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RECENT DEVELOPMENTS IN OKLAHOMA CIVIL APPELLATE PROCEDURE*

Charles W. Adams† and J. Michael Medina‡

"The right of appeal is fundamentally guaranteed only to those who comply with the procedure prescribed therefor."[1]

In recent years, the Oklahoma Legislature has streamlined and simplified the pleading[2], discovery[3], and evidence[4] facets of the civil procedure system.[5] However, until last year the law governing judgments and appeals remained substantially untouched.[6] Now this area is undergoing

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1. Meek v. Williams, 441 P.2d 420, 423 (Okla. 1968). A word of caution: the following discussion refers to a number of unpublished orders and decisions of the Oklahoma Supreme Court and Courts of Appeal as illustrations. These unpublished orders are without precedential value, except in cases of res judicata, collateral estoppel or law of the case. Rule 1.2000 B(E) of the Rules of Appellate Procedure in Civil Cases. Indeed, even if published, opinions of the Court of Appeal have only persuasive value unless they are specifically approved for publication by the Supreme Court. Rule 1.200 C(B). *See e.g.*, Willow Creek Condominiums Second, Inc. v. Andreyev, 798 P.2d 648 (Okla. Ct. App. 1990). This precedential policy is apparently unique to Oklahoma. Mattis & Yalowitz, Stare Decisis Among [SIC] the Appellate Courts of Illinois, 28 DEPAUL L. REV. 571, 596-97 (1979).

2. *See* OKLA. STAT. tit. 12, §§ 2001-2027 (1991).

3. *See* OKLA. STAT. tit. 12, §§ 3201-3237 (1991).

4. *See* OKLA. STAT. tit. 12, §§ 2101-3103 (1991).

5. For a criticism of the rush of many states (Oklahoma included) toward uniformity though adoption of Federal Rules, see Graham, *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293 (1990).

6. In the past few years several commentators have criticized particular aspects of Oklahoma's civil appellate system. *See* Holladay, *Appellate Jurisdiction in Cases Involving Multiple Claims*, 60 OKLA. B.J. 3227, 3225 (1989) ("Oklahoma's adoption of a counterpart to Rule 54(b), Federal Rules of Civil Procedure, would go a long way toward injecting some needed certainty into Oklahoma appellate procedure."); Medina, *Pitfalls in Oklahoma Civil Appellate Practice*, 57 OKLA. B.J. 741, 741 (1986) ("Oklahoma appellate law, because of its unique structural posture, presents many potential traps lurking to snare inexperienced (or even experienced) lawyers."); Note, *Procedure: Effect of Attorney Fees on Finality of Judgment — Amendment to Rule 1.11(c)*, 40 OKLA. L. REV. 145, 145

dramatic change.

In 1990 the Oklahoma Legislature passed the Oklahoma Judgments and Appeals Act (the "Act"),[7] which was a comprehensive revision of the statutes governing the preparation of judgments and the filing of appeals in civil cases. That Act has now been substantially repealed[8] and the Oklahoma Statutes that existed before its enactment have been restored,[9] thereby returning the Oklahoma law governing judgments and appeals to approximately what it was before the Act was passed.[10] However, before the Oklahoma Legislature repealed the Act, the Oklahoma Supreme Court made a number of revisions to its Rules of Appellate Procedure in Civil Cases[11] to conform to the Act. Because the Rules of Appellate Procedure have not been amended since the Act was repealed, there are some inconsistencies between the Rules and the present statutes. In addition, despite the repeal of most of the Act, three of its key provisions were preserved: two of them in newly adopted section 990A and the other in section 1006 of title 12.

At the same time that the Oklahoma Legislature repealed the Act, it established a Joint Interim Committee and an Interim Advisory Committee on Judgments and Post-Judgment Procedure to prepare draft legislation to streamline and clarify the procedures for the rendition of judgment and appeals in civil cases.[12] Thus, although most of the former Oklahoma law has been restored for the time being, further changes to

(1987) ("Despite an unprecedented triple revision of its rules by the Oklahoma Supreme Court, there continues to be a serious question on the most fundamental level of appellate procedure. When must a petition in error be filed with the Oklahoma Supreme Court for it to be timely where the trial court has decided all substantive issues raised in an action other than the issue of attorney's fees?"). The Oklahoma Judgments and Appeals Act, *infra* note 7, addressed a number of the problems noted by these commentators.

7. OKLA. STAT. tit. 12, §§ 1001-1008 (Supp. 1990) (repealed 1991). The Act was to apply to all judgments and appealable orders rendered on and after January 1, 1991. For legislative history pertaining to the Act, see Tawwater, *The Proposed Appellate Procedures Act*, (OBA/CLE Seminar, Oct. 26, 1990); Wallace, *The Legislative History of the New Act on Judgment and Appeals*, (OBA/CLE Seminar, Oct. 26, 1990).

8. 1991 Okla. Sess. Law Serv. 1761, 1769 (West).

9. 1991 Okla. Sess. Law Serv. 1761, 1761-69 (West). For a useful disposition table summarizing the revisions to the statutes, see Ellis, *The 1991 Repeal of the 1990 Judgments and Appeals Act*, 62 OKLA. B.J. 2793 (1991).

10. The statutes governing appellate procedure are found at OKLA. STAT. tit. 12, §§ 941-993 (1991).

11. These Rules appear at OKLA. STAT. tit. 12, ch. 15, app. 1 (1991). The Oklahoma Supreme Court has also promulgated the Rules of the Supreme Court of Oklahoma, *id.* app. 1, and the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to That Court, *id.* app. 3. In addition, some of the Rules for District Courts of Oklahoma, *id.* ch. 2, app. 1 (*e.g.*, Rule 17 on motions for new trial), may affect appellate procedure.

12. S. Con. Res. 20, 1991 Okla. Sess. Law Serv. A-2 (West).

accomplish what were the basic objectives of the Act are likely to be forthcoming from the Oklahoma Legislature.

This Article is divided into two parts. The first part discusses the recent statutory changes concerning judgments and appeals in Oklahoma state courts. It examines the repealed Act and the three of its provisions that have been preserved. It also recommends some changes to clarify and simplify the law of judgments and appeals for Oklahoma state courts. The second part discusses recent judicial developments in this area.

I. STATUTORY CHANGES

A. *The Oklahoma Judgments and Appeals Act*

The major objective of the Act was to clarify the timing for filing appeals from judgments and appealable orders in Oklahoma state courts. This was to be accomplished by tying finality to the preparation and filing with the district court clerk of a written judgment signed by the judge, instead of to the judge's oral pronouncement of the decision. Not only the timing of finality but also the terms of the judgment would be clarified by the requirement of a writing.[13]

Making filing a prerequisite to finality could have the unwelcome side effect of delaying finality, particularly if one of the parties were disposed to delay approval of a judgment in order to avoid its enforcement or to put off the deadline for appeal. Section 1001 in the Act[14] attempted to alleviate this problem by encouraging trial judges to prepare and sign judgments themselves where this was feasible, and where it was not, by specifying a procedure for the prompt preparation of judgments by the attorneys. Section 1001 also specified simple forms for judgments. To assure that the parties received notice of a judgment's filing, section 1002 required a file-stamped copy of the judgment to be mailed to them, unless the judgment was signed in their presence.

The Act also included provisions dealing with the awarding of costs, attorney's fees, and interest on judgments. Section 1001 stated that these items of ancillary relief could be included in a judgment, but their absence would not prevent the judgment from becoming final. Section 1003 specified a deadline of thirty days from the filing of the judgment for a party seeking costs, attorney's fees, or interest to apply to have them awarded. The deadlines for filing post-trial motions and appeals would

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13. *See* OKLA. STAT. ANN. tit. 12, § 1001 Committee Comments (West Supp. 1990) ("[I]n a sense this Act constitutes a statute of frauds for judgments."). *Id.*

14. OKLA. STAT. tit. 12, § 1001 (Supp. 1990) (repealed 1991).

have begun to run with the filing of a judgment. Section 1004 set out the general rule that an appeal from a judgment was commenced by the filing of a petition in error with the Oklahoma Supreme Court within thirty days after the filing of the judgment with the district court clerk. This general rule was qualified in a variety of circumstances and for a variety of reasons. The time for an appellant to file a petition in error was extended if section 1002 required a file-stamped copy of the judgment to be mailed to the appellant and the records did not reflect the mailing. In addition, if a motion for new trial or judgment notwithstanding the verdict was filed within ten days after the filing of the judgment, the time to appeal would not begin to run until the trial court's ruling on the post-trial motion was filed with the district court clerk.

Section 1004 also had savings provisions to handle the problem of premature appeals. A premature appeal could result from the filing of a petition in error either before the judgment was filed with the court clerk or while a post-trial motion was still pending. A premature appeal was subject to dismissal under the Act, but if an appeal was dismissed on account of being premature, the savings provisions would allow a new appeal to be filed within thirty days after the appellant was sent notice of the dismissal.

With respect to the commencement of appeals, section 1004 provided that a petition in error was timely if it was mailed to the Oklahoma Supreme Court within the thirty day deadline after the filing of the judgment. Under prior Oklahoma law, a petition in error had to be received by the Oklahoma Supreme Court within the thirty day time limit in order to be timely.

Section 1006 dealt with appeals in cases involving multiple claims or multiple parties and was another important provision governing the timing of appeals. The general rule was that the time to appeal would not begin to run until a judgment determining all the claims brought by and against all the parties was filed with the court clerk. The general rule was subject to the exception, though, that the trial court could expressly direct the filing of a judgment with respect to less than all the claims and parties, and if that was done, the time to appeal as to those claims and parties would start to run upon the filing of that judgment.

Section 1004 also governed the timing of appeals from appealable orders, both interlocutory and final orders. Final orders were treated as judgments under section 1001(A), and so the time limits on appeals from judgments would apply to them. Final orders were those that terminated

a case and included denials of motions for new trial or to vacate a judgment and orders granting or denying a judgment notwithstanding the verdict. Appealable interlocutory orders included orders involving provisional remedies such as temporary injunctions and attachments, orders granting new trials, and orders certifying or refusing to certify class actions. The appealable interlocutory orders would not necessarily be filed with the district court clerk when they were issued, and so section 1004 specified that the time to appeal from an interlocutory order started to run on the date the order was mailed to the appellant, or if all parties were present at the hearing where the order was issued, on the date of the hearing.

Section 1007 collected a number of statutory provisions dealing with stays of execution of judgments while a case was on appeal. It codified prior case law that made money judgments subject to an automatic ten day stay of execution,[15] and it provided for a further stay while various post-trial motions were pending before the trial court. Section 1007 also set out the procedure for filing a supersedeas bond or cash deposit to stay a money judgment during the appeal, and it authorized the trial court to grant discretionary stays of non-money judgments.

The final section of the Act, section 1008, provided the Oklahoma appellate courts with authority to dismiss frivolous appeals and impose sanctions on appellants and their attorneys who filed them.

B. *Current Oklahoma Law*

When the Act went into effect, Oklahoma judges, attorneys, and court clerks attempted to adjust to its changes. The greatest source of difficulty appeared to be the requirement that judgments had to "conform substantially" to the judgment forms. These judgment forms were designed primarily for money judgments, and some attorneys who handled foreclosures and probate proceedings were dissatisfied because the judgment forms did not cover their cases.

Instead of modifying those specific statutes that required the judgment forms to be used, the Oklahoma Legislature responded to complaints about the judgment forms by repealing the Act almost entirely and re-enacting the prior Oklahoma Statutes. Thus, it eliminated the procedures for the preparation of judgments and the award of costs, attorney's fees, and interest, the savings provision for premature appeals, the temporary automatic stay for money judgments, and the sanctioning

15. *See* Mapco, Inc. v. Means, 538 P.2d 593 (Okla. 1975).

authority for appellate courts. What remains of the Act are its provisions that: 1) measure the time to appeal from the date of filing of the judgment, 2) allow the filing of civil appeals by certified mail, and 3) govern appeals in actions with multiple claims or parties. Limited as the surviving portions are, they nevertheless represent significant improvements in Oklahoma's appellate system.

1. Triggering of the Appeal

New section 990A of title 12 retains a substantial change made by the Act: the filing of a judgment is a precondition to its appealability. Under prior Oklahoma law, a judgment was appealable as soon as it was pronounced.[16] The prior rule created some confusion for attorneys, particularly where the judge's pronouncement was accompanied by a direction for the preparation of a journal entry of judgment by the attorney for the prevailing party.[17] Section 990A sets out the new rule that "an appeal to the Supreme Court may be commenced by filing a petition in error . . . within thirty (30) days from the date the final order or judgment is filed."[18] However, the change is an incomplete one because unlike in the original Act,[19] there are no procedures for the preparation and

16. Grant Square Bank & Trust Co. v. Werner, 782 P.2d 109, 111 (Okla. 1989) ("[T]he time for bringing review does not begin to run from the day an appealable decision is memorialized, but rather from its effective pronouncement. . . ."); Carr v. Braswell, 772 P.2d 915, 917 (Okla. 1989) ("[T]he time to commence an appeal from [an order granting a summary judgment] began to run the day the order was pronounced from the bench and communicated to the parties."); Presbyterian Hosp. Inc. v. Board of Tax-Roll Corrections, 693 P.2d 611, 614 (Okla. 1984) ("[A]n appellant cannot extend his time limit for appeal by refusing to approve the form of the journal entry, after judgment has been rendered and notice given to the parties."); Warehouse Mkt., Inc. v. Berry, 459 P.2d 853, 854 (Okla. 1969) (thirty day period for filing appeal began to run when the trial court's decision was pronounced, rather than when the journal entry was filed); Arkansas Louisiana Gas Co. v. McBroom, 526 P.2d 509, 511 (Okla. Ct. App. 1974) (dismissing an appeal as untimely that was filed within 30 days of the filing of the journal entry but more than 30 days from the date of the jury verdict) (Approved for Publication by the Oklahoma Supreme Court).

17. Miller v. Miller, 664 P.2d 1032, 1034 (Okla. 1983) ("A recital in the clerk's minute that 'the court renders judgment for the defendants per journal entry to be filed' does not constitute a judgment where the trial court's judgment does not appear in the record."); Shaw v. Sturgeon, 304 P.2d 341, 343 (Okla. 1956) (court's statement directing parties to prepare journal entry was not sufficiently explicit to qualify as a judgment); News-Dispatch Printing & Audit Co. v. Board of Comm'rs, 132 Okla. 216, 217, 270 P. 2, 3 (1928) (minute entry reflecting that the court rendered judgment for the defendants "as per journal entry to be filed" did not constitute a judgment). *See also Medina*, supra note 6, at 746 n. 12 (1986); Morgan, *Delayed Attacks on Final Judgments*, 33 OKLA. L. REV. 45, 45 n. 1 (1980) ("A judgment is rendered whenever the judge indicates a present intention to adjudicate the matter. Since no particular form is required there is sometimes uncertainty as to exactly when a judgment is pronounced.").

18. OKLA. STAT. tit. 12, § 990A (1991). *But see* Jaco Prod. Co. v. Luca, 62 OKLA. B.J. 3544 (Okla. 1991) (appeal time begins to run when jury verdict is entered by the clerk, not when journal entry of judgment is filed).

19. *See* OKLA STAT. tit. 12, § 1001 (Supp. 1990), (repealed 1991). *But see*, McCullough v.

filing of judgments and for appropriate notice to counsel. Furthermore, unlike the provisions of the original Act, no specific exclusion from the definition of judgment is provided for letters from the court directing the preparation of an order.[20]

In addition, section 990A deals only with the triggering of the time to appeal. It does not affect the time when the judgment becomes enforceable. Under the prior Oklahoma law, a judgment was effective as soon as it was pronounced, and this appears now to be the rule for Oklahoma state court judgments. Moreover, the time for filing post-trial motions remains tied to the time of rendition, rather than the filing of the judgment.[21]

2. Filing of Appeal by Certified Mail

Another change made by section 990A is its provision for the filing of petitions in error by certified mail with return receipt requested.[22] The need for this change is illustrated by the result in *Turrell v. Continental Oil Co.*.[23] The Oklahoma Supreme Court dismissed the appeal in *Turrell* on the ground that it was not timely filed, where the appellant mailed the petition in error from Tulsa on the Friday before the filing deadline on Monday, and the petition in error was not delivered to the Supreme Court until Tuesday. The Oklahoma Supreme Court ruled: "[m]ailing a petition in error in a cover addressed to the clerk of this court, postage prepaid, within time believed to be required for delivery does not constitute compliance with [section] 990."[24] Thus, under *Turrell*, an appellant

Safeway Stores, Inc. 626 P.2d 1332, 1335 (Okla. 1981) (where the trial court took a motion for summary judgment under advisement, the appellant was allowed 30 days from the time of the mailing of notice that the trial court had granted summary judgment in which to file an appeal), cited with approval on this point, Pope v. Tulsa Professional Collection Serv., Inc., 808 P.2d 640, 644 (Okla. 1991). Rule 1.11(a) of the Rules of Appellate Procedure in Civil Cases confirms this rule. However, a strict reading of the new legislation, *supra* n.17, creates a conflict with the rule. The new legislation measures the appeal time from the *filing* of the judgment or final order. As has been suggested, *Ellis supra* n.9, the safest course is to cover all possibilities, and, if need be, file multiple appeals. For a recent illustration of the benefits of filing multiple petitions in error, see *In re* Goodly, 62 OKLA. B.J. 3018, 3019 (Okla. Ct. App. 1991).

20. *See* OKLA. STAT. tit. 12, § 1001(E) (Supp. 1990) (repealed 1991).

21. *See* OKLA. STAT. tit. 12, §§ 653, 698 (1991). In addition, a potential conflict exists between § 653, prescribing the 10 day period to run from *rendition* of the judgment and Rule 1.12(c)(1), which provides that the period commences on the *filing* of the judgment.

22. Besides filing the petition in error with the Oklahoma Supreme Court, an appellant must also file a copy with the trial court and mail a copy to all other parties to the appeal or their counsel. Rule 1.14(b) of the Oklahoma Rules of Appellate Procedure in Civil Cases. Timely filing of the petition in error is jurisdictional. *See* Rule 1.14(c).

23. 466 P.2d 643 (Okla. 1970).

24. 466 P.2d at 644. *See also* Burk v. Burk, 516 P.2d 268 (Okla. 1973) (affirming denial of motion to vacate that was based on the failure of the Postal Service to deliver petition in error within

who mailed a petition in error to the Oklahoma Supreme Court took the risk of late delivery by the post office, which would cause the appeal to be dismissed as untimely.[25] Consequently, attorneys for appellants who wished to file petitions in error toward the end of the appeal period and who wanted to avoid exposure for malpractice had to incur the expense of utilizing means other than the mail for delivering petitions in error to the Oklahoma Supreme Court.[26]

Section 990A changes the rule of the *Turrell* case by providing that the date of mailing a petition in error is deemed to be the date of its filing with the Oklahoma Supreme Court, so that an appeal will be timely if the petition in error is mailed within thirty days from the filing of the judgment with the court clerk.[27] Section 990A further provides that the date of mailing will be established from the postmark or other proof from the post office. It should be noted, however, that unless the petition in error is sent by certified mail with return receipt requested, the filing will not be effective until the petition in error is received by the Oklahoma Supreme Court.[28] In addition, the proof of mailing must be supplied by the post office; a record from a private postal meter is not effective to establish the date of mailing.[29] An appellant who does not want to have to rely on the Oklahoma Supreme Court's making a record of the date of the postmark or its preserving the envelope in which the petition in error

the 30 day period for a prior appeal); *In re* Dalzell, 813 P.2d 537 (Okla. Ct. App. 1991) (appeal dismissed; mailing rule not retroactive, thus *Turrell* rule applicable).

25. For examples of cases dismissing appeals as untimely, *see e.g.*, Carr v.Braswell, 772 P.2d 915 (Okla. 1989); Grant Square Bank & Trust Co. v. Werner, 782 P.2d 109 (Okla. 1989). In Fields v. A & B Electronics, 788 P.2d 940 (Okla. 1990), however, the court saved an appeal from the Workers' Compensation Court by taking judicial notice that (unknown to appellant), the court clerk's office was closed early on the final day of the jurisdictional period.

26. *See Medina, supra* note 6, at 746 n. 10 (1986) (recommending at least a one day safety margin for transmitting a petition in error to the Oklahoma Supreme Court).

27. The address for mailing prescribed in Rule 1.15(a) of the Oklahoma Rules of Appellate Procedure in Civil Cases is: Clerk of the Supreme Court, Room 1, State Capitol Bldg., Oklahoma City, Oklahoma 73105.

28. Rule 1.15(a) of the Oklahoma Rules of Appellate Procedure in Civil Cases provides in pertinent part: "A petition in error mailed by U.S. mail, other than return receipt requested, or private express or delivered by courier will be deemed filed upon date of receipt by the Clerk."

29. Rule 1.15(a) of the Oklahoma Rules of Appellate Procedure in Civil Cases provides in pertinent part: "A postmark date from a privately owned postage meter will not suffice as proof of the date of mailing and will be deemed filed upon date of receipt by the Clerk." The Clerk of the Appellate Courts has announced that for the filing of a petition in error by mail to be effective, it must be sent by certified mail with return receipt requested and be postmarked by the Post Office, rather than with a private postage meter. *Notice to Attorneys*, 62 OKLA. B.J. 252 (1991).

is mailed should obtain a sender's receipt from a postal employee showing the date of mailing.[30]

The clerk of the Supreme Court formerly accepted petitions in error for filing at his residence in order to provide attorneys with additional time for filing petitions in error. Since section 990(A) now permits filing by certified mail, the Clerk has discontinued this practice.[31]

The filing by mail provision in section 990A applies only to the filing of petitions in error. Briefs, motions and other documents continue to be deemed filed only when actually filed at the Clerk's office.[32] Furthermore, the extra time authorized by title 12, section 2006(D) of the Oklahoma Statutes[33] for a party to respond after being served by mail does not apply to appellate proceedings.[34]

3. Judgments in Cases with Multiple Claims or Parties

The only portion of the Act itself that was not repealed is section 1006 of title 12, which deals with cases involving multiple claims or parties. The joinder of multiple claims and parties in a single action is authorized by various sections of the Oklahoma Pleading Code.[35] If a trial court decides some, but less than all, of several claims asserted in a case, is the court's decision immediately effective and appealable, or must all the claims asserted by and against all the parties be decided before there is a final judgment that is effective and appealable?

The prior Oklahoma law on this question was confusing and uncertain.[36] If a case involved multiple parties and a trial court's ruling had

30. *See* United States Postal Service, Domestic Mail Manual § 912.44(d) (1990) (sender of certified mail may obtain a receipt from the post office showing the time an article is accepted for mailing).

31. *See* Rule 1.15(a) of the Oklahoma Rules of Appellate Procedure in Civil Cases, which provides in part:

> Effective March 1, 1991, when a petition in error is delivered to the Clerk for filing it must be delivered at the Office of the Clerk of the Supreme Court during regular office hours, Monday through Friday between 8:00 a.m. and 5:00 p.m., holidays excluded, at the State Capitol.

Id.

32. Rule 1.15(c) of the Oklahoma Rules of Appellate Procedure in Civil Cases provides: "All briefs, pleadings, motions, petitions for rehearing, and petitions for certiorari to the Court of Appeals are deemed filed on date of receipt of the Clerk of the Supreme Court."

33. OKLA. STAT. tit. 12, § 2006(D) (1991).

34. Rule 1.1(b) of the Oklahoma Rules of Appellate Procedure in Civil Cases provides: "The additional time of three (3) days granted by 12 O.S. Supp. 1985 § 2006(D) is not applicable to the time periods described in these rules."

35. *See* OKLA. STAT. tit. 12, §§ 2013, 2015, 2018-2020, 2022, 2024 (1991).

36. Mann v. State Farm Mut. Auto. Ins. Co., 669 P.2d 768, 770 (Okla. 1983) ("The problem of what constitutes a final judgment or order has been a perplexing one both in federal and state courts."); Holladay, *Appellate Jurisdiction in Cases Involving Multiple Claims*, 60 OKLA. B.J. 3227,

the effect of letting one of the parties out of the case, then the ruling would be final and immediately appealable.[37] Where multiple claims were involved, the disposition of one of several of them was immediately appealable if it arose out of a transaction separate from the others,[38] but it was not appealable until the others were decided if it was interrelated with them.[39]

The practical difficulty of applying these principles is illustrated by *Mann v. State Farm Mutual Automobile Insurance Co.*[40] The plaintiff in *Mann* sued his insurer for breach of the insurance contract and also for bad faith refusal to pay under the policy. The trial court entered judgment in favor of the plaintiff on the insurance contract, and the insurer appealed the judgment and also applied for a writ of prohibition to prevent the trial court from proceeding further with respect to the tort of bad faith refusal to pay the insurance claim. The Oklahoma Supreme Court held that the judgment on the insurance contract was separately appealable from the tort of bad faith refusal to pay the insurance claim, and it issued the writ of prohibition requested by the insurer that directed the trial court to refrain from further proceeding with respect to the tort

3227 (1989) ("Appellate jurisdiction over trial court adjudications which only partially dispose of the parties, or dispose of one or more but less than all of the claims in a lawsuit, can be a confusing area for the Oklahoma practitioner.").

37. Frazier v. Bryan Memorial Hosp. Auth., 775 P.2d 281, 285 n.13 (Okla. 1989) (order of dismissal that let a party out of the lawsuit was an appealable order); Esker v. Kip's Big Boy, Inc., 632 P.2d 414 (Okla. 1981) (time to appeal began to run upon filing of journal entry denying judgment to one of two plaintiffs); Ritter v. Perma-Stone Co., 325 P.2d 442, 443 (Okla. 1958) (order sustaining demurrer as to one of two defendants was immediately appealable as a final order).

38. FDIC v. Ross, 62 OKLA. B.J. 3418 (Okla. 1991) (grant of summary judgment on counterclaim was appealable final order based on separate and distinct claim); Eason Oil Co. v. Howard Eng'g, Inc., 755 P.2d 669, 672 (Okla. 1988) ("[W]hen none of the multiple claims pressed in the same action is interrelated with another, the trial court's decision determining *all* the issues in a single claim will be deemed to constitute a judgment.") (emphasis in original) (dictum); Oklahomans for Life, Inc. v. State Fair of Oklahoma, Inc., 634 P.2d 704, 706 (Okla. 1981) ("A trial court's decision, which determines all of the issues in one entire cause of action among several stated in a suit, constitutes a final appealable disposition.").

39. State *ex rel.* Oklahoma Bar Ass'n. v. Brewer, 794 P.2d 397, 398 (Okla. 1989) ("When [a trial court order leaves interrelated counterclaims unadjudicated] the order is not final for purposes of appellate jurisdiction."); Eason Oil Co. v. Howard Eng'g, Inc., 755 P.2d 669, 672 (Okla. 1988) ("*All interrelated claims* must be decided before judgment will be deemed to have been rendered.") (emphasis in original); Reams v. Tulsa Cable Television, Inc., 604 P.2d 373, 374 (Okla. 1979) ("There can be *no* judgment when the court disposes of but a portion of a single cause of action.") (emphasis in original); Hudson v. Total Petroleum, Inc., No. 71,771 (Okla. Ct. App. 1991) (unpublished) (order sustaining motion for summary judgment against appellant's claims of oral lifetime contract not final because unadjudicated counterclaim for money judgment against appellant at issue); Testerman v. First Family Life Ins. Co., 808 P.2d 703 (Okla. Ct. App. 1990) (fraud claim only one of multiple claims which addressed rights arising from single transaction; thus, disposition of fraud claim was not appealable).

40. 669 P.2d 768 (Okla. 1983).

claim until the determiniation of the appeal of the contract claim.[41] Justice Opala wrote in dissent that because the breach of the insurance contract and the tort of bad faith refusal to pay the insurance claim arose out of the same transaction, they were not separate causes of action, but instead were merely alternative theories of liability, each supporting a different measure of damages.[42]

The split on the Oklahoma Supreme Court in *Mann* shows how hard it was to predict whether the trial court's determination was immediately appealable, because it disposed of an entire claim, or was not appealable until the end of the case, because it resolved only a single theory of liability. An immediate appeal might have been dismissed as premature if the Oklahoma Supreme Court had ruled that the trial court's decision did not entirely dispose of a claim. But an appeal filed at the end of the case might be dismissed as untimely if the Oklahoma Supreme Court ruled that the trial court had previously disposed of an entire claim. A miscalculation could therefore have serious consequences.

Section 1006 was designed to eliminate the difficulties previously encountered with the timing of appeals in cases involving multiple claims or parties by adopting a simple rule. Simply stated, a decision as to only a part of a case is not appealable until the trial court decides all the issues in the case. Some flexibility is provided, though, with an exception that authorizes the trial court, after finding that there is no reason for delaying the appeal to the end of the case, to expressly direct the preparation and filing of a judgment as to fewer than all the claims and parties. Where such an express direction is made by the trial court, it will be clear that a party seeking appellate review must file a petition in error promptly. On the other hand, in the absence of such an express direction, it will be clear that the appeal should not be filed until the judgment determining all the issues in the case is filed with the court clerk. Under section 1006, the trial judge plays the role of a dispatcher[43] with the responsibility for either sending a ruling on a claim up through the appellate process right away or detaining it below until all the claims in the case are resolved.

The trial court is allowed to direct the preparation and filing of a

41. Id. at 772-773.

42. Id. at 773.

43. *Cf.* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956) ("[Under Fed. R. Civ. P. 54(b)], the District Court is used as a 'dispatcher.' It is permitted to determine, in the first instance, the appropriate *time when each 'final decision'* upon 'one or more but less than all' of the claims in a multiple claims case is ready for appeal.") (emphasis in original).

judgment on fewer than all the claims in a case only if its ruling lets one of the parties (either plaintiff or defendant) out of the case entirely, or if its ruling disposes of an entire claim. A trial court may not allow an immediate appeal where it issues a ruling that disposes of only a single theory of recovery against a party who remains in the case.[44] As under prior Oklahoma law, the scope of a claim is determined by a transactional approach,[45] but section 1006 shifts the responsibility for determining whether a trial court's determination entirely disposes of a claim from the appellant to the trial judge.[46]

Section 1006 was based on Federal Rule of Civil Procedure 54(b), whose language it tracks closely.[47] Accordingly, the federal cases interpreting Federal Rule 54(b) should be followed in Oklahoma state courts.[48]

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44. *See* Allegheny County Sanitary Auth. v. EPA, 732 F.2d 1167, 1172-73 (3d Cir. 1984) (multiple counts comprised only one claim and therefore trial court's certification under Fed. R. Civ. P. 54(b) did not confer appellate jurisdiction with respect to dismissal of one of the counts) (dictum); Tolson v. United States, 732 F.2d 998 (D.C. Cir. 1984) (trial court erred when it ordered entry of a final judgment on one theory of recovery, while other theory based on same facts remained to be tried); Backus Plywood Corp. v. Commercial Decal, Inc., 317 F.2d 339 (2d Cir.) *cert. denied*, 375 U.S. 879 (1963) (Fed. R. Civ. P. 54(b) was not properly invoked to permit appeal from an order striking two of three theories of recovery). Under federal practice, the distinction is often not an easy one. See 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2657 at 60 ("Unfortunately, it is not always easy to tell whether an action presents multiple claims.").

45. *See generally*, Retherford v. Halliburton Co., 572 P.2d 966, 968-69 (Okla. 1977) (discussing scope of cause of action). *See also* Spiegel v. Trustees of Tufts College, 843 F.2d 38, 45 (1st Cir. 1988) (counts which were dismissed were intertwined with those that were not, and so separate judgment should not have been entered under Fed. R. Civ. P. 54(b)); RESTATEMENT (SECOND) OF JUDGMENTS § 24 (2) (1982) ("What factual grouping constitutes a 'transaction', and what grouping constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.").

46. One significant modification effected by the 1991 Amendment was to strike from the statute the District Court's authority to stay enforcement of the separate judgment on that claim. *See* OKLA. STAT tit. 12 § 1006(B) (Supp. 1990) (repealed 1991). Section 1006(B) was derived from FED. R. CIV. P. 62(h) and was meant to be applied in situations where immediate enforcement of a judgment with respect to a single claim may create hardship, especially if other claims that have not yet been adjudicated might be offset against the claim that would be enforceable. *Cf.* Fleming v. Baptist Gen. Convention, 742 P.2d 1087, 1099 (Okla. 1987) (Oklahoma Supreme Court ordered stay of execution on main claim until the counterclaim was adjudicated). For federal cases granting stays under Rule 62(h), see St. Marie & Son, Inc. v. Hartz Mountain Corp., 414 F.Supp. 71, 74 (D. Minn. 1976); Morand Bros. Beverage Co. v. National Distillers & Chem. Corp., 25 F.R.D. 27, 29 (N.D. Ill. 1959).

47. Section 1006 is also similar to former Dist. Ct. R. 25, OKLA. STAT. tit. 12, ch. 2, app. (1981), which was revoked and withdrawn on November 18, 1982, OKLA. STAT. tit. 12, ch. 2, app. (Supp. 1990).

48. *See* Hall v. Goodwin, 775 P.2d 291, 293 (Okla. 1989) ("Because Oklahoma obtained its discovery code from the Federal Rules of Civil Procedure, we will examine the federal cases construing Rule 26."); Laubach v.Morgan, 588 P.2d 1071, 1073 (Okla. 1978) ("[I]f one state adopts a statute from another, it is presumed to adopt the construction placed upon that statute by the highest

C. *Suggested Reforms*

Although the Oklahoma Legislature retained a few key provisions of the Act in sections 990A and 1006, a number of problems remain that can be resolved by further reforms, many of which may be taken from the repealed Act.

1. Procedure for Preparation of Judgments

It would be desirable to have a statutory procedure for the preparation, signing, and filing of judgments. With their heavy caseloads and limited clerical support, Oklahoma state court judges cannot realistically be expected to prepare judgments for all the cases they handle. Substantial responsibility for the preparation of judgments thus has to be given to attorneys. Unfortunately, in some circumstances attorneys may be tempted to drag out the preparation of judgments for tactical reasons,[49] such as to delay the running of the time to appeal.

The Act attempted to deal with these problems in its section 1001 by requiring the trial judge to either prepare the judgment or assign responsibility for its preparation to one of the attorneys. Section 1001 provided a ten day limit for the attorney who had been assigned in which to submit the proposed judgment to the court and to opposing counsel, who would then have ten days to file specific objections to it with the court. Section 1001 employed a default mechanism to bring about compliance with the deadline for preparing the judgment: if the assigned attorney did not prepare the proposed judgment within the prescribed time, then any other party could prepare the judgment and submit it to the court.

In many cases, such as foreclosure proceedings, the prevailing party may be able to anticipate the form of the judgment before the judge decides the case. In these circumstances the attorney should be allowed to furnish a proposed judgment to the judge at the time the case is submitted for decision. Then the judge could sign the judgment immediately, instead of assigning the preparation of the judgment to the prevailing party's attorney after the case is decided. A provision authorizing the submission of proposed judgments in advance of judicial decision would facilitate the prompt preparation of judgments in many cases.

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court of the other state."). For cases construing FED. R. CIV. P. 54(b), see Annotation, *Modern Status of Federal Civil Procedure Rule 54(b) Governing Entry of Judgment on Multiple Claims*, 32 A.L.R. FED. 772 (1977); Annotation, *Necessity of Statement of Reasons Underlying District Court's Decision to Grant Ceritification Under Rule 54(b) of Federal Rules of Civil Procedure*, 89 A.L.R. FED. 514 (1988).

49. *Cf.* Brown v. Mayfield, 786 P.2d 708 (Okla. Ct. App. 1989).

Because the judgment forms were the cause of most of the dissatisfaction with the Act, their use should not be mandated. However, suggested forms for judgments may be helpful for some attorneys, and they could be included in a future statute as long as it was clear that it was not mandatory to use them.

2. Awards of Costs, Attorney's Fees, and Interest

The Act had several beneficial provisions dealing with the award of costs, attorney's fees, and interest, which should be included in future legislation. Section 1001(A) stated that these items of ancillary relief could be included in a judgment, but their absence would not prevent it from being final. This provision was meant to resolve what had been a persistent problem in appellate procedure.[50] Section 1001(A) also provided that the trial court retained authority to award costs, attorney's fees, and interest even after the filing of a petition in error. If the trial court awards ancillary relief after a petition in error has been filed, appellate review may be sought under Rule 1.17(c) of the Rules of Appellate Procedure in Civil Cases through amendment of the petition in error. Section 1003 specified a procedure for requesting costs, attorney's fees, and interest, and this included a thirty day deadline for filing the request. A deadline for seeking this ancillary relief appears to be missing from Oklahoma, and it is sorely needed.

3. Notice of the Filing of the Judgment

Section 1002 had provisions which involved the court clerk in the process of providing notice of the judgment to the parties in some cases. It is appropriate to require the giving of notice of the filing of the judgment, because the time to appeal is measured from the time of filing of the judgment. Giving the court clerks responsibility for sending out this notice generated substantial opposition to the Act from them, and this should be avoided in future legislation by placing the entire burden of giving notice on the parties. At the time the judge signs a judgment, he can assign the giving of notice to the prevailing party, who would have the appropriate incentive to send out the notice promptly in order to start the running of the time for filing an appeal.

4. Effect of Post-Trial Motions on Appeal Time

Under the final judgment rule, an appellate court does not review a

50. *See Note, supra* note 6.

case until the trial court is through with it.[51] When is a trial court really through with a case, though? Even though a judgment is filed, the trial court may grant a new trial or a judgment notwithstanding the verdict. Until all the post-trial motions have been resolved, there is a possibility that an appeal may become moot by the trial court's alteration of the judgment. This possibility has been recognized for a long time in title 12, section 991 of the Oklahoma Statutes,[52] which provides that if a motion for a new trial is filed, an appeal should not be taken until after the trial court has ruled on the motion.

Other motions, such as motions to vacate a judgment, can also give the trial court an opportunity to alter a judgment and moot an appeal. But some of these may be filed years after a judgment,[53] and there is no limit on the time for vacating a void judgment.[54] If the final judgment rule required the time limits for filing motions to vacate to expire before an appeal could be filed, then the time to appeal could be put off for an

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51. *See* Eason Oil Co. v. Howard Eng'g, Inc., 755 P.2d 669, 672 (Okla. 1988) (a ruling of a trial court that does not culminate in a judgment is not appealable, unless it falls within specific categories of appealable orders); Stekoll v. Jones, 648 P.2d 13, 14 (Okla. 1982) (trial court ruling that was conditioned on the occurrence of a future event was not final and appealable until the condition was removed).

There are a number of good reasons for the final judgment rule. It averts the confusion and wasted effort that could result if a trial court and an appellate court both handled a case at the same time. The final judgment rule also allows the appellate review of all the trial judge's errors to be consolidated into a single appeal, thus reducing work for the appellate court. By hearing a single appeal at the end of the case, rather than piecemeal as the case progresses, the appellate court can get a better perspective on the case. And finally, postponing an appeal until the end of the case reduces the number of errors that have to be reviewed, because many of the errors committed against a party will become moot if that party prevails at trial.

Even though there are many good reasons for the final judgment rule, there are also a number of circumstances where an immediate appeal would be desirable, and so a number of exceptions to the rule are necessary. The exceptions recognized in Oklahoma state courts are for the interlocutory orders that are appealable by right under OKLA. STAT. tit. 12, §§ 952(b)(2), 993 (1991) and the interlocutory orders that may be certified for appeal under OKLA. STAT. tit. 12, § 952(b)(3) (1991). In addition, appellate review before final judgment may be obtained in some circumstances through the extraordinary writs of mandamus and prohibition. For a recent discussion of appealable interlocutory orders, see Parkinson, *Interlocutory Appeals in Oklahoma*, 62 OKLA. B.J. 1397 (1990).

52. Before § 991 was adopted in 1968, see 1968 Okla. Sess. Laws 655, an appellant was required to file a motion for new trial before commencing an appeal. *See* OKLA. STAT. tit. 12, § 623 (1961 & Supp.1967) (repealed 1968).

53. *See* OKLA. STAT. tit. 12, § 1038 (1991), which prescribes limitation periods that range from one to three years for various grounds for vacating judgment. *See also* Westbrook v. Dierks, 292 P.2d 172, 175 (Okla. 1955) (two year term on motions to vacate on basis of fraud begins to run from time fraud was or should have been discovered).

54. OKLA. STAT. tit. 12, § 1038 (1991) ("A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."). *See also* Chaney v. Reddin, 201 Okla. 264, 267, 205 P.2d 310, 313 (1949) (defendant who delayed more than eight years before attacking void judgment was not precluded by laches); Hinkle v. Jones, 180 Okla. 17, 20, 66 P.2d 1073, 1077 (1937) (the fact that defendant did not appeal from orders denying his prior motions to vacate did not preclude him from attacking the judgment on the grounds that it was void).

unreasonably long period. In fact, final judgments are never completely final, but at a certain point they are final enough for purposes of filing an appeal.

Section 991 drew the line for finality of judgments at motions for new trial. Under section 991, the time to appeal was extended for motions for new trial, but not for the other post-trial motions, notably motions to vacate judgments. Unfortunately, it is not always possible to distinguish a motion for new trial from a motion to vacate a judgment, since the relief sought by these motions can be overlapping.[55] As a consequence, section 991 has produced uncertainty for attorneys and judges, who have experienced some difficulties in applying it.

A more useful approach would not attempt to distinguish between motions for new trial and motions to vacate a judgment on a conceptual basis; instead, it would focus on a ten-day bright line rule. If a motion for a new trial, a motion for a judgment notwithstanding the verdict, or a motion to vacate a judgment (whether denominated as a motion to reconsider, alter, vacate, or amend a judgment) is filed not later than ten days after the filing of a judgment, then it should extend the time for appeal until the trial court's ruling on the motion.[56] A denial of one of

55. Motions for vacating judgments under OKLA. STAT. tit. 12, § 1031.1 (1991), can overlap with motions for new trial, because the relief under § 1031.1 is not restricted to any specific grounds. *See* Schepp v. Hess, 770 P.2d 34, 38 (Okla. 1989) ("*Neither* the terms of § 1031.1 *nor* those of its common-law antecedents *restrict the exercise of term-time power to any specific grounds.*") (emphasis in original). In addition, motions for new trial and motions for vacating judgments under OKLA. STAT. tit. 12, § 1031 (1991), can have common grounds because § 1031 (First) authorizes a trial court to vacate a judgment "[b]y granting a new trial for the cause within the time and in the manner prescribed in section 653 of this title."

56. *See* OKLA. STAT. tit. 12, § 1004 (Supp. 1990) (repealed 1991). This result conforms to prior Oklahoma cases. *See* Hall v. Edge, 782 P.2d 122, 124 (Okla. 1989) (motion to vacate that was filed within 10 days of the granting of summary judgment was treated as a new trial motion and extended the time to appeal); Horizons, Inc. v. KEO Leasing Co., 681 P.2d 757, 759 (Okla. 1984) ("Plaintiff's 'motion to vacate', filed below within 10 days of the judgment date, was properly treated as one for new trial."); Bloustine v. Bloustine, 745 P.2d 412, 413-14 (Okla. Ct. App. 1987) ("Motion for Interpretation and/or Reconsideration" filed within 10 days of a divorce decree was treated as a new trial motion and extended the time for appeal). *See also* Dist. Ct. R. 17 ("A motion seeking reconsideration, re-examination, rehearing or vacation of a judgment or final order, which is filed within 10 days of the day such decision was rendered, may be regarded as a new trial motion.").

The difficulty of determining which post-trial motions extend the time to appeal under section 991 is illustrated by the following cases: Salyer v. National Trailer Co., 727 P.2d 1361, 1362 (Okla. 1986) (two successive motions to reconsider were both treated as motions to vacate and did not extend the time for appeal); Sellers v. Oklahoma Publishing Co., 687 P.2d 116, 119 (Okla. 1982) (untimely motion for new trial was ineffective to extend time for appeal); Horizons, Inc. v. KEO Leasing Co., 681 P.2d 757, 759 (Okla. 1984) (motion to vacate was treated as a motion for new trial and extended the time for appeal); Knell v. Burnes, 645 P.2d 471, 473 (Okla. 1982) (motion to reconsider extended time to appeal).

The federal courts also have experienced problems with distinguishing the post-trial motions that extend the time for appeal from those that do not. *See* Osterneck v. Ernst & Whinney, 489 U.S.

these post-trial motions will itself be a final order.[57] A subsequent motion, however, will not extend the time to appeal.[58] The other side of the bright line rule would be that a motion (however denominated) filed more than ten days after the filing of a judgment would not extend the time for appeal.[59]

5. Savings Provisions for Premature Appeals

The use of the date of filing as the beginning of the thirty day period for commencing an appeal makes it possible that some appeals may be filed prematurely on account of being filed after the judge's decision is announced but before it is filed with the court clerk. An appeal may also be premature if a post-trial motion has been filed, and the petition in error is filed before the trial court has disposed of the post-trial motion.[60]

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169 (1989) (filing of post-judgment motion for discretionary prejudgment interest extended time for appeal); Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) (plaintiff's request for attorney's fees that were authorized by state law did not extend time to appeal); Buchanan v. Stanships, Inc., 485 U.S. 265 (1988) (motion to alter or amend judgment to include costs did not extend time to appeal); Harcon Barge Co. v. D & G Boat Rentals, Inc. 784 F.2d 665, 670 (5th Cir.) (any post-trial motion that is served within 10 days after entry of judgment that is not a motion to correct a clerical mistake extends the time to appeal) (en banc), *cert. denied* 485 U.S. 265 (1988). For a discussion of these and other federal cases involving the effect of post-trial motions on the timing of appeals, see Adams, *The Timing of Appeals Under Rule 4(A)(4) of the Federal Rules of Appellate Procedure*, 123 F.R.D. 371 (1989).

57. *See* Rule 1.10(a)(14) of the Oklahoma Rules of Appellate Procedure in Civil Cases.

58. Rule 1.12(c)(1) of the Oklahoma Rules of Appellate Procedure in Civil Cases provides in part: "The time to appeal from the disposition of [a post-trial motion filed not later than 10 days after the judgment] shall not be extended by any subsequent motion or plea for consideration."

59. OKLA. STAT. tit. 12, § 1004(D) (Supp. 1990) (repealed 1991). *See also* Rule 1.12(c)(2) of the Oklahoma Rules of Appellate Procedure in Civil Cases ("A post-judgment motion, no matter how denominated, filed later than ten (10) days after the date of judgment shall not delay the running of the time to appeal."). This result would be consistent with most of the prior Oklahoma decisions. *See* Salyer v. National Trailer Convoy, Inc., 727 P.2d 1361, 1362 (Okla. 1986) (two successive motions neither of which were filed within 10 days of the trial court's ruling did not extend the time to appeal); Sellers v. Oklahoma Publishing Co., 687 P.2d 116, 118-19 (Okla. 1984) (motion to reconsider that was filed 11 days after an order granting summary judgment was ineffective to extend the time for appeal); Timeplan Corp. v. O'Connor, 461 P.2d 935 (Okla. 1969) (motion for new trial that was filed after the expiration of the 10 day period was ineffective and did not extend the time to appeal). *See also* Dist. Ct. R. 17 ("A motion, however styled, which is filed after the expiration of ten days following the decision is ineffective as a motion for new trial and will not extend appeal time."). This proposed rule, however, would lead to a different result than that reached in Knell v. Burnes, 645 P.2d 471, 474 (Okla. 1982), where the time for appeal was extended by a motion that was filed 16 days after the rendition of judgment.

60. For example, appeals were determined to be premature in Timmons Oil Co., Inc. v. Norman, 794 P.2d 400 (Okla. 1990), and Delhi Gas Pipeline Corp. v. Mayhall, 546 P.2d 1019 (Okla. Ct. App. 1976), because the petitions in error were filed while motions for new trial were pending. The Supreme Court and the Court of Appeals ruled in both cases that the petitions in error were ineffective, because they were filed before the respective trial courts ruled on the motions for new trial. And because there were no subsequent petitions in error filed within 30 days after the trial courts denied the motions for new trial, the appeals were dismissed.

A rule such as that proposed in this article might also obviate the current practice of filing

Lastly, in a case involving multiple claims or parties, an appeal may be premature if it is filed before all the claims involving all the parties are adjudicated.[61] By the time that the appellant finds out an appeal is premature, it may be too late to resurrect the appeal by filing a second petition in error, because the thirty days from the filing of a final judgment may have expired.

Oklahoma law should provide a savings provision whereby an appellant is given thirty days after being sent notice of the dismissal of an appeal as premature in which to file a new petition in error. An appellant should also be able to salvage a premature appeal before it is dismissed by filing a supplemental petition in error after the trial court rules on the post-trial motion. Allowing an appellant to file a new or supplemental petition in error so that a premature appeal can go forward causes no prejudice to an appellee, since even a prematurely filed petition in error gives the appellee notice that an appeal is being sought.[62]

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duplicative appeals from ambiguous oral or letter rulings from the court. Oklahoma cases vary widely in the ultimate result. *See e.g.* Miller v. Miller, 664 P.2d 1032, 1034 (Okla. 1983) ("A recital in the clerk's minute that 'the court renders judgment for the defendant as per journal entry to be filed' does not constitute a judgment. . ."); Shaw v. Sturgeon, 304 P.2d 341, 343 (Okla. 1956) (court's statement directing parties to prepare journal entry was not sufficiently explicit to qualify as a judgment); News-Dispatch Printing & Audit Co. v. Board of Comm'rs, 132 Okla. 216, 217, 270 P.2, 3 (1928) (minute entry reflecting that the court rendered judgment for the defendants "as per journal entry to be filed" did not constitute a judgment); Arkansas Louisiana Gas Co. v. McBroom, 526 P.2d 509, 511 (Okla. App. 1974) ("Judgment is rendered when pronounced by the Court and the Journal Entry is only a record thereof.") (Approved for Publication by Supreme Court). *Compare with* Warehouse Mkt., Inc. v. Berry, 459 P.2d 853 (Okla. 1969); Werfelman v. Miller, 180 Okla. 267, 69 P.2d 819 (1937), where oral renditions of judgment were held to trigger the appeal time. *See generally* Morgan, *Delayed Attacks on Final Judgments*, 33 OKLA. L. REV. 45, 45 n. 1 (1980) ("A judgment is rendered whenever the judge indicates a present intention to adjudicate the matter. Since no particular form is required there is sometimes uncertainty as to exactly when a judgment is pronounced."); Recent Development, *Rendering of Judgment*, 34 OKLA. L. REV. 416 (1981).

61. For example, an appeal of the trial court's ruling on a counterclaim was dismissed as premature in Eason Oil Co. v. Howard Eng'g, Inc., 755 P.2d 669 (Okla. 1988), because the petition in error had been filed before the trial court had adjudicated the interrelated claim of the plaintiff. *See also* Grider v. Texas Oil & Gas Corp., 62 OKLA. B.J. 3049 (Okla. Ct. App. 1991) (appeal premature as to dismissal of one defendant).

62. FED. R. APP. P. 4(a)(2) provides that appeals that are filed after the announcement of a decision but before the entry of judgment are treated as filed after the entry of the judgment. This eliminates one source of premature appeals in federal courts. *Cf.* Firstier Mortgage Co. v. Investors Mortgage Ins. Co., 111 S. Ct. 648, 651-53 (1991) (Advisory Committee Notes suggest that "Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment.").

A large number of appeals have been dismissed by the federal courts because the notices of appeal were filed before the disposition of the post-trial motions enumerated in FED. R. APP. P. 4(a)(4), however. *See, e.g.*, Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251 (1986) (per curiam) (appeal that was filed after the denial of a post-trial motion but before its entry was dismissed because it was premature); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) (per curiam) (a notice of appeal that is filed while a post-trial motion is pending is a nullity).

6. Stays of Enforcement of Judgments

The provisions in the Act's section 1007 should also be restored. Although prior Oklahoma case law recognized an automatic ten day stay of money judgments, it would be desirable to have an explicit codification of this important principle. The future legislation should make clear that the stay covers all means of collecting the judgment, whether through execution or a judgment lien. The automatic say should also extend to the period that a motion for new trial or other motion filed within ten days of the judgment is being considered. A judgment should not be considered final and enforceable until these post-trial motions are resolved. In addition, the statute should make clear that although a supersedeas bond or cash deposit in an appropriate amount must be filed in order to stay a money judgment, the trial court has discretionary authority to stay any other type of judgment.

7. Sanctions on Appeal

An additional portion of the Act that should be restored is section 1008, which authorized the Oklahoma appellate courts to dismiss frivolous appeals and impose sanctions. The heavy caseloads in the appellate system have created unsatisfactory delays. Undoubtedly, some appeals are frivolous, and weeding them out and discouraging their filing would produce greater efficiency and fairness in the appellate process.

II. JUDICIAL DEVELOPMENTS

Since last visited,[63] interesting issues of appellate procedure have continued to arise. Moreover, both published and unpublished case law have highlighted persistent problems for the Oklahoma practitioner. While Oklahoma appellate procedure has its confusing aspects, the detailed rules that govern the appellate process resolve many questions.[64]

See also Adams, supra note 56, at 372 n.6 (noting that there have been hundreds of federal court decisions dealing with FED. R. APP. P. 4(a)(4) since it was adopted in 1979). Unlike repealed section 1004, FED. R. APP. P. 4(a)(4) has no savings provision for this source of premature appeals.

Where an appeal is premature because it is filed before all the claims against all the parties have been adjudicated, the federal courts have permitted the notice of appeal to ripen when the final judgment is entered, if this occurs before the disposition of the appeal. *See* Lewis v. B.F. Goodrich Co, 850 F.2d 641, 645 (10th Cir. 1988) (en banc); Sacks v. Rothberg, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (listing cases from most of the Circuits). For further discussion of these and other cases, see Annotation, *When Will Premature Notice of Appeal Be Retroactively Validated in Federal Civil Cases?*, 76 A.L.R. FED. 199, 208-16 (1986).

63. *Medina, supra* note 6.

64. For a listing of these rules, *see supra* note 11. An appellate attorney may also need to consult local rules that regulate aspects of the appellate process. *See, e.g.*, Administrative Order of

The following discussion has been divided into four areas: (1) appellate record problems; (2) general appellate issues; (3) practice before the Courts of Appeal, and; (4) certiorari practice before the Supreme Court.

A. *Appellate Record Problems*

The most frequently recurring problems involving appellate procedure are those associated with the preparation of the record on appeal.[65] Although this Article will not replow ground excellently covered by Judge Means and Susan Walker,[66] their observations below are especially worthy of repetition:

> It often appears that counsel has placed unwarranted reliance on the role of the court clerk and/or the court reporter in preparing the record, and has been less than diligent in monitoring and ensuring its prompt and thorough completion. This causes undue delay in appellate disposition, and can doom an appeal entirely; absent a record evidencing reversible error, the trial court will be presumed correct and the judgment or order affirmed.[67]

It is well settled that the attorney for the appellant has the primary responsibility for seeing that the record on appeal is completed in a timely and proper fashion.[68] Admissions that are made in an appellate brief may supplement the record,[69] and in some circumstances, an appellate

August 4, 1989, ADC 89-21 (Tulsa County Dist. Ct.) (specifying procedures for designation of transcripts and the filing of designations of record). There may also be specialized statutory provisions. *See, e.g.*, OKLA. STAT. tit. 59, § 513 (1991) (decisions of state board of medical examiners); OKLA. STAT. tit. 66, § 56 (1991) (eminent domain proceedings); OKLA. STAT. tit. 68, § 225 (1991) (tax appeals).

65. *See, e.g.*, Oxley v. City of Tulsa, 794 P.2d 742, 748 (Okla. 1989); Davidson v. Gregory, 780 P.2d 679, 683 (Okla. 1989); Holley v. Shepard, 744 P.2d 945, 947 (Okla. 1987); Chamberlin v. Chamberlin, 720 P.2d 721, 725 (Okla. 1986); and Lewis v. Dependent School District, 808 P.2d 710, 715 (Okla. Ct. App. 1990). Additionally, there have been dozens of unpublished opinions by the Courts of Appeals in the past few years in which the appellate court refused to consider issues urged on appeal because they were not supported by the record on appeal.

66. *See* Means & Walker, *Reducing Errors and Omissions in Records on Appeal*, 60 OKLA. B.J. 1884 (1989).

67. *Id.* at 1885.

68. *E.g.*, Oxley v. City of Tulsa, 794 P.2d 742, 748 (Okla. 1989) ("It is the cross-appellant's duty to ensure that there has been prepared a sufficient trial court record to show cause for reversal at the appellate level."); Davidson v. Gregory, 780 P.2d 679, 682 (Okla. 1989) ("An appellant bears the responsibility for incorporating into the appellate record all materials necessary to secure corrective relief from a trial court's adverse decision."); Chandler v. Denton, 741 P.2d 855, 861 n.8 (Okla. 1987) ("It is the duty of the appealing party to procure a record that is adequate to support the quest for the corrective relief sought."); Snyder v. Smith Welding & Fabrication, 746 P.2d 168, 171 (Okla. 1986) ("One who seeks corrective relief is *responsible* for and *bound by*, the contents of the record presented for review.") (supplemental opinion on rehearing) (emphasis in original).

69. Deffenbaugh v. Hudson, 791 P.2d 84, 85 n.3 (Okla. 1990).

court may allow an omission in the record to be corrected by amendment,[70] but merely attaching evidentiary materials to an appellate brief is not an acceptable method of curing a deficiency in the record.[71] In the absence of a sufficient record to show cause for reversal, a reviewing court will presume that a trial court's decision is correct.[72]

It is generally advisable for attorneys to have a stenographic record made of any part of a proceeding that might possibly be the subject of appellate review.[73] This point is illustrated by *Watkins v. Sears & Roebuck & Co., Inc.*,[74] where the Court of Appeals was unable to review the appellants' contention that inflammatory remarks in closing arguments had prejudiced the jury, because they had waived recording of the closing arguments.[75] Whenever stenographic recording is requested, care should be taken to document the request in writing in case the request is denied without a record of the denial being made.[76]

Recording the hearing on a new trial motion may also be worthwhile in some cases. An appellant will generally be barred from raising an issue on appeal that was not raised in a motion for new trial.[77] The

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70. Oxley v. City of Tulsa, 794 P.2d 742, 748 (Okla. 1989) (affidavit of Court Clerk supplied the basis for allowing the record to be corrected by amendment).

71. Chamberlin v. Chamberlin, 720 P.2d 721, 723-24 (Okla. 1986) ("This court may not consider as part of an appellate record any instrument or material which has not been incorporated into the assembled record by a certificate of the clerk of the trial court, nor may a deficient record be supplemented by material physically attached to a party's appellate brief."). *See also* Robert L. Wheeler Inc. v. Scott, 818 P.2d 475 (Okla. 1991) (attaching copy of pretrial order to brief, where such order not part of record, unavailing).

72. Davidson v. Gregory, 780 P.2d 679, 682-83 (Okla. 1989); Chandler v. Denton, 741 P.2d 855, 862 (Okla. 1987).

73. Van Galder, *Pointers on How to Perfect a Civil Appeal*, 56 OKLA. B.J. 767, 768 (1985) ("[P]erhaps the most important rule concerning preserving the record is to make sure all proceedings are properly recorded.").

74. No. 70,954 (Okla. Ct. App. 1990) (unpublished).

75. To obtain appellate review, the appellant should have resorted to the narrative statement procedure described *infra* in the text accompanying note 81. *See also* Wilhelm v. Jacobs, No. 73, 638 (Okla. Ct. App.1990) (unpublished) (proceeding before small claims court untranscribed; appellate court noted alternatives, such as use of Rule 1.22).

76. *Cf.* Carey v. Maynard, No. 72, 370 (Okla. Ct. App. 1991) (unpublished) (plaintiff's claim that he was prevented by court from introducing evidence not supported by the record); FDIC v. Jarmon, No. 74,966 (Okla. Ct. App. 1991) (unpublished) (no affidavit or other competent evidence in record to establish that trial court refused to allow recordation of argument); Ryan v. Townsend, No. 66,759 (Okla. Ct. App. 1990) (unpublished) (trial court's order did not reflect that the appellants had requested a court reporter to transcribe the hearing for which appellate review was sought or that the court had denied the request).

77. OKLA. STAT. tit. 12, § 991(b) (1991) provides: "If a motion for a new trial be filed and a new trial be denied, the movant may not, on the appeal, raise allegations or error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted." *See also* Rule 1.17(a) of the Oklahoma Rules of Appellate Procedure in Civil Cases ("[I]f a party has filed a motion for new trial, errors either not alleged in that motion or not fairly comprised within the grounds alleged therein may not be asserted on appeal by such party."); Dist. Ct. R. 17 ("At the

omission of an issue from the written motion may be cured, however, if the issue was clearly identified at the hearing on the motion without objection from the opposing party.[78] For the omission to be cured, though, there must be a proper record of the hearing.[79] Obviously, however, relying on the transcript of a hearing on a new trial motion to cure defects in the motion is an inferior alternative for preserving issues for appellate review as compared to including them in the written motion for new trial, or refraining from moving for a new trial at all.

Stenographic recording is the best means for making a record on appeal, but if a stenographic transcript of a proceeding was not made or is not available, the alternatives provided in rules 1.22 and 1.23 of the Oklahoma Rules of Appellate Procedure in Civil Cases may be used. A privately-contracted reporter's notes, however, may not be used.[80] Rule 1.22 authorizes preparation and use of a narrative statement in lieu of a stenographic transcript. It prescribes that an appellant may prepare a statement of the evidence in narrative form from the best sources available, including his personal recollection, file it with the court clerk, and send a copy to opposing counsel. The narrative statement is then subjected to scrutiny from opposing parties, who may file objections or proposed amendments. After settlement of any objections or proposed amendments and approval by the trial court, the court clerk is required to include the narrative statement in the record on appeal.[81] The other

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hearing on the motion or on appeal the movant may not rely on errors which are not fairly embraced in the specific grounds stated in the timely-filed motion for new trial.").

78. Horizons, Inc. v. KEO Leasing Co., 681 P.2d 757, 759 (Okla. 1984). Although the Supreme Court ruled that the motion for new trial was too vague to preserve any errors for appellate review, it went on to rescue the appellant by deciding that the lack of specificity in the motion for new trial was cured by the specific statements of the grounds for the motion that were made at its hearing without any objection from the opposing party. *See also* Reeves v. Agee, 769 P.2d 745, 751 (Okla. 1989) (lack of specificity in motion for new trial was cured at the hearing on the motion, and so the errors urged on appeal were properly preserved for review); Huff v. Huff, 687 P.2d 130, 132 (Okla. 1984) (remanding case for Court of Appeals to determine whether the defect in the appellant's motion for new trial was cured at the hearing on the motion).

79. Cole v. Gossett, No. 71,521 (Okla. Ct. App. 1990) (unpublished) (Court of Appeals could not determine whether Horizons, Inc. v. KEO Leasing Co., *supra* note 78, was applicable without a transcript of the hearing on the motion for new trial); Brewer Const. Co. v. Employers Casualty Corp., No. 71, 190 (Okla. Ct. App. 1990) (unpublished) (without a transcript of the hearing on the motion for new trial, the Court of Appeals could not determine whether there was an attempt to cure defects in the written motion).

80. Doyle v. Couch, 806 P.2d 71 (Okla. 1991); *See also* Watkins v. Sears, Roebuck & Co., Inc. No. 70,954 (Okla. Ct. App. 1990) (unpublished) (privately recorded closing arguments not considered).

81. *See* Cox v. Smith, 682 P.2d 228, 231 n.8 (Okla. 1984) (adopting requirement that the narrative statement and any objections or proposed amendments must be submitted to the trial court for settlement and approval). For an example of an appropriate narrative statement, see Douglas v. Steele, 62 OKLA. B.J. 3023, 3026-27 (Okla. Ct. App. 1991) (Means, C.J., dissenting).

alternative to a stenographic transcript is the statement of the case in lieu of a record on appeal authorized by rule 1.23 of the Oklahoma Rules of Appellate Procedure in Civil Cases. Rule 1.23 provides that where the only issues to be presented on appeal are legal issues which can be determined without examining the trial court record, the parties may prepare and jointly sign a statement of the case. Upon submission to the trial court, the statement is certified by the trial judge to be the record on appeal. Unless the steps specified in rules 1.22 or 1.23 are followed, the appellate court will not review a record of the proceedings that has been prepared by the parties themselves.[82] In addition, in order to move for a new trial under Section 655 of title 12[83] on the basis of impossibility of preparing a record for appeal, a party must demonstrate an attempt to obtain a narrative statement under rule 1.22.[84]

Another area of concern involving record preparation has been the requirement for memorialization of the decision being appealed.[85] An appellate court needs to have the trial court orders that it is being asked to review properly memorialized so that it can adequately perform its role.[86] In addition and most importantly, a memorialization of the order or judgment being appealed is required before an appellate court may initiate its review process.[87]

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82. Hamid v. Sew Original, 645 P.2d 496, 497 (Okla. 1982) ("Neither our case law nor the court rules... will authorize this court to accept — in lieu of a stenographic transcript of trial court proceedings — a narrative statement, prepared and signed by the defeated litigant, which gives only that litigant's version of what had occurred in the courtroom.").

83. OKLA. STAT. tit. 12, § 655 (1991).

84. *See, e.g.*, Claro v. State, No. 74,921 (Okla. Ct. App. 1990) (unpublished). *Cf.* Collins v. Three M Invs., Inc., No. 73,496 (Okla. Ct. App. 1991) (unpublished) (failure to comply with procedure under § 655 dooms appeal).

85. *See, e.g.*, Brown v. Mayfield, 786 P.2d 708, 710 (Okla. Ct. App. 1989) (Court of Appeals issued three consecutive orders to the parties and the trial judge for them to prepare a journal entry to memorialize the judgment).

86. As is explained in Means & Walker, *Reducing Errors and Omissions in Records on Appeal*, 60 OKLA. B.J. 1884, 1888 (1989):

> [T]he appellate court cannot review a judgment or order for error if the court is not informed as to the full nature and extent of the relief granted below. The only legitimate evidence of the existence, terms and effect of the trial court's adjudication is the record entry bearing the judge's signature. The presence of such written order is therefore indispensable to a complete appellate record.

Id. at 1888 (footnote omitted).

87. OKLA. STAT. tit. 12, § 32.3 (1991). *See* Johnson v. Johnson, 674 P.2d 539 (Okla. 1983), construing a provision identical to § 32.3, Okla. Stat. tit. 12, § 32.2 (Supp. 1989) (repealed 1990); Hill v. Hill, 62 OKLA. B.J. 3609 (Okla. Ct. App. 1991) (appeal dismissed for failure to comply with order to provide signed journal entry of judgment).

B. *General Appellate Issues*

This section of the Article covers developments in appellate procedure that are not specific to either the Oklahoma Courts of Appeal or the Oklahoma Supreme Court. These include recent cases dealing with the designation of the appellants in the petition in error, interlocutory appellate review, preserving objections to jury instructions, and the abandonment of an appeal through payment of the underlying judgment.

1. Designation of the Appellants

Although most defects in a petition in error may be corrected by amendment,[88] additional parties to an appeal generally may not be added by amendment once the time to appeal has expired.[89] Despite this general rule, the Oklahoma Supreme Court permitted the amendment of a petition in error to reflect a party's status as an appellant in *Bane v. Anderson, Bryant & Co.*[90] Following a judgment against a company and two individuals, a petition in error was filed in *Bane* that listed only the company as the appellant in its caption. The Supreme Court permitted the petition in error to be amended to include one of the individual defendants as an appellant, but not the other. The individual defendant who was allowed to be a party to the appeal was the president of the company and was represented by the same attorney that represented the company, and the attorney submitted an affidavit that all the pleadings in the appeal had been filed on behalf of both the company and the individual defendant. In addition, the trial court had made a reference in a post-trial order to a pending appeal brought by the company and the individual defendant. Because of these special circumstances, the Supreme Court ruled that the company president was a proper party appellant, but the other individual was not.[91] A spirited dissent[92] urged adoption of the stricter rule applied in federal courts that bars any amendments to a notice of appeal to add additional appellants.[93] Even though the majority did not adopt the more rigid federal rule, *Bane* represents a narrow

88. Rule 1.17 (a) of the Oklahoma Rules of Appellate Procedure in Civil Cases.

89. Ogle v. Ogle, 517 P.2d 797, 799 (Okla. 1973) ("[Rule 1.17(a)] does not contemplate amendment to substitute appellants. Otherwise, the rule, so applied, could, and here would, contravene the time limitation provision of 12 O.S. 1971, § 990.").

90. 786 P.2d 1230 (Okla. 1989).

91. The other individual filed an application to enter an appearance and a request to be included as an appellant. The Supreme Court ruled that the application and request did not invoke appellate jurisdiction because it did not satisfy the formal requirements for a petition in error and it was also filed out of time. *Bane*, 786 P.2d at 1234.

92. *Id.* at 1238-42 (Opala, V.C.J., concurring in part and dissenting in part).

93. *See* Torres v. Oakland Scavenger Co., 487 U.S. 312, 314 (1988) ("The failure to name a

holding that is unlikely to be extended to permit amendments adding parties to petitions in error in other cases.

A later decision by the Oklahoma Court of Appeals concerned an appeal from an order imposing sanctions on an attorney.[94] The Court of Appeals first determined that the attorney was the real party in interest in the appeal because the sanctions were imposed against her personally. It then dismissed the appeal on the grounds that the attorney was not designated as the appellant in either the caption or the body of the petition in error.[95]

2. Interlocutory Appellate Review

In *McLin v. Trimble*,[96] the Oklahoma Supreme Court addressed an interesting issue involving the application of federal procedural law in a case arising under federal law that was being litigated in an Oklahoma state court. An inmate filed a federal civil rights case in an Oklahoma state court against three correctional officers. Two of the defendants filed a motion for summary judgment based on the defense of qualified immunity. After the trial court denied the motion, the defendants appealed. The Oklahoma Supreme Court noted that the defendants would have been entitled to an immediate appeal under the collateral order doctrine if the case had been filed in federal court.[97] The collateral order doctrine is not recognized in Oklahoma appellate procedure, however, and there was no other avenue for immediate appellate review authorized by Oklahoma law. On the other hand, the Supreme Court determined that

party in a notice of appeal . . . constitutes a failure of that party to appeal."). *See also* Minority Employees of the Tenn. Dep't of Employment Sec., Inc. v. Tennessee Dep't of Employment Sec., 901 F.2d 1327, 1330 (6th Cir. 1990) ("We hold that the term "*et al.*" is insufficient to designate appealing parties in a notice of appeal and that appellants must include in the notice of appeal the name of each and every party taking the appeal."). *But cf.* Hartford Casualty Ins. Co. v. Borg-Warner Corp., 913 F.2d 419, 423 (7th Cir. 1990) ("We join the Tenth Circuit in ruling that a notice of appeal is sufficient where the caption names all of the parties seeking to appeal and where the text in the body sufficiently identifies the parties through the use of a generic term such as 'plaintiff' or 'defendants.' ").

94. Davis v. Howard, 803 P.2d 1172 (Okla. Ct. App. 1990).

95. 803 P.2d at 1173-74. *See also* FTC v. Amy Travel Serv., Inc. 894 F.2d 879 (7th Cir. 1989) (dismissing attorney's appeal of rule 11 sanctions order because the notice of appeal named the attorney's clients instead of the attorney); Vickers v. Jaques, No. 71,410 (Okla. App. 1990) (unpublished) (dismissing appeal from order requiring an attorney to personally pay opposing party's legal fees because the attorney was not designated as the appellant in either the caption or the body of the petition in error). *See also* 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE, ¶ 203.17[1], at pp. 3-74 to 3-75 (1991) (noting need for particular care where attorney seeks to appeal sanctions).

96. 795 P.2d 1035 (Okla. 1990).

97. *Id.* at 1037. *See* Mitchell v. Forsyth, 472 U.S. 511, 524-30 (1985). *See also McLin*, 795 P.2d at 1037 n.2 (listing federal cases that have followed *Mitchell*).

federal law entitled the defendants to appellate review before trial of a trial court order denying their claim of qualified immunity.[98] It then resolved the dilemma by permitting immediate review through an original action. The dissent emphasized that federal supremacy did not require Oklahoma courts to follow federal appellate procedure unless the state appellate procedure violated due process.[99] Nevertheless, the majority's decision to permit immediate review through an original proceeding makes good sense, because it avoids the creation of a significant disparity between the treatment of civil rights cases in state and federal courts that would lead to forum-shopping. Allowing immediate review of the denial of a defense of qualified immunity removes an incentive for civil rights plaintiffs to file their cases in state rather than federal court.

3. Preserving Objections to Jury Instructions

The Oklahoma Supreme Court did much to clarify the law concerning the appellate review of jury instructions in *Sellars v. McCullough*.[100] After the jury returned a defense verdict, the plaintiff appealed on the grounds that the trial court had improperly given a jury instruction concerning contributory negligence, when there had been no evidence of contributory negligence introduced at trial. The Supreme Court affirmed, holding that the plaintiff had not properly preserved her objection for appellate review. The Supreme Court explained that the trial court has an obligation to give jury instructions that accurately reflect the law, but the parties have the responsibility for framing the issues that are tried and making sure that the jury instructions are addressed to those issues. Consequently, the giving of legally incorrect jury instructions is what has been termed "fundamental error," which will be reviewed on appeal even if the parties do not object to them at trial. On the other hand, the parties must object to the giving of jury instructions that although legally correct, are not applicable to the issues presented at trial in order to obtain appellate review of the giving of the instructions. The Supreme Court ruled that in the absence of an objection, it will review only "the four corners of the instruction that was given to ascertain whether it embodies a correct statement of the law."[101] The Supreme Court's definitive ruling in *Sellars* apparently was missed by the

98. 795 P.2d at 1040 ("The federal entitlement in the present case is review, prior to trial, of an erroneous trial court decision denying a claim of immunity.").

99. Id. at 1044-45 (Opala, V.C.J., dissenting).

100. 784 P.2d 1060 (Okla. 1989).

101. Id. at 1063.

Oklahoma Court of Appeals in a later decision.[102] Without any citation to *Sellars*, the Oklahoma Court of Appeals found fundamental error in the giving of a jury instruction that it determined was not supported by the evidence and the refusal to give another jury instruction that it determined was supported by the evidence.

In addition to asserting an objection at trial, a party who wishes to challenge a jury instruction should also set it out verbatim in the appellate brief or in an appendix to the brief.[103] Otherwise the appellate court will generally decline review. However, a failure to set out the instruction in the brief in chief or its appendix can be cured by setting out the instruction in an appendix to the reply brief.[104]

4. Abandonment of an Appeal Through Payment of the Underlying Judgment

An appeal was allowed to continue after the underlying judgment had been paid in *Grand River Dam Authority v. Eaton*.[105] The case arose out of an overpayment of a commissioner's award in a land condemnation matter where the award had been paid into the court and then was withdrawn by the appellants. After the appellee obtained a judgment to recover the overpayment, the appellants attempted to protect their farm from a judgment lien by depositing the amount of the judgment with the court clerk pursuant to section 706.2 of title 12.[106] The appellee responded with a request under section 706.3 for a court order requiring the deposit of additional cash to cover costs and interest on appeal. The appellee had also obtained issuance of a writ of execution, and a deputy sheriff informed the appellants that if the judgment was not paid, their property, including their farm, would have to be sold. Worried that they

102. *See* Lee v. Cotton, 61 OKLA. B.J. 1966, 1967 (Okla. Ct. App. 1990).

103. Rule 15 of the Rules of the Supreme Court (1991) (before its recent amendment) provided in part: "Where a party complains of an instruction given or refused, he shall set out *in totidem verbis* the instruction or the portion thereof to which he objects together with his objection thereto." "*In totidem verbis*" means "in precisely the same words," BLACK'S LAW DICTIONARY 738 (5th ed. 1979), or "in so many words," BALLENTINE'S LAW DICTIONARY 659 (3d ed. 1969). *See also* James v. State Farm Mut. Ins. Co., 810 P.2d 365 (Okla. 1991) (amending Rule 15 to permit instructions to be set out in an appendix to the brief). *See* amended Rule 15, 62 OKLA. B.J. 1664 (1991).

104. James v. State Farm Mut. Auto Ins. Co., 810 P.2d 365 (Okla. 1991). Previously such a correction would only be appropriate where opposing counsel did not object to the omission of the instruction in the brief in chief. *Compare* Bentley v. Hardin, 577 P.2d 471, 473 n.1 (Okla. Ct. App. 1978) (no objection), *overruled* in *James*, 810 P.2d at 371-72, *with* Johndrow v. Eastern Okla. Physical Therapy, Inc., No. 70,845 (Okla. Ct. App. 1990) (unpublished) (appellee objected to omission of challenged jury instruction from the appellant's brief in chief).

105. 803 P.2d 705 (Okla. 1990).

106. OKLA. STAT. tit. 12, § 706.2 (1991).

would lose their farm through execution, the appellants instructed the court clerk to apply the section 706.2 cash deposit to satisfaction of the judgment. The appellee then moved to dismiss the appeal on the grounds that the appellants had acquiesced in the judgment by satisfying it.

The Supreme Court denied the motion to dismiss, noting that the appellee had not shown that the appellants intended to abandon their appeal. Expressly disapproving language to the contrary in prior decisions, it held that the payment of a judgment did not cause an appeal to become moot, unless the payment was made with either the intent to settle the case, or the payment made reversal of the judgment impossible. A dissent complained that the new rule announced by the majority would generate factual disputes over a judgment debtor's intent whenever a judgment was paid while a case was on appeal.[107] As an alternative to the majority's holding, it recommended adoption of a procedure for a judgment creditor to pay a judgment "under protest" by tendering the amount of the judgment to the court clerk, who would deposit the money in an interest-bearing account during the appeal.[108] Under the majority's holding, any payment will be "under protest" in the absence of evidence to the contrary.

The *Grand River* decision is a salutary one and will benefit both appellants and appellees. Although there is a possibility that a factual dispute over an appellant's intent could arise, this can be easily avoided through the use of an express statement that payment of the judgment was "under protest." Payment of a judgment provides an option to the procedures for stay of execution and discharge of a judgment lien that is likely to be useful in many cases. Once a judgment is paid, the liability can be removed from the appellant's accounting records. Also, payment of the judgment stops accrual of post-judgment interest and saves an appellant the expense of a surety bond. Giving appellants the option to pay a judgment without abandoning an appeal also benefits appellees as it enables them to obtain immediate access to the money. Although a number of appellants may prefer to pay a judgment while it is on appeal, the procedures for stay of execution and discharge of a judgment lien remain available for cases where an appellant is concerned about the difficulty of obtaining restitution from the appellee after reversal of the underlying judgment.

107. *Grand River Dam Auth.*, 803 P.2d at 710-12 (Opala, V.C.J., concurring in part and dissenting in part).

108. *Id.* at 713.

A question that is likely to arise after *Grand River* is whether a plaintiff-appellant may accept payment of a judgment without abandoning the appeal. A line of cases have held that an appellant may not accept the fruits of a judgment by accepting payment and at the same time seek to repudiate it through an appeal.[109] The majority in *Grand River* distinguished one of these cases[110] on the grounds that the appellants before it had not accepted any benefits from the judgment by paying it. Allowing appellants to pay a judgment, while not allowing them to accept payment, without abandoning an appeal, could produce unsatisfactory results in particular cases. If a plaintiff and defendant were both unhappy with a judgment and both wanted to appeal, then *Grand River* might allow the plaintiff to pay the judgment while the case was on appeal, but the defendant would be forbidden from accepting payment without waiving his own appeal. The logic of *Grand River* would seem to compel that the line of cases holding that an appellant's acceptance of payment renders an appeal moot should be overturned. Nevertheless, until the Supreme Court overrules these cases, appellants should not accept payment of a judgment if they intend to continue with the appeal.

5. Briefing Problems

Parties are still having their briefs stricken for failing to comply with the applicable procedural rules,[111] or ignored for failing to reference either evidentiary support for factual allegations,[112] or to cite supporting

109. Hart v. Jett Enters., Inc., 744 P.2d 561, 562-63 (Okla. 1985); Adams v. Unterkircher, 714 P.2d 193, 196 (Okla. 1985); Tara Oil Co. v. Kennedy & Mitchell, Inc., 622 P.2d 1076, 1077-78 (Okla. 1981); Bras v. Gibson, 529 P.2d 982 (Okla. 1974). A number of cases recognize an exception to this rule, though, for "no risk appeals,"where there is no possibility that the appeal will result in a less favorable judgment for the appellant. *See* Teel v. Public Serv. Co., 767 P.2d 391, 396 (Okla. 1985); United Engines, Inc. v. McConnell Constr., Inc., 641 P.2d 1101, 1104-05 (Okla. 1981); Dickson v. Dickson, 637 P.2d 110, 112 (Okla. 1981); Marshall v. Marshall, 364 P.2d 891, 895 (Okla. 1961). If there is no possibility of a less favorable judgment, the acceptance of the undisputed minimum to which the appellant is entitled is not inconsistent with the appeal. Furthermore, the general rule operates only when the appellant acquires something of benefit. Thus, an attempted execution on the judgment, which achieves no gain, does not preclude pursuit of the appeal. Robert L. Wheeler, Inc. v. Scott, 818 P.2d 475, 477-78 (Okla. 1991).

110. Tara Oil Co. v. Kennedy & Mitchell, Inc., 622 P.2d 1076 (Okla. 1981).

111. *See, e.g., In re* Ray, 804 P.2d 458 (Okla. Ct.App. 1990) (brief stricken for intentional violation of procedural rule governing maximum number of pages for briefs); Brown v. Mayfield, 786 P.2d 709 (Okla. Ct. App. 1989). For federal cases, see Annotation, *Sanctions in Federal Circuit Courts of Appeal for Failure to Comply with Rules Relating to Contents of Briefs and Appendixes*, 55 A.L.R FED. 521 (1981).

112. *See, e.g.*, Caltex Resources Corp. v. Robert Gordon Oil Co., No. 69,443 (Okla. Ct. App. 1989) (unpublished). *See also* Maples v. Bryce, 434 P.2d 214 (Okla. 1967); City National Bank & Trust Co. v. Conrad, 416 P.2d 942 (Okla. 1966); Nunn v. Spears, 171 Okla. 329, 42 P.2d 892 (1935).

legal citations.[113]

C. *Practice Before the Oklahoma Court of Appeals*

The major problem in practice before the Courts of Appeals has been the procedural trap in rule 3.13(B) of the Rules on Practice and Procedure in the Court of Appeals and On Certiorari to That Court,[114] which until recently denied the opportunity to petition for certiorari to a party who failed to petition for rehearing in the Court of Appeals.[115] By the time the Supreme Court dismisses a petition for certiorari for failure to petition the Court of Appeals for a rehearing, the twenty day period[116] for petitioning for rehearing will usually have expired, and review by the Supreme Court will therefore be barred. The Supreme Court displayed a forgiving attitude towards untimely petitions for rehearing in *Stiles v. Oklahoma Tax Commission*,[117] when it granted a petition for certiorari when the petition for rehearing was filed one day past the twenty day deadline. On the other hand, the petition for certiorari in *Griffith v. Special Indemnity Fund*[118] was denied, because the petition for rehearing was untimely and there was no showing of good cause for the late filing of the petition for rehearing.

Petitions for rehearing are only rarely granted by the Oklahoma Courts of Appeals,[119] and so requiring a petition for rehearing as a prerequisite for a petition for certiorari is probably not warranted.[120] Earlier this year, the Supreme Court amended the rules to delete the

113. *See, e.g.*, Anderson v. Dyco Pet. Corp. 782 P.2d 1367, 1379 (Okla. 1989). Of course, failure to file the appellate brief can have obvious and undesirable consequences. See Van Galder, *Pointers on How to Perfect a Civil Appeal*, 56 OKLA. B.J. 770, 771 (1985) (summarizing consequences).

114. OKLA. STAT. tit. 12, ch. 15, app. 3 (1991).

115. *See, e.g.*, Scott v. University of Oklahoma, No. 72,619 (Okla. 1990) (unpublished) (dismissing petition for certiorari for failure to comply with rule 3.13(b)); Lewallen v. Mayberry, No. 59,338 (Okla. 1984) (unpublished) (semble). Petitions for rehearing have also been denied for failure to comply with Rule 3.9's requirement that the petition be filed combined with the brief in its support. *See* Stiles v. Stiles, No. 71,215 (Okla. Ct. App. 1989) (unpublished) (no brief); Yukon Nat'l. Bank v. Holland, No. 70,439 (Okla. Ct. App. 1989) (unpublished) (motion for extension to file brief in support of petition for rehearing denied).

116. *See* Rule 3.9 of the Rules on Practice and Procedure in the Court of Appeals and On Certiorari to That Court; Rule 28 of the Rules of the Supreme Court of Oklahoma. *See also* 57 OKLA. B. J. 2147 (1986) (Court of Appeals gives notice to bar that extensions of time for petitions for rehearing will not be granted unless good cause is shown).

117. 752 P.2d 800, 801 n.1 (Okla. 1987).

118. 785 P.2d 1042 (Okla. 1990).

119. Medina, *Discretionary Review in the Oklahoma Supreme Court: A Practical Guide to the Court's Certiorari Jurisdiction*, 13 OKLA. CITY U.L. REV. 257, 265 n.30 (1988) (survey showed that less than two percent of petitions for rehearing were granted).

120. *Medina, supra* note 119, at 264-67. Motions for new trial are no longer a prerequisite for appellate review in Oklahoma state courts. *See* OKLA. STAT. tit. 12, § 991 (1991). In the federal

requirement of filing of a petition for rehearing.[121]

Oral argument is not a major feature of Oklahoma appellate practice,[122] except in fast track appeals.[123] Although it appears to grant it only rarely,[124] the Oklahoma Court of Appeals has adopted a set of rules governing oral argument.[125]

Once a case is assigned to the Oklahoma Court of Appeals, it generally will be decided there, subject to later review by the Oklahoma Supreme Court through petition for certiorari. A case may be retransferred to the Supreme Court, however, under rule 1.204(III) of the Oklahoma Rules of Appellate Procedure in Civil Cases, if the chief judge of the division to which the case is assigned certifies that the case involves issues of major significance to the public. A case was recently retransferred under this little-used procedure.[126]

Rule 1.200 of the Oklahoma Rules of Appellate Procedure in Civil Cases governs the publication of opinions of the Oklahoma Supreme Court and Court of Appeals. Designation of an opinion for publication normally occurs at the time the Court of Appeals adopts an opinion,[127] but if the Court of Appeals decides not to order publication a party or

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system, there is no need to file a petition for rehearing in Courts of Appeals before petitioning for certiorari to the United States Supreme Court. *See* 28 U.S.C. § 1254 (1988). One proper function, however, of a petition for rehearing is to advise the court of factual errors contained in the court's opinion.

121. *See* Amendments, 62 OKLA. B.J. 1495, effective May 10, 1991, amending rule 3.13(B) of the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court to provide that "[a] party may petition for certiorari without having first sought rehearing in the Court of Appeals."

122. *See* Rule 25 of the Rules of the Supreme Court of Oklahoma ("No oral argument will be granted as a matter of right."). *Cf.*, Rule 3.7 of the Rules on Practice and Procedure in the Court of Appeals and On Certiorari to That Court ("Oral arguments and informal predecisional conferences with counsel may be granted in the Court of Appeals at the discretion of the division."). For contrasting views on the value of oral argument, *compare* Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986) *with* Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986). *See also* Woodward, *The Argument for Oral Argument*, 52 OKLA. B.J. 1767 (1981).

123. For discussions of fast track appeals, see Perry, *The Fast Track: Accelerated Disposition of Civil Appeals in the Oklahoma Supreme Court*, 6 OKLA. CITY U.L. Rev. 453 (1981); VanGalder, *Pointers on How to Perfect a Civil Appeal*, 56 OKLA. B.J. 767, 769 (1985). A somewhat similar procedure used in the California Court of Appeal Third Appellate District is described in Chapper, *Oral Argument and Expediting Appeals: A Compatible Combination*, 16 U. MICH. J.L. REF. 517 (1983).

124. Motions for oral argument were denied in Walden v. Hughes, No. 70,832 (Okla. Ct. App. 1990) (unpublished); Pavestone v. Interlock Pavers, Inc., No. 69, 276 (Okla. Ct. App. 1989) (unpublished), and O'Petro Energy Corp. v. Canadian State Bank, No. 68,988 (Okla. Ct. App. 1989) (unpublished).

125. *In re:* Rules for Oral Argument, 57 OKLA. B.J. 1384 (1988).

126. *See* Greening Donald Co. v. Oklahoma Wire Rope Prods., Inc., 766 P.2d 970, 971 (Okla. 1988). Robert L. Wheeler, Inc. v. Scott, 818 P.2d 475, 479 (Okla. 1991).

127. Rule 1.200(C)(B), Rules of Appellate Procedure in Civil Cases.

other interested person may move for publication. Such a motion was granted recently by the Court of Appeals.[128] Actual publication will not occur until after mandate is issued,[129] and it is not uncommon for the Supreme Court to order a Court of Appeals opinion withdrawn from publication at the same time that it denies certiorari.[130] Withdrawal from publication by the Supreme Court eliminates any precedential or persuasive force the opinion may officially have, save for res judicata, law of the case, and collateral estoppel purposes.[131]

D. *Practice Before the Oklahoma Supreme Court*

The time for filing a petition for certiorari expires twenty days after the denial by the Court of Appeals of a petition for rehearing (if one is filed) or (presumably) within twenty days of the filing of the Court of Appeals opinion if no petition for rehearing is filed. Rule 3.14(G) of the Rules on Practice and Procedure in the Court of Appeals and On Certiorari to That Court[132] expressly provides that the Supreme Court will not extend this time limit. Although counsel should treat the twenty day period as sacrosanct, cases continue to appear where a petition for certiorari was dismissed as untimely.[133] Petitions for certiorari must be received by the Supreme Court within the twenty day period in order to be timely.[134]

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128. Cox v. B.F. Goodrich Co., No. 70,419 (Okla. Ct. App. 1989) (unpublished) (granting motion to publish original and supplemental opinions). The published opinions appear as Cox v. B.F. Goodrich Co., 788 P.2d 967 (Okla. Ct. App. 1989).

129. Rule 1.200(C)(B), Rules of Appellate Procedure in Civil Cases. Under Rule 3.19 of the Rules on Practice and Procedure in the Court of Appeals and On Certiorari to That Court, mandate does not issue until there is no longer an opportunity for further review by either the Court of Appeals or Supreme Court.

130. Recent examples include: Southwestern Bell Tel. Co. v. City of Oklahoma City, No. 68,160 (Okla. 1989) (unpublished); Moulson v. Kingfisher County Bd. of Tax Rolls Corrections, No. 69,226 (Okla. 1989); State *ex rel.* Williams v. Midget, No. 67,565 (Okla. 1989); and Bryant v. El Gato Drilling Co., No. 71,273 (Okla. 1989). For further discussion of this procedure, see *Medina, supra* note 119, at 288-89.

131. Rule 1.200(B)(E), Rules of Appellate Procedure in Civil Cases.

132. OKLA. STAT. tit. 12, ch. 15, app. 3 (1991).

133. *See, e.g.*, State *ex rel.* Roberts v. McDonald, 787 P.2d 466 (Okla. 1990) (certiorari dismissed as untimely).

134. There is a gap in the new rules. The new rules do not specifically set forth the appropriate time period for filing a certiorari petition when *no* petition for rehearing was filed in the Court of Appeals. Conversations with the court staff indicate that twenty days from the date of filing of the Court of Appeals decision would be the appropriate time period. *See* Rule 3.14(G) of the Rules on Practice and Procedure in the Court of Appeals And On Certiorari to that Court. Rule 1.15(c) of the Rules of Appellate Procedure in Civil Cases provides: "All briefs, pleadings, motions, petitions for rehearing, and petitions for certiorari to the Court of Appeals are deemed filed on date of receipt of the Clerk of the Supreme Court." However, in Miller v. B.F. Goodrich Co., No. 69,636 (Sept. 25, 1989) (unpublished) (cited in Justice Opala's dissent in Bane v. Anderson, Bryant & Co., 786 P.2d

Besides being timely filed, the petition for certiorari should also set forth every question for which review is sought. The Supreme Court ordinarily confines its review to the questions presented in the petition for certiorari,[135] although it also considers subsidiary questions that are "fairly comprised" within the questions actually set forth in the petition.[136]

Lastly, the petition for certiorari must be accompanied by a $100 deposit for costs.[137] The requirement of the cost deposit for petitions for certiorari was added in 1986,[138] and the Oklahoma Supreme Court has announced that it is enforcing the requirement by summarily dismissing all petitions for certiorari that are filed without a cost deposit.[139] The Supreme Court dismissed the petition for certiorari in *Ingram v. ONEOK, Inc.*,[140] because the required cost deposit did not arrive before the twenty day period for filing petitions for certiorari expired. Although the Supreme Court decided that it did not have jurisdiction under article 7, section 5 of the Oklahoma Constitution,[141] because the cost deposit was filed too late, it nevertheless assumed jurisdiction of the case pursuant to its general superintending control conferred by article 7, section 4 of the Oklahoma Constitution.[142] The *Ingram* case presented the issue of

1230, 1239 n.4 (Okla. 1989)), the Supreme Court accepted a petition for certiorari as timely that had been mailed before expiration of the 20 day period for filing, but received afterwards. The Court had earlier voted to dismiss the petition as untimely. Miller v. B.F. Goodrich Co., No. 69,636 (Okla. 1989) (unpublished).

135. Howell v. Ballard, 801 P.2d 127 (Okla. 1991); Ford v. Ford, 766 P.2d 950, 952 n.1 (Okla. 1989); Johnson v. Wade, 642 P.2d 255, 258 (Okla. 1982). Similarly, issues must be specified in the petition in error in order to be subject to appellate review. *E.g.*, Kirschstein v. Haynes, 788 P.2d 941, 954-55 (Okla. 1990) (issue not clearly set forth in petition in error is not properly before appellate court).

136. Rule 3.14(A)(3) of the Rules on Practice and Procedure in the Court of Appeals and On Certiorari to That Court provides in pertinent part: "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth or fairly comprised therein will be considered."

137. OKLA. STAT. tit. 20, § 30.4 (1991).

138. 1986 Okla. Sess. Law Serv. 786, 799 (West).

139. Notice to the Bar, 60 Okla. B.J. 1996 (1990).

140. 775 P.2d 810, 812 (Okla. 1989).

141. OKLA. CONST. art. VII, § 5 provides in pertinent part:

> When the intermediate appellate courts acquire jurisdiction in any cause and make final disposition of the same, such disposition shall be final and there shall be no further right of appeal except for issuance of a writ of certiorari ordered by a majority of the Supreme Court which may affirm, modify or make such other changes in said decision as it deems proper.

Id.

142. OKLA. CONST. art. VII, § 4 states in pertinent part:

> The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law.

Id.

whether the statute of limitations for a newly created cause of action under the Worker's Compensation Retaliatory Discharge Act was two or three years. The Supreme Court based its unusual exercise of certiorari on the urgency of the issue presented, the existence of an interdivisional conflict on this issue among the panels of the Court of Appeals, and the fact that its desired resolution did not afford relief to the tardy petitioner for certiorari.[143]

The Oklahoma Supreme Court addressed the recovery of costs on certiorari in a memorandum opinion in *Sunrizon Homes, Inc. v. American Guaranty Investment Corporation*.[144] The court ruled that the successful party may recover various fees imposed by statute,[145] but may not recover the costs of copying briefs and petitions, except as authorized by statute in divorce cases.[146]

CONCLUSION

With the Act's adoption and repeal, Oklahoma appellate procedure has been undergoing fundamental change, and this change is likely to continue for an additional period. Unfortunately, major change requires adjustments and re-education, and generally it produces at least some uncertainty and confusion. The latter have clearly accompanied the Act's adoption and repeal, but eventually this will pass and be replaced by an orderly system of appellate procedure. The discussion of the recent judicial decisions in this area reveals that the Oklahoma Supreme Court and Courts of Appeals approach procedural issues realistically and with general due regard to the interests of justice. These courts can be counted on to administer the appellate process fairly while it is being remodeled.

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143. *Ingram*, 775 P.2d at 812.
144. 782 P.2d 103, 109 (Okla. 1989).
145. These include a $100 appeal fee required by OKLA. STAT. tit. 20, § 15 (1991), a $100 certiorari fee required by OKLA. STAT. tit. 20, § 30.4 (1991), and a $30 record fee required by OKLA. STAT. tit. 28, § 155.1 (1991).
146. *Sunrizon Homes*, 782 P.2d at 109.