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RECENT DEVELOPMENTS IN OKLAHOMA LAW—CIVIL PROCEDURE

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I. INTRODUCTION

This article examines a number of developments in the Oklahoma law of civil procedure during the past year. None of these developments were revolutionary, but they involved a wide spectrum of procedural topics ranging from territorial jurisdiction and pleading to remedies and appellate procedure.

The sources of these recent developments were varied as well. They were brought about through: 1) amendments to the Oklahoma Statutes, 2) revisions of the Oklahoma Rules of Appellate Procedure[1] and the Oklahoma Rules for District Courts,[2] and 3) new decisions by the Oklahoma Supreme Court and the Oklahoma Court of Appeals.

The major statutory changes are found in Senate Bill 1076.[3] These include 1) incorporation of the 1993 amendments to Federal Rule of Civil Procedure Rule 11 into the Oklahoma Pleading Code,[4] 2) new requirements for confidentiality orders involving discovery,[5] 3) a provision that deposition transcripts are no longer to be filed with the court unless the court orders otherwise or they are needed for trial,[6] and 4) a series of amendments making prematurely filed post-trial motions effective.[7]

The revisions of the Oklahoma Rules of Appellate Procedure and the Oklahoma Rules for District Courts were made to establish an

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1. OKLA. STAT. tit. 12, ch. 15, app. 2 (1991).
2. OKLA. STAT. tit. 12, ch. 2, app. (1991).
3. 1994 Okla. Sess. Laws ch. 343.
4. OKLA. STAT. tit. 12, § 2011 (Supp. 1994).
5. OKLA. STAT. tit. 12, § 3226(C)(2) (Supp. 1994).
6. OKLA. STAT. tit. 12, § 3230(G) (Supp. 1994).
7. OKLA. STAT. tit. 12, §§ 653(c), 698, 1031.1 (Supp. 1994).

innovative procedure for accelerated appellate review of summary judgments and orders dismissing cases for failure to state a claim or lack of jurisdiction.

The new case law involves a variety of topics. The Oklahoma Supreme Court decided significant cases involving territorial jurisdiction[8] and the amendment of pleadings[9] under the Oklahoma Pleading Code. Three separate panels of the Oklahoma Court of Appeals ruled that Oklahoma's savings statute did not extend the time for filing suit against a municipality under the Governmental Tort Claims Act.[10] During the past year, an especially large number of cases dealt with attorney fees issues.[11] Finally, the Oklahoma Supreme Court handed down several opinions on whether signed minute orders constituted judgments under the most recent Judgments Act which went into effect in 1993.[12]

The statutory amendments, revisions to the court rules, and the recent appellate decisions are reviewed below. The Oklahoma Supreme Court decisions on territorial jurisdiction and procedural due process are discussed in Part II. Several cases involving statutes of limitations are analyzed in Part III. Part IV is concerned with the recent amendments to the Oklahoma Discovery Code concerning confidentiality orders and the filing of deposition transcripts. Part V covers the amendments to title 12, section 2011 of the Oklahoma Statutes, an Oklahoma Supreme Court decision on amendment of pleadings, the accelerated appellate review procedure for summary judgments, and a case on judicial disqualification. Part VI discusses the recent cases dealing with attorney fees. The statutory amendments affecting appellate procedure are examined in Part VII along with several recent cases.

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8. Hough v. Leonard, 867 P.2d 438, 440 (Okla. 1993).

9. Prough v. Edinger, Inc., 862 P.2d 71, 73 (Okla. 1993).

10. Gibson v. City of Tulsa, 880 P.2d 429 (Okla. Ct. App. 1994); Robbins v. City of Del City, 875 P.2d 1170 (Okla. Ct. App. 1994); Ceasar v. City of Tulsa, 861 P.2d 349 (Okla. Ct. App. 1993).

11. *See* Rout v. Crescent Pub. Works Auth., 878 P.2d 1045 (Okla. 1994); Taylor v. Chubb Group of Ins. Cos., 874 P.2d 806 (Okla. 1994); Smith v. Jenkins, 873 P.2d 1044 (Okla. 1994); Turner Roofing & Sheet Metal, Inc. v. Stapleton, 872 P.2d 926 (Okla. 1994); Oklahoma Turnpike Auth. v. New Life Pentecostal Church, 870 P.2d 762 (Okla. 1994); Gorst v. Wagner, 865 P.2d 1227 (Okla. 1993); Oklahoma Turnpike Auth. v. New, 853 P.2d 765 (Okla. 1993); Wright v. Arnold, 877 P.2d 616 (Okla. Ct. App. 1994).

12. Marshall v. OK Rental & Leasing, Inc., 879 P.2d 132 (Okla. 1994); Aven v. Reeh, 878 P.2d 1069, 1070 (Okla. 1994); Mansell v. City of Lawton, 877 P.2d 1120 (Okla. 1994); Manning v. State *ex rel.* Dep't of Pub. Safety, 876 P.2d 667, 668 (Okla. 1994).

II. JURISDICTION AND DUE PROCESS

In 1984 the Oklahoma Pleading Code replaced Oklahoma's two prior long arm statutes[13] with the following brief but comprehensive provision: "A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States."[14] This provision was construed by the Oklahoma Supreme Court for the first time in *Hough v. Leonard*.[15]

Hough arose out of a contract employing an Oklahoma oil field service company to remove an obstruction from an oil well which was owned and operated by the defendants and located just across the Oklahoma-Kansas border in Kansas.[16] The contract was formed after a number of attempts by Kansas firms to unplug the well had failed.[17] One of the defendants, acting as the agent for the others, telephoned the plaintiff from Texas and asked him for a quotation of his rates to provide additional services.[18] The plaintiff faxed the quotation to the defendant.[19] A few days later the defendants' agent telephoned the plaintiff again and they entered into the contract over the telephone.[20] After a dispute arose over the terms of the contract, the plaintiff left the job and the defendants contacted other Oklahoma companies to provide services on the well.[21] The plaintiff then brought suit in Oklahoma to recover payment for his services.[22] The Oklahoma Supreme Court upheld jurisdiction over the defendants based on the "totality of [their] contacts" with Oklahoma.[23] These consisted of their agent's entering into the contract over the telephone in Oklahoma, their contacting the other Oklahoma companies for services on the well, and one of the defendants' ownership of leasehold interests in Oklahoma.[24] The court observed that while each of these contacts standing alone might not suffice to subject the defendants to

13. OKLA. STAT. tit. 12, §§ 187(a), 1701.03 (1981) (repealed 1984).
14. OKLA. STAT. tit. 12, § 2004(F) (1991).
15. 867 P.2d 438, 442 (Okla. 1993).
16. *Id.* at 441.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 444.
24. *Id.*

jurisdiction in Oklahoma, they were sufficient as a whole for the exercise of jurisdiction over the non-resident defendants by an Oklahoma court.[25]

The court stated that Oklahoma's current long arm statute[26] was a codification of its prior holding in *Fields v. Volkswagen of America, Inc.*[27] The intent of the Oklahoma long-arm statute was to extend the jurisdiction of Oklahoma courts to the outer limits permitted by the United States and Oklahoma Constitutions.[28] Citing a number of decisions by the United States Supreme Court, the Oklahoma Supreme Court noted that a non-resident can be subject to jurisdiction in Oklahoma even if he never enters the state, if he engages in activity outside of Oklahoma that results in harm in the state.[29] Thus, neither the fact that the defendants were not physically present in Oklahoma nor that the contract was not performed in Oklahoma prevented the Oklahoma courts from asserting jurisdiction.

Another recent case decided by the Oklahoma Supreme Court was concerned with the fourteenth amendment's requirement of procedural due process.[30] In a line of decisions beginning with *Bomford v. Socony Mobil Oil Co.*,[31] the Oklahoma Supreme Court has struck down various procedures on due process grounds because they did not afford persons who were being deprived of property by state action reasonable notice and an opportunity to be heard. Consistent with this line of decisions, in *Hagar v. Goodyear Tire & Rubber Co.*,[32] the Oklahoma Supreme Court invalidated, on due process grounds, a portion of Rule 10 of the Rules for District Courts.[33] The first paragraph of Rule 10 requires the giving of five days notice before the taking of a default judgment, but the second paragraph has a long list of exceptions to the notice requirement, including cases where the defaulting party has not made an appearance and garnishment proceedings.[34] The *Hagar* case involved a garnishment proceeding against the defendant's employer.[35] After answering three garnishment summons, the employer failed to answer three later ones that were served

25. *Id.*
26. OKLA. STAT. tit. 12, § 2004(F) (1991).
27. 555 P.2d 48, 52 (Okla. 1976).
28. *Hough*, 867 P.2d at 442.
29. *Id.*
30. Hagar v. Goodyear Tire & Rubber Co., 853 P.2d 768 (Okla. 1993).
31. 440 P.2d 713 (Okla. 1968).
32. 853 P.2d 768, 770 (Okla. 1993).
33. *Id.* at 769.
34. OKLA. STAT. tit. 12, ch. 2, app., R. 10 (1991).
35. *Hagar*, 853 P.2d at 768-69.

shortly before the defendant filed for bankruptcy.[36] The trial court entered a default judgment against the garnishee without prior notice having been given to it, but the Oklahoma Supreme Court reversed by holding that while Rule 10 did not require the giving of notice, due process did.[37] The Oklahoma Supreme Court ruled that the employer's name and address were readily available to the plaintiff, since it had previously answered three garnishment summons, and therefore, the plaintiff should have sent notice to the employer before taking the default judgment.[38] The *Hagar* decision casts doubt on the validity of the remaining exceptions to notice in the second paragraph of Rule 10. Although the Oklahoma Supreme Court has upheld the taking of a default judgment without notice against a party who has not made an appearance,[39] the other exceptions from the notice requirement, such as those for small claims, forcible entry, juvenile, and probate proceedings, appear questionable in light of *Hagar*.

In addition to territorial jurisdiction and procedural due process, another issue that may be encountered at the beginning of a lawsuit is the statute of limitations defense. This is the subject of the next part of this article.

III. STATUTES OF LIMITATION

The Oklahoma Supreme Court and Oklahoma Court of Appeals addressed several statute of limitations issues during 1994. In *Ball v. Harnischfeger Corp.*,[40] the Oklahoma Supreme Court examined the statute of repose[41] for improvements to real property.[42] The Court of Appeals considered whether Oklahoma's savings statute[43] applied to suits under the Governmental Tort Claims Act.[44] Lastly, the Court of Appeals ruled in *Grider v. Independent School District*[45] that once the 180 day period for filing an action under the Government Tort Claims

36. *Id.* at 769.
37. *Id.*
38. *Id.* at 770.
39. *See* Bovasso v. Sample, 649 P.2d 521, 523 (Okla. 1982).
40. 877 P.2d 45 (Okla. 1994).
41. OKLA. STAT. tit. 12, § 109 (1991).
42. *Id.*
43. OKLA. STAT. tit. 12, § 100 (1991).
44. Gibson v. City of Tulsa, 880 P.2d 429, 430 (Okla. Ct. App. 1994); Robbins v. City of Del City, 875 P.2d 1170, 1171 (Okla. Ct. App. 1994); Ceasar v. City of Tulsa, 861 P.2d 349, 350 (Okla. Ct. App. 1993).
45. 872 P.2d 951 (Okla. Ct. App. 1994).

Act had expired, it could not be revived by filing a new claim with the political subdivision.[46]

Responding to a question certified by the United States District Court for the Eastern District of Oklahoma, the Oklahoma Supreme Court decided in *Ball* that under certain circumstances the statute of repose for improvements to real property[47] could apply to the manufacturer of a product that became an improvement to real property after being installed on the property.[48] The *Ball* case arose out of an employee's fall from an overhead crane at the Port of Muskogee.[49] The plaintiff filed a products liability action against the crane's manufacturer more than ten years after the crane had been manufactured and installed at the port terminal.[50] The defendant asserted that the action was barred by the statute of repose in title 12, section 109 of the Oklahoma Statutes, which limits the time to bring an action arising out of any deficiency in the construction of an improvement to real property to ten years from the substantial completion of the improvement.[51] The Oklahoma Supreme Court decided that section 109 would not be applicable to the manufacturer of a mass produced product (such as plywood) that is incorporated into an improvement, because the statute is limited to actions against persons involved in the design, planning, or supervision of the construction of improvements.[52] It held, however, that section 109 did apply to the defendant in the *Ball* case, because the defendant had specially designed the crane to the specifications of the owner of the port terminal and had provided a representative to observe the crane's installation.[53]

During the past year, the Oklahoma Court of Appeals decided four cases involving the relationship of statutes of limitations to the Governmental Tort Claims Act.[54] In three of the cases, three separate panels of the Court of Appeals held that Oklahoma's savings statute[55] was not applicable to suits under the Governmental Tort Claims

46. *Id.* at 952.
47. OKLA. STAT. tit. 12, § 109 (1991).
48. *Ball*, 877 P.2d at 50.
49. *Id.* at 45.
50. *Id.* at 46.
51. *Id.*
52. *Id.* at 50.
53. *Id.*
54. Ceasar v. City of Tulsa, 861 P.2d 349 (Okla. Ct. App. 1993); Gibson v. City of Tulsa, 880 P.2d 429 (Okla. Ct. App. 1994); Robbins v. City of Del City, 875 P.2d 1170 (Okla. Ct. App. 1994); Grider v. Independent Sch. Dist., 872 P.2d 951 (Okla. Ct. App. 1994).
55. OKLA. STAT. tit. 12, § 100 (1991).

Act.[56] The justification for all three decisions was the same: that the Act's special 180 day time limitation for filing an action was a condition precedent to the bringing of an action, rather than an affirmative defense of limitations.[57] In the first case, *Ceasar v. City of Tulsa*,[58] the plaintiff presented a timely claim to the City of Tulsa and before the denial of the claim, filed a premature action against the City.[59] After the claim was deemed denied, the plaintiff amended his petition to allege denial of the claim, instead of filing a new action.[60] The trial court dismissed the action with prejudice on the ground that the plaintiff had not complied with the Governmental Tort Claims Act.[61] In addition, the trial court refused to apply the savings statute[62] which provides that if an action is timely commenced and fails otherwise than upon its merits, the action may be refiled within one year of the dismissal of the first action.[63] The Court of Appeals decided that the trial court was correct in refusing to apply the savings statute.[64] It reasoned:

> Section 100 is a remedial statute which operates generally to extend the statute of limitations in that it serves strictly to lengthen the period allowed for the commencement of an action or proceeding. In contrast, the special time limitations of the [Governmental Tort Claims] Act are conditions imposed upon the very right to bring the action and are not directed solely to the remedy.[65]

Nevertheless, the Court of Appeals reversed, holding that the filing of the amended petition obviated any error in the premature filing of the original petition.[66]

Ceasar was followed in *Gibson v. City of Tulsa*[67] and *Robbins v. City of Del City*,[68] which both held section 100 inapplicable to claims under the Governmental Tort Claims Act.[69]

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56. *Ceasar*, 861 P.2d at 349; *Gibson*, 880 P.2d at 429; *Robbins*, 875 P.2d at 1170.
57. *Ceasar*, 861 P.2d at 349; *Gibson*, 880 P.2d at 429; *Robbins*, 875 P.2d at 1170.
58. 861 P.2d 349 (Okla. Ct. App. 1993).
59. *Id.* at 350.
60. *Id.*
61. *Id.*
62. OKLA. STAT. tit. 12, § 100 (1991).
63. *Ceasar*, 861 P.2d at 350.
64. *Id.* at 350-51.
65. *Id.*
66. *Id.* at 351.
67. 880 P.2d 429 (Okla. Ct. App. 1994).
68. 875 P.2d 1170 (Okla. Ct. App. 1994).
69. *Gibson*, 880 P.2d at 430; *Robbins*, 875 P.2d at 1170.

The Oklahoma Court of Appeals rejected a creative attempt to avoid the Governmental Tort Claims Act's 180 day limit in *Grider*.[70] Title 51, section 157(B) provides that an action under the Governmental Tort Claims Act must be filed within 180 days from the denial of the plaintiff's claim, which itself must be filed within one year of the date of the loss under section 156(B).[71] After the 180 day period expired, the plaintiff filed a second notice within one year of the loss, and then filed a petition within 180 days after the second notice was deemed denied.[72] The Oklahoma Court of Appeals held that there was no statutory basis for allowing a second notice to revive a barred claim.[73]

There were also developments during the past year with respect to civil discovery. Most of the developments relating to discovery were statutory, but the most significant development was the Oklahoma Supreme Court's decision in *Tuller v. Shallcross*.[74] These developments are examined below.

IV. DISCOVERY

In *Tuller*, the Oklahoma Supreme Court authorized discovery of automobile liability insurance information under the Oklahoma Discovery Code.[75] Before the Oklahoma Discovery Code was adopted in 1982, the Oklahoma Supreme Court had held in two cases that liability insurance information was not discoverable because it did not bear on the merits of the case and it was not calculated to lead to the discovery of admissible evidence.[76] The Oklahoma Discovery Code, as it was introduced in the Oklahoma Legislature, contained a provision for the discoverability of liability insurance that was identical to Federal Rule of Civil Procedure 26(b)(2). This provision was stricken in the Oklahoma House of Representatives, however, and the version that was finally enacted contained no provision for discovery of liability insurance.[77] In 1994, the Oklahoma Bar Association sponsored a Legislative Program to restore the stricken provision to the Oklahoma Discovery Code, and although the Bar's Bill passed the Oklahoma

70. Grider v. Independent Sch. Dist., 872 P.2d 951 (Okla. Ct. App. 1994).
71. OKLA. STAT. tit. 51, § 157(B) (1991 & Supp. 1994).
72. *Grider*, 872 P.2d at 952.
73. *Id.*
74. 886 P.2d 481 (Okla. 1994).
75. *Id.* at 485.
76. Hall v. Paul, 549 P.2d 343 (Okla. 1976); Carman v. Fishel, 418 P.2d 963 (Okla. 1966).
77. Michael Minnis, *House Bill 1912: The New Oklahoma Discovery Code*, 53 OKLA. B.J. 1291 (1982).

Legislature, it was vetoed by Governor Walters.[78] Despite the absence of an express statutory provision for discovery of liability insurance, the Oklahoma Supreme Court found support for overruling its precedent in the Legislature's enactment of the Compulsory Liability Insurance Law[79] in 1983.[80]

The *Tuller* case arose out of a personal injury action in which the plaintiff's uninsured motorist carrier had intervened on the ground that it could be liable for the amount of a verdict that exceeded the defendant's liability insurance coverage.[81] After the trial court denied the plaintiff's motion to compel disclosure of the defendant's liability insurance, the plaintiff sought a writ of mandamus to require the defendant to produce information concerning his automobile liability insurance.[82] Noting that the Compulsory Liability Insurance Law mandates automobile liability insurance coverage, the court decided that requiring disclosure of the underlying policy did not violate the insured's right of privacy.[83] The court also observed that "[d]enying discovery [of liability insurance] introduces an undesirable element of hide and seek into the process."[84] On the other hand, allowing discovery would provide the "information necessary to produce results [that are] fair to both sides" and also would minimize the possibility of bad faith litigation against uninsured motorist carriers.[85] Accordingly, it granted the writ of mandamus and directed the trial court to order discovery of the insurance policy.[86]

The Oklahoma Supreme Court expressly limited its holding, however, to automobile liability insurance policies covered by the Compulsory Liability Insurance Law, leaving open the question of whether its holding will be extended to other types of liability insurance.[87] The Federal Rules of Civil Procedure[88] and the other jurisdictions[89] which

78. *Tuller*, 886 P.2d at 484; Sidney G. Dunagan, *Governor Vetoes Amendments to Pleading and Discovery Codes*, 65 OKLA. B.J. 1453 (Apr. 30, 1994); Marvin C. Emerson, *Legislative Report*, 65 OKLA. B.J. 1411 (Apr. 23, 1994).

79. OKLA. STAT. tit. 47, §§ 7-600 to 7-610 (1991).

80. *Tuller*, 886 P.2d at 483.

81. *Id.* at 482.

82. *Id.*

83. *Id.* at 483-84.

84. *Id.* at 484.

85. *Id.*

86. *Id.* at 485.

87. *Id.* at 484.

88. FED. R. CIV. P. 26(a)(1)(D) (mandatory initial disclosure of insurance agreements).

89. *See, e.g.*, CAL. CIV. PROC. CODE § 2017(b) (West Supp. 1994); N.Y. CIV. PRAC. L. & R. § 3101(f) (McKinney 1991); 42 PA. CONS. STAT. ANN. R. Civ. P. 4003.2 (1987); TEX. R. CIV. P. ANN. 166b(2)(f) (West 1994).

authorize discovery of insurance do not distinguish between automobile and other liability insurance policies. However, these other jurisdictions did not base their decision to allow discovery on the presence of a Compulsory Liability Insurance Law and so it is conceivable that the Oklahoma Supreme Court would not allow discovery of other liability insurance.

The major statutory developments concerning discovery were the amendments to the Oklahoma Discovery Code in Senate Bill 1076.[90] The first change was the addition of the following language to title 12, section 3226 of the Oklahoma Statutes which governs protective orders:

> Any protective order of the court which has the effect of removing any material obtained by discovery from the public record shall contain the following:
>
> a. a statement that the court has determined it is necessary in the interests of justice to remove the material from the public record,
>
> b. specific identification of the material which is to be removed or withdrawn from the public record, or which is to be filed but not placed in the public record, and
>
> c. a requirement that any party obtaining a protective order place the protected material in a sealed manila envelope clearly marked with the caption and case number and is clearly marked with the word "CONFIDENTIAL", and stating the date the order was entered and the name of the judge entering the order.[91]

Confidentiality orders have generated significant controversy in recent years, particularly because of their widespread use in products liability cases that are settled. Critics have complained that the insistence by product manufacturers on agreements to confidentiality orders as a condition of settlement has hampered the dissemination of information concerning dangerous products and interfered with the prosecution of cases by other injured plaintiffs.[92] This has led several states to enact legislation to limit the use of confidentiality orders.[93]

It does not appear that the Oklahoma amendment quoted above will have a significant effect on the use of confidentiality orders. The first requirement, necessity for removing the discovery material from

90. 1994 Okla. Sess. Laws ch. 343.

91. OKLA. STAT. tit. 12, § 3226(C)(2) (Supp. 1994).

92. *See generally* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 463-64.

93. *Id.* at 464-65; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 429-30 n.7 (1991).

the public record, is duplicative of the requirement of "good cause," which has long been a prerequisite for the issuance of protective orders. The second requirement, identifying the materials that are being removed from the public record, would not curtail the use of confidentiality orders directly. However, it may facilitate a challenge to a confidentiality order in a case where the identification of the confidential materials shows that the order was improperly granted. The third requirement merely provides a procedure for the sealing of the materials. Thus, the amendment is more superficial than of practical importance.

At the same time that the Oklahoma Legislature added new requirements for confidentiality orders in section 3226, it removed depositions from the public record by the addition of the following language to title 12, section 3230: "Except on order of the court or unless a deposition is attached to a motion response [sic] thereto, or is needed for use in a trial or hearing, depositions shall not be filed with the court clerk."[94] Although depositions will no longer be filed with the court clerk as a general matter, they may be subject to disclosure by the parties unless their confidentiality is protected by a court order.

Another statutory change relating to discovery corrects a loophole that was created when title 12, section 2004.1 was amended[95] to provide for the issuance of a subpoena for a deposition by the court clerk of the court where the action is pending, rather than by the court clerk of the district where the deposition is to be taken. If the court where the action was pending were in another state, a litigant would have to seek a court order to obtain a subpoena for the taking of a deposition in Oklahoma.[96] To keep the court from becoming involved in such matters, section 2004.1 was amended to provide that for actions pending in other states, the clerk of the court where a deposition is to be taken has authority to issue a subpoena for the deposition.[97]

The only significant new case pertaining to discovery, besides the *Tuller* decision is *Higginbotham v. Jackson*.[98] The Oklahoma Supreme Court assumed original jurisdiction and issued a writ of prohibition against enforcement of a trial court's order requiring a plaintiff in a

94. OKLA. STAT. tit. 12, § 3230(G)(1) (Supp. 1994).
95. 1993 Okla. Sess. Laws ch. 351, § 1.
96. OKLA. STAT. tit 12, § 1703.02 (1991).
97. OKLA. STAT. tit. 12, § 2004.1 (Supp. 1994).
98. 869 P.2d 319 (Okla. 1994).

personal injury case to execute a general medical authorization entitling the defendant to obtain all of the plaintiff's medical records.[99] It held that no provision of the Oklahoma Discovery Code requires a plaintiff in a personal injury case to execute such an order and that title 76, section 19(B), which provides for a blanket waiver of the physician-patient privilege, applies only to medical malpractice cases.[100]

There were a variety of recent developments relating to pleading, summary judgment, and trial. The statute governing sanctions was extensively revised, the Oklahoma Supreme Court decided cases involving amendment of pleadings and the standard for disqualification of judges, and it set up a new procedure for appellate review of summary judgments and orders dismissing actions for failure to state a claim. A discussion of these developments follows.

V. PLEADING, SUMMARY JUDGMENT, TRIAL

Senate Bill 1076[101] included a complete rewriting of title 12, section 2011[102] of the Oklahoma Statutes to incorporate the 1993 amendments to Federal Rule of Civil Procedure Rule 11, from which section 2011 was taken. Because of the harshness of its provisions for sanctions, Rule 11 had generated great controversy in the federal courts. The 1993 amendments were made to reduce the severity of the threat of sanctions in litigation and also to correct some interpretation problems that had developed under the Federal Rule.[103] Probably the most significant change made to both Rule 11 and Section 2011 is the "safe harbor" provision which provides that a party will not be subject to sanctions unless it refuses to withdraw or correct its challenged paper or contention within 21 days of service of a motion seeking sanctions.[104] In addition, a party is now allowed to make allegations or factual contentions without evidentiary support as long as they are specifically identified and the party certifies that evidentiary support is likely to follow after a reasonable opportunity for discovery.[105] The amendments also limit the amount of sanctions to what is necessary for deterrence of a further violation, rather than for compensation of

99. *Id.*
100. *Id.*
101. 1994 Okla. Sess. Laws ch. 343.
102. OKLA. STAT. tit. 12, § 2011 (Supp. 1994).
103. FED. R. CIV. P. 11 advisory committee notes.
104. OKLA. STAT. tit. 12, § 2011(C)(1)(a) (Supp. 1994).
105. *Id.* § 2011(B)(3).

the moving party.[106] Moreover, because their purpose is deterrence, not compensation, sanctions should ordinarily be paid to the court, rather than awarded to the moving party.[107] Although section 2011 has not generated the problems in Oklahoma state courts that Rule 11 has in the federal courts, the amendments to section 2011 are beneficial because they clarify a number of issues relating to sanctions.

The Oklahoma Supreme Court issued a helpful opinion concerning the amendment of pleadings in *Prough v. Edinger, Inc.*[108] After filing its answer, the defendant in *Prough* learned for the first time through discovery that most of the plaintiffs' damages were barred by the statute of limitations, and it requested leave to amend the answer to raise the statute of limitations as an affirmative defense.[109] The trial court denied the request,[110] and on certified interlocutory appeal, the Oklahoma Supreme Court reversed, holding that the denial of leave to amend was an abuse of discretion.[111] Noting that title 12, section 2015(A) provides that "leave [to amend] shall be freely given when justice so requires,"[112] the court decided that it was an abuse of discretion for a trial court to deny leave to amend in the absence of undue delay, bad faith, repeated failure to correct deficiencies by prior amendments, undue prejudice to the opposing party, or futility of the requested amendment.[113] In doing so, the Oklahoma Supreme Court adopted the standards set out by the United States Supreme Court in *Foman v. Davis*,[114] which involved an interpretation of Federal Rule of Civil Procedure Rule 15.

Through its amendment of Rules 4 and 13 of the Rules for District Courts,[115] and Rule 1.203 of the Rules for Appellate Procedure in Civil Cases,[116] the Oklahoma Supreme Court created a new procedure for accelerated appellate review of summary judgments and orders dismissing cases based on a failure to state a claim and lack of jurisdiction. The most noteworthy feature of this procedure for accelerated appellate review is that no appellate briefs are permitted, unless the

106. *Id.* § 2011(C)(2).
107. *See* FED. R. CIV. P. 11 advisory committee notes (1993).
108. 862 P.2d 71 (Okla. 1993).
109. *Id.* at 73.
110. *Id.*
111. *Id.* at 76-77.
112. *Id.* at 73-74 (quoting OKLA. STAT. tit. 12, § 2015 (A)(1991)).
113. *Id.* at 77.
114. 371 U.S 178, 182 (1962).
115. OKLA. STAT. tit. 12, ch. 2, app., R. 4, 13 (Supp. 1994).
116. OKLA. STAT. tit. 12, ch. 15, app. 2, R. 1.203 (Supp. 1994).

appellate court orders otherwise.[117] In addition, the record on appeal is limited to: 1) the summary judgment or order of dismissal, 2) the pleadings, 3) the motion and response below along with supporting materials, including briefs, 4) transcripts of the hearing on the motion, if any, 5) any other order dismissing some but not all parties or claims, 6) any motions for reconsideration of the summary judgment or order of dismissal, and 7) any other material on file that the trial court considered in reaching its decision.[118] Thus, the appellate court's review is restricted to those materials that were available to the trial court in making its decision. Because motions for reconsideration that were filed in the trial court will be available to the appellate court,[119] a party who is surprised by a trial court's granting a summary judgment or motion to dismiss may supplement the record available to the appellate court by filing a motion for reconsideration. However, a party will generally not be allowed to bring any materials before the appellate court that the trial court was not able to consider.[120]

It is likely that the elimination of the briefing cycle and the simplification of the record on appeal will significantly expedite the appellate review of summary judgments and orders of dismissal. Reducing delay in the review process is especially desirable for cases where the appellate court reverses the trial court's decision because it lessens the interruption that the appeal caused in the movement of the case to trial.

The Oklahoma Supreme Court addressed the standards for disqualification of a trial judge in *Holloway v. Hopper*.[121] The *Holloway* case arose out of a divorce action in which the wife sought the judge's disqualification by following the procedure in Rule 15 of the Rules for District Courts.[122] The trial judge was married to an attorney with whom the husband in the divorce action had consulted concerning the property settlement in the case.[123] There was no basis for disqualification under the governing statute[124] because neither the trial judge's

117. *Id.* R. 1.203(A)(3).

118. OKLA. STAT. tit. 12, ch. 2, app., R. 4(m), 13(h); ch. 15, app. 2, R. 1.203(A)(1) (Supp. 1994).

119. OKLA. STAT. tit. 12, ch. 2, app., R. 4(m)(9), 13(h)(7); ch. 15, app. 2, R. 1.203(A)(1)(a)(7), (b)(9) (Supp. 1994).

120. OKLA. STAT. tit. 12, ch. 15, app. 2, R. 1.203(A)(3) (Supp. 1994) (briefs are not allowed unless the appellate court orders otherwise).

121. 852 P.2d 711 (Okla. 1993).

122. *Id.* at 712.

123. *Id.* at 712.

124. OKLA. STAT. tit 20, § 1401 (1991).

wife nor her firm entered an appearance.[125] Nevertheless, the Oklahoma Supreme Court ruled that disqualification was required under Canon 3(C)(1)(d)(ii) of the Code of Judicial Conduct,[126] which states that a judge should be disqualified or disqualify himself in a proceeding where his or her impartiality might reasonably be questioned, including where the judge's spouse is acting as a lawyer in the proceeding.[127] Although there was no evidence that the trial judge had discussed the case with his wife, the Oklahoma Supreme Court issued a writ of mandamus ordering that disqualification was appropriate because of the appearance of impropriety.[128]

The next section of this article deals with attorney fees, an area where the Oklahoma Supreme Court has been especially active recently.

VI. Attorney Fees

During the last year, the Oklahoma Supreme Court and Court of Appeals resolved a number of issues pertaining to attorney fees. These included the enforceability of nonrefundable retainer provisions, whether time charges for legal assistants may be awarded as attorney fees, whether both sides are entitled to an award of attorney fees if they each prevail on their claims and counterclaims, whether attorney fees may be awarded in slander of title cases and in actions under the Governmental Tort Claims Act, the amount of attorney fees that a court may award if a personal injury action is brought in bad faith, and the types of expenses that may be recovered by a prevailing landowner in condemnation actions.

In *Wright v. Arnold*,[129] the Oklahoma Court of Appeals ruled that a nonrefundable retainer provision in an attorney-client contract was unenforceable, because it was an impermissible restraint on a client's right to discharge an attorney and it violated Rule 1.16 of the Oklahoma Rules of Professional Conduct.[130] Upon termination of the attorney-client relationship, an attorney is entitled only to the reasonable value of the services rendered to the date of termination.[131]

125. *Id.*
126. Okla. Stat. tit. 5, ch. 1, app. 4, 3(c)(1)(d)(ii) (1991).
127. *Holloway*, 852 P.2d at 713.
128. *Id.*
129. 877 P.2d 616 (Okla. Ct. App. 1994).
130. *Id.* at 618.
131. *Id.* at 619.

Following precedent from the United States Supreme Court, the Oklahoma Supreme Court held in *Taylor v. Chubb Group of Insurance Companies*,[132] that hourly charges for legal assistants may be included in an award of attorney fees under the Oklahoma Statutes.[133] The Oklahoma Supreme Court limited its holding to the circumstances where the legal assistants' time is customarily billed to clients and the legal assistants' services involved substantive legal work that would otherwise have to be performed by an attorney at a higher hourly rate.[134] Thus, time spent by a paralegal copying documents or doing other secretarial tasks could not be included in an attorney fees award.[135] The *Taylor* decision encourages the use of legal assistants, and thus it should have the salutary effect of lowering costs for legal services.

In *Smith v. Jenkins*,[136] the Oklahoma Supreme Court decided that both sides may recover attorney fees if they each prevail on their respective claim and counterclaim.[137] In *Smith*, the plaintiff sued for property damage arising out of an automobile accident and the defendant also filed a counterclaim for property damage.[138] In a bench trial, the court found both sides equally at fault and awarded damages to each under the comparative negligence statute for 50% of the respective amounts of their property damage.[139] Both parties sought attorney fees pursuant to title 12, section 940(A), but the trial court determined that there could be only one prevailing party in a case, and therefore awarded attorney fees only to the defendant, who had recovered the greater amount for her property damage.[140] The Oklahoma Supreme Court reversed, holding that the award of attorney fees to only one prevailing party was inconsistent with Oklahoma's comparative negligence scheme.[141] Its decision was expressly limited to comparative negligence cases in which claims and compulsory counterclaims are asserted for the same tort.[142]

132. 874 P.2d 806 (Okla. 1994).
133. *Id.* at 807.
134. *Id.* at 809.
135. *Id.*
136. 873 P.2d 1044 (Okla. 1994).
137. *Id.* at 1045.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1049.
142. *Id.*

Turner Roofing & Sheet Metal, Inc. v. Stapleton,[143] dealt with the scope of section 940, which authorizes an award of attorney fees for negligent or willful injury to property.[144] Following its earlier decision in *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*,[145] the Oklahoma Supreme Court determined that Section 940 applied only to physical injuries to property and not to damages to property rights, such as slander of title or conversion, that did not result in physical injury to the property itself.[146] The Oklahoma Supreme Court expressly overruled the contrary decision of the Oklahoma Court of Appeals in *McDowell v. Glasscock*.[147]

Rout v. Crescent Public Works Authority,[148] dealt with the relationship between section 940 and the Governmental Tort Claims Act.[149] After prevailing in an action for property damage against a political subdivision, the plaintiff was awarded attorney fees by the trial court.[150] The Oklahoma Supreme Court affirmed.[151] It pointed out that while the Governmental Tort Claims Act does not expressly authorize an award of attorney fees against a political subdivision, section 164 of the Act incorporates the Oklahoma Statutes that are not inconsistent with the Act.[152] Accordingly, it held that attorney fees may be recovered against a political subdivision if the recovery was otherwise authorized by statute.[153]

The Oklahoma Supreme Court applied title 23, section 103 to limit an award of attorney fees in *Gorst v. Wagner*.[154] After sustaining a demurrer to the evidence in an action for civil conspiracy, the trial court found that the action was not well grounded in fact, was brought in bad faith, and was vexatious, and it awarded an assessment in excess of $35,000 in attorney fees and costs against the plaintiff.[155] The Supreme Court reversed, stating that section 103 limited an award of costs, including attorney fees, based on a finding of bad faith to $10,000.[156]

143. 872 P.2d 926 (Okla. 1994).
144. *Id.* at 927.
145. 700 P.2d 1011, 1013 (Okla. 1985).
146. *Turner Roofing*, 872 P.2d at 928.
147. 672 P.2d 682 (Okla. Ct. App. 1983).
148. 878 P.2d 1045 (Okla. 1994).
149. OKLA. STAT. tit. 51, §§ 151-172 (1991 & Supp. 1994).
150. *Rout*, 878 P.2d at 1047.
151. *Id.*
152. *Id.*
153. *Id.* at 1051.
154. 865 P.2d 1227 (Okla. 1993).
155. *Id.* at 1228.
156. *Id.*

The Oklahoma Supreme Court addressed the award of attorney fees and expenses in condemnation actions in two recent cases.[157] In *Oklahoma Turnpike Authority v. New*,[158] the court disallowed recovery of litigation expenses for copying, mileage, long distance telephone calls, telefax expenses, and postage for the reason that they were part of the attorney's overhead.[159] This ruling can be expected to affect the billing practices of attorneys who handle condemnation cases. Instead of billing clients for these charges separately, condemnation attorneys should incorporate the charges into their hourly billing rates as part of their overhead. In *Oklahoma Turnpike Authority v. New Life Pentecostal Church*,[160] the Oklahoma Supreme Court upheld an attorney fee award based on a 40% contingency contract.[161] It ruled that attorney fees may be awarded on a contingency fee basis as long as the fees are not excessive.[162]

Appellate procedure is another area where there were a number of significant developments in the past year. These consisted of a number of statutory amendments involving the effectiveness of post-trial motions as well as a series of decisions clarifying what constitutes a "judgment" under the recently adopted Judgments and Appeals Act. The next section considers these developments.

VII. Appellate Procedure

Senate Bill 1076[163] contained a series of amendments to title 12, sections 653, 698, and 1031.1 that make effective, prematurely filed motions for new trial, motions for judgment n.o.v., and motions to modify or vacate a judgment. The Judgments Act provided that any of these motions was to be filed within ten days after the filing of the judgment. This created the possibility that one of these motions could be premature, and hence ineffective, because it was filed before the judgment was filed.[164] The premature filing of a post-trial motion

157. Oklahoma Turnpike Auth. v. New, 853 P.2d 765 (Okla. 1993); Oklahoma Turnpike Auth. v. New Life Pentecostal Church, 870 P.2d 762 (Okla. 1994).

158. 853 P.2d 765 (Okla. 1993).

159. *Id.* at 767.

160. 870 P.2d 762 (Okla. 1994).

161. *Id.* at 769.

162. *Id.* at 766.

163. 1994 Okla. Sess. Laws ch. 343.

164. *Cf.* Brown v. Green Country Softball Ass'n, 884 P.2d 851, 853 (Okla. 1994) (motion for new trial was premature, but decision operated only prospectively after issuance of mandate in case).

would not cause any prejudice to the opposing party, who would receive fair notice of the relief that the moving party was seeking. By making prematurely filed motions effective as long as they are filed after the pronouncement of the judgment, the amendments to sections 653, 698, and 1031 have removed a procedural trap that could otherwise prevent the motions from being decided on their merits.

In the past year, the Oklahoma Supreme Court has issued a number of opinions dealing with the revisions to appellate procedure made by the Judgments Act that went into effect on October 1, 1993. The major difficulties concerned the appealability of minute orders, but the Oklahoma Supreme Court appears to have resolved most of these problems in a series of decisions holding that minute orders are not appealable.[165] There were also two decisions concerning the timing of appeals in cases where less than all claims are decided.[166] Lastly, one case addressed the liberal standard for sufficiency of a petition in error to preserve allegations of error for appellate review.[167]

The Oklahoma Supreme Court decided four cases involving the appealability of minute orders in June and July of 1994. The first case, *Manning v. State ex rel. Department of Public Safety*,[168] was decided under the law prior to October 1, 1993, the effective date of the Judgments Act. It involved a handwritten entry on a printed form labelled "court minute," which was made and signed by the trial judge and set forth all the terms of his ruling.[169] Before the parties left the courtroom, the judge directed the plaintiff's counsel to prepare a journal entry, and the journal entry containing the same terms as the court's early handwritten entry was filed several weeks later.[170] The defendant's petition in error was filed less than thirty days after the filing of the journal entry but more than thirty days after the filing of the handwritten entry.[171] The court held that the petition in error was filed too late, but gave its ruling only prospective effect because of the obscurity and complexity of the issue.[172] Justice Summers wrote a concurring opinion stating that his concurrence was based on the law in

165. Manning v. State *ex rel.* Dep't of Pub. Safety, 876 P.2d 667 (Okla. 1994); Marshall v. OK Rental & Leasing, Inc., 879 P.2d 132 (Okla. 1994); Mansell v. City of Lawton, 877 P.2d 1120 (Okla. 1994); Aven v. Reeh, 878 P.2d 1069 (Okla. 1994).

166. Jones v. Tubbs, 860 P.2d 234 (Okla. 1993); Davis v. Gray, 875 P.2d 1145 (Okla. 1994).

167. Markwell v. Whinery's Real Estate, Inc., 869 P.2d 840 (Okla. 1994).

168. 876 P.2d 667 (Okla. 1994).

169. *Id.* at 669.

170. *Id.*

171. *Id.*

172. *Id.* at 673.

effect prior to October 1, 1993, and he suggested that the result should be different under the amendment to title 12, section 696.2(c), which provides that a minute entry is not appealable.[173]

Justice Summers wrote the majority opinions in the next three cases involving minute orders. *Marshall v. OK Rental & Leasing, Inc.*,[174] was concerned with a minute order sheet filed before October 1, 1993, which contained orders in three cases, including an order granting summary judgment against the plaintiff.[175] At the top of the minute order sheet was a statement signed by the trial judge directing the court clerk to mail notice of the judge's rulings to the parties.[176] The Oklahoma Supreme Court held that the minute order sheet was not appealable because the judge's signature did not appear below the dispositive order granting summary judgment.[177] *Mansell v. City of Lawton*[178] and *Aven v. Reeh*[179] both involved minute orders that were filed after October 1, 1993. In both cases, the Oklahoma Supreme Court held that the orders were not appealable, even though they were signed by a judge.[180]

Jones v. Tubbs[181] concerned the finality of an order granting a default judgment, where the trial court reserved ruling on punitive damages, attorney fees, and costs.[182] The Oklahoma Supreme Court held that the trial court's reservation of a decision on punitive damages prevented its ruling from being final, and hence appealable.[183] Accordingly, it dismissed the appeal.[184] *Davis v. Gray*[185] involved an appeal from a default judgment against one out of thirty defendants.[186] Applying title 12, section 1006,[187] the Oklahoma Supreme Court held that a judgment by default against less than all parties to a case was not appealable without an express direction by the trial judge for the filing of judgment.[188]

173. *Id.* at 674.
174. 879 P.2d 132 (Okla. 1994).
175. *Id.* at 133.
176. *Id.*
177. *Id.* at 136-37.
178. 877 P.2d 1120 (Okla. 1994).
179. 878 P.2d 1069 (Okla. 1994).
180. *Mansell*, 877 P.2d at 1121; *Aven*, 878 P.2d at 1070.
181. 860 P.2d 234 (Okla. 1993).
182. *Id.*
183. *Id.* at 235-36.
184. *Id.* at 236.
185. 875 P.2d 1145 (Okla. 1994).
186. *Id.* at 1146.
187. Renumbered to § 994 by 1993 Okla. Sess. Laws ch. 351, § 30.
188. *Davis*, 875 P.2d at 1147.

In *Markwell v. Whinery's Real Estate, Inc.*,[189] the Oklahoma Supreme Court adopted what appears to be a "notice pleading" standard for the sufficiency of allegations of error in a petition in error.[190] The sole mistake alleged in the petition in error in *Markwell* was that the trial court should not have granted the defendant's motion for summary judgment.[191] While acknowledging that this was too general of a statement to preserve the error under the applicable Rules of Appellate Procedure in Civil Cases,[192] the nature of the allegations of error was clarified in the summary of the case that was attached to the petition in error and in the appellant's brief.[193] The Oklahoma Supreme Court pointed out that the filing of a timely brief amends deficiencies in a petition in error, and a formal amendment is not necessary if the issues briefed are fairly comprised within the allegations of error.[194] Concluding that the summary of the case and the brief adequately informed it of the reasons why the appellant believed summary judgment was improper, the court ruled that the petition in error was sufficient to preserve the allegations of error.[195] In spite of the Oklahoma Supreme Court's leniency, the better practice would of course be to state the allegations of error with some specificity in the petition in error.

VIII. CONCLUSION

Oklahoma civil procedure continues to evolve, and there have been recent developments in a variety of areas in the past year. Probably the most significant developments were the *Tuller v. Shallcross* decision,[196] allowing discovery of liability insurance, and the new accelerated appellate review procedure for summary judgments and orders of dismissal.[197] By giving plaintiffs access to the liability insurance coverage of their adversaries, the *Tuller* decision promises to facilitate early settlement, thereby reducing the number of cases that have to be tried. The accelerated appellate review procedure can be expected to substantially reduce the time for the disposition of appeals in important categories of cases. In addition, this innovative

189. 869 P.2d 840, 842 (Okla. 1994).
190. *Id.* at 844.
191. *Id.* at 842.
192. OKLA. STAT. tit. 12, ch. 15, app. 2, R. 1.16(C) (Para. D of Form) (1991).
193. *Markwell*, 869 P.2d at 842-43.
194. *Id.* at 843.
195. *Id.* at 844.
196. 886 P.2d 481 (Okla. 1994).
197. OKLA. STAT. tit. 12, ch. 2, app., R. 4, 13; ch. 15, app. 2, R. 1.203 (Supp. 1994).

procedure promises to improve the administration of justice by making sure that the decisions of both the trial and appellate courts are based on the same information. Both of these developments are therefore not only significant, but are also likely to be beneficial to litigants, lawyers, and judges.