppel.

Membership Interest

Finally, Guardian argues that Yale 21 is not eligible to purchase Guardian's interest in 2100 Yale because Yale 21 has defaulted on its obligations under the Operating Agreement. If Yale 21 is able to establish that it has not defaulted under the terms of the Operating Agreement, or, alternatively, that its default is excused, it may be able to purchase Guardian's interest under the terms of Section 20.1 if it can also prove a default by Guardian. Yale 21's statement that Guardian has offered to sell its interest in 2100 Yale to Yale 21 (Resp. Br., Dkt. # 23, at 12, ¶ 26) is beside the point. It is also an inappropriate statement to make in response to a motion for partial summary judgment since the offer was made by Guardian's counsel as part of settlement negotiations. (See

Letter from Richard Koljack to John Carwile, dated February 16 2000 attached to Pl. Resp. Br. as Ex. S.) Nonetheless, discussion of whether either party is eligible to buy out the interest of the other under the terms of Section 20.1 is premature without a finding of default or legitimate excuse for default. These issues await a determination by the trier of fact.

CONCLUSION

Based upon the foregoing, the undersigned recommends that Guardian's Motion for Partial Summary Judgment (Dkt. # 13) be **DENIED**.

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); 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 2nd day of June, 2000.

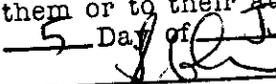


CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

5 Day of June, 2000, 10:44



370

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

FILED

CATHERINE D. FREEMAN,)
)
 Plaintiff,)
)
 v.)
)
 PROVIDENT LIFE & ACCIDENT)
 INSURANCE COMPANY, a Tennessee-)
 based insurance company authorized to)
 transact business in the State of)
 Oklahoma,)
)
 Defendant.)

JUN 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99 CV 00826
Judge Burrage

ENTERED ON DOCKET

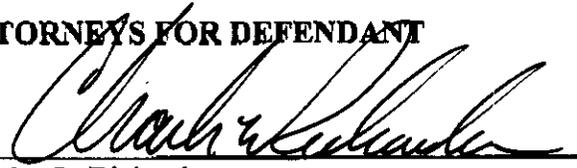
DATE JUN 2 2000

JOINT STIPULATION OF DISMISSAL

The parties hereby stipulate to the dismissal of this action with prejudice to refiling.



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c/5

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

F I L E D

BETTY STIPE,
SSN: 432-80-7628,

Plaintiff,

v.

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

Defendant.

JUN 01 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 99-CV-525-M

ENTERED ON DOCKET

DATE JUN 02 2000

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 1st day of June, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

Plaintiff was born June 16, 1945 and was 51 years old at the time of the hearing. [R. 29, 168]. She claims to have been unable to work since 1982 due to Systemic Lupus Erythematosus (lupus)². [R. 29, 168, Plaintiff's Brief].

The ALJ determined that Plaintiff has a severe impairment consisting of lupus but that she retains the residual functional capacity (RFC) to perform a complete range of light work subject to sitting or standing no more than two hours at a time; walking no more than three hours at a time; a total of no more than five hours sitting, two hours standing, or three hours walking during an eight hour day; occasionally squat; frequently bend and reach; and a mild restriction on unprotected heights, being around moving machinery exposure to marked change in temperature and humidity, exposure

² Systemic Lupus Erythematosus, a chronic, remitting, relapsing inflammatory disease and often febrile multisystemic disorder of connective tissue, acute or insidious in onset, characterized principally by involvement of the skin, joints, kidneys and serosal membranes. *Dorlands Illustrated Medical Dictionary*, 964 (28th. ed. 1994).

to dust, fumes and gases, driving, and vibration. [R.20]. He determined that Plaintiff could not return to her past relevant work (PRW) of mail sorter but decided, based upon the testimony of a vocational expert (VE) that there were other jobs available in significant numbers in the economy that Plaintiff could perform with this RFC. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 22]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the decision of the ALJ is not supported by substantial evidence. Specifically, she contends the ALJ failed to properly consider all the medical expert's testimony at the hearing and that he failed to rely upon the VE's response to a hypothetical question that presented all her impairments. [Plaintiff's Brief]. The Court agrees. For the reasons set forth below, the Court finds this case must be reversed and remanded to the Commissioner for the immediate calculation and award of benefits.

S.Y. Andelman, M.D., a Rheumatologist, testified as a medical expert (ME) at the hearing on March 7, 1997. [R. 133-134, 148]. He had reviewed the medical records in the claim file but had not examined Plaintiff. [R. 150, 161]. Dr. Andelman testified that the record contained two opposing opinions as to whether Plaintiff met the "criteria" for a diagnosis of lupus.³ [R. 151]. The doctor testified the first positive

³ 20 C.F.R. Ch. III, Pt. 404, Subpt. P, App. 1. 14.00 B.1: This disease is characterized clinically
(continued...)

ANA found in the record was 10/5/92. [R. 152]. He also testified, however, that he was "sure it was done beforehand because she was diagnosed in '76 by Dr. April evidently, and he doesn't make a diagnosis without positive findings." *Id.* Dr. Andelman advised that the records of Plaintiff's treating physician, Dr. B.B. Baker, were incomplete as they did not contain the ANA tests results although there were references in Dr. Baker's notes regarding those and other tests for lupus. [R. 153-156]. He noted Dr. Baker had prescribed medication for Plaintiff that would be normal medications for lupus and thyroid problems. [R. 156]. It was Dr. Andelman's opinion, based upon the medical records, that Plaintiff evidently met the criteria for lupus during the time period at issue in this claim.⁴ [R. 156]. He testified that during the limited time period focused upon by the ALJ, June 21, 1983 to March 31, 1984, Plaintiff had minor symptoms of lupus and her condition did not meet or equal the "listings."⁵ [R. 157, 160]. He also testified, however, that he felt Plaintiff suffered from a

³ (...continued)

by constitutional symptoms and signs (e.g., fever, fatigability, malaise, weight loss), multisystem involvement and, frequently, anemia, leukopenia, or thrombocytopenia. Immunologically, an array of circulating serum auto-antibodies can occur, but are highly variable in pattern. Generally, the medical evidence will show that patients with this disease will fulfill The 1982 Revised Criteria for the Classification of Systemic Lupus Erythematosus of the American College of Rheumatology. (Tan, E.M., et al., *Arthritis Rheum.* 25: 11271-1277, 1982).

⁴ The parties agree Plaintiff must prove she was disabled on or before March 31, 1984, as her disability insurance coverage expired on that date.

⁵ 14.02 Systemic lupus erythematosus. Documented as described in 14.00 B1, with involvement of one of the following: Joint; Muscle; Ocular; Respiratory; Cardiovascular; Digestive; Renal; Skin; Neurological; Mental, or Lesser involvement of two or more organs/body systems listed above with significant, documented, constitutional symptoms and signs of severe fatigue, fever, malaise, and weight loss. At least one of the organs/body systems must be involved to at least a moderate level of severity.

combination of problems, lupus and hypothyroid, and that weakness and fatigue is normal for a person with lupus and hypothyroidism. [R. 151, 156, 163, 190].

The ALJ cited only a portion of Dr. Andelman's testimony in his decision denying benefits, and then stated: "Dr. Andelman testified that the claimant did not meet the diagnostic criteria for the lupus listing. The claimant's ANA was 273, the date of the first positive ANA test was October 5, 1992." [R. 19]. As noted above, the testimony of the ME was just the opposite. He actually testified that the first ANA test found in the record was October 5, 1992, but he was convinced, after reviewing the entire medical record available at the time, that ANA tests had been conducted prior to that date and that Plaintiff did indeed meet the criteria for the diagnosis of lupus during the relevant time period. [R. 152, 156].

In addition to misstating the conclusions articulated by the ME during his testimony, the ALJ failed in his duty to consider all the relevant medical evidence of record in reaching his conclusion as to disability. See *Baker v. Bowen*, 886 F.2d 289, 291 (10th Cir. 1989). The following testimony was elicited from Dr. Andelman by Plaintiff's attorney at the hearing:

Q. Okay. What would you -- in light of your experience, what would you -- would you feel it's reasonable that that -- with this particular record before us that she would have a difficult time completing an eight-hour workday?

A. Yes, she would.

Q. Okay. And that's at any level. Is that correct. Was that a yes or --

A. Yes.

Q. Okay.

ATTY: Nothing further, Your Honor.

RE-EXAMINATION OF MEDICAL EXPERT BY ADMINISTRATIVE LAW

JUDGE:

Q. Okay. When you say would have difficulty completing an eight-hour workday, what do you mean by that? Would she be able to work eight hours a day, or would she not be able to work eight hours a day? If she did, would she be tired or --

A. If she, if she rests -- if she had certain rest periods, she might complete an eight-hour day. Without rest at different times because of fatigue syndrome, she couldn't work an eight-hour day.

Q. And what kind of rest periods are we talking about?

A. Two, three, four times a day. That's a program I give many of my patients.

ATTY: And this restriction would comply with the -- with her condition at the time that we're talking about. Is that correct?

ME: Yes.

[R. 166-167].

The ALJ chose to ignore this testimony in his decision denying benefits. This type of selective recitation of the record is prohibited. See *Switzer v. Heckler*, 742 F.2d 382, 385-86 (7th Cir. 1984) ("The [Commissioner's] attempt to use only the portions of a doctor's report favorable to [his] position, while ignoring other parts, is improper"); *Smith v. Bowen*, 687 F.Supp. 902, 904 (S.D.N.Y. 1988) ("Although the ALJ is not required to reconcile every ambiguity and inconsistency of medical testimony, he cannot pick and choose evidence that supports a particular conclusion") (citing *Ferraris v. Heckler*, 728 F.2d 582, 587 (2d Cir. 1984); *Fiorello v. Heckler*, 725 F.2d 174, 175-76 (2d Cir. 1983); *Ceballos v. Bowen*, 649 F.Supp. 693, 700 (S.D.N.Y. 1986)).

Furthermore, the ALJ offered no explanation as to his reason for disregarding this portion of the ME's testimony. At a minimum, the ALJ would have to explain his reason(s) for rejecting part of the doctor's opinion. See *Garfield v. Schweiker*, 732 F.2d 605, 609 (7th Cir. 1984) (holding that if the ALJ and Appeals Council had reason to reject certain reports, "those reasons should have been stated"). The ALJ is required to address uncontroverted evidence he chooses not to rely on. See *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996).

When rendering a decision, an ALJ is required to consider the totality of the circumstances and articulate his considerations for the record. *Winfrey*, 92 F.3d at 1020. "To find that the [Commissioner's] decision is supported by substantial

evidence, there must be sufficient relevant evidence in the record that a reasonable person might deem adequate to support the ultimate conclusion." *Bernal v. Bowen*, 851 F.2d 297, 299 (10th Cir.1988).

In addition, it is troubling that the Appeals Council also ignored Dr. Andelman's testimony, especially in light of the January 22, 1999 letter to the council by Plaintiff's attorney, which specifically raised the issue and cited the ME's testimony in the record. [R. 144]. See *Sorenson v. Bowen*, 888 F.2d 706, 712 (10th Cir. 1989) (the Appeals Council did not rely on substantial evidence in its finding and ignored both substantial evidence to the contrary and contradictory Tenth Circuit case law); *Nieto v. Heckler*, 750 F.2d 59, 61 (10th Cir. 1984) (Appeals Council abused its discretion in ignoring social security disability claimant's complaints which were supported by medical evidence).⁶

The Court finds the Commissioner's failure to accord proper consideration to the medical evidence would require, at the least, remand of the claim to the Commissioner for reconsideration. However, Plaintiff's claim has been pending since 1995 and, in view of the Vocational Expert's testimony that there would be no jobs available for Plaintiff that would allow the required rest periods as described by the ME, [R. 195], the Court finds that additional fact finding would not be useful and that further administrative proceedings would only further delay the appropriate determination and

⁶ The Court also notes counsel for the Commissioner, in Defendant's brief, failed to address the testimony of the medical expert regarding required rest periods in order for Plaintiff to work 8-hour days, which was specifically raised by Plaintiff in her Memorandum Brief.

award of benefits. See *Dollar v. Bowen*, 821 F.2d 530, 534 (10th Cir. 1987) ("outright reversal and remand for immediate award of benefits is appropriate when additional fact finding would serve no useful purpose") (citing: *Podedworny*, 745 F.2d 210, 222 (3rd Cir. 1984) (production by [Commissioner] of additional evidence to support finding of no disability doubtful when [Commissioner] has burden of proof in already lengthy proceeding)). See also *Broadbent v. Harris*, 698 F.2d 407, 414 (10th Cir. 1983) (reversal with order to grant benefits when prima facie case of disability not sufficiently rebutted by [Commissioner]).

Accordingly, the Court exercises its discretion pursuant to 42 U.S.C. § 405(g) and REVERSES and REMANDS the case to the Commissioner with directions to award disability benefits in accordance with Plaintiff's September 15, 1995 application.

SO ORDERED this 1ST day of JUNE, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESA LYNN EDWARDS,)
)
Petitioner,)
)
)
)
)
HOWARD RAY, Warden of Central)
Oklahoma Correctional Facility, McCloud,)
OK, and DREW EDMONDSON, Attorney)
General of the State of Oklahoma,)
)
Defendants.)

99-CV-0761-B (E) /

ENTERED ON DOCKET
DATE JUN 02 2000

ORDER

Petitioner applies for a writ of habeas corpus through her retained appellate counsel pursuant to 28 U.S.C. § 2254, and this application is before the Court for decision. It is conceded Petitioner has exhausted her state court remedies for purposes of habeas corpus review and her habeas corpus petition has been timely brought. No evidentiary hearing is required as Petitioner has not met the requirements of 28 U.S.C. § 2254(e)(2).

Petitioner is an inmate in the custody of the Central Oklahoma Correctional Facility, Oklahoma Department of Corrections, serving an eight (8) year sentence following a plea of guilty pursuant to a plea agreement.

On October 27, 1997, the Petitioner was charged with the crime of attempting to obtain a controlled drug by fraud after former conviction of two or more felonies, in violation

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of Okla. Stat. Supp. 1996, tit. 63, § 2-407(A)(1), in the District Court of Tulsa County, State of Oklahoma, Case No. CF-97-509. The Petitioner faced an enhanced penalty for the offense between twenty years' imprisonment to life imprisonment, Okla.Stat. tit. 21 1991, § 51.

Previous to the guilty plea hearing on December 29, 1997, defendant, her counsel, prosecution's counsel, and ultimately, the court, signed a document captioned "Findings of Fact - Acceptance of Plea." In pertinent part, this document states:

"Is there a plea agreement? Yes
What is your understanding of the plea agreement? State agrees to strike 2nd page; 8 Years In, \$1,000 Fine; \$250 VCF; \$100 DACF; \$500 Mental Health Assessment; + Ct. Costs. cc w/parole revocation. - CT Orders Defendant into F.O.R.T. Program & ~~New Beginnings Program.~~" (The New Beginnings Program language is lined out).

The transcript of the plea hearing reflects that defendant was mentally sound and properly advised of her right to a jury trial and waived same. Pertinent additional dialogue at the time of the plea hearing, in which defendant was under oath, provides as follows:

THE COURT: * * * Ms. Edwards, I need you to raise your right hand, please madam. Do you solemnly swear or affirm the testimony you shall give will be the truth, the whole truth and nothing but the truth, so help you God?

MS. EDWARDS: Yes, Your Honor.

* * *

THE COURT: Did you read and understand the information in your charges against you?

MS. EDWARDS: Yes, Your Honor.

THE COURT: Do you have any questions about either one of those documents?

MS. EDWARDS: No, Your Honor.

THE COURT: Madam, you've read and understood each one of those documents. You know you're charged in CF-97-5090 with the offense of attempting to obtain controlled drugs by fraud after prior conviction of two or more felonies. This offense for you carries a minimum penalty of twenty years up to a life sentence and a fine up to \$10,000. Do you understand that?

MS. EDWARDS: Yes, Your Honor.

* * *

THE COURT: What are the recommendations, Ms. Keely?

MS. KEELY: Strike the second page, eight years in custody of the Department of Corrections, \$1000 fine and court costs, \$250 Victims' Compensation Fund, \$100 District Attorney Drug Fund, \$500 mental health assessment.

THE COURT: Is that your understanding as well as your agreement, madam?

MS. EDWARDS: Yes, Your Honor.

THE COURT: Counsel?

MR. MALONE: Yes, Your Honor.

THE COURT: Based upon these recommendations, madam, is it your free and voluntary desire to give up your right to trial by jury as well as non-jury trial?

MS. EDWARDS: Yes, Your Honor.

THE COURT: Anybody force you, threaten you or pressure you to get you to do so?

MS. EDWARDS: No, Your Honor.

THE COURT: This is what you want to do given your options, madam?

MS. EDWARDS: Yes, Your Honor.

THE COURT: Do you concur, counsel?

MR. MALONE: Yes, Your Honor.

* * *

THE COURT: Court will accept that waiver. Madam, to the amended information in CF-97-5090, it's alleged you did in the state of - on October 23, 1997, Tulsa County, State of Oklahoma did commit the felony offense of attempting to obtain controlled drugs by fraud. To that charge, madam, how do you plead?

MS. EDWARDS: Guilty.

THE COURT: Are you pleading guilty because you are guilty and for no other reason?

MS. EDWARDS: For no other reason. I'm guilty.

THE COURT: Anybody force you, threaten you or pressure you to get you to plead guilty to that?

MS. EDWARDS: No, Your Honor.

THE COURT: This is what you want to do, given your options?

MS. EDWARDS: Yes, Your Honor.

THE COURT: Tell me briefly, what did you do?

MS. EDWARDS: I called in a prescription and attempted to pick it up and was arrested.

THE COURT: Do you happen to hold any kind of license that allows you to call in a prescription, madam?

MS. EDWARDS: No, Your Honor.

THE COURT: Did you actually have a prescription from a doctor, madam?

MS. EDWARDS: No, Your Honor.

THE COURT: Did this happen in Tulsa County?

MS. EDWARDS: Yes, Your Honor.

THE COURT: Do you concur with your client's plea, sir?

MR. MALONE: Yes, Your Honor.

THE COURT: The Court finds there is a factual basis for a plea of guilty. The Court accepts the plea of guilty and makes a finding of guilt. * * *

* * *

THE COURT: Court having accepted your plea of guilty and made a finding of guilt will follow the State's recommendations and sentence you to eight years in prison, assess a \$1000 fine plus the court costs, a \$250 Victim's Compensation Fund assessment, \$100 District Attorney Drug Fund assessment. Also, the Court will assess a \$100 Mental Health Fund assessment. In addition, the Court will order you to complete - reduced that from \$500, by the way. In addition, the Court will order you to complete the FORT Program. There will be no 120 day review in

this case. The Court will give you credit for the time you served thus far.. * * *

The striking of page 2 of the Information had the effect of eliminating the after former conviction of two or more felonies from the charge. The record reflects the New Beginnings Program was lined through on the signed Findings of Fact - Acceptance of Plea and was no part of the allocution at the plea hearing.¹ The reference to cc in the Findings of Fact - Acceptance of Plea was a reference to the fact that any sentence for defendant's parole violation of the prior felony conviction was to be concurrent with the instant offense.

The Findings of Fact - Acceptance of Plea and the transcript, above quoted, state the Court will order you (defendant) to complete the F.O.R.T. Program.² The Department of Corrections concluded shortly after the defendant commenced her confinement sentence that she was not qualified for the F.O.R.T. Program because of her specific eight (8) year commitment sentence, and as noted above, the court actually stated, "There will be no 120-day review in this case."

Not long after the defendant commenced serving her eight (8) year sentence, the

¹New Beginnings, the record reveals, is an approximately sixteen-week drug treatment program offered to Mabel Bassett Correctional Center facility residents only. Fifteen applicants are considered for the New Beginnings program twice annually out of the 333 Mabel Bassett female inmates in custody.

²F.O.R.T. is an acronym for "Female Offender Regimented Treatment." It was designed for defendants in a delayed or deferred sentencing case and/or cases where the court ordered a 120-day sentencing review. Fed.R.Evid. 201.

parole authorities, acting through the Chief Executive, ordered revocation of the defendant's prior parole for five years to run consecutive with her eight (8) year sentence. This effectively made the defendant's commitment sentence thirteen (13) years. The Oklahoma Court of Criminal Appeals, in its order granting post-conviction relief on June 28, 1999, corrected this error by stating and ordering:

'We find Petitioner has established entitlement to post-conviction relief under 22 O.S. 1991, § 1080(d) which requires modification of her sentence. IT IS THEREFORE THE ORDER OF THIS COURT that Petitioner's eight (8) year sentence in Case No. CF-97-5090 be MODIFIED to run concurrently with Petitioner's five (5) year sentence in Case No. CRF-93-2330. In that regard, the District Court is further ORDERED to prepare a new Judgment and Sentence in Case No. CF-97-5090 reflecting the sentence is to run concurrently with the sentence in Case No. CRF-93-2330.'

In its opinion, the Oklahoma Court of Criminal Appeals noted that the trial court denied post-conviction relief concerning the F.O.R.T. Program claim because the trial court was without authority to order completion of the F.O.R.T. Program, and further noted that while Petitioner was in fact sent to the F.O.R.T. Program, she was removed six days later because she did not qualify for the F.O.R.T. Program. The Oklahoma Court of Criminal Appeals denied Petitioner's relief relative to the purported violation of the plea agreement concerning the F.O.R.T. and/or New Beginnings Programs.

In the Petitioner's brief before the Oklahoma Court of Criminal Appeals for the trial court's denial of her post-conviction relief, on page 10, under Conclusion, Petitioner states:

"Through no fault of her own, Ms. Edwards was misled into believing that she would only serve eight (8) years and she is now actually serving thirteen (13) years. * * *"

The Oklahoma Court of Criminal Appeals granted Petitioner's petition in this regard so she is now serving the agreed upon eight (8) year sentence, not thirteen years.

Petitioner now urges the following propositions before this Court:

1. The Oklahoma Court of Criminal Appeals denied Ms. Edwards' due process of law when it ignored a comprehensive body of well-settled Oklahoma jurisprudence and did not order that Ms. Edwards receive a new trial.
2. The Court of Criminal Appeals' partial performance of Ms. Edwards' plea agreement violates her right of due process of law.

The substance of Petitioner's argument is that once the Oklahoma Court of Criminal Appeals found Petitioner was denied the benefit of her bargained plea agreement, Petitioner was entitled to have her plea agreement set aside or withdrawn and she is entitled to a trial in reference to the crime of attempting to obtain a controlled drug by fraud. Further, when Petitioner was not placed in the F.O.R.T. and New Beginnings Programs, this rendered the plea agreement unknowing and involuntary, destroying the voluntary nature of her plea, thus denying her due process. The Court disagrees. Petitioner's arguments are ill-suited for both the facts reflected in the record and the applicable law.

Petitioner is now serving the eight (8) year custodial sentence for which Petitioner originally bargained. Petitioner urges that when the parole authorities erred and ran her five (5) year parole revocation sentence consecutive to her underlying eight (8) year sentence, this

gives her a due process right to withdraw her guilty plea and demand a trial on the underlying charge. It should be noted that the Petitioner makes no claim of innocence in her post-conviction filings.

28 U.S.C. § 2254(d)(1)(2) provides two statutory bases for granting federal habeas corpus relief if the adjudicated 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; 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.

The analysis proceeds under paragraph (1) above as paragraph (2) is inapplicable because a factual predicate for the finding of guilty was established in the trial court.

The decision of the Oklahoma Court of Criminal Appeals granting Petitioner's requested relief in part by ordering her eight (8) year principal offense sentence to run concurrent with her five (5) year parole revocation sentence is not an unreasonable application of clearly established federal law as determined by the Supreme Court. In the case of *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274, 279 (1969), the Supreme Court stated the standard for determining the validity of a guilty plea is whether "such a plea was voluntarily and knowingly entered by the defendant." The voluntariness of the plea is determined by considering all of the relevant circumstances surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747

(1970).

There are two potential remedies for the government's breach of a plea agreement: either remand for specific performance of the plea agreement or withdrawal of the guilty plea. As stated in *Allen v. Hadden*, 57 F.3d 1529, 1534-35 (10th Cir. 1995), (quoting from *United States v. Canada*, 960 F.2d 263, 271 (1st Cir. 1992), "[t]he choice of remedy rests with the court and not the defendant." There is authority that specific performance is the preferred remedy. *U.S. v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996). The Oklahoma Court of Criminal Appeals granted specific performance of the plea agreement, running the sentences concurrently. This choice of remedy rests with the court and not the Petitioner.

Regarding Petitioner's complaint she entered her plea of guilty relying on the fact that she would be placed in the F.O.R.T. Program, the district court was without authority to order the Oklahoma Department of Corrections to place an inmate in any particular program. In the case of *Fields v. Driesel*, 941 P.2d 1000, 1005 (Okla.Crim.App. 1997), the Oklahoma Court of Criminal Appeals stated that due to the separation of powers, a district court is without authority to order the Oklahoma Department of Corrections to place an inmate in any given program or to prevent an inmate from being placed in a particular program. In *Fields*, the court stated:

"The Oklahoma Legislature, at 57 O.S. 1991, § 501 *et seq.* (the Oklahoma Corrections Act of 1967), granted to the Department of Corrections the sole and exclusive power to operate the state

prisons. The Act provides for appointment of a Director and sets forth the powers and duties of that Director. *See e.g.*, 57 O.S. 1991, §§ 507 and 510; 57 O.S.Supp. 1996, §§ 510, 510.9 and 510.10. The Director's duties specifically include the assignment of prisoners to and from EMP (Electronic Monitoring Program) and the determination of which prisoners may be assigned to that program rests solely within the discretion of the Director of the Department of Corrections. *See* 57 O.S.Supp. 1996, § 510.9.

"This Court has recognized for a long time that custody and place of confinement is an administrative matter and not a judicial act. *See e.g.*, *Ex Parte Hampton*, 87 Okl.Cr. 416, 198 P.2d 751, 754 (1948); *Ex Parte Hunt*, 93 Okl.Cr. 106, 225 P.2d 193 (1950).

Id.

The assignment of inmates to various rehabilitative programs while in confinement is within the discretion of the prison authorities. "Broad discretionary authority is necessary because the administration of a prison is 'at best an extraordinarily difficult undertaking.'" (quoting from *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974), *Hewitt v. Helms*, 459 U.S. 460, 467, 103 S.Ct. 864, 869 (1983). "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him (her) and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Id.* at 468 (citing *Montanye v. Haymes*, 427 U.S. 236, 242, 96 S.Ct. 2543, 2547, 49 L.Ed.2d 466 (1976)). The treatment programs available to inmates in confinement are not integral to the statutory sentence imposed by the court. In this case, Petitioner was actually

relieved of the obligation of completing the F.O.R.T. Program and her agreed eight (8) year sentence remains undisturbed. Regarding the rehabilitative programs, Petitioner raises an issue of state law that is not cognizable in a federal habeas proceeding. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991).

For the reasons stated herein, Petitioner's application for writ of habeas corpus is denied.

DATED this 15th day of June, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESA LYNN EDWARDS,)

Petitioner,)

99-CV-0761-B (E)

HOWARD RAY, Warden of Central)

Oklahoma Correctional Facility, McCloud,)

OK, and DREW EDMONDSON, Attorney)

General of the State of Oklahoma,)

Defendants.)

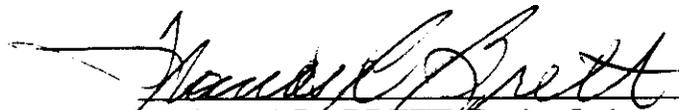
ENTERED ON DOCKET

DATE JUN 02 2000

JUDGMENT

In keeping with the Court's Order filed this date, the Petition for Writ of Habeas Corpus of Petitioner, Teresa Lynn Edwards, pursuant to 28 U.S.C. § 2254 is hereby denied, and judgment is entered in favor of the Respondents, Howard Ray, Warden of Central Oklahoma Correctional Facility, McCloud, Oklahoma, and Drew Edmondson, Attorney General of the State of Oklahoma.

DATED this 1st day of June, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED
JUN 1 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOEL and RUBY ADAMS)
)
 Plaintiffs,)
)
 vs.)
)
 REPUBLIC INSURANCE COMPANY)
)
 Defendant.)

Case No. 99-CV-1046E-(J) ✓

ENTERED ON DOCKET
DATE JUN 02 2000

ORDER OF REMAND

On this 1st day of June 2000, this case comes before the court by agreement of the parties for consideration of Plaintiffs' Motion to Remand, filed May 25, 2000. Plaintiffs appear by and through their counsel of record, Mr. Richard D. Gibbon. Defendant appears by and through its counsel of record, R. Jack Freeman of Feldman, Franden, Woodard & Farris. Having reviewed the case file, having heard from counsel for each of the parties and otherwise having been fully advised in the premises, and in consideration thereof, the court finds and orders that:

Plaintiffs' stipulate that the amount or value of the Plaintiffs' claims, exclusive of interest and fees, is less than \$75,000 in the aggregate. Accordingly,

IT IS ORDERED that this case will be remanded to state courts of Oklahoma, where Plaintiffs' claims, exclusive of interest and fees, will not exceed the amount of \$75,000 in the aggregate.


THE HONORABLE JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KEVIN P. CHRISTOPHER,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA, and)
 NEC SPARTAN SCHOOL,)
)
 Defendants.)

Case No. 00-CV-0034-BU (E)

ENTERED ON DOCKET
DATE **JUN 02 2000**

REPORT AND RECOMMENDATION

Plaintiff Kevin P. Christopher ("Christopher") initiated this action alleging violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) ("RICO") and violations of his right to due process and equal protection under the Fifth Amendment of the Constitution of the United States. He also challenges the constitutionality of Title IV of the Higher Education Act of 1965 ("HEA"), as amended, 20 U.S.C. § 1070 *et seq.* The Court has referred to the undersigned for Report and Recommendation the motion to dismiss (Dkt. #9) filed by Defendant NEC Spartan School of Aeronautics ("Spartan"). Spartan seeks dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted because plaintiff's claims are barred by the statute of limitations and plaintiff lacks standing to assert his claims. For the reasons set forth below, the undersigned recommends that the motion be **GRANTED**.

BACKGROUND

Plaintiff filed this action *pro se*. The allegations of his complaint are lengthy and sometimes difficult to understand. The following synopsis is an attempt to fairly summarize his claims. He enrolled for training at Spartan in 1989 and took advantage of federal student loan programs to pay for his tuition and fees at Spartan until he left the school in 1992. Although the allegations in his

complaint are not entirely clear, it appears that he was required to sign a form allowing Spartan to keep all of the loan proceeds in excess of tuition and fees before the school would disburse the loan proceeds. Plaintiff claims that when he challenged this practice, Spartan expelled him.

Plaintiff began sending letters of complaint to various agencies, organizations, and people, including the Department of Education, the Oklahoma Board of Private Vocational Schools, the Federal Aviation Administration, among others, and to his federal congressional representatives. Plaintiff believes Spartan defrauded the federal government by accepting federal student loan proceeds for students, like himself, who were not eligible because they were not full-time students. Perhaps more important to him, he argues that Spartan also violated the HEA by retaining loan proceeds instead of disbursing the excess of tuition and fees to students from whom they accepted loan proceeds. As a result, he believes that he should not have to repay his loans or fulfill his payment obligations for training at Spartan.

Plaintiff seeks more than a billion dollars in damages as well as injunctive and declaratory relief. He asks the Court to “enjoin as unconstitutional the enforcement of [HEA].” (Complaint, Dkt. # 1, at 1), and claims that the HEA infringes upon his constitutional rights. (*Id.* at 52.) His first claim for relief sets forth his RICO claim. His second claim for relief invokes the due process clause of the Fifth Amendment, indicating that Spartan has “violated it by defrauding the Plaintiff, other students, and the United States, of funds [sic] loans, under color of Title IV, HEA and in doing so they denied the plaintiff, and other students, of his, and their, constitutional rights.” (*Id.* at 53.) His third and final claim for relief echoes the second claim by charging that the HEA “deprives Plaintiff, and other students, of their protected liberty interests and fundamental constitutional rights without

fair notice, explanation of defendant's evidence, or any opportunity to be heard and violate[s] the Fifth Amendment to the Constitution of the United States." (Id. at 54.)

In its motion to dismiss, Spartan alleges the following facts as undisputed, given the statements plaintiff made in the complaint and the exhibits he attached to the complaint. Plaintiff signed a training agreement with Spartan on September 18, 1989. The initial disbursement of federal funds occurred on or about October 27, 1989. All of the federal funds were disbursed under two federal student financial assistance programs authorized under Title IV of the HEA (Title IV Programs); namely, the Federal Family Education Loan Program (formerly known as the Guaranteed Student Loan or GSL Program), 20 U.S.C. §§ 1071 - 1087h, and the Federal Perkins Loan Program, 20 U.S.C. §§ 1087bb-1087ii. Plaintiff ceased attending Spartan on February 15, 1992. The final disbursement of federal funds occurred on or about February 21, 1992. At least as early as July 12, 1992, plaintiff contacted the United States Department of Education regarding his contention that Spartan had improperly disbursed certain federal funds, that refunds were due to the lenders of those federal funds, that refunds were due to plaintiff, and that he had overpaid Spartan for tuition and fees.

Plaintiff claims to dispute certain of these facts, although he appears more concerned with their completeness than their verity. He claims that his complaint addresses all funds he received for training at Spartan, including the training he received in the school's mechanic program. He began that program in July 1987. He alleges that Spartan threatened to send the loan funds back to lenders if he did not sign the form allowing Spartan to keep all loan proceeds, that he signed that form for each disbursement from July 1987 until February 21, 1992, that Spartan continued that practice until the summer of 1999, and that he never actually received any funds covered under HEA (apparently because Spartan kept the loan proceeds). He claims that Spartan also disbursed Pell Grant and

Supplemental Loans to him. According to plaintiff, Spartan has represented that he was a full-time student until February 21, 1992 (not February 15, 1992, as Spartan alleges). Finally, plaintiff admits that he contacted the United States Department of Education regarding his contention that Spartan had improperly disbursed certain federal funds, but he claims that it was earlier than July 12, 1992, and that his complaint at that time minimized the alleged misconduct by Spartan because of undue influence by the Department in prior telephone conversations with plaintiff. As set forth below, plaintiff is not entitled to relief even if all of his allegations are true.

REVIEW

Standard of Review

A motion to dismiss is properly granted when it appears beyond doubt that a plaintiff could prove no set of facts entitling him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 586 (10th Cir. 1994). For purposes of making this latter determination, a court must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Ramirez, 41 F.3d at 586; Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992); Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991). *Pro se* complaints are held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). Thus, "if the [district] court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991).

Statute of Limitations

Spartan alleges that plaintiff's RICO claims are barred by the four-year statute of limitations established by the United States Supreme Court in Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987), and Klehr v. A. O. Smith Corp., 521 U.S. 179, 117 S. Ct. 1984 (1997), and by any state law statute of limitations "borrowed" pursuant to DelCostello v. Teamsters, 462 U.S. 151, 159 n. 12 (1983).

Rico Claim

In Agency Holding Corp., the Supreme Court held that the four-year statute of limitations applicable to Clayton Act civil enforcement actions applied to RICO civil enforcement actions, and in that case, the period ran from the earliest time the RICO action could have accrued. 483 U.S. at 156-57. Thus, plaintiff's RICO claim is barred unless it accrued within the four-year period prior to January 13, 2000, when plaintiff filed suit in this court.

Spartan claims that the claim accrued no later than the date of the last overt act alleged in the Complaint: the improper disbursement of federal funds on or about February 21, 1992. Plaintiff claims that Spartan engaged in mail fraud when it made false statements to the federal government concerning his loans, and the last false statement known to him was mailed by Spartan to USA Group (a guarantee agency that investigated his claims) and forwarded to plaintiff on July 9, 1997. This, according to plaintiff, was a "last predicate act." Under the "last predicate act" rule, a civil RICO action accrues when a plaintiff knows or reasonably should know of the last injury or the last predicate act in a pattern of racketeering activity. Klehr, 521 U.S. at 186.

The Supreme Court rejected that rule in the 1997 Klehr decision. Id. at 187. "[T]he plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other

earlier predicate acts that took place outside the limitations period.” Id. at 190. Plaintiff has not shown how the alleged false statement to USA Group caused him harm over and above the harm that Spartan’s earlier acts caused.

Further, the Klehr Court ruled that the plaintiff must exercise reasonable diligence in trying to discover his civil RICO claim in order to rely upon the “fraudulent concealment” doctrine to toll the limitations period or estop the defendant from asserting the limitations defense. Id. at 195-96. The fraudulent concealment doctrine may be invoked when a defendant acts affirmatively to conceal unlawful activity from the plaintiff. Id. at 194-95. Plaintiff does not assert that Spartan concealed the alleged fraud from him, only from the government. He knew of the facts underlying his cause of action at least by the date of the last disbursement to him. It is no excuse that he may not have known the law until a later date.

To the extent plaintiff pleads for application of the “injury and pattern discovery” rule, that rule has also been rejected by the Supreme Court. Rotella v. Wood, __ U.S. __, 120 S. Ct. 1075, 1078-79, 145 L.Ed.2d 1047 (2000). The “injury and pattern discovery” rule permits accrual only when the plaintiff discovers, or should discover, both an injury and a pattern of RICO activity. Id. at 1081. In Rotella, the Supreme Court explicitly approved the “injury discovery accrual” rule and explained that “discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.” Id. To hold otherwise would be “at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.” Id. Although the Rotella Court recognized that

federal statutes of limitations are generally subject to equitable principles of tolling, plaintiff has not presented any reasons why equitable tolling is appropriate here, as opposed to “where a pattern remains obscure in the face of a plaintiff’s diligence in seeking to identify it. . . .” See id. at 1084.

Constitutional and HEA Claims

Plaintiff’s constitutional claim is inextricably intertwined with his HEA claim because, in essence, he claims that the manner in which Spartan interprets the HEA, and the manner in which the United States enforces the HEA, violate his constitutional due process rights under the Fifth Amendment and thus the HEA, as applied to him, is unconstitutional. He states:

The Plaintiff alleges the Defendants, SPARTAN and the UNITED STATES, conspired to violate his right of due process and equal protection guaranteed under the Fifth Amendment to the Constitution of the United [S]tates, and in doing so places the Plaintiff in the most unusual position of being an unwilling participant in the enterprise and places him in jeopardy of violating the same laws, with the continuing possibility of being prosecuted as an accomplice and conspirator. The Plaintiff alleges the Defendants, SPARTAN, and UNITED STATES, have been using the ambiguous language of HEA, as a weapon against the Plaintiff, and other students, for whom the statue was created, without an appropriate entity to ensure the compliance with the HEA, and is therefore, unconstitutional. They continue to perpetuate the myth that the program is regulated, at the expense of the rights of the Plaintiff and other students, and do so by allowing tax offsets, wage garnishment, and property seizure without due process. Their use of the HEA is harsh to the class for whom it was intended, yet, the ones violating the HEA are having a blind eye turned toward them, and it only encourages more violations.

(Complaint, Dkt. # 1, at 2.) Later in the Complaint, plaintiff’s second and third claims for relief invoke both the due process clause of the Fifth Amendment and the HEA, indicating that Spartan violated plaintiff’s due process rights “under color of Title IV, HEA” and that the HEA itself deprives plaintiff of his due process rights. (Id. at 53-54.) Plaintiff asks that the Court declare HEA unconstitutional *and* enjoin the United States from implementing and enforcing Title IV of the HEA (Id. at 54.)

In response to Spartan's motion to dismiss, plaintiff asserts that he did not suspect a violation of his constitutional rights until mid-1998, and his suspicion was not confirmed until late December 1999 when he read a 1997 Washington Post article about loan abuses by some trade schools. (Resp. Br., Dkt. # 12, at 5.) He further contends that constitutional violations continue due to "threats of wage garnishments, property seizures, and tax offsets, all without a fair hearing." Id.

These claims are barred by an even shorter period than the RICO claims. Since there is no express statute of limitations, a federal court turns to state law for the applicable statute of limitations. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 159 n. 12 (1983). "Where Congress has not enacted an express statute of limitations for a particular cause of action, federal courts generally borrow and apply the most closely analogous state statute of limitations unless to do so would be inconsistent with federal law." Industrial Constructors Corp. v. United States Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994).

The most closely analogous state law is the Oklahoma two-year period for "an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated." Okla. Stat. tit. 12, § 95(3) (1991). Further, even if the two-year period were not deemed the most closely analogous limitations period, plaintiff would have only five years under Oklahoma's catch-all provision, which provides: "Any action for relief, not hereinbefore provided for, can only be brought with five (5) years after the cause of action shall have accrued." Id. § 95(10).

As with plaintiff's RICO claims, the statute of limitations on plaintiff's constitutional and HEA claims begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action. Industrial Constructors Corp., 15 F.3d at 969. Plaintiff claims that he was relying upon the United States to protect his rights, and he was "taking the word"

of the Department of Education “that there was something in the law unknown to him” that relieved Spartan from liability for its action. (Resp. Br., Dkt. # 12, at 5.) Again, however, plaintiff had reason to know of his injury when he should have discovered it through the exercise of reasonable diligence. Industrial Constructors Corp., 15 F.3d at 969. Neither his “suspicion” in 1998 nor his reading of an article in 1999 reflect the exercise of reasonable diligence on his part. “A plaintiff need not know the full extent of his injuries before the statute of limitations begins to run.” Id.

More important, he has not alleged that he was ignorant of the facts underlying his cause of action -- he only alleges ignorance of the law. While fraudulent concealment may toll the statute of limitations, he has not shown that his ignorance of his cause of action was due to affirmative acts or active deception by Spartan to conceal the facts giving rise to his claim. Id. The fact that Spartan denied any wrongdoing in correspondence with the United States does not mean that Spartan concealed the truth from him. The statute of limitations bars plaintiff’s constitutional and HEA claims against Spartan.

Standing

Even if plaintiff’s constitutional and HEA claims were not barred by the statute of limitations, plaintiff has no standing to assert such claims. In L’ggrke v. Benkula, 966 F.2d 1346, 1348 (10th Cir. 1992), the Tenth Circuit held that no private cause of action exists under Title IV of the HEA. The L’ggrke court specifically addressed the issue of whether a student borrower could assert a private right of action against an educational institution that allegedly violated Title IV by wrongfully retaining funds provided under a student loan program. Id. at 1346-47. Like the plaintiff in this matter, L’ggrke alleged that he was ultimately expelled from school in retaliation for his demands for the funds in excess of amounts required for tuition and fees. Id. at 1347. The L’ggrke

court specifically found that Congress vested exclusive enforcement authority for Title IV in the Secretary of Education; thus, students could not seek civil damages. Id. at 1348.

Plaintiff cannot circumvent L'ggrke's interdiction by characterizing his claims as purely constitutional due process claims. In response to Spartan's argument that plaintiff lacks standing to assert his claims for Fifth Amendment violations because Spartan is a private entity, United States v. Guerro, 983 F.2d 1001, 1004 (10th Cir. 1993) (citation omitted), plaintiff claims that there is a sufficient nexus between the United States and Spartan to show that Spartan's actions could fairly be treated as those of the United States. (Resp. Br., Dkt. # 12 at 5-8). Again, his contentions are not entirely clear, but his argument appears to be that the government delegated authority to Spartan to "propose, enact, interpret and enforce laws and regulations." Id. at 6 (citing Blum v. Yaretsky, 457 U.S. 991, 1004-5 (1982)). He contends that Spartan exercised that authority when it determined, under the HEA and applicable regulations, whom it considered full-time students, when they were full-time students, and when they were eligible for federal student loans. Plaintiff also argues that the United States Department of Education "encouraged" Spartan's decisions and actions in other ways. (Resp. Br., Dkt. # 12 at 6).

In essence, plaintiff argues that he has a Fifth Amendment claim against Spartan, a private entity, because Spartan may "fairly be said to be a state actor." See Smith v. Kitchen, 156 F.3d 1025, 1028 (10th Cir. 1997) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982), and Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 635-36 (10th Cir. 1983)). A determination of whether Spartan may fairly be said to be a state actor in this circumstance would require a detailed analysis of Spartan's decisions and actions with regard to federal financial aid fund disbursements under Title IV of the HEA. It would also involve evaluating the degree to which the Department of

Education and other governmental agencies influenced or controlled Spartan's decisions and actions or the extent to which government regulations dictated Spartan's decisions.

"The mere fact that a private business is subject to state regulation does not by itself convert its action into that of the State," Blum, 457 U.S. at 1004 (quoting Jackson v. Metropolitan Edison Co., 419 U.S.345, 350 (1974)). However, the United States may have "exercised such coercive power or such significant encouragement that it is responsible for the specific private conduct challenged," or Spartan may have "exercised powers that are traditionally the exclusive prerogative of the government." Blum 457 U.S. at 1004-05; Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (both cases quoting Jackson, 419 U.S. at 353)).¹ Similarly, Spartan may have based its decisions upon some rule of decision for which the state is responsible or the alleged deprivation may have "resulted from the exercise of a right, privilege or rule of conduct having its source in state authority." Gilmore, 710 F.2d at 638 (citing Lugar, 457 U.S. at 937).

Nonetheless, there is no suggestion in the HEA regulatory framework that Spartan's decisions or actions are attributable to the United States or otherwise constitute government action. In fact, L'ggrke discusses in detail the exclusive enforcement authority of the Secretary of Education (966 F.2d at 1348) and the procedures for handling alleged violations by an institution like Spartan (id.). The Secretary of Education is the enforcer and is charged with review of students' complaints. Without a private right of action, plaintiff has no standing to assert that Spartan violated his

¹ Although Blum involved the due process protections of the Fourteenth Amendment, the same principles apply to the Fifth Amendment due process clause. E.g. Medical Institute of Minnesota v. National Ass'n of Trade and Technical Schools, 817 F.2d 1310, 1313 (8th Cir. 1987); Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986).

constitutional rights by the manner in which Spartan interpreted the HEA. Those complaints are properly lodged, and were lodged, with the Department of Education.

RECOMMENDATION

It appears beyond doubt that a plaintiff could prove no set of facts against Spartan entitling him to relief. See Conley v. Gibson, 355 U.S. at 45-46. Therefore, dismissal of his claims against Spartan is appropriate. The undersigned recommends that Spartan's motion to dismiss (Dkt. #9) be **GRANTED**.

OBJECTIONS

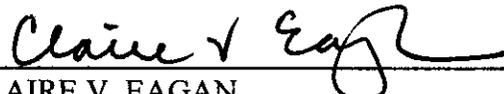
The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections 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); 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 31st day of May, 2000.

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

2 Day of June 2000 16



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

CATHERINE D. FREEMAN,)
)
Plaintiff,)
)
vs.)
)
PROVIDENT LIFE & ACCIDENT)
INSURANCE COMPANY,)
)
Defendant.)

Case No. 99-CV-826-BU

ENTERED ON DOCKET
DATE JUN 01 2000

FILED

MAY 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 31st day of May, 2000.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

1/10

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 01 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRIS V. KEMENDO,)
)
Plaintiff(s),)
)
vs.)
)
OMNIMARK, LTD., WILLIAM BLACKWELL, and)
GARRETT KRAUSE,)
)
Defendant(s).)

Case No. 99-CV-808-B(J) /

ENTERED ON DOCKET

DATE JUN 01 2000

REPORT AND RECOMMENDATION

On May 10, 2000, Plaintiff filed a Second Motion for Sanctions and Motion for Judgment by Default against Defendant William Blackwell and Defendant Garrett Krause. [Doc. No. 25-1].

Plaintiff previously filed, on March 3, 2000, a Motion to Compel responses from Defendants William Blackwell and Garrett Krause. At the hearing on Plaintiff's Motion, Defendants acknowledged that Defendants had provided no response to Plaintiff's discovery. The Court sustained Plaintiff's discovery motion. Defendant Krause was ordered to file a response to the discovery requests by March 24, 2000. Defendant Blackwell was ordered to respond to the discovery by March 30, 2000. The Court additionally imposed sanctions against Defendants, jointly and severally, in the amount of \$400.

On April 7, 2000, Plaintiff filed a motion for sanctions and for default judgment against the Defendants. Plaintiff alleged that Defendants had failed to fully comply

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with the Court's prior order, and Plaintiff requested the entry of sanctions or default judgment against the Defendants.

Defendant Blackwell had provided some discovery responses to Plaintiff but the responses were obviously deficient. With regard to Defendant Blackwell, the Court, at an April 25, 2000 hearing, ordered the Defendant to submit a supplemental response to Plaintiff within 24 hours of the date of the hearing.

Defendant Krause had provided no discovery responses to Plaintiff as of the date of the April 25, 2000 hearing. With regard to Defendant Krause, the Court ordered that a full and complete response to all discovery requests should be provided to Plaintiff by May 9, 2000.

In the April 26, 2000 Order, the Court additionally stated that "this is the second time that Defendant has been ordered to respond to Plaintiff's discovery requests. If Defendant does not fully and completely respond by May 9, 2000, Plaintiff should file a motion for default judgment or dismissal pursuant to Fed. R. Civ. P. 37. Upon the filing and review of Plaintiff's motion, the Magistrate Judge will recommend to the District Court that judgment be entered in favor of Plaintiff and against Defendant Krause."

On May 10, 2000, Plaintiff filed a Motion for default judgment against both Defendant Blackwell and Defendant Krause. Plaintiff detailed the insufficient responses by Defendant Blackwell, and the continued lack of response by Defendant Krause. As of May 31, 2000, Defendants have failed to file any response to Plaintiff's Motion.



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

FILED

JUN 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)

Plaintiff,)

vs.)

Case No. 99 CV 0707E(E)

TRANSPORTATION ONE, LLC, a)
Michigan Limited Liability Company)
and Mikhail G. Kheyson,)
an individual,)

Defendants.)

ENTERED ON DOCKET
DATE JUN 1 2000

ORDER GRANTING MOTION TO DISMISS

The Court, being fully advised, hereby grants the Motion of Thrifty Rent-A-Car System, Inc. to dismiss its claim against defendant, Mikhail G. Kheyson, with prejudice.

IT IS SO ORDERED.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(Transferred from the Central District of California)

F I L E D

JUN 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OKLAHOMA PLAZA INVESTORS, LTD.,)
a California limited partnership,)

Plaintiff,)

vs.)

TRAVELERS INSURANCE COMPANY,)
a Corporation, and Does 1-50,)

Defendant.)

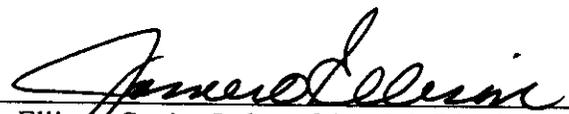
Case No. 98-CV-844 E (M) ✓

ENTERED ON DOCKET
DATE JUN 01 2000

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for consideration this 15th day of June, 2000, upon the Joint Stipulation of the Plaintiff, Oklahoma Plaza Investors, Ltd., a California limited partnership, and the Defendant, Travelers Insurance Company, a corporation, for a Dismissal With Prejudice of the claims of the Plaintiff against all of the Defendants and the Court having reviewed the Joint Stipulation and being fully advised hereby finds and orders that the claims of the Plaintiff, Oklahoma Plaza Investors, Ltd., a California limited partnership, against the Defendants, Travelers Insurance Company, a corporation, and Does 1-50, BE AND IS HEREBY DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.


James Ellison, Senior Judge of the U.S. District Court
for the Northern District of Oklahoma

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

FILED

MAY 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARRY MICHAEL CHENEY

Petitioner,

vs.

STEVE HARGETT

Respondents.

Case No. 97-CV-300-K (M) ✓

ENTERED ON DOCKET

DATE JUN 1 2000

REPORT AND RECOMMENDATION

Petitioner, Garry Michael Cheney, an Oklahoma state inmate, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 alleging nine grounds of relief: (1) failure of the state to prove sanity beyond a reasonable doubt; (2) defective insanity instruction; (3) insufficient proof of malice aforethought for first degree murder conviction; (4) failure to instruct jury on second degree murder; (5) erroneous heat of passion manslaughter jury instruction; (6) evidence of other crimes erroneously admitted; (7) prosecutorial misconduct; (8) ineffective assistance of counsel; (9) improperly admitted opinion evidence. Except for Petitioner's claim of ineffective assistance of trial counsel based on the failure to request a competency hearing, Petitioner's claims have been fully exhausted and his petition was timely filed. In accordance with Rule 8(a) of the Rules Governing Section 2254 Cases, the undersigned has determined that an evidentiary hearing is not required.

For reasons stated below, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DENIED.

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BACKGROUND

Following a jury trial in the Oklahoma State District Court, Petitioner Garry Michael Cheney was convicted of First Degree Murder. He received a capital sentence for the murder conviction. The Oklahoma Court of Criminal Appeals (OCCA) upheld the conviction, but modified the sentence to life without parole. *See Cheney v. State*, 909 P.2d 74 (Okl.Cr. 1995) (finding (1) evidence was insufficient to establish that murder was especially heinous, atrocious, or cruel, as aggravating circumstance; (2) pretrial publicity did not require change of venue; (3) evidence was sufficient to support finding that defendant was sane at time he fatally shot his wife; (4) other crimes evidence was relevant and admissible; (5) photograph of victim's body was admissible; (6) acts of prosecutorial misconduct were not sufficient to support relief; (7) trial court did not err in failing to give second-degree murder instruction sua sponte; and (8) defendant was not denied effective assistance of counsel).

FACTS

On Friday, April 30, 1993, Petitioner Garry Michael Cheney shot and killed his estranged wife, Margaret Cheney, in the parking garage at the Occidental Oil and Gas (Oxy) building in downtown Tulsa. Earlier that afternoon, Mr. Cheney purchased a .45 caliber pistol and bullets from a pawn shop. According to defense witnesses, Mr. Cheney went to the Oxy parking garage to make a final attempt at reconciling with his wife. Should he not be successful, Mr. Cheney planned to kill himself.

Several witnesses testified they saw Mr. Cheney in the parking garage that afternoon. The evidence established that Margaret Cheney sprayed Mr. Cheney in the

face with a mace-like substance, then ran from him. He pursued her and shot her 7 times, killing her. He then exited the parking garage, walked to his car and drove away. At about midnight, a reserve detective with the Greene County Sheriff's Department in Springfield, Missouri observed Mr. Cheney's car at a convenience store. Mr. Cheney lead police on a highspeed chase through a residential area before crashing his car and being apprehended.

STANDARD OF REVIEW

Mr. Cheney filed his habeas petition with this court on April 2, 1997, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), consequently the standards established by that statute are applicable. *See, e.g., Medlock v. Ward*, 200 F.3d 1314, 1318 (10th Cir. 2000).

This court reviews the state courts' rulings under the AEDPA standard enunciated in 28 U.S.C. §§ 2254. Under that section, a federal court is precluded from granting habeas relief on any claim adjudicated on the merits by the state court, unless the state proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. §§ 2254(d)(1), or "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)(2). All factual findings of the state court are presumed correct unless the petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. §§ 2254(e)(1).

DISCUSSION

I. Insufficiency of the Evidence

Under 28 U.S.C. § 2254(d)(1), the court must first decide whether the Oklahoma court's resolution of Petitioner's insufficiency of the evidence claim used a legal standard contrary to clearly established federal law as set forth by the United States Supreme Court. In analyzing such claims the Oklahoma Courts apply the standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) which requires the court to view the evidence in a light most favorable to the State to determine if any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okla. Crim. App. 1985).

Next, under 28 U.S.C. § 2254(d)(2) the court must decide whether the State court proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court. However, under 28 U.S.C. § 2252(e) "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

A. Failure to Prove Sanity Beyond Reasonable Doubt

Petitioner argues that the evidence establishing his insanity at the time of the shooting was overwhelming and that the state offered no proof in rebuttal and therefore his conviction is violative of the Fourteenth Amendment protection against

conviction "except upon proof beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). The OCCA addressed this claim and found that the State's lay and expert testimony supported the jury's finding that Mr. Cheney was sane at the time of the murder. *Cheney*, 909 P.2d at 86.

Under Oklahoma law, a defendant is presumed to be sane. The defendant bears the burden of raising a reasonable doubt about his sanity. If the defendant establishes reasonable doubt of his sanity, the presumption of sanity vanishes and the State is required to prove beyond a reasonable doubt that the defendant could distinguish between right and wrong at the time of the offense. *Cheney*, 909 P.2d at 85. The record contains numerous pieces of evidence upon which a reasonable juror could conclude beyond a reasonable doubt that Mr. Cheney could distinguish between right and wrong at the time of the shooting. The state court accurately characterized the evidence concerning sanity as follows:

Cheney admits he killed his wife in the Oxy parking garage. His defense at trial was that he was not guilty by reason of insanity, or, alternatively, that he was only guilty of the lesser offense of Manslaughter in the First Degree. In support of these defenses, Cheney called two expert witnesses to testify about his mental condition at the time of the crime. Dr. Dodson and Dr. Reynolds testified Cheney suffered from bi-polar manic-depression and he had suffered from this illness for many years. Both doctors maintained that Cheney went to the garage to try to reconcile with his wife and that, if she refused him, he intended to kill himself. The doctors asserted that when Cheney was sprayed with mace something snapped and he killed his wife. Both doctors testified that at the time of the murder, Cheney could not appreciate the nature and consequences of his acts and that he could not distinguish right from wrong. Dr.

Dodson also opined that Cheney should never have been released from Brookhaven Hospital and that the lithium that Brookhaven prescribed for Cheney was too low to control his manic-depression. Cheney had voluntarily admitted himself for treatment in Brookhaven Hospital on April 1st and was released on April 16th. Two weeks later he shot and killed his wife.

According to the defense doctors, after the shooting, Cheney experienced a psychogenic fugue in which he could act normally but would have no idea or recollection of what he was doing. After the shooting, Cheney drove to Kansas. When he realized what had happened, he decided to kill himself in Arkansas. As he was driving through Missouri on his way to Arkansas, the Missouri police apprehended him.

In rebuttal, the State called Dr. Wakefield, a psychologist who treated Cheney at Brookhaven. Wakefield testified that on March 31, a month before the shooting, Cheney knew what he was doing when he confronted his wife and threatened her.

The State also called Donald Perssons who occupied the cell next to Cheney in the county jail. Perssons had a Ph.D in psychology and had practiced as a psychologist for a number of years. Perssons also had been convicted of child molestation, distribution of child pornography and possession of a firearm. Perssons opined that Cheney was quite rational and that Cheney told him he would "walk" because he would claim he was insane. Perssons' jailhouse diagnosis of Cheney was that Cheney was manic-depressive with extreme narcissistic tendencies.

In addition, the State called several lay witnesses. Among the lay witnesses was Toni Pruitt, Cheney's secretary at his former place of employment. She testified about discussions she and Cheney had about his divorce and the counseling he was receiving in connection with his divorce. Pruitt stated that on two occasions Cheney said it was stupid for Mrs. Cheney to claim he was crazy because he could kill her and get off on an insanity plea. These statements occurred a few months before Mrs. Cheney's death. Wanda Maxwell, the Cheneys' babysitter, also testified. She stated she spoke with Cheney on April 30,

just hours before he killed his wife. Maxwell stated Cheney sounded fine and he made sense when he talked to her.

Cheney, 909 P.2d at 84-85.

The undersigned finds that the OCCA's evidentiary findings have support in the record, are not clearly erroneous, and have not been rebutted by clear and convincing evidence. Further, its conclusions are not an unreasonable application of clearly established federal law. Therefore, Mr. Cheney is not entitled to habeas relief on this ground.

B. Sufficiency of Proof of Malice Aforethought

Mr. Cheney asserts that in light of his mental condition, proof concerning the requisite intent was insufficient to support the jury verdict that he was guilty of murder in the first degree. The intent required in Oklahoma for first degree murder is "that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." *Huckaby v. State*, 804 P.2d 447, 452 (Okla. Crim. App. 1990).

The OCCA found that although there was conflicting evidence, there was competent evidence to support the jury's finding regarding Mr. Cheney's intent to kill his wife. *Cheney*, 909 P.2d at 86. Indeed, there was evidence showing that Mr. Cheney suffered from mental illness at the time he shot Margaret Cheney. However, there was also evidence showing that he possessed the intent to take away Mrs. Cheney's life: he commented before the shooting that he could kill her and get off on

an insanity plea; he bought a gun and ammunition just hours before the shooting; he waited for her for several hours in the Oxy parking garage; he chased her when she ran from him; he fired numerous shots in short succession at close range.

The OCCA's evidentiary findings have support in the record and are not clearly erroneous, and its conclusions are not an unreasonable application of clearly established federal law. Accordingly, Mr. Cheney is not entitled to habeas relief on this ground.

II. Defective Insanity Instruction

Mr. Cheney asserts that the jury instructions on insanity were fundamentally defective in that they incorrectly stated the applicable law upon which the jury was required to base its determination of his sanity or insanity at the time of the crime. According to Mr. Cheney, Oklahoma's failure to provide him with the protections of its own law on this point is a due process violation.

The Tenth Circuit has stated that a petitioner bears a great burden when seeking to collaterally attack a state court judgment based on an erroneous jury instruction. *Lujan v. Tansy*, 2 F.3d 1031, 1035 (10th Cir. 1993). "[H]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense." *Id.* (quoting *Brinlee v. Crisp*, 608 F.2d 839, 854 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733 (1980)). The United States Supreme Court has "stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*,

502 U.S. 62, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 100 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1991)). The only question for the federal court is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

Instruction 22 concerning insanity provided:

A person is insane when that person is suffering from such a disability of reason or disease of the mind that he does not know that his acts or omissions are wrong and is unable to distinguish right from wrong with respect to his acts or omissions. A person is also insane when that person is suffering from such a disability of reason or disease of the mind that he does not understand the nature and consequences of his acts or omissions.

[Dkt. 10, Ex C]. The OCCA found that the insanity instruction accurately reflected Oklahoma law and the jury was properly instructed on the issue of insanity. *Cheney*, 909 P.2d at 90. Mr. Cheney has not demonstrated that the insanity instruction was erroneous, consequently it cannot be said that it so infected the entire trial such that his conviction violated due process. Consequently, Mr. Cheney is not entitled to habeas relief on this ground.

III. Failure to Instruct on Second Degree Murder

Trial counsel did not request, and the trial court did not give a jury instruction on second degree depraved mind murder. Mr. Cheney argues that there was ample evidence to support this instruction and because the court is required to instruct on

every degree of homicide suggested by the evidence, the court's failure to give such an instruction deprived him of a fair trial.

The OCCA considered this issue and stated:

Second degree murder was not suggested by the facts of this case. Second degree murder is murder that results from conduct that is imminently dangerous to another but which "is not done with the intention of taking the life of or harming any particular individual." [*Palmer v. State*, 871 P.2d 429, 432 (Okl.Cr. 1994)]. Here, Cheney's conduct was directed specifically at his wife. The trial court did not err in not giving the second degree murder instructions sua sponte. [footnotes omitted].

Cheney, 909 P.2d at 90.

Cases, such as the instant case, in which the death penalty is sought, but is not imposed are essentially non-capital cases for habeas corpus analytical purposes. *Trujillo v. Sullivan*, 815 F.2d 597, 602 (10th Cir. 1987). The Tenth Circuit has held that "a petitioner in a non-capital case is not entitled to habeas relief for the failure to give a lesser-included offense instruction 'even if in our view there was sufficient evidence to warrant the giving of an instruction on a lesser included offense.'" *Lujan*, 2 F.3d at 1036 (quoting *Chavez v. Kerby*, 848 F.2d 1101, 1103 (10th Cir. 1988)). Applying *Lujan*, Petitioner is not entitled to habeas relief on this claim.

IV. Erroneous Heat of Passion Manslaughter Jury Instruction

The trial court instructed the jury on manslaughter in the First Degree by Heat of Passion in accordance with Oklahoma Uniform Jury Instructions.¹ Mr. Cheney asserts that he was denied the right to a fair trial because the Oklahoma Uniform Jury Instructions require the jury to view the existence of adequate provocation from the standpoint of a reasonable person in the position of the defendant, rather than from the defendant's perspective.² Mr. Cheney urges the adoption of the Model Penal Code standard under which adequate provocation is determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be. Model Penal Code, § 210.3(1)(b)(198). The OCCA declined to adopt the Model Penal

¹ OUJI-CR 4-97 provides:

Heat of passion exists when four requirements are proven. These requirements are:

First, adequate provocation;

Second, a passion or emotion such as fear, terror, anger, rage, or resentment existed in defendant;

Third, the homicide occurred while the passion still existed, and before there was reasonable opportunity for the passion to cool;

Fourth, there was a causal connection between the provocation, the passion and the homicide.

² OUJI-CR 4-98 provides:

"Adequate provocation" refers to any improper conduct of the deceased toward the defendant which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in the position of the defendant. Generally, actions which are calculated to provoke an emotional response and ordinarily cause serious violence are recognized as adequate provocation. Actions that do not ordinarily provoke serious violence do not constitute adequate provocation. In determining whether the deceased's conduct was adequate provocation, the conduct is judged as a person of reasonable intelligence and disposition would respond to it. . . .

Code standard and found that the reasonable person standard does not violate Mr. Cheney's right to due process. *Cheney*, 909 P.2d at 90.

The undersigned finds that Mr. Cheney has not demonstrated that Oklahoma's rejection of the Model Penal Code standard was erroneous or that the instruction rendered the trial fundamentally unfair.

V. Evidence of Other Crimes Erroneously Admitted

Mr. Cheney argues that evidence of uncharged crimes was improperly admitted over his objection and deprived him of due process and a fair trial. The trial court admitted evidence: that he lied on the Alcohol, Tobacco, and Firearms (ATF) form he completed to purchase the murder weapon; admitted evidence of prior altercations with his wife; and admitted evidence of violations of a protective order. Mr. Cheney claims that the unfairness to him was exacerbated when the prosecutor highlighted this evidence during closing arguments.

Federal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights. Thus, the inquiry under the Fifth, Sixth, and Eighth Amendments as applied to the states under the Fourteenth Amendment is whether admission of the evidence in question rendered the proceedings fundamentally unfair. *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 2000).

The OCCA acknowledged that pursuant to Oklahoma law, "[o]ther crimes evidence is not admissible as proof of character but 'may. . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge,

identity or absence of mistake or accident.'" *Cheney*, 909 P.2d at 87 (quoting 12 O.S. 1991, § 2404(B)). The Court found that evidence respecting misrepresentations on the ATF form was properly admitted for the purpose of showing Mr. Cheney's state of mind and to rebut his insanity defense. *Id.* Similarly, this court finds that evidence of Mr. Cheney's prior altercations with his wife were properly admitted for those purposes. The OCCA found that evidence of the protective order and Mr. Cheney's violation of it was relevant and admissible to establish intent and motive and to rebut the claim that he was insane at the time of the commission of the homicide. *Id.* Admission of such evidence did not render the proceedings fundamentally unfair. Therefore Mr. Cheney is not entitled to habeas corpus relief on this claim.

VI. Prosecutorial Misconduct

Mr. Cheney claims that prosecutorial misconduct at trial denied him a fundamentally fair trial and denied him due process. The particular instances of alleged misconduct by the prosecution include:

- (1) introduction of inadmissible "other crimes" evidence;
- (2) comment on Mr. Cheney's failure to call a witness, and references made to a witness the trial court ruled the State could not call at trial;
- (3) improper argument concerning evidence which had been stricken by the trial court;
- (4) prosecution improperly denigrated defense witnesses;
- (5) prosecutor rendered personal opinions on expert testimony and misstated expert testimony;
- (6) misstated and misrepresented evidence and argued facts not in evidence;
- and (7) improperly appealed to the jury for sympathy for the victim and her children.

[Dkt. 19, p.48-64].

Prosecutorial misconduct does not warrant federal habeas relief unless the conduct complained of is so egregious as to render the entire proceedings against the defendant fundamentally unfair. *Smallwood*, 191 F.3d at 1275. In making such a determination, the federal court considers "the totality of the circumstances, evaluating the prosecutor's conduct in the context of the whole trial." *Id.* at 1276 (quoting *Cummings v. Evans*, 161 F.3d 610, 618 (10th Cir. 1998)). The Tenth Circuit has stated the court must look first at the strength of the evidence against the defendant and decide whether it is plausible that the prosecutor's statements could have tipped the scales in favor of the prosecution. The court is also to consider whether curative instructions, if given, might have mitigated the effect of the improper statements on the jury. *Id.* The OCCA conducted a similar weighing process and found that although there were instances of the prosecutor overstepping the bounds of proper argument and examination of witnesses, given the overwhelming evidence in the case, the errors are not sufficient to warrant relief. *Cheney*, 909 P.2d at 89.

This court has conducted a thorough review of the record and Petitioner's allegations of prosecutorial misconduct and concludes that the prosecutor's comments were not of sufficient magnitude to influence the jury's decision. Furthermore, Petitioner has not demonstrated that the state court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United

States." 28 U.S.C. § 2254(d)(1); see also *Williams v. Taylor*, — U.S. — 120 S.Ct. 1495; 2000 WL 385369 *23-27 (U.S.).

VII. Ineffective Assistance of Counsel

Mr. Cheney asserts that he was denied effective assistance of counsel. In particular, he asserts that trial counsel's performance was deficient in the following respects: (1) counsel failed to request an instruction on second degree murder and to request a cautionary instruction on other crimes; (2) counsel failed to object to rebuttal testimony; (3) counsel failed to object to various instances of prosecutorial misconduct; and (4) counsel failed to request a competency hearing.

The OCCA found: that since the facts in the case do not suggest second degree murder, counsel did not err in failing to request an instruction; a limiting instruction may have been prudent, but the omission did not appear to have prejudiced Mr. Cheney; the State's rebuttal witnesses were properly called and therefore counsel was not ineffective for failing to object; although Mr. Cheney argued that trial counsel should have requested a continuance because he was surprised by one of the rebuttal witnesses, that appeared to have been a reasonable trial strategy that did not result in prejudice; trial counsel could not have successfully challenged the testimony of Dr. Wakefield on the basis of physician patient privilege as Mr. Cheney's mental condition was at issue as an element of his defense, 12 Okla. Stat. 1991 § 2503(D)(3); trial counsel was not ineffective for failing to object to the prosecutor's comments, as those comments were not sufficient to warrant relief. *Cheney* 909 P.2d at 91.

Ineffective assistance of counsel claims are governed by the two-part *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner must show: "(1) that his counsel's performance fell below an objective standard of reasonableness and; (2) that the deficient performance was prejudicial to his defense." *Smallwood*, 919 F.3d at 1269-70 (quoting *Hickman v. Spears*, 160 F.3d 1269, 1272 (10th Cir. 1998)). To satisfy the first prong the petitioner must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The focus is not on what is prudent or appropriate, but only on what is constitutionally compelled. *Id.* The second prong requires that petitioner establish that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

The OCCA specifically cited and applied the *Strickland* test. *Cheney*, 909 P.2d at 91. Petitioner has not established that the OCCA decision was contrary to the *Strickland* standard or that the *Strickland* test was unreasonably applied. Habeas relief is not available on the grounds presented to the OCCA because Plaintiff has not established that the OCCA decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. §§ 2254(d)(1), or "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)(2).

Mr. Cheney raised ineffective assistance of counsel to the OCCA, but did not present counsel's failure to request a competency hearing as one of the grounds for reversal. [Dkt. 10, Ex. B p. 52-55]. Although this particular claim remains unexhausted, the AEDPA permits the court to deny the application for writ of habeas corpus on the merits. 29 U.S.C. § 2254(a)(2). Having considered the merits, the court finds that the writ should be denied for this aspect of Petitioner's ineffective assistance of counsel claim.

The record reflects that trial counsel had been handling Mr. Cheney's divorce. He was therefore acquainted with Mr. Cheney before the homicide and subsequent arrest. Further, while he was in jail Mr. Cheney was evaluated by William W. Dodson, M.D., a psychiatrist, [Dkt. 13, p. 730-744], and underwent testing performed by Alan Eugene Reynolds, a psychologist. [Dkt. 13, p. 860-867]. On January 21, 1994, Mr. Cheney testified on his own behalf in the sentencing phase of the trial. [Dkt. 15, p. 1363-1433].

A review of the transcript reveals that Mr. Cheney was able to accurately recount his medical history related to his bipolar disorder. He was also able to testify about his personal history as it related to a previous conviction; his education, past employment, marriage and children; traumatic events in his life and in Margaret Cheney's life, including family deaths and the events precipitating the divorce filing, circumstances regarding the protective order and his violation of it; and his memory of the day of the murder. The record thus reflects that at the time of trial Mr. Cheney had

"sufficient present ability to consult with his attorney with a reasonable degree of mental understanding and had "a rational and factual understanding of the proceedings against him." *Bryson v. Ward*, 187 F.3d 1193, 1201 (10th Cir. 1999)(quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 41 L.Ed.2d 824 (1960)(per curiam)). Since Mr. Cheney unquestionably met the standard for competency to stand trial, his trial counsel was not ineffective for having failed to request a competency hearing.

VIII. Improperly Admitted Opinion Evidence

As his final ground for habeas corpus relief, Mr. Cheney asserts that the opinion testimony of Donald Perssons, that Mr. Cheney was a manic depressive with extreme narcissistic tendencies, deprived him of a fair trial.

Mr. Perssons was jailed in the cell next to Mr. Cheney at the Tulsa County Jail. He had been previously convicted of sexual abuse of a child, exploitation of a minor, providing harmful materials to a minor, interstate transportation of pornography, and possession of a firearm by a fugitive. He testified that he was a psychologist and had conducted a case study of Mr. Cheney while they were both in jail. The OCCA considered Mr. Cheney's objections to Mr. Perssons' testimony and concluded that Perssons was testifying as a lay witness and it was error for him to testify about his medical diagnosis of Mr. Cheney. However, since similar testimony was elicited from expert witnesses at trial, the evidence was merely cumulative. *Cheney*, 909 P.2d at 88-89.

The relevant question for habeas corpus review is whether admission of the evidence in question rendered the proceedings fundamentally unfair. *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 2000). This court concludes that the admission of cumulative evidence did not render the proceedings fundamental unfair and therefore habeas relief should be denied.

CONCLUSION

Based on the foregoing, the undersigned United States Magistrate Judge recommends that habeas corpus relief be DENIED.

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 31st Day of May, 2000.

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

1st Day of June, 2000.
C. Portillo, Secretary Clerk

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

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

F I L E D

MAY 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SIDNEY L. SWIFT,
SSN: 444-44-6839,

Plaintiff,

v.

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

Defendant.

CASE NO. 99-CV-485-M

ENTERED ON DOCKET
DATE JUN 01 2000

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 31ST day of MAY, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 31 2000 *SL*

SIDNEY L. SWIFT,
SSN: 444-44-6839,

PLAINTIFF,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.

CASE NO. 99-CV-485-M ✓

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

DEFENDANT.

ENTERED ON DOCKET
DATE JUN 01 2000

ORDER

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

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

¹ Plaintiff's February 19, 1996 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held July 10, 1997. By decision dated July 25, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council denied review on May 28, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born September 12, 1943 and was 53 years old at the time of the hearing. [R. 42, 233]. He claims to be unable to work due to chest pain, shortness of breath, right shoulder pain, back pain, right leg pain and depression. [R. 53; Plaintiff's Brief]. The ALJ determined that Plaintiff has a severe impairment consisting of a reduced exercise tolerance due to a heart attack but that he retains the residual functional capacity (RFC) to perform the full range of light work. [R.16]. He concluded that Plaintiff is still capable of performing his past relevant work (PRW) of gatekeeper, manager and car driver and found, therefore, that Plaintiff is not disabled as defined by the Social Security Act. [R. 16]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the Commissioner's decision is not based upon substantial evidence. Specifically, Plaintiff contends the ALJ: 1) failed to accord appropriate

weight to the opinion of Plaintiff's treating physician; 2) improperly evaluated Plaintiff's credibility; and 3) failed to consider Plaintiff's impairments in combination and failed to develop the record in assessing Plaintiff's RFC. The Court finds this case must be reversed and remanded to the Commissioner for further development.

Plaintiff's medical history as related in the record consists of amputation of the right index finger at the distal interphalangeal joint level in 1977 [R. 180-184, 211]; herniated disc L-4, 5 and disc disease in 1979 [R. 185-191]; decompression laminectomy L5-S1 in 1981 [192-204, 209-211]; right orchiectomy in 1987 [R. 79-82]; right shoulder strain in 1991[R. 205-208]; and a myocardial infarction (heart attack) and subsequent catheterization procedure in 1995 [R. 83-132].

J.R. Priest, M.D., Plaintiff's treating physician, completed and signed a "Medical Assessment Of Ability To Do Work Related Activity form" dated June 30, 1997. [R. 221-223]. On that form, Dr. Priest wrote that Plaintiff could sit only 30 minutes at a time, stand 15 minutes at a time and walk 30 minutes at a time in an 8 hour workday and that he must take rest breaks during the 30 minute walk periods. He indicated also that the total amount of time Plaintiff could sit, stand and walk during the entire 8 hour work day was 1 hour each activity. [R. 221]. Dr. Priest noted that, due to drowsiness and shortness of breath, Plaintiff must lie down during his "best consecutive 8 hours" which would not include the typical 15 minute breaks and 1 hour lunch period. *Id.* Dr. Priest further limited Plaintiff's lifting and carrying activities to: occasionally up to 5 lbs, rarely 6 to 9 lbs and never more than 10 pounds. [R. 222]. He stated Plaintiff was unable to use his hands for repetitive pushing and pulling of

controls and fine manipulation and that he could use only his left hand for simple grasping. *Id.* He also restricted Plaintiff's right foot usage for repetitive pushing and pulling of leg controls. [R. 223]. Dr. Priest noted Plaintiff can only occasionally bend, that he could never squat, crawl, climb or reach and that he is totally restricted around unprotected heights, being around moving machinery, exposure to marked changes in temperature and humidity, driving automotive equipment and exposure to dust, fumes and gases. *Id.*

20 CFR 416.927(d) requires that a treating physician's opinion, if it is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in claimant's record be given **controlling weight**. *Castellano*, 26 F.3d at 1029. If the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for this action must be set forth. *Frey v. Bowen*, 816 F.2d 508, 512 (10th Cir. 1987).

Here, the ALJ wrote a conclusory statement that Dr. Priest's estimation of the claimant's ability to perform work-related activities is "in stark contrast" to his medical notes. [R. 15]. He deemed Dr. Priest's assessment form worthy of only "minimal weight" because of what he described as "glaring inconsistencies" between Dr. Priest's report and his notes. Dr. Priest's handwritten notes are found in the record at pages 134, 137 and 220. The notes cover the time period between April 12, 1989 and February 22, 1996. They document complaints and symptoms but do not contain details of the examination findings, diagnoses or treatment plans.

In his decision, the ALJ stated: "Dr. Priest treated the claimant after his heart attack and found that there were no residuals from his heart attack, except a reduced exercise tolerance noted from the treadmill test, and there was no evidence of a reduced ability to sit, stand, walk, or use his upper or lower extremities for work-related activities." [R. 14]. There is no reference in the ALJ's decision to any medical evidence that supports this statement. Dr. Priest's office notes do not contain detailed clinical findings or examination results which would clarify his conclusions regarding Plaintiff's physical limitations. In fact, the notes do not contain **any** references to Plaintiff's exertional abilities or limitations. On the other hand, nowhere in the notes is there any indication that Dr. Priest ever assessed Plaintiff's exertional limitations to be anything other than what he wrote on the assessment form in June 1997. Nor is there any indication in any of Dr. Priest's notes or records that he "found that there were no residuals from his heart attack." While the notes do not contain outright findings that, ideally, would serve as support for Dr. Priest's assessment form, they also do not contradict or conflict with the findings expressed by Dr. Priest on the assessment form. The ALJ seems to have based his rejection of Dr. Priest's opinion upon an absence of supporting notes in the medical records rather than evidence that is "in stark contrast" to that opinion. The absence of evidence is not evidence. *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993).

Furthermore, the exercise tolerance test, which the ALJ apparently did give probative value, is also a form which was filled out and signed by Dr. Priest, shortly after Plaintiff's heart attack and subsequent surgery in 1995. [R. 138]. The ALJ did

not explain why he chose to give more weight to a form filled out by the treating physician in 1995 (the "exercise tolerance test") than the form filled out for disability purposes by that same physician in 1997 ("medical assessment form"). An ALJ may not reject apparently probative medical evidence without explanation. See *Teter v. Heckler*, 775 F.2d 1104, 1006 (10th Cir. 1985) (error to reject some medical reports as based on inadequate findings when they are comparable to those reports the ALJ found sufficiently detailed).

Defendant contends the ALJ considered reports of "normal" treadmill tests during the few months following Plaintiff's heart attack as contradictory of Dr. Priest's opinion. The Court notes, however, that these letters were written as reports to Dr. Priest on Plaintiff's recovery progress shortly after cardiac surgery. The physicians who wrote the letters reporting Plaintiff's treadmill test results did not render any opinion as to Plaintiff's ability or inability to work. The treadmill test results, therefore, do not contradict or conflict with Dr. Priest's opinion regarding Plaintiff's inability to perform work activity on a sustained basis two years later.

The record also contains a November 4, 1996, stress test performed by S.P. DeFehr, a cardiologist who reported to Dr. Priest, which indicated a history of recurrent chest pain and hospitalization over the weekend for chest pain. [R. 213]. The test was discontinued after 4½ minutes due to leg weakness and fatigue. [R. 213-214].

Dr. Priest, who had treated Plaintiff many times over a long period and was familiar with Plaintiff's health problems, had all this information before him when he assessed Plaintiff's ability to do work-related physical activities. See Dr. Priest's

handwritten notes: [R. 220 (11/3/96 stress test summary noted); R. 134 (Dr. Tinker's reports and exercise tolerance test of 9/13/95 noted)]. The treating physician's opinion on the subject of disability is "binding on the fact-finder unless contradicted by substantial evidence; and ... [is] entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder." *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir.1987)(quoting *Schisler v. Heckler*, 787 F.2d 76, 81 (2d Cir.1986)).

Since Dr. Priest's RFC evaluation is the only assessment in the record by a medical care provider of Plaintiff's limitations and, since the ALJ did not sufficiently articulate good cause for disregarding and rejecting the opinion of Plaintiff's treating physician, his conclusory statement that the treating physician's opinion was inconsistent with his notes is insufficient under the established precedent. See *Goatcher v. United States Department of Health & Human Services*, 52 F.3d 288, 290 (10th Cir. 1995) (ALJ must examine other evidence to see if it outweighs the treating physician report, not the other way around). After giving Dr. Priest's opinion "minimal" weight, the ALJ had no medical opinion in the record to support his findings as to Plaintiff's RFC. Upon remand, if necessary, the Commissioner is encouraged to exercise his discretionary power to retain a consultative examiner for assistance in evaluating the medical record and determining Plaintiff's capabilities in light of his

exertional and nonexertional impairments. *Thompson*, 987 F.2d at 1491; *Baker*, 886 F.2d at 291-92; also see *Carter v. Chater*, 73 F.3d 1019, 1021 (10th Cir.1996).

Furthermore, the ALJ's consideration of the medical record portion of the claim was apparently tainted by his confusion regarding the commencement date of Plaintiff's back and leg pain complaints and the alleged date of onset of disability. Early in his decision, the ALJ stated: "The claimant alleges that he became disabled on December 31, 1981." [R. 12]. This is factually inaccurate. Plaintiff asserted his "condition first bothered" him enough to affect his work on January 16, 1981, (referring to his back and leg pain). [R. 58]. He advised he had been able to continue working until 1994 by changing to a sedentary job. *Id.* The date identified by Plaintiff as the date his condition finally made him stop working was February 1, 1994. *Id.* This contention is supported by the medical record. A written summary by James W. Zeiders, M.D., Plaintiff's orthopedic surgeon, dated June 22, 1981, is part of the medical record. [R. 209]. In that report, the surgeon included this comment: "Please note that [Plaintiff] continues to have some degree of symptoms on activity in the low back area with occasional radicular discomfort into his right leg. We have insisted that his job activity be less strenuous and his neurological exam is stable except for the objective complaints and there is no objective findings at this time except for some tightness of his hamstrings." *Id.* The ALJ did not address this evidence in his decision other than to state that Plaintiff's "lower part of his back has hurt him since 1981 when he bends or lifts." [R. 12].

The ALJ reported in his decision that he disbelieved Plaintiff's claim of severe impairment due to back, leg and shoulder pain, because there is a three and one-half year gap between Plaintiff's 1991 medical visits and his January 1995 heart attack. [R. 14]. This conclusion ignores Dr. Priest's handwritten notes. See Dr. Priest's treatment notes: "arthritis of (R) shoulder" on August 30, 1992; "pain low back" on September 18, 1992, along with dates of prescription refills noted. [R. 137].

The ALJ also disregarded the medical evidence regarding Plaintiff's arthritis in his right shoulder which was confirmed by X-ray on June 5, 1991. [R. 206]. A note in the record regarding Plaintiff's treatment for this condition indicates he was released to work on August 14, 1991 with caution on "certain aspects of lifting." [R. 208]. This is the only medical evidence regarding claimant's back and shoulder problems other than Dr. Priest's assessment form. It is impossible to know from the ALJ's decision whether he considered this evidence in concluding Plaintiff had no additional nonexertional impairments to reduce further the light work base. [R. 15].

The same is true of the right orchiectomy procedure Plaintiff underwent in April 1987. [R. 79-82]. Although the medical record is silent as to any residual effects from this surgery, Plaintiff contended at the hearing that he continued to experience burning sensation in his leg and groin and that he was taking medication for relief of pain. [R. 237]. Nor is there any indication from the ALJ's decision that he considered Plaintiff's loss by amputation of part of his right index finger in 1977 in assessing his RFC for sedentary work. [R. 180-184].

Even though he is not required to discuss every piece of evidence, the ALJ is required to "evaluate every medical opinion" he receives, 20 C.F.R. S 404.1527(d), and to "consider all relevant medical evidence of record in reaching a conclusion as to disability,". *Baker v. Bowen*, 886 F.2d 289, 291 (10th Cir.1989). "Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." *Clifton v. Chater*, 79 F.3d 1007 (10th Cir.1996) (citations omitted).

Conclusion

The Court cannot say that the record contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner is REVERSED and REMANDED to the Commissioner for proper consideration of the medical evidence, for further development of the record and for reevaluation of Plaintiff's credibility and the resulting impact upon his RFC.

SO ORDERED this 31ST day of MAY, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAY 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM SCOTT SOURS,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 98-CV-0050-B (E)

ENTERED ON DOCKET

DATE JUN 01 2000

REPORT AND RECOMMENDATION

Defendants filed a Motion to Dismiss or in the Alternative, Motion for Summary Judgement (Dkt. # 14) on December 18, 1998. The undersigned entered a Report and Recommendation (Dkt. # 19) addressing that motion, and the Court adopted that Report and Recommendation in part by Order entered March 6, 2000 (Dkt. # 21). On May 5, 2000, the District Attorney for Tulsa County, Oklahoma filed another Motion to Dismiss or in the Alternative, Motion for Summary Judgement and Brief in Support (Dkt. # 31) on behalf of defendants. The Court referred defendants' May 5, 2000 motion to the undersigned for a report and recommendation. See 28 U.S.C. § 636.

Defendants incorporated into their "renewed" motion to dismiss the brief in support of the December 18, 1998 motion. Since the Court has recently ruled on the December 18, 1998 motion, and defendants have presented no reason for the Court to reconsider its recent ruling, the undersigned recommends that the Motion to Dismiss or in the Alternative, Motion for Summary Judgement (Dkt. # 14) 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 31st day of May, 2000.


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

1 Day of June, 2000, 10.